

STEPARENTS' UPBRINGING OBLIGATION TOWARDS THEIR STEPCHILDREN

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ABSTRACT

The article explores the issue of reconstructed families, focusing specifically on the roles of individual family members and the processes that occur within such families. Due to the complexity of the above processes, the article concentrates on the deliberations about the stepparent's upbringing process towards the stepchild, determining its content, scope and role. The article analyses of the stepparent's duty towards the stepchild, highlighting its normative sources, and assesses this duty in relation to the parental authority of the spouse and the parental authority of the other biological parent outside the reconstructed family. The deliberations presented in the article aim to support the primary thesis of the article that in order for the foster parent's current custody of the child to be effective, the stepparent's situation in terms of upbringing obligation should be made independent of the biological parent's situation, which stems from their parental authority. The article proposes introducing for example, an institution of the so-called "adoptive parent's care" that would encompass some rights and obligations typical of parental authority and independent of the parental authority of the child's biological parent. This could serve as an equivalent to the concept of parental responsibility found in English law.

Keywords: upbringing obligation, stepparent (stepfather/stepmother), stepchild, spouse, parental authority, biological parent, reconstructed family, parental responsibility

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INTRODUCTION

Thinking about reconstructed families and relationships formed inside them, we usually consider issues related to upbringing, namely stepparents' upbringing obligation towards their stepchildren. The situation of stepparents' upbringing obligation towards their foster children considerably differs from that of biological parents although the social roles they have to play are similar. In spite of the important and prominent role of a stepparent in the area of upbringing a stepchild, the legal regulations are far from a model solution that is the way in which the position of a biological parent in relation to a child is shaped. In recent years, the regulations in this area based on the provisions of family law have been considerably enriched within the field of opinions and observations concerning legal aspects of the relationships between relatives. What should be emphasised is the fact that a stepchild is recognised as a member of the family within the meaning of Articles 23 and 27 of the Family and Guardianship Code (FGC), and a stepfather/stepmother is perceived as a person obliged to satisfy a stepchild's material needs within the scope of the reconstructed family existing. To tell the truth, the interpretation of the provisions of FGC is not far from creating a norm granting foster parents the upbringing rights and obligations towards a stepchild based on FGC. However, in the doctrine and court judgements, questions are raised about the issue of a foster parent's participation in the stepchild's upbringing process within the scope of mutual assistance and cooperation in order to satisfy the needs of a new family in accordance with Articles 23 and 27 FGC. The forms of the above-mentioned assistance and cooperation may be reflected in various ways: starting with a spouse's moral support in his/her everyday concerns and problems and finishing with claims for a spouse's assistance in satisfying personal maintenance obligations towards the relatives of the spouse obliged.

Speaking about a foster parent's upbringing obligation, it is necessary to determine its content and scope, as well as compare them with a biological parent's upbringing obligation, as well as consider the introduction of new solutions to the Polish family law, which might strengthen the position of an adoptive parent in relation to a stepchild. The present article is devoted to these issues.

STEPPARENT'S UPBRINGING OBLIGATION

In accordance with Articles 23 and 27 FGC,¹ the stepchildren's belonging to a family also determines the participation of a foster parent in the process of upbringing them. A stepfather/stepmother, although they are not granted parental authority, is obliged to support his/her spouse in the process of upbringing and maintaining a stepchild. Hampering contacts, inappropriate treatment of a stepchild, and limiting a spouse's possibilities of exercising rights and fulfilling obligations towards a stepchild may even

¹ See Articles 23 and 27 Act of 25 February 1964 Family and Guardianship Code (Journal of Laws of 2020, item 1359), hereinafter referred to as FGC.

lead to a divorce. A court may recognise such activities as a reason for a breakdown of the matrimonial life, and thus, for such conduct, a spouse may be recognised as the only party guilty of a breakdown of the marriage.

In its judgement of 7 March 1953 in the case C 2031/52 (OSN 1953, item 123), the Supreme Court emphasised that:

(...) a spouse's children born in his/her former marriage become members of the family created by that spouse's new marriage. A person who marries another person who has children under age born in the former marriage, although does not have legal custody of them, should strive for their maintenance and upbringing jointly with his/her spouse. A spouse who by means of his/her conduct creates conditions making it difficult for the other spouse to fulfil the duty of taking care of physical and spiritual development of this spouse's children born in the former marriage, especially when he/she, for no justified reasons, does not agree for the stay of the children in the common house or makes the other spouse leave the children's upbringing to people outside the family, fails to fulfil those obligations. Ill-treatment of a spouse's children may constitute reasons for a breakdown of the matrimonial life because it harms parental feelings of that spouse and may make it difficult for him/her to fulfil the obligation of taking caring of the children's maintenance and upbringing.

In such situations, provided that a foster parent's relation with a stepchild is inappropriate and fails to fulfil his/her obligations towards the family founded by means of a marriage to a biological parent of that child, and as a result becomes the reason or one of the reasons for a breakdown of the matrimonial life of the parties, the reason may be the foster parent's fault, which may lead to a court's judgement ruling a divorce at fault of both parties subject to the fact whether it was an exclusive reason or a co-reason beside the biological parent's one.² At the same time, in the judgement of 18 November 1961, CR 325/61,³ the Supreme Court Civil Chamber indicated that:

(...) a stepmother may be recognised as "the closest member of the family" of the deceased (stepson) entitled to damages under Article 166 of the Code of Obligations of 27 October 1933 (Journal of Laws No. 82, item 598),⁴ provided that she took care of him like of her own son from his earliest age. Regardless of whether the opinion is applicable to a 'family' referred to in Article 14 of the Family Code Act of 27 June 1950 (Journal of Laws No. 34, item 308),⁵ it may constitute an interpretational hint for the interpretation of Article 166 of the Liabilities Code of 17 October 1933 (Journal of Laws No. 82, item 598) using a term 'family' in a wider meaning emphasising, from the point of view of moral harm suffered, an actual family relationships and not formal kinship level.

As court judgements indicate, mutual rights and obligations of a stepparent and a stepchild are similar to those of biological parents and their children, which also translates into successive entitlements within the family or damages related benefits resulting from this relationship.

² See the judgement of the Supreme Court Civil Chamber of 7 March 1953, C 2031/52, *Orzecznictwo Sądu Najwyższego Izby Cywilnej i Izby Karnej*, 1953, No. 4, item 123, *Legalis*, No. 179783.

³ See the judgement of the Supreme Court Civil Chamber of 18 November 1961, 2CR 326/61, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1963, No. 2, item 32, *LEX*, No. 105715.

⁴ See Article 166 Regulation of the President of the Republic of Poland: Code of Obligations of 27 October 1933 (Journal of Laws No. 82, item 598).

⁵ See Article 14 of the Family Code Act of 27 June 1950 (Journal of Laws No. 34, item 308).

In addition, mutual assistance and cooperation in the area of satisfying the needs of a family by a stepparent and a stepchild, mentioned above, may take various forms and adopt various methods. It can be a spouse's moral or emotional support, financial assistance in the area of a spouse's maintenance obligations towards his/her relatives. Thus, the list of activities that can be undertaken within this assistance may be quite extensive. That is why it is necessary to organise and highlight the most important ones for family communities.⁶ Article 27 FGC seems to be a determinant of those activities because it contains norms that make it possible to specify the general concept of the assistance and cooperation related obligation. Spouses' work in the area of satisfying the needs of their family should constitute such activities. The above-mentioned needs may be financial and non-financial in nature. Thus, satisfying them may take the form of provision of money or benefits in kind, e.g. doing the housework or striving to raise children.⁷ Speaking about financial needs we mean, inter alia, a stepparent's maintenance obligation towards a stepchild. Article 144 FGC laying down a maintenance obligation towards relatives determines that it must be in conformity with the principles of social coexistence, which results in the need to apply the rule entirely in case of the maintenance of a stepchild also in accordance with Article 27 FGC.⁸

In literature, a maintenance obligation imposed on (legal) parents of a child is prior, as a rule, to a maintenance obligation of this child's stepparent. The obligation of a relative may occur when a child's parents' gainful employment and financial possibilities are insufficient to satisfy a child's justified, in given circumstances, needs.⁹ The obligation stipulated in Article 27 FGC "concerns the entire family in its current shape, including one spouse's children raised in this family".¹⁰

In literature, it is postulated that the needs of a stepchild treated as a member of a family founded by spouses are satisfied together with the needs of the entire family, thus in general in accordance with Article 27 FGC.¹¹

Apart from financial needs, spouses are obliged to satisfy their family needs, also in the form of non-financial benefits; however, the actual kinship is insignificant. Therefore, if there is a stepchild in a family, a stepparent's obligation, in the light of Article 27 FGC, is to assist his/her spouse in the child upbringing. Assistance in

⁶ For a similar stance see Szlezak, A., *Prawnorodzinna sytuacja pasierba*, Poznań, 1985, p. 87.

⁷ For a similar stance see Strzebińczyk, J., *Udział powinowatych dziecka w jego utrzymaniu i wychowaniu według KRO*, Wrocław, 1985, p. 47; for a different stance see B. Dobrzański, who points out that participation of a stepparent in upbringing a stepchild results from moral norms regulating the functioning of 'healthy' reconstructed families (Dobrzański, B., in: Dobrzański, B., Ignatowicz, J. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 1975, p. 817).

⁸ Strzebińczyk, J., *Udział powinowatych...*, op. cit., pp. 47–48.

⁹ Smyczyński, T., in: Smyczyński, T., Gajda, J., Nazar, M. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 11, Warszawa, 2014, p. 229, marginal ref. No. 36; also see Szlezak, A., *Prawnorodzinna sytuacja...*, op. cit., pp. 69–72.

¹⁰ Dolecki, H., in: Dolecki, H., Sokołowski, T., Andrzejewski, M., Haberko, J., Lutkiewicz-Rucińska, A., Olejniczak, A., Sylwestrzak, A., Zielonacki, A. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Lex/el., 2013, Article 27 FGC.

¹¹ Strzebińczyk, J., *Udział powinowatych...*, op. cit., p. 49; cf. Haak-Trzaskowska, A., in: Haak, H., Haak-Trzaskowska, A. (eds), *Małżeństwo (zawarcie małżeństwa, prawa i obowiązki małżonków)*, Warszawa, 2022, commentary on Article 27, marginal ref. No. 2.

this area consisting in a spouse's personal striving to raise a stepchild constitutes an obligation imposed on a foster parent in the way relevant to the legal situation of the spouses. Thus, a stepparent's upbringing activities are not a reflection of the exercise of parental authority as the psychological and pedagogical point of view might suggest.

As it was mentioned above, the exemption from the obligation to contribute to the satisfaction of the needs of a family may take place when one of the three above-mentioned types of conduct occurs. That is why it can be assumed that upbringing activities or doing the housework will not be a spouse's duty if he/she provides a maintenance benefit accounting for a certain amount of money. Thus, e.g. by personal striving to raise children, he/she may obtain exemption from the obligation to pay money. However, this type of statement seems to be groundless. Having in mind the provisions regulating parental authority (Article 95 FGC), one should point out that a biological parent's obligation to personally strive to raise a child does not have a collateral nature and thus, one cannot get exemption from it by means of payment. The legislator does not impose any obligations on a stepparent in the provisions regulating the exercise of parental authority, but regulates upbringing obligations and relations between parents and their biological children.¹² That is why it should be considered whether it would be right in this case to apply Article 95 § 1 FGC by analogy. It seems that there are stronger arguments for the opposite stance. The legal relation of parental authority results from the ties of kinship, thus any exemptions from the consequences determined for kinship in statute should clearly result from statute and concern regulated relationships of adoption or a foster family. With regard to the obligation of personal effort to raise a child, particularly compared to other types of conduct fulfilling the obligation to contribute to satisfy the needs of a family, it is necessary to refer to the functional rules of interpretation. In the hierarchy of values that the legislator indicates, the good of a child is a superior value, thus a family in which a child is raised has a duty to protect this good. Obviously, the role of parents (spouses) cannot just mean satisfying a child's material needs but it must take into account his/her upbringing and shaping the child's personality.

According to K. Jagielski, as well as T. Sokołowski,¹³ the concept of the child's upbringing should be understood as physical upbringing reflected in taking care of the proper development of the child's physical fitness and health, as well as psychological upbringing that should consist in developing the child's moral sense, personal dignity, world views and intellectual abilities by means of appropriate education. According to K. Jagielski, the components of parental authority are: concern for ensuring appropriate living conditions, protection against hazards and proper development.¹⁴

¹² Szlęzak, A., *Prawnorodzinna sytuacja pasierba*, op. cit., p. 89.

¹³ Jagielski, K., 'Istota i treść władzy rodzicielskiej', *Studia Cywilistyczne*, Kraków, 1963, pp. 124, 126, 128; Sokołowski, T., *Władza rodzicielska nad dorastającym dzieckiem*, Poznań, 1987.

¹⁴ Jagielski, K., 'Istota i treść władzy rodzicielskiej', op. cit., pp. 124, 126, 128.

J. Ignatowicz, within custody of the child, distinguishes his/her upbringing (differentiating physical and spiritual upbringing), a duty to guide the child, concern for ensuring appropriate living conditions and security.¹⁵

T Sokołowski presents an extended division of the personal components of parental authority. According to this author, the lack of separation of the semantic scopes of individual elements in the above-presented divisions determines the following division of the elements of the custody of the child: (1) upbringing, i.e. individually developing a child's personality, his/her emotional and intellectual aptitudes; (2) directing understood as determining a child's place of residence, supervising his/her lifestyle, deciding and a child's participation in the non-family communities, selection and supervision of information; (3) taking care of the child's material environment; (4) taking care of the child's physical wellbeing; (5) coordinating the child's fitness and mental ability. The author admits hybridising the conceptual scopes of particular elements.¹⁶

The above-presented conceptions depict the desire to formulate possibly precise network of terms determining the scope of parental authority and its personal element. The advantage of the above-presented analytical views on the personal element of parental authority is the interpretation of the components of the custody of a child that should be treated as the development and specification of expressions included in the statutory provisions discussed, which makes it possible to clarify the meaning and determine the scope of parental authority. Due to the fact that the interpenetration of the selected components is inevitable, such views cannot be treated as classifications in the logical sense. Thus, their usefulness in the practice of family law application is limited.

Another approach to the structure of the personal element of parental authority proposed in literature and taking into account the above-mentioned interpretational difficulties within the custody of a child, according to J. Strzebińczyk, consists in: (1) purely actual actions, required for a child's good, not unambiguously included in the content of other legal-family relations between parents and children; (2) formalised parents' decisions taken mainly in a child's interest and substantially shaping his/her non-financial legal situation.¹⁷ The above-mentioned author differentiated actual parents' actions, the variety of which undermines purposefulness of proposing their division, and actions aimed at shaping a child's legal situation.

It is stated in the doctrine and courts' judgements that the attributes of parental authority should not be limited to activities aimed at a child's good. In accordance with Article 110 FGC, it is necessary to take into account a possible misuse of parental authority, thus exercising it inconsistently with a child's good. In such a situation,

¹⁵ Ignatowicz, J., in: Ignatowicz, J., Nazar, M., Nowacki, J., Rodak, L., Tkacz, S., Tobor, Z. (eds), *Prawo rodzinne*, Warszawa, 2016, p. 152.

¹⁶ Sokołowski, T., *Władza rodzicielska nad dorastającym dzieckiem*, op. cit., pp. 32–33; idem, in: Dolecki, H., Sokołowski, T., Andrzejewski, M., Haberkó, J., Lutkiewicz-Rucińska, A., Olejniczak, A., Sylwestrzak, A., Zielonacki, A. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, op. cit., pp. 650–652 and 656–664.

¹⁷ Strzebińczyk, J., in: Smyczyński, T., Holewińska-Lapińska, E., Stojanowska, W., Strzebińczyk, J. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 12, Warszawa, 2011, Chapter VII "Władza rodzicielska", p. 283.

of course, the guardianship court has grounds to intervene and issue a decision on deprivation of parental authority. As a child's good constitutes the main directive determining the way of exercising parental authority, it is a determinant of its assessment by the guardianship court and is a decisive factor in its potential decision on intervention.¹⁸

It is pointed out in literature that the custody of a child includes, *inter alia*, an obligation to provide him/her with maintenance and upbringing.¹⁹ The provision of these measures in accordance with Article 128 FGC is within the scope of the obligation to pay maintenance, which is independent of parental authority, and places a burden on parents who do not exercise parental authority.²⁰ Thus, parents exercising parental authority have an obligation to take care of the conditions in which a child is raised, they are obliged to take care of food, clothes, medical treatment, and they should e.g. exercise a child's rights in these fields by making relevant claims. The obligation to only provide measures of maintenance and upbringing for a child is assessed through the prism of the obligation to pay maintenance, but the latter does not constitute an element of parental authority.

Thus, the statutory provisions are aimed at improving the fulfilment of basic functions of a family by means of improving and shaping a child's personality and are to serve self-actualisation of the adult family members. Thus, structuring a hierarchy of different forms of adult family members' activities in relation to a child and taking into account his/her good, one should state that financial benefits are always of lower significance than upbringing activities aimed at shaping a child's personality and his/her development. That is why it is hard to agree with the statement that financial benefits referred to in Article 27 FGC may exempt a foster parent from personal efforts to bring up a stepchild. The obligation to bring up a stepchild burdens a stepparent regardless of other obligations stipulated in the above-mentioned provision.

Summing up, one may state that the provisions of Articles 23 and 27 FGC are a source of a stepparent's upbringing obligation, which is just one of the duties that burden a stepparent regardless of other forms of contribution to satisfying the needs of a family stipulated in Article 27 FGC. The duty is contained in the spouses' obligation to assist and cooperate for the good of the family founded by their marriage. A stepparent's upbringing activities and efforts target a stepchild, which causes that he/she makes direct use of a foster parent's activities, however, it is necessary to have in mind that only spouses are in the legal relation within which a stepparent's obligation exists, and a stepchild's favourable situation results from the spouses' rights and obligations established by legal norms. Therefore, this

¹⁸ See a commentary on Article 96 Act of 25 February 1964: Family and Guardianship Code (Journal of Laws of 2020, item 1359); Osajda, K., in: Osajda, K., Domański, M., Grochowski, M., Matusik, G., Kociuk, L., Mostowiak, P., Pawliczak, J., Prucnal-Wójcik, M., Słyk, J. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Tom V, Warszawa, 2022.

¹⁹ Trybulska-Skoczelas, E., in: Wierciński, J., Borysiak, W., Manowska, M., Sadowski, J., Skowrońska-Bocian, E., Trebska, B., Trybulska-Skoczelas, E., Zegadło, R. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2014, p. 699.

²⁰ See the Supreme Court ruling of 12/12/2000, V CKN 1751/00, *Legalis*, No. 299530.

shapes different positions of a biological parent and a foster one. The obligation of the former results from the legal relation of parental authority and a marriage, and the latter has an upbringing obligation only as a result of the legal relation of a marriage. The upbringing related situation of a foster parent is secondary in comparison to the situation of a biological parent. In other words, a foster parent may act only within the limits of parental authority determined by the scope of a biological parent's parental authority. The provisions under Articles 23 and 27 FGC only stipulate the assistance and cooperation obligations in the field of a child's upbringing and do not assign a foster parent a sphere of activities independent of the scope of a biological parent's rights and obligations.²¹

CONTENT AND SCOPE OF A STEPPARENT'S UPBRINGING OBLIGATION TOWARDS A STEPCHILD

According to Article 27 FGC, spouses have an obligation to contribute to satisfying the needs of the family they founded by their marriage. The obligations include, inter alia, the obligation to make personal efforts to bring up their children. Speaking about a child's upbringing, it is necessary to consider the interpretation and meaning of the concept of 'upbringing' in relation to a foster parent. There is no statutory definition of the term, however, its determination results from the content of Article 96 FGC, which stipulates that parents have an upbringing obligation towards a child by means of taking care of his/her physical and spiritual development and appropriate preparation to work for the benefit of society subject to his/her aptitude. The statutory provisions do not allow for formulating a clear structure pattern of parental authority due to the fact that particular obligations laid down by the legislator interpenetrate. The components of parental authority laid down in Article 96 FGC constitute elements of parents' custody of a child. In the light of that, a question is raised whether this definition is also applicable to the concept of 'upbringing' in relation to a foster parent. It turns out that it is. The obligation under Article 96 FGC determining upbringing objectives does not contain any elements that might indicate its exclusive applicability to parents who have the right to exercise parental authority. Here, it should be pointed out that each upbringing process, regardless of the person or institution involved in it, e.g. a school or kindergarten, is aimed at a child's upbringing and development. That is why a foster parent should also undertake upbringing activities in relation to a stepchild, which should make him/her achieve a given level of physical and psychological development and properly prepare them to work in the interest of society. Thus, Article 96 FGC contains arrangements that indicate the content, scope and objectives of any upbringing process.

The issue and the answer to the question whether the scope of upbringing obligation is the same for a biological parent and a stepparent cover another aspect. First of all, it is necessary to consider specifying a stepparent's upbringing

²¹ Szlezak, A., *Prawnorodzinna sytuacja pasierba*, op. cit., p. 91.

obligation through the prism of the principles applied by statute in relation to parental authority. Another question is raised here how such concepts as 'current custody', 'custody of a person and property' and 'upbringing and directing' should be interpreted.

Authors discussing the issue of parental authority adopt various stances on the matter. According to some of them, a term 'upbringing' should not be used in a different meaning than the term 'directing' because, as J. Marciniak points out, the opinion indicating the separation of upbringing from directing a child and determining different meanings of the two concepts in law is wrong.²² The above opinion is supported M. Safjan's one according to which an upbringing process is always connected with directing, and it can be assumed that the process of directing concerns taking decisions within the scope of upbringing, e.g. an operation on a child in order to rescue his/her life or health. Thus, it should be recognised that a foster parent's upbringing obligation is connected with the process of directing, however, only in the scope concerning the upbringing sphere.²³

The upbringing and directing processes may be linked together by custody of a person (the child) and his/her property. Parents' obligation is to bring up and direct a child by means of activities concerning him/her as well as his/her property.

At this point, it might be alleged that the above-indicated interpretation of the provisions concerning parental authority are not based on the statutory provisions, because in accordance with Articles 95 and 96 FGC, four equivalent elements of parental authority are distinguished, i.e. custody of a child and his/her property, upbringing and directing a child, and Article 98 § 1 FGC indicates the fifth element, which is representation. The above-listed elements cannot be, however, distinguished with the use of the same criterion and constitute a separate and complete division of the scope of parental authority by determining a separate scope of each of them. Namely, Article 95 FGC contains subjective elements of parents' influence, i.e. a child and his/her property, and Article 96 FGC concerns the content of parents' activities, i.e. features that allow for determining the content of parents' activities and the scope and content of their conduct within the obligations and rights they have by virtue of parental authority. The detailed content of those activities results from Article 96 second sentence FGC, which stipulates that parents are obliged (entitled) to undertake upbringing and directing activities aimed at achieving by a child an appropriate level of physical and spiritual development and getting prepared to work in the interest of society subject to aptitude.

Indicating Articles 95 and 96 FGC, one should point out that they concern the rights and obligations within the scope of parental authority, on the one hand, highlighting what parents' activities should target, and on the other hand, highlighting what features those activities should have and what their content should be. The fifth element that concerns the rights and obligations related to a child's representation does not concern, however, two of the above-mentioned

²² Marciniak, J., *Treść i sprawowanie opieki nad małoletnim*, Warszawa, 1975, p. 48.

²³ Safjan, M., *Instytucja rodzin zastępczych. Problemy prawnego-organizacyjne*, Warszawa, 1982, pp. 166–167.

typologies. Parents' activities targeting an upbringing process or directing a child are addressed to that child and his/her property, and they can take the form of legal activities as well as others. However, in order to perform those activities, parents must have the relevant competence that is referred to in Article 98 § 1 FGC, i.e. the right to represent a child.

Another aspect concerns determination of the meaning of the term 'current custody of a child'. Some activities targeting a child are conducted in the form of mutual interaction between an educator and a pupil, which presumes their everyday, permanent contact; however, other activities do not require such interaction, e.g. consent for a medical operation. It is reflected in statute where 'current custody' emphasises the significance of direct contacts between parents and children in order to achieve desired results of an upbringing process.

Yet another issue consists in the application of the above-mentioned terms to describe a foster parent's upbringing obligation and compare the above-indicated scope of upbringing obligations of a stepparent and a biological one.

The concept of the scope of obligation is not laid down in statute, but was constructed for the purpose of comparing the situation of a biological parent and a foster one. That is why it is necessary to define and designate them as an indicator of biological and foster parents' conduct ordered, because their aim is to strive to achieve a situation referred to in Article 96 FGC. In this area, their classification must meet definite criteria.

Parents conducting an upbringing process are known for undertaking various activities. The obligations they have make them treat property and a child in a specific way. In practice, the process of upbringing involves various activities. For example, a parent having his/her child's bicycle repaired exercises custody of the child's property and takes care of an element of this property, as well as fulfils the obligation to have custody of the child because he protects the child against a potential accident for technical reasons. However, this type of conduct will not make it possible to determine a difference between the duties analysed above. That is why it is necessary to look at the upbringing obligation of the child's biological parents that consists in undertaking steps that may take the form of legal actions or other activities that are not legal in nature. The former are legal actions performed on behalf of parents themselves, e.g. their consent granted to a child to perform legal action on their own; the latter are actions performed by parents on behalf of the child because the performance of them requires statutory representation. Thus, the above activities may be divided into those that require the existence of a specific competence to be valid and those that can be efficiently performed without it. Therefore, a question arises whether the upbringing competences of an adoptive parent include both types of the above-mentioned activities or only one of them.

If we do not opt for the analogous application of the provisions on parental authority to a foster parents' upbringing obligation, we will draw a conclusion that the scope of a foster parent's obligation is smaller than that of the scope of a biological parent's upbringing duty. The legal institution of statutory representation is always laid down by statute; therefore, it would be unlawful to grant a foster parent the right to act on behalf of a child in the field of legal actions based on analogy. That

is why it should be recognised that a foster parent has not been burdened with the obligation referred to in Article 96 FGC, because he/she would need to have an effective competence with the content corresponding to the structure of statutory representation. It is different in case of a biological parent, because the content of Article 98 § 1 FGC clearly indicates that parents are statutory representatives of a child who is under their parental authority. Therefore, the above-mentioned statutory representation expires in the event of deprivation of parental authority (Article 111 FGC), suspension of parental authority (Article 110 FGC), and as a result of other events resulting in its expiration, in particular in case of legal incapacitation of parents (Article 94 § 1 FGC), and parents' consent to adoption of their child in the future without indication of adoptive parents (Article 119¹ § 1 FGC). The right to represent a child does not depend on whether parents are married, whether they live with a child, whether they really have custody of a child, etc. What may be important, from the point of view of the assessment of the scope or existence of parents' statutory representation, is the modification of their parental authority by means of the court's decision. Two situations may occur here: limitation of parental authority in accordance with Article 58 § 1a FGC (or pursuant to Article 107 FGC or Article 93 § 2 in conjunction with Article 107 FGC), or pursuant to Article 109 FGC. In both cases, the decisions are different and may lay requirements for parents' rights of representation differently.²⁴

Apart from cases of judicial interference in parental authority, regulations limiting the scope of its exercise may also affect the scope of statutory representation performed by parents. These include: exclusion of parental management of a child's earnings and objects given to him/her for free use (Article 101 § 2 FGC), and an object given to a child as a gift or one inherited provided a donor or a testator made an appropriate reservation (Article 102 FGC). Parents cannot represent their child within the above-indicated scope, however, in case of a child's earnings, the guardianship court may determine other management rules (Article 21 Civil Code). As concerns objects given to a child for free use, a child's performance of activities exceeding the scope of ordinary management requires the consent of a statutory representative, who in turn must obtain the consent of the guardianship court.²⁵

Parents' statutory representation also exists within the scope of activities exceeding the ordinary management of a child's property. In order to perform such activities and to give consent to a child to perform them, parents must obtain the guardianship court's consent (Article 101 § 3 FGC). In the event a child is over 13 and has not been completely incapacitated, he/she obtains limited legal capacity and may enter into legal transactions with his/her legal representative's consent (Article 17 of the Civil Code). Despite the possibility of performing legal activities

²⁴ See a commentary on Article 96 FGC. Osajda, K., in: Osajda, K., Domański, M., Grochowski, M., Matusik, G., Kociuk, L., Mostowiak, P., Pawliczak, J., Prucnal-Wójcik, M., Stryk, J. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, op. cit., pp. 1–184 (*Legalis*).

²⁵ See Article 22 Act of 23 April 1964: Civil Code (Journal of Laws of 2022, item 1360) in conjunction with Article 101 § 3 FGC; thus Strzebińczyk, J., in: Smyczyński, T., Holewińska-Łapińska, E., Stojanowska, W., Strzebińczyk, J. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, op. cit., Vol. 12, p. 285.

by a child, he/she is still represented by parents.²⁶ The same happens in case of activities for which a minor obtains full legal capacity, with the exception of those listed herein in relation to which the provisions of Family and Guardianship Code exclude management by parents.²⁷ It is indicated in literature that the above principles should be adopted due to the interest of a child, who should be also represented when he/she does not show initiative in respect of this.²⁸

In those circumstances, a foster parent is not competent to perform legal actions within the scope indicated and, therefore, will not be able to e.g. manage a child's property apart from performing actions that do not constitute legal transactions; like in case of custody of a child, a foster parent will not be e.g. obliged or entitled to take a stance concerning the issue of recognising this child as his/her stepchild. Despite the limited scope of duties in comparison to the scope of obligations imposed on biological parents, the duties of the most significant and greatest importance in the field of psychological and pedagogical process of a child upbringing burden a foster parent to the same extent as a biological one. As it was mentioned above, a stepfather's (or stepmother's) actions will concern custody of both a stepchild and his/her property. As far as the custody of a child's property is concerned, it will not be of much importance because a foster parent is not competent to act on behalf of a foster child because he/she is not his/her statutory representative. Therefore, this custody will be limited to the physical protection of a child's property. Of course, this type of custody is also of great importance in a stepchild upbringing process as long as a stepparent's actions that express taking care of a stepchild's property are actions of upbringing value. On the other hand, custody of a child as a person is a duty of a stepfather (stepmother) resulting from their mutual cooperation (current care). A stepparent's participation in the process of a stepchild upbringing should consist in their daily contact with one another. Custody of a child that goes beyond the scope of current care, in order to be effective, requires powers and competences resulting from parental authority, which is not vested in a stepparent. Therefore, a stepparent should act within the limits of current care of a stepchild under his/her educational influence. It is similarly indicated in Article 112¹ FGC, where current duties of a foster family concerning custody of a child are laid down. At this point, one can see a significant similarity between foster parents and adoptive parents with regard to the functions that they have to perform in the field of a child upbringing. In none of those cases is there a first-degree kinship in a direct line to a child because both foster and adoptive parents perform their basic tasks in the process of current interaction with a child, and a legal regulation only reflects the actual system of social relationships existing in families in which they live.

²⁶ Grzybowski, S., in: Grzybowski, S., Czachórski, W. (eds), *System Prawa Cywilnego*, Vol. I, Wrocław-Warszawa, 1985, p. 349.

²⁷ See Article 20 Act of 23 April 1964: Civil Code (Journal of Laws of 2022, item 1360), cf. Pazdan, M., 'Glosa do postanowienia Sądu Najwyższego z 15.12.1999 r., I CKN 299/98', *Orzecznictwo Sądów Polskich*, 2000, No. 12, item 186; however, cf. the opposite stance: Strzebińczyka, J., in: Smyczyński, T., Holewińska-Łapińska, E., Stojanowska, W., Strzebińczyk, J. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, op. cit., Vol. 12, Chapter VII "Władza rodzicielska", p. 288.

²⁸ Ignatowicz, J., in: Ignatowicz, J., Nazar, M. (eds), *Prawo rodzinne*, Warszawa, 2016, p. 836.

Summing up, it is eventually possible to clearly determine the scope of a foster parent's upbringing obligation in comparison to the scope of a biological parent's obligations.

First of all, it is necessary to indicate that, in terms of custody of both a child as a person and his/her property, a foster parent who has no competences resulting from statutory representation is not burdened with obligations the effectiveness of which requires such competences.

Secondly, when speaking about custody of a stepchild as a person, a stepparent should fulfil duties that exhaust the concept of current care.

Thirdly, when it comes to a stepparent's duties within the scope of custody of a child's property, they are of secondary significance and concern only such activities that are also of educational importance.

Fourthly and finally, an adoptive parent's activities should consist in a stepchild upbringing within the scope of the implementation of the obligation to assist and cooperate for the good of the family by means of contribution to meeting its needs. Thus, the obligation to manage a child will burden a stepparent to the extent that constitutes an element of the educational process.

A STEPPARENT'S UPBRINGING OBLIGATION VERSUS A SPOUSE'S PARENTAL AUTHORITY

In the earlier deliberations, only the category of obligation was analysed. In the provisions on parental authority, there is also a legal category that combined with an obligation creates a statutory representation of parental authority.

As T. Sokołowski indicates in his book *Charakter prawny władzy rodzicielskiej*, one can notice two norms of conduct in the wording of Article 95 FGC: one concerns the duties of a parent and the other concerns the duties of all other persons except a parent. Thus, the second norm concerns the rights that are subjective in nature, which parents have only in connection with the exercise of their parental authority, and the infringement of them by persons who are not competent results in the interference of the guardianship court, which is stipulated in Article 100 FGC. The situation is different in the event of a breach of the obligation by parents, because the obligation to perform and exercise parental authority constitutes their obligation towards the state, and then a guardianship court regulates only the issues arising from the administrative-legal relationship between the state and parents when it is in connection with the exercise of parental authority by parents. Thus, it should be pointed out that the subjective right is granted to parents so that they can fulfil their obligation towards the state.

However, the upbringing obligation does not rest solely with a child's biological parents. As can be seen based on the former analysis, including the content of Articles 23 and 27 FGC, it also rests with adoptive parents living with a stepchild in the same family within the meaning of the above-mentioned provisions. However, the provisions do not lay down a subjective right granted to a stepfather (stepmother) pursuant to Article 95 FGC, effective towards everyone, granted to him/her

in order to properly fulfil the obligation. Thus, it should be recognised that this right is not vested in a stepparent. This does not mean, however, that a situation in some sense favourable for a stepparent who fulfils the upbringing obligation will not occur. It functions in the sphere protected by the subjective right of a biological parent against the interference of third parties; however, the conduct of a foster parent cannot be treated as a third party's forbidden interference in the exercise of that right, because otherwise it would mean that one norm bans what another norm stipulates an obligation. In other words, the activities of a foster parent would be prohibited if their fulfilment consisted in a stepparent's personal efforts in upbringing children who are members of such a family, because pursuant to Articles 23 and 27 FGC, they constitute an obligation to assist and cooperate for the good of a family. The sphere of a stepparent's activities is inaccessible for other persons as a result of the protection arising from the content of the subjective right of a biological parent having parental authority, however, not resulting from the subjective right of a foster parent who, as we know, is not entitled to demand that other persons should refrain from interference.

It is necessary to return to the statement that the situation of a foster parent is a derivative of the legal situation of a biological parent, which results from the fact that the former can act effectively, i.e. fulfil his/her obligation only in the field defined by the scope of parental authority vested in his/her spouse. This is a result of the way in which legal responsibility for upbringing activities is developed. Only a biological parent is subject to the state's interference in case the interest of a child is endangered in the course of an upbringing process. As far as the source of this threat is concerned, it may also be the circumstance of inappropriate fulfilment of upbringing obligations by persons other than a child's parents. A foster parent's obligation is not subject to the state's sanctions because it is an obligation burdening a stepparent only in relation to his/her spouse and consists in the duty to assist and cooperate in upbringing a child. In addition, a foster parent is not entitled to any independent rights that a biological parent has in connection with the subjective rights granted to them. The only protection that a foster parent is entitled to results from his/her spouse's subjective right that prohibits interference of third parties in the sphere of a biological parent's exclusive activities.

Therefore, it can be pointed out that the legal situation of a biological parent determines the legal situation of a foster parent. That is why changes taking place in a biological parent's parental authority will affect the situation of a foster parent.

According to A. Szlęzak, who presents his stance in his book *Prawnorodzinna sytuacja pasierba*, in a situation when a biological parent has parental authority, a stepparent fulfilling his/her obligation even to a limited extent acts independently within the scope of certain rights and upbringing tasks. It is not laid down by statute what measures and methods should be used to achieve a planned upbringing objective by persons fulfilling their educational duties. The obligation to assist and cooperate alone is not limited to implementing a biological parent's instructions, but should be aimed at achieving a particular level of physical and mental development by a child, as well as preparing him/her properly for life in society. That is why a foster parent fulfilling an obligation to assist and cooperate

for the good of a family gets independence within the scope of upbringing activities and methods of conducting them. This independence has its significance and role as long as a biological parent does not exercise his/her rights granted by virtue of parental authority. A foster parent cannot oppose any of those rights and cannot definitely influence a child's situation. Therefore, in a situation when a biological parent undertakes steps aimed at changing the actual state of affairs within the scope determined by a stepparent's conduct, the only form of interference in his/her behaviour is the one by the guardianship court, which in the event of a threat to the wellbeing of a child has the right to change a legal situation of a biological parent using the measures laid down in Articles 109, 110 or 111 FGC.²⁹

It is important that the law in force will be excluded as to the possibility of using the measures laid down in Articles 24 and 97 § 2 FGC in the event of disagreement between spouses over the method of carrying out the upbringing process. With regard to the measure stipulated in Article 97 § 2 FGC, it concerns persons who have even limited parental authority. A foster parent has no parental authority so the norm laid down in Article 97 § 2 FGC is not applicable to him/her. The same concerns a regulation stipulated in Article 24 FGC. However, in case of a biological parent, the legislator used the same construction in Article 97 § 2 FGC as in Article 24 FGC concerning the settlement of important family matters. In both cases, the principle of joint biological parents' resolution and a possibility of requesting the court to resolve a dispute are indicated. Thus, the directives of the two norms are the same but their hypotheses were defined differently. Significant family affairs constitute a broader catalogue, but a child's significant matters are distinguished in special provisions, i.e. Article 97 § 2 FGC.³⁰ A child's biological parents' application to the guardianship court, e.g. in relation to the choice of a child's further education or job should be based on Article 97 § 2 FGC and not Article 24 FGC.³¹ As in case of Article 24 FGC, it is necessary to assess the consequences of the infringement of the principle laid down in Article 97 § 2 FGC. The lack of parents' co-decisions about a child's significant matters does not affect the effectiveness of legal actions taken within the performance of their parental authority towards third parties.³²

The lack of possibility of applying the norms laid down in Article 97 § 2 FGC to a foster parent stems from the fact that Family and Guardianship Code does not grant a foster parent the rights in the sphere of upbringing, which he/she might oppose the sphere of the rights of a child's biological parent. That is why a foster parent's position in the sphere of upbringing cannot be equal. Such a situation would make it possible to apply the measure laid down in Article 24 FGC to a foster

²⁹ Szlęzak, A., *Prawnorodzinna sytuacja pasierba*, op. cit.

³⁰ Sychowicz, M., in: Piasecki, K., Ciepła, H., Czech, B., Domińczyk, T., Kalus, S., Sychowicz, M. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2006, pp. 112–113.

³¹ Gajda, J., Pietrzykowski, K., in: Pietrzykowski, K., Gajda, J. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2021, Article 24, marginal ref. No. 5–6.

³² Ignatowicz, J., Pietrzykowski, K., in: Winiarz, J., Gajda, J., Ignatowicz, J., Pietrzykowski, J., Pietrzykowski, K. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2003, p. 816; characterising the scope of the regulation in question, the author uses the word "outside"; Strzebińczyk, J., in: Smyczyński, T., Holewińska-Lapińska, E., Stojanowska, W., Strzebińczyk, J. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, op. cit., Vol. 12, p. 299.

parent. On the other hand, in a situation when a foster parent is granted the rights, the measure under Article 24 FGC will be applicable to matters concerning the methods of upbringing a stepchild between spouses in the reconstructed family.

Finally, let me add a few words about determining the moment a stepparent's upbringing obligation starts and expires. Pointing out these obligations pursuant to Articles 23 and 27 FGC, the moment a child's biological parent and a foster parent get married is the moment they start. They continue to exist in case of spouses' actual separation, although its shape and scope change, especially if a stepfather lives outside the family in which a stepchild lives. Their creation is a consequence of the marriage and the requirement of an upbringing process in the functioning family is the basic justification of their existence. Thus, their specification must be formulated in a certain way that will allow for obtaining clarity and certainty of a stepchild's legal situation. In addition, it is necessary to emphasise the fact that a foster parent's duties in the area of upbringing expire the moment the marriage between a biological parent and a foster one ends or is annulled, or the moment a stepchild turns into an adult, becomes independent, the parental authority expires and responsible and fully-fledged participation in legal transactions and social life starts.

A STEPPARENT'S UPBRINGING OBLIGATION TOWARDS A STEPCHILD VERSUS THE PARENTAL AUTHORITY OF A BIOLOGICAL PARENT LIVING OUTSIDE THE RECONSTRUCTED FAMILY

Speaking about the rights and obligations of a child's biological parent living outside his/her family, it is necessary to draw attention to the fact that having and exercising parental authority by this parent may have a significant impact on the exercise of a stepparent's rights.

With regard to this issue, a question arises whether the inclusion of the second biological parent's set of rights and obligations in the research sphere is going to modify a foster parent's legal situation.

Firstly, it needs to be pointed out, which was mentioned earlier, that a stepchild upbringing obligation burden a foster parent only when he/she is a member of a family set up by means of a marriage between a biological parent with a stepparent, and it is important that a stepchild lives in the community created by the members of a reconstructed family. Thus, speaking about a stepchild's belonging to a family pursuant to Articles 23 and 27 FGC, there must be a real situation in which a stepchild lives with such a family, the existence of which is at the same time a reflection of the legal regulation of the issue of taking current care of a child born in the previous marriage. Apart from that, the duties of a foster parent are also included in current care and in this area he/she has independence, which was mentioned above. As far as the second biological parent is concerned, even if he/she has full parental authority, he/she actually has no big influence on taking current care of a child by a biological parent and a foster one, he/she has no possibility of taking current care on his/her own, either, because of staying outside the family community in which a child lives. That is why there is hardly any fear

that there will be a collision between the activities performed by a foster parent and the other biological parent. Their activities take place in different areas, namely the second biological parent having full parental authority does not take current care of a child, which belongs to a stepparent. The same applies to a situation in which the second biological parent's parental authority is limited but does not concern current care of a child. However, in a situation when the second parent's limited parental authority does not concern current care, then he/she has the right and obligation to take current care of a child, and this can cause a conflict between a biological parent and a foster one. It should then be recognised that the activities of the second biological parent are binding for a stepparent. If necessary, a foster parent can only request the guardianship court to interfere in the exercise of parental authority (Articles 106, 107, 109, 110 and 111 FGC), or persuade his/her spouse to take steps aimed at correcting the other biological parent's activities. A foster parent alone has no rights that could be effectively exercised against the rights arising from the subjective right of the second biological parent.

The situation will be different in case the second biological parent has no rights to take current care of a child, thus his/her parental authority is suspended, is limited or does not concern current care. Then, the activities of the second biological parent constitute interference in the sphere of the subjective right of a foster parent's spouse and although a stepparent has no right to demand that infringement should be stopped, the activities of the second biological parent are not binding on him/her, either. It lets a foster parent to exercise a kind of autonomy that can only be limited by actions taken by his/her spouse.

In practice, taking day-to-day care of a child by the second parent staying outside a child's family community is limited due to the actual situation, i.e. the existence of another family in which a child lives and is raised. The mere fact that parents live separately as a result of formal separation, divorce or for other reasons weakens the bond with a child, precludes both parents from taking current care of a child, which affects the quality of the upbringing process. The research conducted into the relationship between parents and children in broken homes shows that the contacts of the second biological parent with a child weakens over time, which directly affects the reduction of the second parent's participation in a child upbringing process. Thus, it means that what constitutes the most important factors in the formation of relationships between people are the quality and frequency of contacts that take place in a family functioning effectively in a friendly atmosphere and not the existence of their biological bonds.

In the literature on the subject, it is noticed that quite often there is a visible tendency to grant both parents full parental authority after their divorce. This practice creates a fiction, because the scope of parents' rights and obligations is not the same before and after a divorce; their situation in the sphere of upbringing is not the same, either. Moreover, the conditions for such regulations of parental authority are seldom appropriate. Such a shape of the legal situation of both biological parents may constitute an effective obstacle for a foster parent to take over the parental role in a reconstructed family.

Summing up, if both parents are entitled to parental authority and only one of them stays in a family community with a child, it is obvious that the full parental authority of the second parent cannot be exercised in the area of current care of a child for factual reasons.

The situation may be different in case of alternating custody of a child. The amendment of FGC of 25 June 2015 introduced a new wording of Article 58 § 1a FGC.³³ The main aim of the authors of the bill was to emphasise the right of a child to be brought up by both parents. The current regulations do not stipulate obligatory limitation of parental authority of one parent in case they cannot reach agreement within the meaning of Article 58 § 1 FGC.³⁴ As a rule, both parents should maintain their full parental authority; when it is in conflict with the best interest of a child, the court may limit the authority of one of the parents to some specified rights and obligations.³⁵ The Supreme Court in its resolution of 18 March 1968 adopted a stance that "(...) in each case in which the exercise of parental authority is entrusted to one of the parents, the judgement adjudicating a divorce should definitely determine which types of obligations and rights towards a child within the second parent's parental authority are limited".³⁶

³³ Act of 25 June 2015 amending Family and Guardianship Code Act and Civil Procedure Code Act (Journal of Laws of 2015, item 1062). The former provision under Article 58 § 1a FGC had the following wording: "§ 1a. In the event of the lack of agreement referred to in § 1, the court, taking into account the child's right to be brought up by both parents, rules the joint exercise of parental authority and the maintenance of contact with the child after a divorce. The court may entrust the exercise of parental authority to one parent and limit parental authority of the other parent to specified obligations and rights towards the child if the wellbeing of the child requires that". After the amendment, after § 1a, § 1b was added, which stipulates: "On the agreed application of both parties, the court shall not adjudicate on the maintenance of contacts with the child".

³⁴ See, pursuant to Article 58 § 1 FGC: "In the judgement adjudicating on a divorce, the court shall decide about parental authority over the child of the two parents and their contacts with the child, and rule how much each of the parents should provide for the child maintenance and education. The court shall take into account a written agreement of the spouses concerning the method of exercising their parental authority and maintaining contacts with the child after a divorce, provided it is not in conflict with the child's wellbeing. Siblings should be brought up together unless the wellbeing of the child requires otherwise".

³⁵ See, in particular, from the perspective of the interpretation of Article 107 FGC §§ 1 and 2, stipulating that: "In the event both parents living in separation are entitled to have parental authority, the guardianship court may, due to the wellbeing of the child, determine the way of exercising it and maintaining contacts with the child. The court shall leave parental authority to both parents if they provide a written agreement on the exercise of parental authority and maintenance of contacts with the child, which is harmonised with the wellbeing of the child. Siblings should be brought up together unless the child's wellbeing requires otherwise; § 2. In the event of the lack of agreement, the court, taking into account the child's right to be brought up by both parents, shall decide on the method of joint exercise of parental authority and maintaining contacts with the child. The court may entrust the exercise of parental authority to one of the parents and limit parental authority of the other parent to specified obligations and rights towards the child provided that the wellbeing of the child requires that". Jedrejek, G., 'Uwagi do art. 58 krio', in: Jedrejek, G. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany*, Lex/el., 2019.

³⁶ The Supreme Court resolution of 18 March 1968, III CZP 70/66, *Orzecznictwo Sądu Najwyższego Izby Cywilnej, Pracy i Ubezpieczeń Społecznych*, 1968, No. 5, item 77, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych*, 1968, No. 7, item 151, *Legalis*, No. 13450.

However, the amendment of 2015 allows for the use of a different solution, i.e. alternating custody. This solution consists in an assumption that a common child is “part of the two parents’ families”.³⁷

Alternating custody may be ruled directly by the court or based on an upbringing plan submitted by a child’s parents and approved by the court in addition to a decision on parental authority and the child maintenance costs. Of course, adjudicating on the way of exercising parental authority over a minor, the court should take into account many important aspects, in particular: the necessity of considering the interest of a child, which takes priority over the interest of parents, and the need to take into consideration personal features of the parents from the point of view of the wellbeing of a child.³⁸ What is also important is a child’s age, parents’ qualifications, their emotional bonds with a child, and a child’s possible mental disorders in the event of a change of upbringing conditions.³⁹ However, a child’s wellbeing and interest are the basic prerequisites for the application of alternating custody. The advantages of alternating custody are, inter alia: (1) the possibility of maintaining contact between a child and both parents, which has a positive impact on children’s social adaptation; (2) the protection of a long-term relationship between parents and a child, which is also important for the needs of parents; (3) the reduction of the risk of a conflict between parents and the occurrence of domestic violence; (4) the fulfilment of the principle of social justice in relation to the protection of the rights of a child.⁴⁰ It should be pointed out that the application of alternating custody, firstly, creates conditions for a child’s participation in everyday activeness of each parent and observing them in different situations and life roles, makes it possible to provide and adopt particular norms of conduct, values and behaviour patterns. Secondly, each parent hosting a child over a certain period may actively participate in a child’s extracurricular activities without any time restrictions.⁴¹ Alternating custody is also an adequate solution in case of proper relations between parents. Reaching agreement by parents on the issue of custody of a child also leads

³⁷ By the way, it is necessary to draw attention to the fact that the Supreme Administrative Court used an unfortunate description of the position of a child in a family. The ruling of the Supreme Administrative Court of 8 November 2021, case No. I OPS 1/21, ONSA and WSA, 2022, No. 1, item 3, p. 56, *Legalis*, No. 2632176.

³⁸ See the judgement of the Supreme Court of 7 June 1950, case No. Ł.C. 522/50, *Państwo i Prawo*, 1950, No. 11, p. 158. The judgement of the Supreme Court of 30 August 1949, case No. Wa. C. 76/49. Published: DPP 1950/1/60.

³⁹ See the Supreme Court judgement of 21 November 1952, case No. C 1814/ 52, *Orzecznictwo Sądu Najwyższego Izby Cywilnej i Izby Karnej*, 1953, No. 3, item 92, *Legalis*, No. 683972; the Supreme Court judgement of 8 December 1997, case No. I CKN 319/97, *LexPolonica*, No. 346220 and the Supreme Court judgement of 16 June 1958, case No. 4 CR 383/57, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1959, No. 3, p. 344; *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1959, No. 4, p. 266. For more see: <https://e-prawnik.pl/temat/naprzemienna-opieka-nad-dziecmi-opinia-prawna.html>.

⁴⁰ Kruk, E., ‘Arguments for an Equal Parental Responsibility Presumption in Contested Child Custody’, *American Journal of Family Therapy*, 2012, Vol. 40, No. 1, pp. 33–55.

⁴¹ Milewska, E., *Ocena wpływu opieki naprzemiennej na małe dzieci i ich relacje z rodzicami*, Warszawa, 2017.

to considerable acceleration of the proceeding concerning the dissolution of their marital relationship.⁴²

Alternating custody also carries a lot of risks to the interest of a child. The basic principle of alternating custody is that there must be certain rules, bonds and mutual trust between parents in order to lead to maintaining proper contact with a minor. It is often difficult, because, after a process filled with negative emotions and stress, the people who have separated are often unable to reach agreement putting their interest above the wellbeing of a child.⁴³ Therefore, parents' attitude is an important condition for ensuring a child's interest properly in case of alternating custody. However, often, this condition is not satisfied. It is common practice to prevent or hinder a child's contacts with a parent, and courts do not have effective coercive means of enforcing their decisions concerning those contacts.⁴⁴ Pursuant to Code of Civil Procedure (hereinafter: CCP), a person who hinders contact with the child may be ordered to pay a specified sum of money to the person entitled to maintain contact with the child for each violation of the obligation (Article 598¹⁵ CCP).⁴⁵ However, the sanctions are not effective. On the one hand, they are not costly; on the other hand, raising them might burden a parent's budget to the level that would be bad for a minor. The representatives of the doctrine call for

⁴² See the judgement of the District Court in Warsaw of 27 November 2017, case No. IV C 1212/17, PoSP. In the case, the court stated that as a result of a divorce, the wellbeing of the child was going to suffer, which would constitute an obstacle to adjudicating on a divorce pursuant to Article 56 § 2 FGC. On the contrary, the state of tension between the parties revealed in pleadings and oral declarations justifies the conviction that refusal to dissolve a marriage and insisting that the obligation to maintain a fiction of a relationship might endanger the appropriate development of the child. The court believed the parties' assurance that the joint exercise of parental authority based on an alternating system of care, including weekly periods of the child's stay with each parent, as well as similar holiday and festive periods would be a better solution for the child than the adjudication on the child's living only with one parent. In the court's opinion, alternating custody of the child ensures better contacts of the child with the parents and provides an opportunity for equal participation of each parent in the upbringing process, and it also ensures just division of obligations, including the costs of the child maintenance and upbringing when each of the parents covers these costs in person, especially when the child lives with them in regularly repeated periods; the statement that parents cover relevant costs in the equal proportion would be a more appropriate phrase and a resolution pursuant to the statute. In such a case, parents are obliged to cover all expenditures that exceed standard and day-to-day costs of the child maintenance in equal parts. In particular, it concerns covering the costs resulting from the decisions made jointly, e.g. to enrol the child at an educational institution or for extracurricular activities, to give the child expensive medical treatment etc.

⁴³ See the judgement of the District Court in Sieradz of 9 October 2013, case No. I Ca 352/13, PoSP.

⁴⁴ See, inter alia, the judgement of the Regional Court in Olkusz of 16 June 2015, case No. III RC 95/15, PoSP. The judgement of the Regional Court in Warsaw of 24 June 2018, case No. VI Nsm 2419/17, PoSP.

⁴⁵ Act of 17 November 1964: Code of Civil Procedure (Journal of Laws of 2018, item 1360). In accordance with Article 598¹⁵ CCP § 1: "In the event a person who has custody of the child does not fulfil or inappropriately fulfils obligations resulting from the judgement of an agreement concluded before the court or a mediator concerning contacts with the child, the guardianship court, taking into account the financial situation of the person, may order the person to pay the person entitled to maintain contact with the child a certain sum of money for each infringement of the obligation".

the application of mediation; however, adapting to its provisions seems unrealistic. That is why it is necessary to amend the provisions of family law and probably even also penalise the obstruction of contact by one of the parents in order to counteract parents' pathological practices of hindering contacts with a child.

POSSIBLE MODELS OF VIABLE MECHANISMS FOR EQUAL EXERCISE OF CUSTODY OF A CHILD BY BIOLOGICAL PARENTS AND STEPPARENTS

Bearing the above in mind, one can state that there are no viable legal mechanisms in the Polish legal system that allow for equal exercise of custody of a child by biological parents who have full parental authority and by stepparents.

Hence a question arises what solutions should or could be introduced into the Polish legislation to strengthen the position of a foster parent at the expense of the second biological parent who remains outside a family community of which a child is a member and in case of alternating custody.

In the Polish legal system, parental authority is a typical basic relation resulting from consanguinity or adoption, therefore a stepparent does not actually exercise parental authority over a stepchild unless one of the spouses adopts the other spouse's child.

The situation is different under foreign legal regulations where parental authority is separated from basic family bonds and this relation is developed as an independent one based on a parental responsibility agreement. This type of agreement is characteristic of the legal system that is in force in contemporary England and Wales. In the system, parents' responsibility results from the legal relation of kinship; however, a parental responsibility agreement is an example of an exception to the rule presented above.⁴⁶

In the English system, there is the so-called parental responsibility consisting in the exercise of custody of a stepchild by a stepparent based on a civil law agreement on parental responsibility. It takes place between persons who are not in a legal relationship of consanguinity.⁴⁷

In the English law, like in the Polish legislation, a foster parent is a spouse of a biological parent who got married again after a divorce or the death of the other biological parent of a child. The circumstance of co-habitation with a child's biological parent and a child does not result in the acquisition of the status of a stepparent. It is important and necessary that those partners get married and a foster parent adopts a child, although in the English law it is admissible to obtain parental responsibility

⁴⁶ Shapiro, J., 'Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children', in: MacLean, M. (ed.), *Family Law and Family Values*, Oxford, 2005, p. 93.

⁴⁷ In such a case, although an agreement is a source of parental authority, nevertheless the family status of persons competent to conclude such an agreement is not irrelevant from the point of view of the English law; Kosior, W., Łukasiewicz, J., 'Umowa jako źródło władzy rodzicielskiej nad pasierbem – ujęcie modelowe na podstawie angielskiego ustawodawstwa', *Przełęcz Prawniczy Uniwersytetu Warszawskiego*, 2017, R. XVI, No. 2.

without adoption based on other legal instruments. They include: (1) obtaining a *child arrangement order* confirming that a child lives with a foster parent who provides for him/her; thus, a parent is entitled to parental rights; (2) obtaining a *parental responsibility order* at the request of a foster parent⁴⁸; (3) concluding a constitutive responsibility agreement on parental responsibility, i.e. a *parental responsibility agreement*.

Such an opportunity is laid down by means of the 2005 amendment to the Adoption and Children Act 2002, by virtue of which Section 4a(1) was introduced to the Children Act 1989, which stipulates:

Where a child's parent ("parent A") who has parental responsibility for the child is married to (or a civil partner of,) a person who is not the child's parent ("the step-parent") – (a) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child; or (b) the court may, on the application of the step-parent, order that the step-parent shall have parental responsibility for the child.⁴⁹

The agreement is therefore concluded between the child's biological parent or parents having parental responsibility and the child's adoptive parent. Before such an agreement is concluded, it is necessary that the adoptive parent is married to (or in a civil partnership with) the child's biological parent having parental responsibility for the child and that this foster parent obtains the consent of all persons having parental responsibility for the child and his/her property, i.e. he/she must obtain the consent from both biological parents of the child. Therefore, both biological parents must give their consent to grant a foster parent parental responsibility, which emphasises the special nature of this agreement.⁵⁰

As a result, the English law provides an opportunity for more than two parents to have parental responsibility for the child. Moreover, in the event of the lack of agreement between the child's biological parents, the court can grant parental responsibility for the child on the application of an adoptive parent pursuant to Section 4a(1) Children Act. By concluding parental responsibility agreement, an adoptive parent has the same rights and obligations as biological parents have towards the child. The agreement does not affect the current scope of biological parents' parental responsibility for the child, but only equalises the legal status of the adoptive parent. In addition, based on the agreement on parental responsibility, a stepparent does not become liable for child maintenance, because there is no legal relationship of consanguinity between a stepparent and a stepchild.⁵¹

There is a uniform template for the agreement on parental responsibility, which is laid down in the Statutory Instrument 2009 No. 2006, Children and Young

⁴⁸ Mitchels, B., Bond, T., *Legal Issues Across Counselling & Psychotherapy Settings: A Guide for Practice*, London, 2011, p. 128.

⁴⁹ See Section 4a(1) Children Act.

⁵⁰ Black, J. et al., *A Practical Approach to Family Law*, Oxford, 2012, pp. 12–15.

⁵¹ It is worth pointing out that an agreement on parental responsibility shall not be subject to cancellation; the only way to terminate the contractual relationship of parental authority is via the interference of the court on the application filed by each person who has parental authority or on the child's request.

Persons, England and Wales: The Parental Responsibility Agreement (Amendment) Regulations 2009.⁵² The agreement should be developed in writing and contain the biological parents' declarations of giving their consent to grant a foster parent parental responsibility for the child. The persons concerned, including an adoptive parent, should sign the agreement in the court in the presence of a justice of the peace, a justice's clerk, an assistant to a justice of the peace, or a court official who is authorised by the judge to administer oaths, who will witness their signatures and sign the certificates of the witness.⁵³ It is also necessary to submit documents confirming that biological parents have parental responsibility for the child, i.e. a copy of the child's birth certificate and a marriage certificate with information about the biological parents' divorce in order to prove that the parents were married at the time of the child's birth. It is also possible to submit a document confirming that a biological father has parental responsibility for the child. An adoptive parent should submit a document confirming marriage to the child's biological parent. The agreement signed in the way specified above should be developed in three copies (one for each person concerned), i.e. the entitled biological parents and a foster parent and sent to the Principal Registry of the Family Division in London. After its receipt and approval, each parent is given one copy stamped with the seal of the court, supplemented with a relevant court note. The agreement takes effect the moment it is registered. In the event of granting parental responsibility for more than one child, a separate parental responsibility agreement should be developed.⁵⁴

DE LEGE FERENDA CONCLUSIONS

In accordance with the legal norms in force, an adoptive parent's obligation is to raise a stepchild as part of the assistance and cooperation for the good of the family established by an adoptive parent and a biological one. The obligation should be fulfilled in the form of activities aimed at taking current care of the child and, to a certain limited extent, should constitute activities related to custody of the child's property. However, the regulations in force do not give the adoptive parent the rights in the upbringing sphere, which weakens his/her position in comparison to the other biological parent, as well as third parties. The statutory provisions do not stipulate the protection of a stepparent's rights directly, e.g. by means of granting him/her competences to demand that the third party stop interfering in the sphere in which he/she performs their duties, but indirectly, i.e. by means of their spouse's subjective right. Thus, it can be pointed out that the statute does not stipulate any specific protection for the fulfilment of the obligation imposed on an adoptive

⁵² Department for Education, *The Children Act: Guidance and Regulations. Family Support, Day Care and Educational Provision For Young Children*, Vol. 2, London, 1991, pp. 5–6; Lowe, N., Douglas, G., *Bromley's Family Law*, Oxford, 2015, p. 372; Powell, R., *Child Law: A Guide for Courts and Practitioners*, Winchester, 2001, p. 34.

⁵³ A solicitor cannot witness the signatures.

⁵⁴ Kosior, W., Łukasiewicz, J., *Umowa jako źródło władzy rodzicielskiej nad pasierbem...*, op. cit., p. 318.

parent. Therefore, it seems purposeful and appropriate to make a stepparent's upbringing obligation related situation independent of the situation of a biological parent resulting from his/her parental authority. Such a solution would allow for making this obligation independent, and its fulfilment by an adoptive parent would be completely independent and protected against third parties' interference. At the same time, the right would be connected with a demand that certain authorities apply coercive measures in the event unauthorised persons infringed this area of a stepparent's rights. However, the rights and obligations of a stepparent should be limited to taking current care of the child and his/her property. Apart from that, even having such duties, a stepparent would not be entitled to statutory representation of the child. Determining a broader scope of a stepparent's rights and obligations does not seem to be necessary and required.

Thus, the proposed way of shaping an adoptive parent's rights and obligations in the field of the upbringing duties would be typical because of the characteristic features of the measure that can be called the adoptive parent's custody. It would include some rights and obligations typical of the parental authority relation and would be independent of a spouse's parental authority. In the face of an adoptive parent's situation independent of the biological parent's situation, the system based on the assumption that an adoptive parent's activities are subject to consent given by means of the court interference in the scope of his/her spouse's parental authority would stop functioning. With regard to this, there is a need to develop a different mechanism, *inter alia*, to provide the guardianship court with the right to define a stepparent's rights and duties in more detail, and ultimately, to deprive him/her of custody.

In this way, apart from parental authority and a foster family's care or custody, a new legal institution would come into being. Its emergence might affect the scope of application of the existing ones. Therefore, it should be considered whether the introduction of an adoptive parent's custody to Family and Guardianship Code would cause changes in the scope of a biological parent's parental authority, in particular the authority of the biological parent who lives outside the stepchild's family community.

In this situation, two solutions may be put forward. The first of them indicates the existence of an adoptive parent's custody in addition to the set of both parents' rights and obligations, with no influence on their scope. This type of situation might result in the emergence of a new entity in the sphere of family law relations, equipped with competences to act independently in the upbringing process, however, its appearance would not affect changes in the rights and obligations of biological parents. Such a solution would be similar to the statutory model allowing for parallel and independent fulfilment of the same obligations and the exercise of the same rights towards the child by several persons.

As regards disadvantages of the solution, firstly, it might not lead to the elimination of the conflicts between an adoptive parent and the second biological parent that may arise in the future in relation to the exercise of their current custody. If the second biological parent had unlimited parental authority in terms of current custody, he/she would be able to claim the right to interfere in the exercise of it by

a stepparent in spite of the fact that he/she remains outside the stepchild's family community, and even if his/her activities were in good faith, they might exert negative influence on the upbringing process in the reconstructed family. Secondly, it would lead to the conclusion that the new legislative solution would not eliminate the imperfections of the previous one.

The second solution proposed is devoid of flaws. It assumes equipping an adoptive parent with rights and obligations in the field of current custody and, at the same time, depriving the second biological parent of them. Such a solution indicates the need to strengthen the position of the entity that has the real ability to conduct the child's current upbringing process. A similar model of relation is laid down in Article 112¹ FGC concerning the regulation of rights and obligations of a foster family.

The above-discussed solution would be applicable only to the relations in a reconstructed family. In spite of this, the issue of the scope of rights and obligations of a biological parent who lives outside the child's community is of more general significance. It results from the fact that in each case when a biological parent remains outside the child's family community a question arises whether it is right that a person who does not stay with the child maintains the current custody related rights and obligations, which he/she cannot exercise. It is important in case of spouses' actual separation, as well in a situation when the child's parents are not married, live apart and the child lives permanently with only one of them. Then, it seems appropriate to introduce the court's broader right to shape parental authority and to limit its scope in relation to the parent remaining outside the child's family community. Restrictions of this type should be aimed at deprivation of current custody related rights and obligations, which can be exercised only by means of constant everyday contact with the child. On the other hand, it should be assumed that full parental authority is vested only in the parent who permanently lives with the child in a family community, while the scope of the other parent's rights and obligations does not include current custody of the child if he/she does not stay in the child's family community. Such a solution would allow for the restoration of the sense of the concept of full parental authority and, at the same time, would make it possible to describe family relations in the language of legal norms more precisely. The rest is a matter of regulating mutual relations between the members of a reconstructed family.

In view of the above-presented thoughts, which are just preliminary proposals but do not indicate any specific and checked solution in terms of strengthening the position of an adoptive parent, a question arises whether it would be possible to introduce the solutions adopted in the English law to the Polish legislation.

Analysing the English relation of parental responsibility based on an agreement, one can state that it is an example of how the modern system of values in family law can change. Apart from people being formally family members, there are also persons actually included in a family community based on close bonds, which, however, are not of great importance from the point of view of law.⁵⁵ Deliberation

⁵⁵ Kosior, W., Łukasiewicz, J., *Umowa jako źródło władzy rodzicielskiej nad pasierbem...*, op. cit., p. 319. According to the authors, "There are ties of kinship between a stepfather or a stepmother

over the introduction of such a constitutive agreement on parental authority to the Polish legislation of course requires extremely thorough and reliable research.⁵⁶ The most important thing is to determine and examine whether such a form of a parental authority will fulfil its function in the Polish family law and whether it will have a positive effect on foster children, first of all, bearing in mind their wellbeing. If in the English law, based on an agreement of parental responsibility, parental authority is recognised as a legal relation that may have its source in a family-legal contract,⁵⁷ perhaps also in the Polish legal system such a form of agreement on an adoptive parent's care of the stepchild could fulfil its functions and facilitate taking many decisions concerning the child by an adoptive parent in a situation where biological parents who have parental authority exercise equal rights and obligations towards the child. In the Polish legal system, the so-called adoptive parent's custody mentioned above might play the role corresponding to the English solution, and it might result in making a stepparent's situation in the field of upbringing obligation independent of the situation of the child's biological parent and, at the same time, it would regulate their mutual obligations in the form of a contract.

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and a stepchild. In the light of the Polish family law, the relationship is not too significant, because apart from the ban on marriage (Article 14 FGC) and possible maintenance in some cases (Article 144 § 1 FGC), as well as possible inheritance, the relationship does not constitute grounds for the exercise of parental authority (cf. Article 95 et seq. FGC)" and formal inclusion in the family (Article 27 FGC).

⁵⁶ For the issue of introducing contracts to family law, cf. Łukasiewicz, J.M., *Ewolucja stosunku alimentacyjnego*, in: Pływaczewski, E.W., Bryk, J. (eds), *Meandry prawa – teoria i praktyka. Księga jubileuszowa prof. zw. dra hab. Mieczysława Goettela*, Szczytno, 2017, pp. 305–315.

⁵⁷ Kosior, W., Łukasiewicz, J., *Umowa jako źródło władzy rodzicielskiej nad pasierbem...*, op. cit., pp. 319–320.

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