


Book Review

REVIEW OF THE BOOK IMPLEMENTATION OF THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD IN MEDIATION IN MATTERS CONCERNING THE EXERCISE OF PARENTAL AUTHORITY AND CONTACTS, EDITED BY JOANNA MUCHA

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Summary: 1. Introduction. – 2. Main Ideas and Focus of the Book. – 3. Concluding Remarks.

ABSTRACT

The monograph is based on the thesis that in court proceedings in matters relating to a child and mediation in matters concerning the exercise of parental rights and contact with a child, the primary value to be protected should be the best interests of the child. The analysis and research allowed the researchers to determine the extent to which the applicable regulations and mediation practice implement this principle and what instruments adopted in legal regulations and used in mediation serve to respect it.

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The authors emphasised that in many acts of international law and the provision of Art. 72 of the Constitution of the Republic of Poland, the order to protect the best interests of the child is a fundamental and overriding principle of the Polish system of family law. All regulations in the sphere of relations between parents and children are subordinated to this principle. It signifies the primacy of the child's best interests over the interests of other people, especially parents, and is the purpose of exercising parental authority and contacts. This analysis was supplemented with positions based on other legal systems – Ukraine and Italy. In both cases, the importance of the best interests of the child was confirmed in the procedures for resolving conflicts related to the separation of parents.

Keywords: *the principle of the best interests of the child; mediation in family matters; Code of Civil Procedure; civil proceedings; alternative dispute resolution; access to justice*

1 INTRODUCTION

The reviewed book concerns the important issue, from the theoretical and practical point of view, of the implementation of the principle of the best interests of the child in mediation in matters concerning the exercise of parental authority and contacts.

The monograph consists of 13 chapters in which the following topics are discussed:

- 1) Parental breakup in a child's life – a psychological perspective;
- 2) Assessment of the usefulness of mediation as a form of resolving family conflicts – analysis from the perspective of family pedagogy;
- 3) The child's subjectivity in family mediation in matters of contact and care – axiology of the child's subjectivity in mediation;
- 4) The principle of the best interests of the child in mediation in selected legal systems of other countries;
- 5) The best interest of the child as a value subject to special protection in matters relating to the exercise of parental responsibility and contacts with the child;
- 6) The objective scope of court proceedings and mediation in matters relating to the exercise of parental authority and contacts;
- 7) The subjective scope of court proceedings and mediation in matters related to parental responsibility and contacts;
- 8) The process and psychological guarantees of the implementation of the principle of the best interests of the child in matters relating to the exercise of parental authority and contacts and mediation;
- 9) The participation of the child in mediation in matters relating to the exercise of parental authority and contacts and his/her representation;
- 10) The role of the mediator in mediation in matters relating to the exercise of parental authority and contacts;
- 11) The best interest of the child and the settlement concluded before the mediator in matters relating to the exercise of parental authority and contacts;
- 12) Surveys;
- 13) Summarising considerations (made in an exemplary manner).

The authors analysed the applicable legal regulations, including the Constitution of the Republic of Poland, the Family and Guardianship Code, the Code of Civil Procedure, and numerous acts of international law concerning court proceedings involving children or in matters relating to children. This analysis was supplemented with positions based on other legal systems, both those in which mediation was not regulated at the time of writing

the book but was regulated after its publication² (Ukraine) and those where it is based on legal provisions (Italy). In both cases, the importance of the best interests of the child was confirmed in the procedures for resolving conflicts related to the separation of parents.

2 MAIN IDEAS AND FOCUS OF THE BOOK

The authors emphasised that in many acts of international law and the provision of Art. 72 of the Constitution of the Republic of Poland, the order to protect the best interests of the child is a fundamental and overriding principle of the Polish system of family law. All regulations in the sphere of relations between parents and children are subordinated to this principle.³ It signifies the primacy of the child's best interests over the interests of other people, especially parents, and is the purpose of exercising parental authority and contacts. In a properly functioning family, this goal is already in line with the parents' interests. In the disturbed communication of parents who are separated or in the phase of separation, this goal remains unchanged. However,, the proper exercise of parental authority and contacts requires the interference of state authorities, e.g., a court, or other entities, e.g., a mediator.⁴

In mediation covering issues related to determining the manner of exercising parental responsibility and maintaining contacts, such as court proceedings relating to these matters, the value subject to special protection should be the best interests of the child and the related empowerment of the child. In terms of the legal relationship of parental authority, as well as contacts, the child is to be treated as their subject and not as a specific goal of parental 'managerial' activities carried out on the basis of legal norms.⁵

The empowerment of the child required an answer to the question of whether, in order to ensure the implementation of the principle of the best interests of the child in matters relating to the exercise of parental responsibility and contacts, its direct participation is necessary, and whether his/her welfare shall be fully protected only in this way. The analysis carried out in the reviewed study allowed the authors to draw a correct conclusion that neither the principles expressed in numerous provisions of international law acts concerning the participation of children in proceedings concerning them nor the provisions of the Constitution of the Republic of Poland require that the child have the status of a participant or party to the proceedings within the meaning of procedural law. At the same time, the authors concluded from the essence of parental authority and contacts that it is up to the parents to determine how they should be exercised, which means that the child not only does not have to, but cannot be, in light of the regulations, a party or a participant in proceedings concerning these matters, because the child is not a party to the dispute in this regard. This thesis is debatable and depends on the recognition whether, when deciding on parental authority, the guardianship court in its decision refers to the child or acts only in the sphere of parents' rights and obligations. The answer to this question requires an analysis of the concept of parental authority and clarification of the relationship in which parents and

2 The Mediation Act was passed 16 November 2021. The act entered into force 15 December 2021: Document 1875-IX <<https://zakon.rada.gov.ua/laws/show/1875-IX#Text>> accessed 13 December 2021.

3 Case No K 18/02 [2003] Judgment of the Constitutional Tribunal of The Republic of Poland (2003) (4) OTK-A, Case No IV CSK 442/17 [2018] The decision of the Supreme Court, the Republic of Poland, LEX no 2483681.

4 J Mucha, J Mucha (eds), 'Rozważania podsumowujące' in *Realizacja zasady dobra dziecka w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów* (Warsaw 2021) 455.

5 Ibid. 456.

children remain (until they reach the age of majority).⁶ The doctrine distinguishes between three types of approaches to parental responsibility. According to one, parental responsibility is the subjective right of parents,⁷ according to another, it is a set of subjective rights,⁸ or finally, all obligations and rights that are imposed on parents towards their children.⁹ As H. Dolecki notes, the first two terms of parental authority are not convincing due to the mechanical transfer of the concepts of subjective law to family law. The subjective right is primarily a right, and its exercise is left to the will of the entitled person, and the exercise of parental authority is the responsibility of the parents. Therefore, according to H. Dolecki, it is most accurate to define parental authority as a complex of interrelated rights and obligations. With this approach to parental responsibility, any changes to it (limitation, suspension, deprivation) directly affect the parents (because they affect the sphere of their rights and obligations) and, at the same time, affect the child¹⁰ because it matters to the child who is entitled to parental responsibility for him/her, who will shape his/her psyche, and who he/she would stay with.¹¹ This means that the result of the case affects the legal sphere of the child who, as an interested party, should take part in the case as a participant.¹²

The thesis indicated by the authors that the child is not a participant in the proceedings in matters of parental responsibility and contact with the child also implies the conclusion that the child is not a party to a mediation settlement concluded in such cases (also when such a

- 6 H Dolecki, 'Sytuacja prawna małoletniego w postępowaniu przed sądem opiekuńczym w sprawach dotyczących władzy rodzicielskiej' (1976) 11 Nowe Prawo 1518-1519; A Gersdorf, 'Postępowanie sądowe w sprawach dotyczących władzy rodzicielskiej' (1972) 4 *Palestra* 46.
- 7 K Jagielski, 'Istota i treść władzy rodzicielskiej' (1963) 3 *Studia Cywilistyczne* 104; J Ignatowicz, *Prawo rodzinne. Zarys wykładu* (Warsaw 1987) 320; J Ignatowicz, J Pietrzykowski (eds), *Kodeks rodzinny i opiekuńczy z komentarzem* (Warsaw 1993) 408, 466; J Ignatowicz, M Grudziński, J Ignatowicz (eds), *Kodeks rodzinny. Komentarz* (Warsaw 1959) 737; J Ignatowicz, J St Piąkowski (eds), *System prawa rodzinnego i opiekuńczego*, part 1 (Ossolineum 1985) 809.
- 8 A Wolter, *Prawo cywilne. Część ogólna* (Warsaw 1955) 108; K Jagielski (n 8) 104; S Szer, *Prawo rodzinne* (Warsaw 1966) 263; B Walaszek, *Zarys prawa rodzinnego i opiekuńczego* (Warsaw 1971) 169; B Dobrzański, *Komentarz do kodeksu rodzinnego i opiekuńczego* (Warsaw 1975) 658; E Cyrański, 'Dobro dziecka i władza rodzicielska w postępowaniu o wydanie dziecka' (1964) 10 Nowe Prawo 977; J Kosik, 'Problem przywrócenia władzy rodzicielskiej w świetle kodeksu rodzinnego i opiekuńczego' (1973) 10 Nowe Prawo 1464; I Długoszewska, *Przesłanki oraz skutki ograniczenia i pozbawienia władzy rodzicielskiej* (Warsaw 2012) 60.
- 9 J Winiarz, J Gajda, *Prawo rodzinne* (Warsaw 2001) 205-206; A Łapiński, *Ograniczenie władzy rodzicielskiej w polskim prawie rodzinnym* (Warsaw 1975) 23; J Sauk, *Granice obowiązków i praw rodziców wobec dzieci i społeczeństwa. Studium prawno-porównawcze* (Toruń 1967) 14; A Gersdorf (n 7) 46-47; J Strzebińczyk, T Smyczyński (eds), *System Prawa Prywatnego*, vol 12, *Prawo rodzinne i opiekuńcze* (Warsaw 2003) 228, 250-251; T Smyczyński, *Prawo rodzinne i opiekuńcze* (Warsaw 2012) 224; J Ignatowicz, J St Piąkowski (n 8) 809; Z Radwański, *Prawo cywilne – część ogólna* (Warsaw 1993) 68.
- 10 H Dolecki (n 7) 1522; H Haak, *Ochrona prawna udzielana przez sąd opiekuńczy* (Toruń 2002) 202, 209, 211-213, 361, 366; F Zedler, *Sądy rodzinne. Wybrane zagadnienia organizacyjne i procesowe* (Warsaw 1984) 124; K Korzan, *Postępowanie nieprocesowe* (Warsaw 2004) 418; cf Z Świeboda, 'Wykonanie orzeczeń o odebranie osoby podlegającej władzy rodzicielskiej lub pozostającej pod opieką' (1976) 4 *Zeszyty Naukowe Instytutu Badań Prawa Sądowego* 112; E Wengerek, *Postępowanie zabezpieczające i egzekucyjne. Komentarz* (Warsaw 1972) 718; W Siedlecki, 'Przegląd orzecznictwa Sądu Najwyższego (Prawo procesowe cywilne – II półrocze 1973 r.)' (1974) 11 *Państwo i Prawo* 138; H Haak, *Władza rodzicielska. Komentarz* (Toruń 1995) 35; A Rydzewski, 'Problematyka uczestnictwa małoletnich w postępowaniu przed sądem opiekuńczym w sprawach z zakresu "władzy rodzicielskiej"' (1997) 11 *Rejent* 98; A Zieliński, 'O sądzie opiekuńczym' (1968) 7-8 Nowe Prawo 1108; A Zieliński, *Sądownictwo opiekuńcze w sprawach małoletnich* (Warsaw 1975) 102.
- 11 W Siedlecki, Z Świeboda, *Postępowanie nieprocesowe* (Warsaw 2001) 149; W Siedlecki (n 11) 139; F Zedler (n 11) 91; K Korzan, 'Głosa do postanowienia SN z 15.04.1971 r., I CZ 49/71' (1973) 4 *OSPİKA* 175; K Korzan (n 11) 103; K Korzan, 'Podmioty postępowania nieprocesowego (cz. I)' (2005) 2 *Rejent* 24; M Goettel, 'Wybrane zagadnienia z zakresu postępowania o pozbawienie władzy rodzicielskiej' (1981) 15 *ZNIBPS* 980100; justification of the Supreme Court's resolution 21 February 1968, III CZP 105/67, OSNCP 1968, no 10, pos 162; J Polickiewicz, Z Siedlecki, E Wengerek, *Postępowanie nieprocesowe* (Warsaw 1973) 143; A Gersdorf (n 7) 46.
- 12 J Bodio, *Status dziecka jako uczestnika postępowania nieprocesowego* (Warsaw 2019) 335-337.

settlement includes a parental agreement). However, in an unquestionable way – both at the level of international law and in the provisions of the Constitution of the Republic of Poland (Art. 72 para. 3), the Family and Guardianship Code (Art. 95 § 4), and the Code of Civil Procedure (Arts. 216¹ and 576 § 2) – under the right to be heard, the child is granted the right to express his/her opinion on matters relating to him/her, which is in line with the principle of the best interests of the child. Ensuring that a person is heard, and at the same time, limiting him/herself to this form is a sufficient guarantee of the child's welfare. However, the content of the right to expression in court proceedings and in mediation implemented through the institution of a hearing should not be equated with the right to decide about oneself, but only with the right to participate in the decision-making process.¹³

The authors rightly emphasise that the positioning of a child as a participant or party to court proceedings and assigning him/her an adequate position in mediation must be associated with the risk and responsibility of taking actions that result in their legal sphere. Hence, it was aptly pointed out in the reviewed work that

the requirement of decision-making in one's own affairs and in matters of one's own family may not be an implementation, but a threat to the welfare of a child and may constitute a source of negative experiences for the child as a result of participation in activities relating to earlier situations in his life, including traumatic experiences (which, in turn, can be treated as a form of secondary victimization in the course of court procedures with reference to family matters). As a consequence, the shaping of dispute resolution procedures, including mediation, and legal institutions, including the hearing, should be treated as tools by which this psychological layer can be fully respected. A child in matters concerning him, in particular with regard to determining the methods of exercising parental authority and contacts, should be assigned a consultative role, possibly and to some extent opinion-forming, but not a decision-making role, regardless of whether these matters are the subject of court proceedings or mediation.¹⁴

This means that the child should also not be considered a party to a mediation settlement. The indicated conclusions result from the fact that, from the legal point of view, the principle of the best interests of the child is genetically related to the system of human rights protection and is firmly embedded in the axiology of law, its primary genesis has a psychological basis.¹⁵

The authors rightly emphasise that allowing a child to express his/her views in mediation may better protect his/her welfare, because as a rule, unlike in court proceedings, parents have an impact both on the conduct or resignation of the hearing and its scope. In the course of mediation, the implementation of the principle of the best interests of the child comes down to informing the child about the need to resolve the dispute regarding the exercise of parental authority and contacts and the results of the agreement reached as part of mediation, but also about the role of individual entities in mediation, including the mediator, and about the impact on the result of mediation so that he/she may express his/her own position through them. The parents should provide the child with relevant information. In this aspect – according to the authors – the superiority of mediation over court proceedings, in which the information obligation is rarely fulfilled, is manifested. In this sense, mediation can better serve the best interests of the child.¹⁶ Therefore, the book proposes to introduce

13 J Mucha, J Mucha (n 5) 459-460.

14 Ibid. 459.

15 Ibid. 458.

16 Ibid. 461-462.

a provision to the Code of Civil Procedure regulating the hearing of a child in mediation in matters relating to him/her, including matters relating to the determination of the methods of exercising parental authority and maintaining contacts. However, the hearing conducted in the course of mediation in the current legal status, due to the principle of confidentiality, does not replace the hearing referred to in Arts. 216¹ and 576 § 2 of the Code of Civil Procedure as part of court proceedings – hence, if necessary, it will have to be repeated under the conditions set out by the provisions of the Code and court practice.¹⁷

Moreover, the reviewed book supports the draft law of introducing obligatory referral of parents to mediation by the court. At the same time, this 'obligatory' should only concern the meeting with the mediator in order to inform its participants about its advantages, course, and possible result, and not its obligatory conduct, because commencing mediation must – as in any case – be left to the will of the parties, only then may prove effective.¹⁸

Research on the role of the mediator in mediation on children's matters led the authors to the conclusion that protecting the child's welfare in the course of mediation should rest primarily with the parents and not with the mediator (due to a potential conflict with the principles of impartiality and neutrality). The role of the mediator should be to ensure that the child's perspective is included in mediation and to sensitise parents to their needs and the possible negative consequences of separation.¹⁹

Analysing the issue of how the principle of the best interests of the child is implemented in mediation in cases concerning the exercise of parental authority and contacts, the authors put forward some interesting *de lege ferenda* conclusions. The first is the introduction – modelled on the German regulation – of the institution of the representative of the child's interests (the child's advocate), whose task would be to ensure that the child's interests are taken into account in the final mediation agreement.

The second *de lege ferenda* conclusion is the possibility of introducing a parental agreement to the provisions of the family and guardianship code, which would not eliminate the possibility of concluding a mediation agreement. From the legal point of view, it was assumed that the parental agreement and the agreement concluded before the mediator constitute two separate institutions serving to make arrangements on similar issues. The choice of one of these forms would be left to the parents.

If they prefer to agree on issues related to the exercise of parental responsibility or contacts without the help of a third party, their arrangements will take the form of a parental agreement referred to in the provisions of art. 58 § 1 and 107 § 1 of the Family and Guardianship Code. Then, assuming that it is not contrary to the best interests of the child, it will be taken over as an element of the facts to the divorce or separation judgment. It does not have an independent procedural nature and remains at most a settlement agreement (the so-called substantive law settlement). However, if the parents decide, on their own initiative or as a result of court actions, to use the help of a mediator, their joint arrangements will take the form of a mediation agreement, which, being a substantive law agreement, will also gain the value of causing procedural effects (and in the case of mediation will become a procedural step).²⁰

The third *de lege ferenda* conclusion is the introduction to court proceedings involving issues relating to the person of a child (i.e., in divorce, separation, and marriage annulment proceedings in cases where the parties have minor children, as well as in proceedings before

17 Ibid. 460.

18 Ibid. 508.

19 Ibid.

20 Ibid. 468.

the guardianship court, the subject of which is the regulation of the manner of exercising parental authority and contacts) the possibility of obligatory referral of parents to mediation by the court. However, this 'obligatory' should only concern the meeting with the mediator in order to inform its participants about its advantages, course, and possible result, and not its obligatory conduct, because commencing mediation must – as in any case – be left to the will of the parties.²¹

The fourth *de lege ferenda* conclusion is a clear indication of the child's best interests as a criterion for approval of the settlement by the court and the recognition that its violation should be a ground for refusing to approve a settlement concluded not only in cases for divorce or separation, but in every case concerning the child, including proceedings before the guardianship court, regarding the establishment or change of the methods of exercising parental authority and contacts.

The analysis led the authors to the correct conclusion that the applicable legal provisions seem, in principle, sufficient to guarantee the implementation of the principle of the best interests of the child in mediation.

The authors rightly concluded that

in the current legal situation, the implementation of the principle of the best interests of the child in mediation in matters relating to the exercise of parental responsibility and contacts is guaranteed by:

- allowing mediation in these matters, both in proceedings for divorce, separation, or marriage annulment, as well as in non-contentious proceedings before the guardianship court (awarding the mediation capacity),
- the requirement of attempt to reach an out-of-court agreement (e.g., through mediation) prior to taking legal action,
- the legal requirements as to the professional qualifications of the mediator, including a degree in psychology, pedagogy, sociology or law and their practical skills in the practice of mediation in family matters,
- giving the child the opportunity to express his or her position on matters related to the mediation concerning him/her (mainly by listening to him/her),
- giving priority to parental decisions regarding the exercise of parental rights and contact (in the form of a parental agreement or settlement agreement) over the judicial decision,
- leaving to the court the role of the guarantor of the child's best interests at the stage of the approval of the parental agreement or mediation settlement worked out in the course of mediation and taking the child's best interests as the criterion for approving such an agreement or settlement.²²

3 CONCLUDING REMARKS

The monograph is based on the thesis that not only in court proceedings in matters relating to a child but also in mediation in matters concerning the exercise of parental rights and contact with a child, the primary value to be protected should be the best interests of the child. The conducted analysis and research allowed us to determine to what extent the applicable regulations and mediation practice implement this principle and what instruments adopted in legal regulations and used in mediation serve to respect it.

²¹ Ibid. 471-472.

²² Ibid. 468-469.

When considering the indicated issue, the authors used not only theoretical analysis (juridical, pedagogical, psychological) but also conducted a survey among mediators, which illustrated the state of their knowledge on issues related to the participation of children in mediation, the importance of the principle of their well-being and the ability to conduct mediation with their participation, and also indicated their expectations in the field of instruments to protect the best interests of the child in mediation.

The substantive side of the work deserves a high rating. The authors undertook the analysis of an original issue. A reliable approach to the subject allowed for freedom in the systematisation of matter. The layout of the work is clear and logical, and the division of issues is consistently carried out – individual issues correspond to the content of the respective chapters. The dogmatic analysis is characterised by reliability. The work is written in communicative yet legal language.

The research also deserves recognition. The questionnaire research was carefully conducted, the questions were formulated in an accessible way, reflecting the subject of the research. The survey results were well interpreted. Insightful conclusions were drawn from them, which can certainly contribute to a practical change in regulations via the presented *de lege ferenda* conclusions.

The subject matter of the monograph under review is not only important but also original, which means that it fills the gap existing in the legal market. The subject of the study is topics of great importance – it is both theoretical and practical. The research problem presented in the monograph concerns the important issue of the implementation of the principle of the best interests of the child in mediation in matters relating to the exercise of parental authority and contacts. For these reasons, the reviewed publication may be of significant importance for mediators and family judges or advocates, especially 'child advocates'.

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