

## Child-Friendly Justice – Polish Perspective

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### ABSTRACT

A child has the right to express his/her opinion, especially in matters concerning him/her and those that concern his/her legal interest, especially in the course of court proceedings. The child's right to express himself/herself during court proceedings is a manifestation of the child's appreciation as a valuable source of information. Hearing the child increases the chances of determining the factual circumstances of the case as fully as possible and, consequently, makes it easier to issue an accurate decision. Properly conducted, it allows in almost every case to determine the child's current care and upbringing situation as well as his/her relationship with his/her parents. It allows one to learn about the child's preferences and expectations regarding the court's decision. Creating conditions for the child to exercise the right to express himself/herself during a hearing is a manifestation of recognising the child's subjectivity, treating him/her as capable of understanding the situation that is the subject of the proceedings and expressing his/her position. Giving the child a chance to express his/her needs allows them to be diagnosed and taken into account when making a decision, which should always be aimed at realising the child's good whenever a child appears.

### KEYWORDS

freedom of expression, rights of the child, welfare of the child, court proceedings, grounds for hearing

### 1. Introduction

A child does not have the right to self-determination, but he/she has the right to participate in the decision-making process, especially in matters that affect him/her. The above is a consequence of the dignity inherent in every human being, from which stems the imperative to be treated subjectively, regardless of any factors, including age. A child's subjectivity indicates that he/she is not an object in the hands of parents or state authorities but a separate subject within the family group and other social groups. The expression of human subjectivity is, among other things, freedom of expression, which allows the child to articulate his/her needs, signal problems, and demand certain actions. The child's freedom of expression is realised on many levels,

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from expression within the family to situations involving his/her participation in legal procedures. “The exercise of the right to express oneself should be possible in all settings in which the child is present, that is: in the family, in school, in health and social care institutions, in the police, in court, in assemblies in which the child may participate. (...) of course, this usually concerns matters in which children can be involved, without any harm to them and respecting their childhood”.<sup>1</sup> In this way, the child will not be treated merely as an object of adult influence but as an active participant in the decision-making process whose position will at least have to be considered.

A fundamental right of the child in legal proceedings is to be able to express his/her point of view on matters concerning him/her, served by the institution of a hearing. The purpose of a hearing is to find out the position of the child in a particular case, get a better picture of the facts in question, look at the problem from a broader perspective, and, as a consequence, be in a better position to deal with the case in a way that is in the best interests of the child. The child’s statements can only broaden the perspective of the assessment of the child’s situation, confronting the parents’ positions with the direct information obtained from the child. Hearing the child increases the chances of ascertaining the facts of a case as fully as possible and consequently facilitates a sound judgment. It also provides an opportunity for the judge to engage directly with all members of the family. Conducting a hearing thus provides a unique opportunity to uncover possible irregularities or abuses toward the child, allowing for the proper protection of the child’s rights.<sup>2</sup> It also counteracts the shifting of the burden of the judge’s decision to opinions formulated by experts.<sup>3</sup>

From a psychological perspective, a hearing is a conversation between a judge and a child. It is a conversation that is specific to the child given the circumstances and situational context in which it is conducted, the place where it is carried out, the interlocutor, the purpose, and the content addressed. A hearing is a particular form of interpersonal relationship whose specificity lies in the imbalance between the interlocutors. On one side is the judge – a mature adult aware of the purpose of the meeting, familiar with the procedure, endowed with social authority, assessing the family’s problems, and deciding on their resolution. The second interlocutor is the child – a minor experiencing helplessness, confusion, and anxiety, often induced, against his/her will, to talk to the judge, embroiled in adult conflict, and placed in situations of having to choose between parents and their judgements.<sup>4</sup> In short, in psychological terms, listening is the process of giving and receiving information in direct contact with another person.

The study attempts to assess the institution of hearing of the child in Poland in civil proceedings as a means of involving the child in matters concerning him/her.

1 Borkowska, 2014, p. 20.

2 Cieśliński, 2017, p. 147.

3 Słyk, 2015, p. 22.

4 Budzyńska, 2015, p. 35.

It also draws attention to the psychological assessment of this institution, which is extremely important in view of the need to use psychological knowledge in dealing with the child, especially in assessing the statutory criteria for hearing a child. This will help answer the question of whether the procedural guarantees are sufficient and meet the needs of the child in both legal and psychological areas.

## 2. Constitutional Grounds for Hearing the Child

A child's right to be heard is one of the fundamental rights of the child and a constitutional value in its own right.<sup>5</sup> It stems from dignity, which is the source of freedoms and rights, which in turn gives rise to the right to self-determination, the manifestation of which is having one's own views and articulating them. For this reason, the right to be heard requires, at the very least, that the child be given the opportunity to present them.<sup>6</sup> It is guaranteed by the Constitution of the Republic of Poland of 2 April 1997,<sup>7</sup> which is the supreme law of the Republic of Poland (Article 8). It follows that in the system of Polish law, which includes both acts of domestic law and acts of international law, there are no normative acts that would override the Constitution of the Republic of Poland.

The right to be heard is a consequence of the freedom of expression guaranteed by Article 54 of the Polish Constitution, according to which "Everyone shall be granted the freedom to express his/her opinions and to obtain and disseminate information". The legislator does not differentiate between freedom of expression, considering it a fundamental right of every human being. It allows the child to signal his/her needs, make comments, present complaints, and interact with adults who must at least listen to his/her views. The right to be heard is also part of a child's socialisation and upbringing. The failure of parents to fulfil these responsibilities can result in the restriction or termination of their parental rights. The implementation of the upbringing process begins directly with the arrival of the child. Upbringing is a dynamic process, conditioned by a number of variables, whose fundamental aim is to prepare the child to function responsibly in the social environment and form the child's personality. The process of upbringing, however, cannot be based solely on a system of commands and prohibitions upheld by the child's parents. Parents have the right to bring up their children according to their own convictions. However, this upbringing should take into account the degree of maturity of the child, as well as the child's freedom of conscience and religion and his/her beliefs<sup>8</sup>. The degree of maturity affects, at each stage of a child's development – up to the age of majority, the scope of decisions the child can take independently and thus the scope of his/her

5 Judgment of the Constitutional Tribunal of 21 January 2014, SK 5/12, OTK-A 2014, No. 1, item 2.

6 Lis, 2018, pp. 209-221.

7 Constitution of the Republic of Poland of 2 April 1997, Dz. U. 1997, No. 73, item 483 as amended (hereinafter: the Polish Constitution).

8 Art. 48(1) of the Polish Constitution.

rights and obligations. Article 48(1) corresponds to Article 53(3) of the Polish Constitution, which guarantees parents the right to provide their children with moral and religious upbringing and teaching in accordance with their beliefs. This right stems from the assumption that the child, as an immature and dependent being, requires constant care and concern from adults. The upbringing of the child is the responsibility of the parents and falls within the autonomy of the family.<sup>9</sup> The safeguards adopted are intended to protect the family from interference by external factors, in particular by preventing the imposition by public authorities of preferred upbringing patterns, value systems, and perceptions of the world affecting the formation of the child's attitudes, personality, and beliefs. The anchoring of the right to be heard dictates that the child should be treated as an active participant in the upbringing process, not merely as an involuntary object of influence by his/her parents on the way his/her personality, attitudes, and behaviour are shaped. This emphasises the child's subjectivity, while also drawing his/her attention to the need to take his/her needs into account in the context of the family's capabilities, thus teaching the child responsibility for himself/herself and his/her loved ones. It also shows the dynamism of the educational process, which must take into account the maturation of the child and, consequently, the acquisition of an increasing influence on the shape of his upbringing and the functioning of the family.

The rights arising from the content of Articles 48(1) and 53(3) of the Polish Constitution are limited by the content of Article 72(3) of the Polish Constitution, according to which 'In the course of determining the rights of the child, public authorities and persons responsible for the child shall be obliged to hear and, as far as possible, take into account the child's opinion'. The solution adopted affects the way in which parental authority is exercised. The addressees of the duty to listen to the child are the public authorities and persons responsible for the child, first and foremost, of course, the parents. Thus, it can be assumed that this circle includes all entities entitled and obliged to decide on the determination of the child's rights. The Constitutional Tribunal has clearly emphasised that from the content of Article 72(3) of the Polish Constitution stems the obligation of the entities influencing the fate of the child to respect the child's distinctiveness, individuality, and convictions and the necessity to recognise the subjectivity of the child and to listen to the child's opinion<sup>10</sup> in the course of determining the rights of the child. The obligation to listen to the child has been defined in an absolute manner, without specifying exceptions that would allow the child's hearing to be waived, such as his/her age, degree of maturity, state of consciousness, etc. However, the right to be heard does not imply that the child's opinion will be prejudicial, as the child's opinion is to be taken into account only "as far as possible". This implies an obligation to listen to the child when he/she is affected by a particular legal proceeding and to respect the opinion expressed by him/her. This

<sup>9</sup> Lis, 2020, p. 23.

<sup>10</sup> Judgment of the Constitutional Tribunal of 11 October 2011, K 16/10, OTK-A 2011, No. 8, item 80.

does not mean, however, to attach any legal effect to this opinion.<sup>11</sup> The limitation of the right to be heard is, therefore, built into its essence. It is an expression of the recognition of the autonomy of the family and the parental authority resulting from the fact of parenthood, which is a consequence of the child's dependence and is determined by the need to control the child's actions. The Constitutional Court has even stated that the child's right to be heard is framed, as it were, in opposition to the subjects to whom the final decisions belong. These actors help the child define his/her position in the world, guided by his/her welfare, respecting his/her opinions, convictions, and distinctiveness, but filtering them through their own experience and knowledge, which the child, for obvious reasons, does not yet have.<sup>12</sup>

### 3. Hearing of the Child Under International Law

The constitutional provisions on the issue of the hearing of the child are in line with the provisions of acts of international law ratified by Poland, which, by virtue of Article 87(1) of the Polish Constitution, are sources of universally binding law in the Republic of Poland.

Fundamental among these is the Universal Declaration of Human Rights adopted on 10 December 1948, which, in Article 19, guaranteed everyone the right to freedom of opinion and expression.<sup>13</sup> Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up on 4 November 1950, which, in Article 10, determined that everyone has the right to freedom of expression.<sup>14</sup> Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989,<sup>15</sup> in Article 12 obliged States Parties to ensure that a child capable of forming his/her own views has the right to express them freely in all matters affecting the child and to give them due weight in accordance with the age and maturity of the child. To this end, the child will, in particular, be given the opportunity to express himself/herself in all judicial and administrative proceedings concerning the child, either directly or through a representative or an appropriate authority, in accordance with the procedural rules of domestic law. The consideration of the child's position, therefore, depends on the child's age and maturity. The refinement of these criteria is left to the law of individual States Parties to the Convention. They have a great deal of freedom to shape the legal instruments guaranteeing the child's right to express his/her own views. It should be added that by ratifying the Convention, Poland made

11 Judgment of the Constitutional Tribunal of 21 January 2014, SK 5/12, OTK-A 2014, No. 1, item 2.

12 See judgment of the Constitutional Tribunal of 11 October 2011, K 16/10, OTK-A 2011, No. 8, item 80; judgment of the Constitutional Tribunal of 21 January 2014, SK 5/12, OTK-A 2014, No. 1, item 2.

13 United Nations, 1948.

14 Council of Europe, 1950.

15 United Nations General, 1989.

a declaration stipulating that the exercise of a child's Convention rights, in particular those expressed in Articles 12-16, would be done with respect for parental authority, in accordance with Polish customs and traditions concerning the child's place within and outside the family. The Declaration emphasised the fundamental and irreplaceable role of the family in the process of upbringing and responsibility for the child's development, which stems from natural law.

The protection of children's rights in judicial proceedings is ensured by the European Convention on the Exercise of the Rights of the Child, drawn up on 25 January 1995. According to Article 3(b), a child, considered under national law as having sufficient understanding, in proceedings concerning him/her before a judicial authority, should be given the right - and may himself/herself request such a right - to be questioned and to express his/her views. This corresponds to Article 6(b), which provides that in proceedings concerning children considered under domestic law to have sufficient understanding, the judicial authority, before taking a decision, should (1) ensure the child has been provided with all relevant information, (2) where appropriate, informally if necessary, consult the child himself, either personally or through other persons or institutions, in a manner appropriate to the child's discernment, unless to do so would be manifestly contrary to the child's best interests, and (3) give the child an opportunity to present his/her views.

The obligation to take the child's view into account in pending judicial and administrative proceedings also derives from Recommendation No. R/84/4 of the Committee of Ministers of the Council of Europe of 28 February 1984 on parental responsibility.<sup>16</sup> Annex No. 3 of the Recommendation contains a guideline addressed to the authority with the power to decide, obliging it to take note of the child's position. It follows that 'The competent authority obliged to take a decision on parental responsibility or on the exercise thereof, which concerns the child's essential interests, should take cognisance of the child's position, insofar as the child's degree of maturity permits'. In view of this, the European Court of Human Rights has rightly noted that as soon as children become mature enough to form an opinion about their relationship with their parents, courts should take into account their views and feelings and their right to respect regarding their private life.<sup>17</sup>

It is clear from the wording of the provisions cited above that a child's right to express himself/herself in matters concerning him/her is an expression of the dignity inherent in every human being and of the need to protect the child's welfare, which is a central category of Polish family law.

To conclude the section on international law norms, it should be noted that they do not provide a sufficient basis for the formulation of definitive rules determining the obligatory or optional nature of a child's hearing in proceedings before a court, as well as the standards for such a hearing. In particular, they do not oblige to provide for a face-to-face hearing. They only define it as a definitely desirable element of the

<sup>16</sup> More extensively: Council of Europe, 1994.

<sup>17</sup> ECtHR, *Khusnutdinov and X v. Russia*, No. 76598/12, 18 December 2018.

proceedings, realising fundamental human rights, and oblige to enact appropriate procedural guarantees,<sup>18</sup> leaving this issue to the internal legislation of individual states.

#### 4. Legal Nature of the Hearing

The constitutional obligation to listen to the child has been detailed in the Act of 25 February 1964 Family and Guardianship Code.<sup>19</sup> From its content, it follows that ‘A child under parental authority owes obedience to his parents, and in matters in which he can independently make decisions and declarations of will, he should listen to the opinions and recommendations of his parents formulated for his good’ (Article 92 § 2 KRiO). The legislator presupposes the consensual cooperation of family members and that a certain margin of discretion is left to the child in matters in which he/she can make decisions and declarations of will independently.

‘Parents, before making decisions on more important matters concerning the person or property of the child, should listen to the child, if the child’s mental development, state of health and degree of maturity so permit, and take into account, as far as possible, the child’s reasonable wishes.’<sup>20</sup>

The legislator did not set an age caesura to involve the child in the decision-making process, recognising that parents are best placed to judge the maturity of their child and the views they express. The duty to hear the child has been defined in absolute terms, while the duty to take the child’s views into account has a relative character. The child must be heard “before a decision is taken”, i.e. at the latest immediately before a final decision is made on major issues concerning the child’s person or property. However, the legislator has not formulated any indication regarding the criteria for categorising a case as more important. The doctrine also refrains from attempting to define the concept of “more important matters”, indicating only that such matters certainly include the choice of school (especially secondary school), extracurricular activities, the decision to take the child abroad, the determination of the method of medical treatment, the sale of property belonging to the child, or the purchase of property forming part of the child’s estate. The duty to listen to the child only comes into play when the child’s mental development, state of health, and degree of maturity allow it. However, this is decided by the child’s parents. The child should have an understanding of the matters about which he/she is being heard so that he/she can express an opinion with a good understanding of what is at stake. Parents should

18 Słyk, 2015, p. 17.

19 Act of 25 February 1964 Family and Guardianship Code, consolidated text Dz. U. 2023, item 2809 (hereinafter: the KRiO).

20 Art. 95 para. 4 of the KRiO.

take into account the child's position, provided that this takes the form of reasonable wishes. These should be taken into account "as far as possible", which leaves parents with the option of disregarding the child's position when making decisions if they consider them to be impossible due to their complexity, the disproportionate nature of the time, resources, and action required in relation to the objective pursued, or due to a lack of sufficient financial resources.

For civil proceedings, the institution of hearing the child is regulated in the Act of 17 November 1964 Code of Civil Procedure,<sup>21</sup> separately for procedural<sup>22</sup> and non-procedural<sup>23</sup> proceedings. The provision of Article 216<sup>1</sup> § 1 of the CPC stipulates that 'The court in cases concerning the person of a minor child shall hear the child if his/her mental development, state of health, and degree of maturity allow it. The hearing shall take place outside the courtroom'. Contrarily, according to Article 576 para. 2 of the CPC,

'The court in matters concerning the person or property of the child shall hear the child if his mental development, state of health and degree of maturity so permit, taking into account, as far as possible, his reasonable wishes. The hearing shall take place outside the courtroom.'<sup>24</sup>

The wording of these provisions dictates they should be applied at all times and in every case involving the person or property of the child and testifies to the intention to establish such an instrument to enable the court to have direct contact with the child. At the same time, the position of the court is not prejudicial; the child must consent to be heard, and the refusal to do so constitutes a reason for waiving the child's hearing. Where the hearing of the child is abandoned at the latest before the conclusion of the proceedings, it shall be indicated in the minutes of the hearing or the hearing for what reasons the hearing was not held. As an aside, it should be added that the provisions of Articles 216<sup>1</sup> paras. 3 and 4 of the CPC and 216<sup>2</sup> of the CPC apply to Article 576 § 2 of the CPC *mutatis mutandis*, which is intended to ensure equal treatment of minor participants in trial and non-trial proceedings.

The child's hearing is a procedural act, not part of the evidentiary process. Consequently, whatever content the child discloses, the hearing is not the basis for establishing the facts of the case.<sup>25</sup> This does not mean, however, that they have no relevance. A hearing is not a means of proof and, unlike a witness interview, is not referred to as evidence. Nevertheless, the function of a hearing is similar to that of witness evidence, as it seeks to establish the child's position on a matter that directly concerns him/her. It is, therefore, described as 'an auxiliary procedural institution of

21 Act of 17 November 1964 Code of Civil Procedure, unified text Dz. U. 2023, item 1550 as amended. (hereinafter: the CPC).

22 Arts 216<sup>1</sup> -216<sup>2</sup> of CPC.

23 Ibid., Art. 576 para. 2.

24 Ibid., Art. 576 para. 2.

25 Cieśliński, 2017, p. 148.



a technical-procedural nature, serving to obtain from the court the explanations and factual statements needed by the court for the determination of the case'.<sup>26</sup> However, it is not subject to formalised rules of evidence. In particular, it is not subject to the criminal sanction of giving false testimony.

As a child hearing is a procedural act, both its conduct and its omission are decided by the court, i.e. by the court's panel and not by its president.<sup>27</sup> The order to hold a child's hearing is unappealable, but the refusal of a hearing may already be the basis of an appeal plea.

The institution of a hearing provides the child with procedural subjectivity but does not equip him/her with procedural capacity, i.e. the capacity to take action in person. Pursuant to Article 65 para. 1 of the CPC, procedural capacity, i.e. the capacity to take procedural actions, is vested in natural persons having full capacity to take legal actions, legal persons, and organisational units which are not legal persons and which are granted legal capacity by law. A natural person without procedural capacity may take procedural actions only through his/her statutory representative<sup>28</sup>. The child, therefore, as a natural person who does not have full legal capacity, does not have procedural capacity, and, consequently, hearing the child does not mean granting him/her the status of a participant in the proceedings.<sup>29</sup>

The court will hear the child if the child's mental development, state of health, and degree of maturity allow it. Making the hearing dependent on the child's personal qualities determines its relatively obligatory nature. After evaluating the child's mental development, state of health, and degree of maturity, the court shall decide whether to conduct a hearing. A minor cannot have more procedural rights than an adult person, for whom both the informational hearing<sup>30</sup> and the conduct of subsidiary evidence from the hearing of a party have been left to the court's discretion<sup>31</sup>. Undoubtedly, however, the abandonment of the hearing leads to a *de facto* limitation of the possibility of learning the child's position and, consequently, limits the cognitive capacity of the judge, which may influence the case decision. "If the court has abandoned the hearing of the child, at the latest before the end of the proceedings, it shall indicate in the minutes of the meeting or hearing for what reasons this activity was not carried out"<sup>32</sup>. It should be added that if the court does not hear the child, although it could have done so, or, having heard the child, does not take the child's opinion into account at all and does not justify its position convincingly, parties may challenge such a decision. It is assumed that these are such significant procedural errors that they may constitute an effective ground of appeal initiating appellate proceedings.

26 Markiewicz, 2010, p. 342.

27 Judgement of the Supreme Court of 13 December 2013, SNO 35/13, LEX No. 1409019.

28 Art. 66 of CPC.

29 Order of the Supreme Court of 16 December 1997, III CZP 63/97, LEX No. 32972.

30 Art. 216 of the of CPC.

31 Ibid., Art. 299.

32 Ibid., Art. 216<sup>1</sup> § 4.

As an aside, it should be added that it is extremely difficult for a judge to decide whether a child's mental development, state of health, and degree of maturity permit a hearing. This is because deciding on these issues requires psychological or, more broadly, medical knowledge. Mental development in psychology means the degree of intellectual, social, and emotional development of a child in relation to the age norm. It can, therefore, happen that a child is very well developed intellectually - has a rich vocabulary, a wide knowledge of the surrounding world, and knowledge of social norms, but his emotional or social development is disturbed, causing significant difficulties in contact with the judge and problems in formulating his own judgments, experiences, needs, and preferences. At the same time, deficits in intellectual development may not exclude the child's participation in the hearing. Their depth and relevance to the child's ability to express his/her position, needs, and preferences require the consultation of a psychologist and the adaptation of the interlocutor in the interview to the individual capacities and peculiarities of the child. The issue of developmental stage, as well as individual deviations from generally accepted developmental norms, must, therefore, be considered.

In the context of the hearing, the child's degree of maturity is a set of characteristics, among which the following are of particular importance: awareness of one's own needs and preferences and the child's relative constancy, ability, and readiness to express them; lack of excessive dependence on others; expressing a sense of autonomy and independence of judgement, resilience in difficult situations, ability to recognise the intentions of others; and understanding one's role in civil proceedings. The health condition, from a psychological point of view, limiting the possibility of the child's participation in the hearing depends on somatic diseases, the treatment of which, according to the specialist, excludes the child's participation in legal procedures; psychosomatic ailments, the symptoms of which may be aggravated under stress; autism; holistic developmental disorders with aggravated features of Asperger's syndrome; the therapy process to which the child is subjected due to traumatic experience; and emotional problems. In all these cases, the child is under the care of relevant professionals who should provide their opinion on the child's ability to participate in the hearing activity, which will be extremely helpful to the judge.<sup>33</sup>

At a later stage of the proceedings, according to the circumstances, the child's mental development, state of health, and degree of maturity, the court will take into account the child's opinion and reasonable wishes<sup>34</sup>. Thus, at this stage of the proceedings, the court reassesses these grounds, which means that even if it previously considered that they justify hearing the child, it may then, on the basis of direct contact with the child, observation of the child's behaviour, and assessment of the information provided, conclude there are no grounds for taking the child's opinion and reasonable wishes into account. Hearing the child does not, therefore, imply an

33 Budzyńska, 2015, pp. 43–44.

34 Art. 216<sup>1</sup> para. 2 of CPC in conjunction with Art. 576 para. 2 of CPC.

obligation to take the child's view into account when making a decision concerning him/her.

## **5. Types of Cases Justifying a Hearing with the Child**

The legal safeguards for a child's hearing are open-ended; they do not specify the range of matters on which a hearing is permissible. Notably, while personal issues may be easier for a child to assess, as they might often be related to their emotions and desires, property issues, which require knowledge and life experience, are generally beyond a child's capacity for independent assessment.

Analysing the doctrinal and case law position shows that the hearing of the child is conducted in cases of divorce, separation, determination of contact, enforcement of contact orders, prohibition of contact, ordering the enforcement of contact and imposing a fine for non-compliance, surrender of the child, modification of a divorce judgment on parental authority, modification of a divorce judgment on the whereabouts of a minor, limitation of parental authority, suspension of parental authority, termination of parental authority, establishment of custody, placement in a foster family, termination of a foster family, modification of an order on parental authority, modification of a child's place of residence, adoption, termination of adoption, determination of the child's essential interests, maintenance payments, unenforceability of a writ of execution, authorisation to issue a passport, change of name, determination of the validity of admission to a psychiatric hospital, authorisation for a woman to marry despite being underage, determination/denial of the child's origin, determination of the ineffectiveness of an acknowledgment of a child, annulment of an acknowledgment of a child, surrender of a child on the basis of the Hague Abduction or Retention Convention, issuance of custody orders, disposition of a child's property, and authorisation to perform an act exceeding the ordinary administration of the child's property. These examples testify to the inclusion of the child in the decision-making process and the strengthening of the legal position of the child, to whom the legislator guarantees the possibility of co-decision in various categories of matters concerning his/her person or property.

## **6. Conditions for the Conduct of the Hearing**

The hearing depends on the fulfilment of the statutory prerequisites, among which the legislator has included the child's attainment of an appropriate level of mental development, the degree of maturity, and the state of health. All these prerequisites must be considered together. The court assesses them in light of the totality of the circumstances of the particular case and in relation to the particular child. It follows that the court should approach each case individually and analyse on a case-by-case basis whether involving the child directly in the court proceedings is necessary from

the point of view of those proceedings, considering the impact of the hearing on the child's welfare and emotions. It is also for the court to assess what weight to give to the child's hearing and whether and to what extent to take into account the child's views and reasonable wishes.

The hearing should be conducted at a stage of the proceedings where the evidence gathered in the case makes it possible to assess the child's mental development, degree of maturity, and state of health. Contact with the child too early results in the judge not knowing what issues will need to be clarified and not having sufficient knowledge of the child to assist in planning and conducting the hearing. Conversely, a hearing at the final stage of the proceedings may lead to the child being held responsible for the outcome. As there will be parental expectations of this activity, it may in turn put pressure on the child. Therefore, it is advisable that the judge's interview with the child is not carried out either at the beginning of the proceedings or at the end but at a stage when material on the functioning of the child and his/her family has been collected, it is possible to identify issues that need to be identified when in contact with the child, and the judge has already formulated some hypotheses that he/she wishes to verify.<sup>35</sup> The decision whether to grant a hearing to a child should be made on the basis of a careful assessment of the information gathered that relates to the person of the child and the case, enabling a decision to be made as to the use and suitability of the institution of a hearing in a particular case. This information usually comes from an interview conducted by the probation officer, an examination by a panel of forensic specialists, a school opinion, and medical certificates or other documents collected in the case file. The knowledge of the child also allows for proper preparation for the hearing, in particular, to decide on the participation of a psychologist during the hearing, formulate questions, and make the right choice of time and place for the activity. Before proceeding with the hearing, the court should also consider whether the direct involvement of the child in the court proceedings is necessary in view of the objectives of the proceedings, the complexity of the proceedings, as well as the conflict between the parents and the impact of this conflict on the child.

The issue of competence arises against this background, and the question is whether the court has jurisdiction to assess whether there are sufficient grounds for a hearing. Furthermore, does it have the competence to assess the statutory conditions for a child's hearing?

'Their assessment requires taking into account both the developmental context and the personal skills and talents of the child, as well as the dynamics of changes taking place in the child's development (developmental abnormalities) conditioned by situational factors, especially the family situation, which is both the subject of the trial and possibly testimony before the court.'<sup>36</sup>

35 Ibid., pp. 44–45.

36 Czerederecka, 2010, p. 27.

There is no doubt that the legitimacy of the hearing of the child can only be ensured by a person prepared to do so, with expertise, first of all by psychologists dealing with children and adolescents, who prepare a relevant opinion on the order of the court. Such an opinion should be prepared on the basis of an analysis of the court case file, an examination of the child (observation, interview, psychological tests), and an interview with the parents or legal guardians. Of course, such a solution piles up practical problems. It generates additional costs, and the waiting time for the opinion prolongs the duration of the trial.<sup>37</sup>

Although a hearing plays an important role, it is for the court to assess in each case whether it is in the best interests of the child. This is because the nature of the case may create such tensions and evoke such emotions that the physical presence of the child in court may be inappropriate and detrimental to the child's mental health.<sup>38</sup> The child's hearing must be accompanied by an absolute conviction of the absolute necessity of the exercise and the value of the information it can provide. In other words, the hearing should be carried out for the sake of the principle of the child's welfare and in accordance with the child's best interests. It must not cause any negative consequences either in the emotional-psychological or in the socio-educational sphere. The importance of the child's welfare has been confirmed by the Supreme Court, which has held that guided by expediency, taking into account the degree of maturity of the minor and the nature of the guardianship case, the competent court should take cognisance of the position of that minor with a view to his/her welfare.<sup>39</sup> The best interests of the child should constitute the basic premise of all court decisions concerning the child, the directive in the case of the creation of the law and its application, as well as a criterion of evaluation in deciding on the child's affairs and in resolving conflicts between the interests of the child and those of third parties.<sup>40</sup>

‘In the hearing of the child, in addition to the judge, only an expert psychologist may participate if, due to the health condition, mental development or age of the child, it is necessary to provide psychological assistance to the child during the hearing or it is necessary to assist the judge in identifying the needs of the child during the hearing.’<sup>41</sup>

The legislator emphasises the judge's personal participation in the hearing activity, establishing contact with the child, and the possibility of directly shaping the conversation. Thus, it excludes the possibility of the judge being replaced by another entity. This is also supported by direct contact between the judge and each participant in

37 Ibid., p. 39.

38 CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga vs. Simone Pelz*, 22 December 2010 [Online]. Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CJ0491> (Accessed: 6 February 2024).

39 Order of the Supreme Court of 15 December 1998, I CKN 1122/98, LEX No. 35758.

40 More extensively: Stojanowska, 2000, pp. 55–65.

41 Art. 216<sup>2</sup> para. 2 of CPC.

the court proceedings. The expert psychologist plays only a supporting role here and performs his/her role under the guidance and supervision of the court; he/she can assess whether the emotional development of the child allows the hearing to take place and assist the judge in formulating questions addressed to the child. The expert psychologist provides a great deal of support and assistance, mainly in the area of expressing feelings and speaking out about the child's family. He/she also provides a guarantee of the correctness of the conduct of the hearing from the perspective of the child's emotional costs and signals any overload involved while assessing the child's motivation to express himself/herself.

No other persons, and under no circumstances the child's parents or persons representing the parents, may attend the hearing. The presence of these persons may have an embarrassing effect on the child, involving an internal compulsion to please those close to him/her and a conflict of loyalties, ultimately causing the child to be selective about the information provided to the court. It should be remembered that the more people there are, the more difficult it is to establish proper contact with the child and obtain a comprehensive, relaxed relationship with him/her.

It is difficult to determine the age limit of a child beyond which a hearing is justified. However, it is not so much and not only the age that determines the use of the institution of a hearing but also the level of mental development and the degree of maturity, which, after all, may vary among children of the same age. Psychological studies of children during childhood on determining the possibility of expressing reasonable wishes in matters concerning them show that this is a period in which children have great difficulty in doing so, mainly due to developmental issues (difficulties in determining time, distance, taking the perspective of the parent under whose care they are currently placed, succumbing to authority figures, etc.)<sup>42</sup>. Practical experience confirms that regardless of the efforts made by the judge and the conditions of the hearing, young children do not bring anything of value to the case, as they are not mature enough and can easily be manipulated.<sup>43</sup> If judges already decide to hear a child, they do so with children who have reached the age of 13. This limit is not accidental, as from the age of 13, the child acquires limited legal capacity. Of course, it is also possible to hear a younger child if it is supported by his/her subjective qualities, which are, after all, of an eminently individualised nature. This is all the more so since the legislator does not provide for limitations on the possibility of hearing a child on the criterion of his/her age. This confirms that the decision to hear the child is highly discretionary and falls within the judge's discretionary power.

42 More extensively on the characteristics of human life periods: Harwas-Napierała and Tremapała, 2004; Czerederecka, 2010.

43 Cieśliński, 2017, p. 145.

‘The child may be heard only once in the course of the proceedings, unless the child’s best interests require this to be done again or the need for a new hearing is raised by the child. The re-hearing of the child shall be conducted by the same court, unless this is impossible or the child’s best interests prevent it.’<sup>44</sup>

Repeated summoning of the child to court, appearing at the court premises, repeating questions, replaying observations and facts, and arousing related emotions may lead to secondary traumatisation of the child.

Bearing in mind the child’s subjective qualities and the accompanying experiences, it is important to prepare the child adequately for this activity. Of course, this does not mean instructing the child on what he/she can or cannot say. The process of preparing the child for the hearing must not influence the content of his/her speech. Nevertheless, it is necessary to sensitise the child to the fact that he/she should speak the truth and describe what has actually happened. Before the hearing begins, the child should be informed of the purpose and implications of the activity, its course, and the role it will play in a way that he/she understands. It should be explained to the child who will be present at the hearing and the role these people will play. It is extremely important to make the child aware that the hearing is motivated by his/her welfare and serves to defend his/her interests. It is essential that the child understands the purpose and meaning of presenting his/her position. The child must be informed that he/she can refuse to attend the hearing or to answer the questions put to him/her. It should be explained that he/she does not need to know the answers to the questions asked, and he/she has the right to say that he/she “does not know” or “does not remember” something, without fear of consequences. It is equally important to discuss the tensions and fears associated with participating in this type of legal procedure. It is important to anticipate the situation and be able to mentally adjust to participating in the hearing, so the child should be warned in advance about when and where the hearing will take place. Predictability of the situation increases the sense of security and makes it easier to cope with the emotions involved. Adapting the conditions of the hearing to the child’s capacity can be a condition for obtaining reliable and credible information, and the child’s right to express himself/herself will then be fully realised.<sup>45</sup>

Parents play a huge role as they are the persons who, due to their daily contact with the child and their knowledge of the child’s reactions, are best placed to prepare the child to participate in legal procedures. Therefore, they are the ones who first need to be equipped with basic information about the legal procedures in which their child will be involved in order to then explain to the child what these procedures will consist of, what their purpose is, and how they will be carried out. The awareness of the child’s parents will, in many cases, determine the success of a procedure.

44 Art. 216<sup>1</sup> para. 3 of CPC.

45 Borkowska, 2014, p. 46.

## 7. Conduct of the Hearing

Of great practical importance, often determining the success of the hearing, is the time and place at which it is held. The timing of the hearing should be adapted to the child's physical and mental state, as determined on the basis of information obtained from the parents and other sources available to the court. The time of the hearing should be adapted to the child's age, state of health, and the time of the child's optimal cognitive activity. The duration of the hearing should be adapted to the child's individual capacities. The hearing should not interfere with the child's other activities or force the child to wait a long time before being interviewed. If more than one child is involved in the proceedings, the date of the hearing should be set individually for each child.

'The hearing of the child shall take place in a closed session, which shall be held in appropriately adapted premises at the seat of the court or, if the welfare of the child so requires, outside the seat of the court.'<sup>46</sup>

This regulation is specified in § 186(1) of the Rules of Procedure of common courts, according to which the hearing of a minor child shall be conducted, if possible, in a room intended and adapted for this purpose. If there is no such room on the premises of the court, the hearing may be held in a room meeting these conditions located outside the court building, cooperating in this respect with non-governmental organisations dealing with the protection of children's rights.<sup>47</sup> The choice of the venue for the hearing is extremely important from the point of view of the child's mental state. There is no doubt that the conditions in which the hearing is conducted will influence the judge's gaining of the child's trust and facilitate the child's openness to conversation. Therefore, it is important to create conditions that are as friendly as possible, where the child feels at ease and does not feel any pressure. A child's visit to the court premises or any other place where hearings are held should not involve stress and negative experiences for the child.

The venue for the hearing must be child-friendly, provide a sense of security, an atmosphere of intimacy and discretion, and promote concentration and freedom of expression. Concern for the welfare of the child participating in legal procedures is an overriding value, which is why the legislator obliged the Minister of Justice to determine by regulation the manner of preparation and conduct of a child's hearing and the conditions to be met by the premises intended for the conduct of such hearings<sup>48</sup>. To date, however, no such regulation has been issued.

<sup>46</sup> Art. 216<sup>2</sup> para. 1 of CPC.

<sup>47</sup> Regulation of the Minister of Justice of 18 June 2019 - Rules of Procedure of common courts, unified text Dz. U. 2022, item 2514.

<sup>48</sup> Art. 216<sup>2</sup> para. 4 of CPC.



In psychological terms, it is emphasised that the room in which the child's hearing is conducted should correspond to the conditions of a friendly interrogation room, also known as a blue room, and be closer to a living room than to a staff room. It should also be equipped with a seating area adapted for the child and, depending on the age, accessories that give it a friendly character.<sup>49</sup> The hearing of the child should take place in the most favourable conditions possible, which is why it takes place outside the courtroom in appropriately adapted premises, which must meet certain formal and technical requirements, at the seat of the court or, if the best interests of the child require it, outside the seat of the court. In practice, however, under Polish conditions, minors are most often heard in judges' offices, which are not adapted for such activities.

In the field of civil proceedings, there is currently no clear regulation of standards such as those applicable in criminal proceedings for questioning a minor witness specified by the Minister of Justice.<sup>50</sup> Within the framework of civil proceedings, some solutions resulting from the content of this regulation are applied by analogy. The hearing room should be isolated from outside noises and protected against unauthorised entry of outsiders. The colour scheme of the hearing room should be light and subdued. It should be equipped with furniture suitable for adults and children, and the floor should be covered with soft carpeting. The dress code of the hearing officer should be informal, so the judge must not be dressed in a toga and chain.

While the creation of appropriate conditions for the hearing is important in terms of the child's atmosphere and well-being, more important is the manner in which the hearing is conducted. The judge conducting the hearing should begin by introducing himself/herself to the child, introducing the psychologist expert, if present, and explaining the purpose of the hearing and the child's role in the court proceedings. The way in which the child is addressed, the questions asked, the tone of voice, and the order in which the topics are taken up (first, a "loose talk" on general topics, without rushing, without any pressure on the child, then moving on to the issues related to the case) is important.<sup>51</sup> It follows that the child should be allowed to speak spontaneously, after which he/she can be asked brief clarifying questions relating to it. The judge should communicate with the child using language adapted to the child's age and intellectual level. Above all, however, the content and form of the child's speech depend on whether the person conducting the hearing has succeeded in establishing a good rapport with the child, gaining the child's trust, making the child feel secure, and, at the same time, asking questions in a way that they are fully understood by the child and do not suggest the direction of the answer.<sup>52</sup> Questions asked of the child should be open-ended. The degree of difficulty of the questions depends on the child's

49 Czerederecka, 2010, p. 41.

50 Ordinance of the Minister of Justice of 28 September 2020 on the manner of preparation of the interrogation conducted in accordance with the procedure set out in Articles 185a-185c of the Code of Criminal Procedure, Dz. U. 2020, item 1691.

51 Cieśliński, 2017, p. 146.

52 Czerederecka, 2010, p. 37.

subjective qualities. Questions should be graded, from easiest to most difficult. In the course of the conversation with the child, the judge should use an active listening technique, paraphrase the child's statements to make sure the child's utterances are properly understood, and avoid judging the child, his/her statements, and those close to him/her.

Children's hearing shall be documented by an official note. The course of the hearing shall not be recorded by means of a sound or video recording device<sup>53</sup>. An activity documented by means of an official note is an appropriate solution, as the aim of the hearing is not to gather evidence, but to learn about the child's position. The official note also has the advantage of excluding the presence of third parties during the hearing. The date and time of the hearing, the place and conditions of the hearing, the content of the information given to the child about the rules of the hearing, the type of case on which the child is to be heard, the child's position, the conclusions of the hearing, and the signature of the judge drawing up the document should all be recorded in such a note. The official note should, of course, reflect the hearing as fairly as possible.

Once the hearing is complete, the resulting conclusions should be communicated to the parties/participants in the proceedings at the next court session.

## **8. Conclusions and Recommendations**

A child hearing is necessary if the case concerns a child; the child has an understanding of the nature of the case; the child's mental development, state of health, and degree of maturity make a hearing possible; and it is not contrary to the child's welfare. When properly conducted, it makes it possible in almost every case to establish the child's current care and educational situation and his/her relationship with his/her parents, as well as the child's preferences and expectations regarding the court's decision. It undoubtedly enables the court to understand how the child perceives the family problems and his/her situation and provides a broader perspective of the case to be decided. The hearing complements the evidence gathered in the case. It should be advocated that listening to the child and taking into account his/her position should intensify as the child grows and acquires further intellectual and emotional competences.

A properly conducted hearing not only gives the child a chance to protect himself/herself by helping make a decision aligned with the child's best interests but also shows the child that he/she has the right to be heard. Hearing the child not only helps make the most appropriate decision for the child's welfare but also influences the child's coming to terms with the changes taking place by giving him/her the feeling that his/her views will also be taken into account. It also fulfils the educational objective of developing the child's sense of co-responsibility in deciding matters that concern

53 Art. 216<sup>2</sup> para. 3 of CPC.

him/her. By having the opportunity to be heard and to have their views taken into account, children have the chance to build up a positive self-image as an individual who has a say about their own life and their own needs, who, in one way or another, have some control over their life and can cope with the worries of everyday life.<sup>54</sup>

Though the opportunity to be heard undoubtedly realises the child's right to be heard on the issues at stake in the court proceedings, the information obtained from the child, without proper knowledge of how to interpret it, may lead to hasty conclusions and, consequently, be contrary to the child's welfare. Hence, there is a need for intensive ongoing training of judges in developmental psychology and techniques for establishing contact with the child and conducting interviews in a hearing. It follows that, in addition to the legal regulations, which must be consistent, logical, transparent, and as precise as possible, the substantive preparation of the judge to conduct the child hearing is also very important. Indeed, the value of the information obtained from the child depends not only on the individual capacities of the child but also on the manner in which this activity is conducted and on the knowledge, experience, and interpersonal skills of the hearing officer.<sup>55</sup>

Not every judge is predisposed to conduct this kind of activity. A lack of skills in listening to a child may not only fail to realise the child's right to be heard but also harm the child's welfare. The hearing of a child by unprepared persons may not only lead to a misperception of the child's position but even to an undermining of confidence in court or, more broadly, the justice system, which may have far-reaching consequences in the future. Proper preparation of the judge is, therefore, an important element of an effective and friendly hearing.

The judges should have to go through training covering the basic principles of child psychology. They should have the knowledge to ask questions in a manner adapted to the maturity and mental development of the child and to interpret the answers obtained both verbally and non-verbally.<sup>56</sup> Furthermore, judges should be able to properly assess the child's behaviour and the way he/she reacts in order to draw appropriate conclusions. He/she must have the ability to shape the course of the conversation in such a way as to obtain the child's position rather than a reflection of the position of one of his/her parents. It follows that a proper hearing should also be accompanied by adequate training in communication with children of different age groups. This applies in particular to family court judges, who should be the first to be trained in the proper tactics of listening to a child.

This, of course, requires continuous training within the various judicial specialisations. Require everyone to be good in every area of law is difficult. Lack of specialisation and inadequate staffing result in judges losing out on the emotional weight of care cases. They are also often unable to empathise with the situation of the parties or minor children. Hence, there is a need for professional specialisation of family court

54 Gardziel, 2022, p. 100.

55 Borkowska, 2014, p. 34.

56 Słyk, 2015, pp. 25–26.

judges and the elimination of situations where cases involving children are handled by random people.<sup>57</sup>

Nevertheless, pre-hearing activities are important in order to prepare judges for meetings with the children. Each interview is unique and has its own peculiarities resulting from the personality of the interviewees, their mutual attitude to the subject of the interview, their state of health, and the nature of the case before the court. The judge must be duly prepared for such a meeting, must know the details of the case, gather as much information about the child as possible, and conduct the interview in partnership, without emphasising or using his/her advantage. Only such an approach will meet the objectives of the hearing and allow a decision to be made that is in the best interests of the child.

57 Gardziel, 2022, p. 111.

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