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Elżbieta Szczot
The John Paul II Catholic University of Lublin, Poland
https://orcid.org/0000-0002-8360-4250

"Person" in the Polish Family and Guardianship Code

Abstract: The article presents the issues related to the understanding of the person in the Polish Family and Guardianship Code. It shows the complex issue of acquiring legal capacity, including the legal capacity of the conceived child, the relation between parental authority and the child, adoption of the child, the acquisition and scope of capacity for legal acts, as well as some limitations resulting from incapacitation were showed.

Keywords: person, child, conceived child, parental authority, incapacitated person

The Family and Guardianship Code,[1] which has been in force in Poland since 1964, is a set of norms regulating family relations and matters pertaining to the protection of the interests of minors over whom no parental authority is exercised as well as the interests of fully incapacitated adults. It is considered to be a section of the Civil Code due to the civil approach to regulating family relations whereby all sides have equal status, and any resulting disputes are settled by the court.[2] However, given the specificity of legal relations arising from family law, it constitutes a separate codification. The article presents the term

[1] Ustawa Kodeks rodzinny i opiekuńczy, 25 II 1964, Dz. U. 1964, nr 9, poz. 59 z późn. zm. (last amendment: Dz. U. z 2020 r. poz. 1359). The Code has been amended many times. The English translation after: *The Family and Guardianship Code*, trans. Nicholas Faulkner (Warszawa: Wydawnictwo C. H. Beck, 2018). All the subsequent translations will be from this edition (hereinafter referred to as FG-C), unless otherwise specified.

[2] Marek Andrzejewski, *Prawo rodzinne i opiekuńcze. 5 wydanie zmienione i uaktualnione* (Warszawa: Wydawnictwo C. H. Beck, 2014), 3.

"person" as understood by the legislator in the Family and Guardianship Code and points to the complexity in its application to selected areas.

Each human being is a person from the very moment of their existence, however, a proper understanding of this concept was achieved only in Christianity which became the cradle of personalism. The theology of the person, which was developing throughout the first five centuries of Christianity, became the philosophy of the person owing to Boethius. He was a Roman philosopher, logic and theologian who lived at the turn of the 5th and 6th centuries. Boethius defined a human being as *rationalis naturae individua substantia*, that is, an individual substance of a rational nature.[3] This definition became the basis for all the subsequent attempts to define a human being.[4]

Since the beginning of Roman law, it has been recognized that a person in the legal sense is the one who can be a subject in legal relations.[5] In the Code, the term "person" refers to subjects of law with general legal capacity and capacity for legal acts such as: a spouse, a child, a minor, an incapacitated person, a guardian or a custodian.

Art. 8 § 1 of the Civil Code states: "Every human being has legal capacity from the moment of birth."[6] Legal capacity is the ability to be a subject of rights and obligations in civil law relations. "Birth" should be understood as the appearance of a living child outside the mother's body. According to the Regulation of the Minister of Health of 6 April 2020 on the types, scope and templates of medical documentation and the method of its processing,[7] a live birth is understood as "the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes or shows any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of

[3] Mieczysław Albert Krąpiec, *Człowiek i prawo naturalne* (Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, 1986), 137. Boethius, Anicius Manlius Severinus Boëthius, Severinus of Pavia, born c. 480, died c. 524, More see: Marian Kurdziałek, "Boecjusz," in *Encyklopedia Katolicka* (Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, 1985), vol. 2, col. 704–706.

[4] Bp Edward Ozorowski, "Personalizm chrześcijański," in *Rocznik Teologii Katolickiej*, IV(2005), 7–17, accessed January 25, 2021, https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/5037/1/RTK_4_2005_E.Ozorowski_Personalizm_chrzescijanski.pdf.

[5] Wacław Osuchowski, *Rzymskie prawo prywatne. Zarys wykładu*, (Warszawa: Państwowe Wydawnictwo Naukowe, 1980), 158.

[6] The English translation after: *The Civil Code*, trans. Ewa Kucharska (Warszawa: Wydawnictwo C. H. Beck, 2018). All the subsequent translations will be from this edition (hereinafter referred to as CC), unless otherwise specified.

[7] Rozporządzenie Ministra Zdrowia z dnia 6 kwietnia 2020 r. w sprawie rodzajów, zakresu i wzorów dokumentacji medycznej oraz sposobu jej przetwarzania. The Regulation includes an appendix which contains the evaluation criteria used when making entries in the documentation regarding the duration of pregnancy, miscarriages, live and stillbirths, Dz. U. poz. 666 (as last amended on December 3, 2020, item 2350, legal state as per January 25, 2021).

voluntary muscles, whether or not the umbilical cord has been cut or the placenta has been severed."[8] Whereas a stillbirth is understood as "the complete expulsion or extraction from its mother of a product of conception, provided it occurs after the 22nd week of pregnancy, which, after such expulsion or extraction, does not breathe or show other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles."[9]

According to Art. 9 of the Civil Code it is presumed that when the child is born, he/she is born live.[10] Then, at the time of his/her birth,[11] the child becomes a natural person. Human rights are strictly connected with this very moment as each human being is entitled to them from the moment they are born into the world. The inherent dignity of a person is a source of human rights, which means that they stem from natural laws and are not granted by the state. They are inherent, which means that each person is entitled to them regardless of the will of the authorities. Human rights are also inalienable, which means that they cannot be waived. They are also inviolable and it is the duty of the state to guarantee their implementation and protection. Moreover, they are universal and concern each human being without any exceptions.

Recognizing the Conceived Child as the Person

The status of the conceived child is still a complex legal matter. The unborn child is defined as *nasciturus*,[12] which means "one who is to be born." Some jurists do not consider such a child to be a natural person and, thus, he/she does not have legal capacity.[13] Moreover, in the Family and Guardianship Code the

[8] Trans. Anna Bysiecka-Maciaszek.

[9] Trans. Anna Bysiecka-Maciaszek.

[10] It is a rebuttable presumption, the so-called *praesumptio iuris tantum*, that is, an assumption taken to be true unless proven otherwise.

[11] "The age of a natural person is calculated in years, with the time limits running from the day of birth (not the moment)" (trans. Anna Bysiecka-Maciaszek) – see Stefan Grzybowski, *Prawo cywilne. Zarys części ogólnej*, *Wydanie III poprawione*, (Warszawa: Państwowe Wydawnictwo Naukowe, 1985), 164.

[12] *Nasciturus* (from Latin *nascor, nasci, natus sum – one who is to be born*) is a term commonly used to refer to a conceived child and the unborn child. See: Antoni Dębiński and Maciej Jońca, *Leksykon tradycji rzymskiego prawa prywatnego. Podstawowe pojęcia* (Warszawa: Wydawnictwo C.H. Beck, (2016), 244, 245.

[13] Grzybowski, *Prawo cywilne. Zarys części ogólnej*, 157–158, 162. Bronisław Walaszek was of a different opinion, "Nasciturus w prawie cywilnym," *Państwo i Prawo* (1956), zeszyt 7, 121 et seq. See: Jacek Mazurkiewicz, "Nasciturus w prawie cywilnym i karnym," *Palestra* 17/11(191), (1973), 37–43.

Polish legislator grants parental responsibility not earlier than at the time of child's birth. Therefore, in the doctrine, there is a dispute over legal capacity of the unborn child.[14] In Poland the Act on family planning, protection of the human foetus, and conditions for termination of a pregnancy[15] entered into force in 1993. Art. 1 point 1 regulates that "Each human being from the moment of their conception has the right to life," whereas point 2 guarantees as follows: "The life and health of the child shall be subject to protection from the moment of his/her conception."[16] Under the Act on Family Planning the unborn child acquired legal capacity and, consequently, a new paragraph was added in Art. 8 of the Civil Code stating that also the conceived child has legal capacity, however property rights and obligations are granted only if he/she is born alive. *Nasciturus* acquired full legal capacity to such non-property rights as: life, health, marital status—rights arising from being born to particular parents and the resulting consanguinity, as well as legal capacity—provided he/she is born live—as regards property rights. The provision included in § 2 of Art. 8 was in force for three years and was deleted in 1996 as a result of the Amendment to the Act on Family Planning,[17] which, in turn, was connected with the introduction of some regulations on abortion for social reasons. This created a possibility to terminate pregnancy "at woman's request"[18] and violated previous arrangements. However, in the judgement of 28 May 1997, the Polish Constitutional Tribunal overruled the provisions allowing termination of pregnancy for social reasons and in the justification it defined the standards of health and life protection of the conceived child.[19]

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[14] Although legal capacity was not recognized in the Civil Code, in certain situations it was recognized in court judgements, for example see: the Judgement of the Supreme Court of 8 October, 1952, C 756/51, *Nowe Prawo* 5 (1953), 70–72; the Judgement of the Supreme Court of 8 January 1965, II CR 2/65, *Państwo i Prawo* 10(1957), 633; the Judgement of the Supreme Court of 4 April 1965, OSNC 1966/9/158; the Judgement of the Supreme Court of 3 May 1967, II PR 120/67, OSNC 1967/10/189.

[15] Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, Dz. U. 1993, nr 17, poz. 78. The Act on family planning, protection of the human foetus, and conditions for termination of a pregnancy (hereinafter referred to as the Act on Family Planning) changed Ustawa z dnia 27 kwietnia 1956 r. o warunkach dopuszczalności przerywania ciąży (the Act of 27 April 1956 on the conditions of permissibility of abortion), Dz. U. 1956, nr 12 poz. 61.

[16] Trans. Anna Bysiecka-Maciaszek.

[17] Ustawa z dnia 30 sierpnia 1996 r. o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży i niektórych innych ustaw, Dz.U. 1996, nr 139, poz. 646.

[18] Dz.U. 1996, nr 139, poz. 646: Art. 4a. point 4 states that a termination of pregnancy may be performed only by a doctor, when a pregnant woman is in difficult living conditions or in a difficult personal situation.

[19] Wyrok Trybunału Konstytucyjnego z dnia 28 maja 1997 r., K26/96, OTK ZU 1997, no. 2, item 19; Jacek Szczot, "Prawne aspekty ochrony życia poczętego w Polsce," in *Етичні та*

On 22 October 2020 the Polish Constitutional Tribunal adjudicated that Art. 4a (1)(2) of the Act of 7 January 1993 on family planning, protection of the human foetus, and conditions for termination of a pregnancy (Dz. U. Nr 17, poz. 78, ze zm.) is inconsistent with Art. 38 of the Constitution of the Republic of Poland[20] in conjunction with Art. 30 in conjunction with Art. 31(3) of the Constitution of the Republic of Poland.[21] Upon the publication of this judgement in *Monitor Polski* on 27 January 2021, the previously binding provision of the Act on Family Planning expired, thus making it impermissible to terminate a pregnancy where "on the basis of prenatal tests and/or on other medical grounds, there is a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness."[22]

Despite repealing § 2 of Art. 8 of the Civil Code in 1996 the Polish legislator guarantees the conceived child legal protection under relevant provisions of the Family and Guardianship Code. For example, as regards the recognition of

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правові аспекти абортів і евтаназії. Etyczne i prawne aspekty aborcji i eutanazji, ed. Elżbieta Szczot, and Jacek Szczot (Lutsk: Publishing House of Volyn Orthodox Theological Academy ΈΙΚΩΝ, 2015), 84; see Wyrok Trybunału Konstytucyjnego z dnia 29 maja 1996 r., III ARN 96/95, OSNP 1996, no. 24, item 366.

[20] Wyrok Trybunału Konstytucyjnego z dnia 22 października 2020 r., accessed January 28, 2021, https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy.

[21] Art. 38 of the Constitution of the Republic of Poland contains the legal principle of the protection of life: "The Republic of Poland shall ensure the legal protection of the life of every human being." Art. 30 refers to the protection of human dignity: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities." Art. 31 point 3 refers to freedom and the premises of its restriction: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights" (the English translation quoted after: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm), see Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. Nr 78, poz. 483 z późn. zm.; Ogłoszenie uzasadnienia do wyroku Trybunału Konstytucyjnego w sprawie o sygn. akt K 1/20 wraz ze zdaniami odrębnymi do wyroku oraz zdaniami odrębnymi do jego uzasadnienia, *Monitor Polski*. Dziennik Urzędowy Rzeczypospolitej z dnia 27 stycznia 2021 r., poz. 11.

[22] Ustawa z dnia 30 sierpnia 1996 r. o zmianie ustawy o planowaniu rodziny art. 4a ust. 1 pkt 2. Dz. U. Nr 17, poz. 78. For the so-called abortion compromise in Poland see: Marek Andrzejewski, "Rozważania o prawnej ochronie życia nienarodzonych dzieci (z nawiązaniem do pewnej debaty sprzed lat)," in Jacek Mazurkiewicz and Piotr Mysiak, *Nasciturus pro iam nato habetur. O ochronę dziecka poczętego i jego matki* (Wrocław 2017), 7–23; Franciszek Longchamps de Bérier, "Emocje w interpretacji prawa a opis rzeczywistości. Refleksje na marginesie książki Ernesta Bianchiego *Per un'indagine sul principio 'concepto pro iam nato habetur*,' *Forum prawnicze* 3(11) 2012, 63–67, accessed January 29, 2021, https://forumprawnicze.eu/pdf/11-2012.pdf.

paternity Art. 75 § 1 states that "it is possible to recognize paternity before the birth of a conceived child." The recognition of the child prior to his/her birth is a way of determining paternity. In this case the conceived child is understood as a child whose father is a man not married to the child's mother—but who is for example in cohabitation, or as a child who is born in a non-marital partnership, or if a man who is not the mother's husband claims to be the child's father and recognizes the child of his own free will and thus admits to being the child's biological father and assumes the responsibilities resulting from such recognition.[23] Under Art. 62 of the Family and Guardianship Code a child born during a marriage or within three hundred days from its termination or annulment is presumed to be the child of the mother's husband. Under Art. 75 § 1 the provision does not apply if the child is born to the mother after she concludes a marriage with a man other than the man who recognized paternity.[24] The recognition of the conceived child results in particular legal consequences: the child bears the surname indicated in unanimous statements filed by the parents under Art. 89 of the Family and Guardianship Code, the man recognizing the child is granted parental authority, and the right of succession and reciprocal alimentary duties arise. If the man who is not the mother's husband recognized the child, the mother may demand that he, even prior to the child's birth, set aside an appropriate sum of money for the cost of maintaining the mother for three months during pregnancy and the costs of maintaining the child during the first three months after the birth. The court determines the date and manner of payment of this sum. Thus, indirectly, under Art. 142 of the Family and Guardianship Code the conceived child was granted legal protection.[25]

If it is necessary to protect the future rights of the child conceived but not yet born, a custodian may be appointed in accordance with Art. 182 of the Family and Guardianship Code. These rights include any future subjective rights of the child such as health and life, and not solely succession rights. In this case the custodian is referred to as *curator ventris nomine*[26] (the guardian of the womb; Polish *kurator łona*). The custodianship ceases upon the child's birth

[23] Andrzejewski, *Prawo rodzinne i opiekuńcze*, 127; cf. Bronisław Walaszek, *Uznanie dziecka w prawie rodzinnym* (Kraków: Państwowe Wydawnictwo Naukowe, 1958).

[24] Olaf Szczypiński, *Uznanie dziecka poczętego i jego ochrona*, accessed January 20, 2021, https://depot.ceon.pl/bitstream/handle/123456789/6013/uznanie_dziecka_poczetego.pdf?sequence=1&isAllowed=y.

[25] See Art. 754 of the Code of the Civil Procedure: Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz. U. 1964 nr 43 poz. 296; Orzeczenie NSA z dnia 28 listopada 1985 r., III SA 1183/85, OSP 1987, nr 2, poz. 28.

[26] On the institution of the guardian of the womb (*kurator łona*), see: Helena Pietrzak, "Curator ventris" dla "nasciturusa," *Studia nad Rodziną*, 15 /1–2 (28–29), (2011), 145–164; more on the responsibilities of *curator ventris* see: Olaf Szczypiński, *Uznanie dziecka poczętego i jego ochrona*.

and parents, by virtue of parental authority, take over their responsibilities over the child. Legal capacity with regard to succession rights was included in the provisions of the Civil Code but subject to certain conditions. Art. 927 of the Civil Code states that "§ 1. A natural person who is not alive at the time the succession is opened and a legal person which does not exist at that time cannot be an heir. § 2. However, a child that has already been conceived when the succession is opened can be an heir if it is born alive." According to the Roman rule *nasciturus pro iam nato habetur quotiens de commodo eius agitur*, that is, the unborn child is considered born whenever it is to his/her advantage, the child conceived at the time of opening the succession can be an heir, provided he/she is born alive. This rule became the minimum standard for the protection of the rights of the unborn child.[27]

Parental Authority and the Child

The Polish legislator does not provide any definition of parental authority in the Family and Guardianship Code. It is assumed in the doctrine that parental authority is a set of rights and obligations of parents towards their minor child, which guarantee due care over the child and his/her property.[28] In accordance with Art. 95 § 1: "Parental responsibility covers, in particular, the rights and duties of the parents to exercise care over the person and the property of the child and the child's upbringing, respecting his/her dignity and rights." Additionally, § 3 emphasizes that "parental responsibility should be carried out as required for the welfare of the child and in the social interest." Therefore, the guiding principle of exercising parental authority is to act for the welfare of the child. The provisions of the Family and Guardianship Code include the term "welfare of the child," yet it has no statutory definition. Wanda Stojanowska notes that these provisions constitute a normative source of the principle of protection of this welfare in its specific forms, for example Art. 56 § 2 of the Family and

[27] See Marta Banyk, "Status prawny dziecka poczętego na tle jego prawa do ochrony życia i zdrowia, wynagradzania szkód doznanych przed urodzeniem oraz ochrony dóbr osobistych matki," *Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM*, 4: 18 (2014), accessed 18 January, 2021.

[28] Rafał Łukasiewicz, "Władza rodzicielska, Instytucje prawa rodzinnego," ed. Jakub M. Łukasiewicz, Stanisław Grobel, Jakub M. Łukasiewicz, Rafał Łukasiewicz, and Jerzy Wiktor, *Praktyczny komentarz. Wzory pism i dokument*y (Warszawa: Wolters Kluwer 2014), 186; for more see: Tomasz Sokołowski, *Władza rodzicielska nad dorastającym dzieckiem* (Poznań: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu, 1987); Wanda Stojanowska, *Władza rodzicielska* (Warszawa: Wydawnictwo Prawnicze, 1988).

Guardianship Code lists the welfare of the child as a negative legal prerequisite for divorce.[29] Whereas constitutional norms are a normative source of the general principle of protection of the child's welfare included in Art. 72 of the Constitution of the Republic of Poland.[30] As Stojanowska rightly observes, lack of a statutory definition of the child's welfare proves that the Polish legislator leaves the decision to the discretionary judgement of a judge, whereas this term requires a contextual definition.[31]

It should be emphasized that anyone who exercises parental authority or has guardianship or care over a minor is forbidden to use corporal punishment.[32] Such a ban was only introduced in Poland in 2010 (to compare, in Sweden it was in 1979) when the Act of 10 June 2010 amending the Act on counteracting domestic violence and some other acts (Journal of Laws no. 125, item 842) amended the Family and Guardianship Code by adding Art. 96[1]. The child remains under parental authority until he/she reaches the age of majority. According to Polish law, an individual who has attained 18 years of age is recognized as an adult, however, a female minor becomes an adult upon conclusion of a marriage (Art. 10 of CC), that is, the guardianship court may permit a woman who has reached the age of sixteen to marry (Art. 10 § 1 of FGC).

The Family and Guardianship Code does not define the beginning of parental authority. It is assumed that the moment the child is born parents are granted this authority, however, interestingly, some grant this right upon the conception

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[29] "However, despite the irretrievable and complete breakdown of matrimonial life, a divorce is not permitted if it would be detrimental to the welfare of the minor children of both spouses, or if there are other reasons why the decision to divorce is contrary to the principles of social coexistence" (Art. 56 § 2 of FGC).

[30] Art. 72: "The Republic of Poland shall be the common good of all its citizens." Quoted after www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[31] Wanda Stojanowska, "Dobro dziecka w aspekcie sprawowanej nad nim władzy rodzicielskiej," *Studia nad Rodziną* 4/1(6), 55–65, (2000), 62; see: Art. 2 and 3 of the Convention on the rights of the child, Konwencja o Prawach Dziecka przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., ratyfikowana przez Polskę 7 lipca 1991 r., Dz. U. z 1991 r., Nr 120, poz. 526.

[32] The amendment to Art. 96 of the Family and Guardianship Code was introduced in 2010 by the Act of 10 June 2010 amending the Act on counteracting domestic violence and certain other acts, Dz. U. 2010, nr 125, poz. 842. In accordance with Art. 2 point 2 of the Act on counteracting domestic violence, "domestic violence—shall be understood as a single or recurring willful action or negligence infringing upon the personal rights or wellbeing of persons listed in point 1, in particular exposing these persons at the risk of losing life, health, compromising their dignity, physical integrity, freedom, including sexual freedom, causing damage to their physical or psychical health, and causing pain and moral suffering in persons subjected to violence" (quoted after https://archiwum.mpips.gov.pl/przeciwdzialanie-przemocy-w-rodzinie-nowa/ogolne/akty-prawne-z-zakresu-przeciwdzialania-przemocy-w-rodzinie/akty-prawne-w-jezyku-angielskim-/), see: Ustawa z dnia 29 lipca 2005 r. (Dz. U. nr 180, poz. 1493).

of a child.[33] As a rule, parental authority is vested in both parents (Art. 93 of FGC), however, if one of the parents is dead or does not have full capacity for legal acts, then it is vested in the other parent. Moreover, if neither of the parents has parental authority (e.g., because the court deprived parents of their parental authority) or the parents are unknown, the court appoints a custodian for the child (Art. 94 of FGC). If parental authority is vested in both of the parents, then each of them is entitled and obliged to exercise it (Art. 97 § 1 of FGC). If both parents have parental authority over the child but are not in a marriage (e.g., due to divorce) or they are in a marriage but they are separated, the court may give parental authority to one of the parents, limiting parental authority of the other parent to particular rights and responsibilities (Art. 107 of FGC). However, it is important that parents make a joint decision on important matters of the child (Art. 97 § 2 of FGC) such as going abroad, a choice of school or medical treatment.

The opposite of the exercised parental authority is the obligation of the child to obey the parents: "A child under parental responsibility should obey his/her parents, and in matters where he/she can take his/her own decisions and submit declarations of intent, he/she should listen to the opinions and recommendations of his/her parents for his/her own welfare" (Art. 95 § 2 of FGC). This regulation is an example of a norm without sanctions whose aim— according to Marek Andrzejewski—is to show "a model approach to the relation between parents and a child."[34] Obedience towards parents should be understood as submission to the will of parents.

The child's welfare may also be implemented by adoption.[35] Only a minor can be adopted and the adoption may only be for his/her welfare (Art. 114 § 1 of FGC). The criteria for minority, that is, being under 18 years of age, must be

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[33] Janusz Borucki, "Istotne obowiązki małżeńskie w świetle przepisów prawa kanonicznego i polskiego," *Studia Włocławskie* 8(2005), 262. The Act on the Ombudsman for children in Art. 2, point 1 defines a child as follows: "a child is every person from the moment of conception until the age of majority" (quoted after http://brpd.gov.pl/sites/default/files/ustawa_o_rpd_en.pdf), Dz.U., nr 6, poz. 69 z dnia 6 stycznia 2000 roku. The definition of a child included in the Convention on the rights of the child, which was ratified by Poland in 1991, does not refer to the beginning of a child's life. Art. 1 states the following: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (quoted after https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx).

[34] Andrzejewski, *Prawo rodzinne*, 147. Trans. Anna Bysiecka-Maciaszek.

[35] Andrzejewski, P*rawo rodzinne*, 193–196. In the Polish language the word "przysposobienie" ("adoption)" is synonymous with "adopcja" and "usynowienie." The Polish canon law uses the term "adopcja" (Latin *adoption, -are*, Cann. 110, 535 § 2, 877 § 3, 1094 of the Code of Canon Law; *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, 25 I 1983, Acta Apostolicae Sedis 75 (1983) pars II, 1–37 and *Kodeks Prawa Kanonicznego*. Przekład polski zatwierdzony przez Konferencję Episkopatu, Pallottinum, Poznań 1984), whereas the term "przysposobienie" is used in civil law.

fulfilled on the date of submitting an application for adoption (Art. 114 § 2 of FGC). Adoption results in establishing a legal bond between the adopter and the adoptee which is similar to the bond between parents and the child, according to the rule *adoptio naturam imitatur* (Art. 121 of FGC). These two legal bonds are only similar and not identical since in some cases adoption can be dissolved. Adoption is not a uniform legal institution, sometimes it can create a legal relation only between the adopter and the child, with no consequences for other family members (the so-called incomplete adoption). However, the arising rights and obligations are the same as between the child and his/her natural parents.[36] As a result of the established relation a legal obstacle arises, namely, the obstacle of consanguinity and affinity.[37]

Person and Capacity for Legal Acts

After reaching the age of majority, that is, 18 years of age, or in the case of a woman who reached the age of 16 and concluded a marriage with the consent of the court (she does not lose the age of majority even if the marriage was annulled, Art. 10 § 2 of CC), each natural person obtains capacity for legal acts. It means that such a person has legal right to exercise his/her own will in his/her own person and on his/her behalf.[38]

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[36] Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze. Analiza i wykładnia* (Warszawa: Wydawnictwo C.H. Beck, 2001), 331–332.

[37] The scope of the obstacle of consanguinity is broader in cannon law than in the provisions set forth in the Family and Guardianship Code. In civil law, the obstacle concerns only the parties to the adoption and, as if, mirrors the obstacle of consanguinity in a straight line. Art. 14 § 1 of the Family and Guardianship Code does not forbid a marriage between an adoptee and relatives of the adopter (Art. 15 § 1: It is not possible for an adopter and an adoptee to marry"). In the culture of European countries sexual intercourse between close relatives is not allowed and incestuous intercourse is considered a crime ("Whoever has sexual intercourse with an ascendant, descendant, or a person being an adopted, adopting relation or brother or sister shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years," quoted after https://www.legislationline.org/download/id/7354/file/Poland_CC_1997_en.pdf, see Art. 201 of the Criminal Code). The obstacle of affinity results from the accepted customs and concerns relatives in a straight line (father-in-law – daughter-in-law, mother-in-law – son-in-law, daughter-in-law – stepfather, stepmother – stepson, stepfather – stepdaughter). The court may authorize a marriage between relatives by affinity but only because of important reasons (Art. 14 § 1 of FGC)—see Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze*, wydanie 5. uzupełnione i uaktualnione (Warszawa: Wydawnictwo C. H. Beck, 2009), 48.

[38] Osuchowski, *Prawo rzymskie prywatne*, 181; Grzybowski, *Prawo cywilne*, 163–164.

The Civil Code distinguishes three significant periods in human life: the first, from birth to reaching the age of 13 (Art. 12 of CC), the second, from 13 to 18 years old (Art. 15 of CC) and the third, from reaching the age of majority till death (Art. 10 of CC). The first two periods define the person—the child—as a minor, whereas the third period is the time of majority. As a result of reaching a particular age, each person acquires a certain degree of capacity for legal acts.

Minors who have reached the age of 13 and persons partially legally incapacitated have limited capacity for legal acts (Art. 15 of CC), whereas persons who have not reached the age of 13 and persons fully legally incapacitated do not have any capacity for legal acts (Art. 12 of CC). A person who has reached the age of 13 may be fully legally incapacitated if he/she is incapable of controlling his/her behavior due to mental illness, mental retardation or other mental disorder (Art. 13 § 1 of CC). If a fully legally incapacitated person is not under parental control, a guardian is appointed (Art. 13 § 2 of CC). Persons who do not have full capacity for legal acts cannot exercise parental responsibility (Art. 94 § 1 of FGC), they cannot adopt (Art. 114^1 § 1 of FGC) or be a guardian[39] or custodian (Art. 148 § 1 of FGC, Art. 178 § 2 of FGC). Fully legally incapacitated persons[40] cannot conclude a marriage (Art. 11 § 1 of FGC).

Under Article 183 of the Family and Guardianship Code the Polish legislator defines the premises relating to the appointment of a custodian for a disabled person, however, the provision does not define such a person.[41] It is only stated in § 1 that this person requires help to "carry out any issues or matters of a particular type, or to settle a particular case. The scope of rights and duties of a custodian is appointed by the guardianship court." Also the court may revoke

[39] See Art. 148 § 1a. "It is not possible to appoint as the guardian of a minor anyone who has been deprived of parental responsibility; or sentenced for a crime against sexual freedom […]." The Polish legislator defines the requirements for the adopting parent in Art. 114^1 § 1 of the Family and Guardianship Code. This person should meet the following requirements: full capacity for legal acts, personal qualifications justifying the belief that they will properly carry out the obligations of an adopter, an assessment opinion and a certificate of completing training organized by an adoption center, referred to in the provisions on supporting the family and foster care system.

[40] The Polish legislator did not include the term "incapacitation" in the Code, see Art. 175–177 of FGC.

[41] The explanation of who is considered a disabled person can be found in the Act on vocational and social rehabilitation and employment of disabled persons, Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych, Dz. U. 1997 r., Nr 123, poz. 776 (last amended in 2021, poz. 159). The act defines the degrees of disability and sets forth the requirement of care and assistance from other people to perform social roles. Therefore, the court may appoint a custodian for a person with a significant degree of disability: "Art. 4 1. The significant degree of disability applies to the person with disturbed efficiency of the body, unable to work or capable of working only in the conditions of sheltered employment, who in order to perform social roles requires permanent or long-term care and help of other people because of his/her inability to exist independently" (trans. Anna Bysiecka-Maciaszek).

custodianship at the request of the person for whom a custodian was appointed (Art. 183 § 2 of FGC).

All regulations included in the Family and Guardianship Code basically concentrate on the protection of minors who—due to their age, do not have full capacity for legal acts, or persons who reached the age of majority but do not have full capacity for legal acts due to their illness, mental retardation, and alcohol or drug addiction, or who need assistance or help due to their disability. This is reflected indirectly in the provisions on the child conceived but not yet born, and directly in the provisions referring to parental authority or other institutions regulated in the Code. The understanding of the person, especially the unborn, is deepened once the person is granted with the ability to be a subject of rights and obligations in legal relations. For the last 57 years of their validity, the provisions of the Family and Guardianship Code have been frequently amended, particularly because of the doctrine and judicature, but also the will of the legislator.

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Elżbieta Szczot

« Personne » dans le Code polonais de la famille et de la tutelle

Résumé

L'article présente la question liée à la compréhension d'une personne dans le Code polonais de la famille et de la tutelle. L'auteur y montre le problème complexe de l'acquisition de la capacité juridique, y compris la capacité juridique d'un enfant conçu, la relation entre l'autorité parentale et l'enfant, l'adoption de l'enfant et l'acquisition et l'étendue de la capacité juridique. Les limitations résultant de l'incapacité ont été indiquées.

Mots-clés : personne, enfant, enfant conçu, autorité parentale, personne inapte

Elżbieta Szczot

"Persona" nel codice polacco della famiglia e della tutela

Sommario

Il presente articolo espone la questione relativa alla comprensione del concetto di persona nel Codice della famiglia e della tutela polacco. L'autore mostra il complesso problema dell'acquisizione della capacità giuridica, compresa la capacità giuridica del concepito, il rapporto tra la potestà genitoriale e il bambino, l'adozione del bambino e l'acquisizione e l'estensione della capacità giuridica. Sono state indicate le limitazioni derivanti dall'incapacità giuridica.

Parole chiave: persona, bambino, bambino concepito, potestà genitoriale, persona incapace