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THE ROLE OF COURT EXPERTS IN PROTECTING THE INTEREST OF THE CHILD IN DOMESTIC CIVIL PROCEDURES

Abstract. In court procedures, the role of court experts and their opinions is important for the final decisions. It is generally accepted that the court appoints experts and makes decisions based on – among other things – specialised expertise and opinions of these experts. Court experts' knowledge differs from that of judges. It is worth analysing the intersections between these two types of knowledge. In this context, special attention is to be paid to the position and status of the child in court proceedings in family matters. The main purpose of this article is to examine the role of court experts in safeguarding children's best interests in civil procedures within the family matters context, which can help to improve the understanding of and trust in court experts' contribution from the institutional and societal perspective.

Keywords: the role of court experts, specialised knowledge of court experts, the status and rights of child in court proceedings, hearing, public trust

ROLA BIEGŁYCH SĄDOWYCH W OCHRONIE DOBRA DZIECKA W RODZIMYM POSTĘPOWANIU CYWILNYM

Streszczenie. W procedurach sądowych rola biegłych i ich opinie mają znaczenie dla ostatecznych rozstrzygnięć. Przyjęło się, że sąd wyznacza i powołuje biegłych, aby na podstawie m.in. ich specjalistycznej ekspertyzy i opinii podejmować decyzje. Wiedza biegłych różni się od wiedzy sędziów. Warto przeanalizować punkty przecinania się tych dwóch rodzajów wiedzy. W tym kontekście szczególnej uwagi godne jest miejsce i status dziecka w postępowaniach sądowych dotyczących spraw rodzinnych. Głównym celem niniejszego artykułu jest analiza roli biegłego sądowego w ochronie dobra dziecka i jego statusu prawnego w postępowaniu cywilnym w sprawach rodzinnych, co może wzmocnić zrozumienie działalności biegłych oraz pokładane w niej zaufanie z perspektywy zarówno instytucjonalnej, jak i społecznej.

Słowa kluczowe: rola biegłych sądowych, specjalistyczna wiedza biegłych sądowych, status dziecka w postępowaniu sądowym, zaufanie publiczne

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1. INTRODUCTION

This article employs the doctrinal approach, taking into account the interdisciplinary perspective of court experts' roles in protecting the best interest (e.g. Jędrejek 2018; Zajączkowska-Burtowy 2021; Pisarska 2024) and rights of the child in civil proceedings. The analysis integrates insights from both legal disciplines – particularly civil law – and social sciences, including psychology and pedagogy. The research method includes elements of the interpretation of the current regulations, a review of the debate on them in recent years, and, finally, an analysis of noticeable improvements in the participation of children in civil procedure as well as the identification of changes that are still required.

In court procedures, the role of court experts and their opinions are important for the final decisions. These considerations pertain to family cases involving juveniles, in which a common, dominant, and priority directive for experts and judges is to act in the best interest of the child. Experts are required to possess professional knowledge, skills, and competencies that enable them to initiate and maintain constructive contact with the juvenile in order to carry out the assessment ordered by the judge. When presented as evidence in the case, court experts' opinions often constitute a significant basis for the decisions made by the judge. However, before such a ruling is issued, the child may have contact with both the experts and the judge, as well as with the attorneys of the parties involved. It is important that these interactions occur in a manner that respects the child's rights, with the child's best interests guiding the course of the judicial proceedings.

The court expert and the judge are the most important individuals that a juvenile child of parents involved in judicial proceedings may encounter, whether the parents are in the process of divorce, after a divorce, or in another life situation requiring a judicial ruling (Stankowska 2012; Długoszewska 2012; Mróz-Szarmach 2020) on matters of custody over and care of the child, shared custody, foster care, or the child's contact with a parent. This article will consider the place and status of the child in judicial proceedings from a general, broad perspective, both legal – referencing current information and regulations included, among others, in Joanna Bodio's 2019 book titled *The Child as a Participant in Non-litigious Proceedings* – and psychological and social. It will also elaborate on the practice of court experts and their role. It is important to highlight that the concept of “the best interest of the child”¹ lacks a statutory definition. According to the Supreme Court Decision of 24 November 2016², it

¹ The phrasing “the best interest of the child” has been discussed by various authors, including Joanna Zajączkowska-Burtowy (2021, 141). A comprehensive review of the literature on this subject has also been conducted by Aleksandra Krzysiak (2023, 99–101).

² Supreme Court Decision of 24 November 2016, case II CA 1/16, published in OSNC 2017/7–8, item 90.

is interpreted as the child's entitlement to the protection of life and health, and encompasses all measures aimed at creating conditions for their peaceful and proper development, safeguarding their dignity, and ensuring their involvement in decisions that affect their situation in judicial proceedings. The determination of what constitutes a child's best interest is case-specific and must be evaluated in the light of the particular child's circumstances and perspective. In this context, the role of the court-appointed expert is crucial. The expert's role is to identify what the best interests of the specific child entail, propose concrete ways to secure the child's welfare moving forward, and ensure that the child's best interests are safeguarded throughout the judicial process (Andrzejewski 2017, 83 f.).

2. SPECIALISED KNOWLEDGE OF COURT EXPERTS

It is generally accepted that the court appoints experts, and that judicial decisions are made based on the specialised knowledge of court experts and the reliability of their expert opinions. The roles of court experts and judges are different, as are their duties and tasks. As a result of their work, a specific, professional system of knowledge is created, without which proper case assessment – in accordance with the law, professional ethics, and specialised scientific knowledge – would often not be possible. The role of experts is not to establish facts or assess the credibility and strength of evidence, as this is the role of the court. The primary task of an expert is to elucidate various circumstances and matters from the perspective of an expert, thus on the basis of specialised knowledge (Article 278 of the Code of Civil Procedure), skills, and experience.³ Specialised knowledge consists of multiple layers of both descriptive and explanatory nature, enhanced by the expert's additional specialised training, enabling them to perform specific analyses, diagnoses, and opinions, as well as consultations and mediations (more on this topic in Stanik 2013, 401–408, 415, 417–423). The expert's specialised insights, both in terms of factual descriptions and their explanations – guided by the highest ethical standards in their profession – are intended to assist the court in resolving the substantive issues of the case under consideration (Stanik 2013, 430–446).

³ In his book titled *Poznanie sądowe a poznanie naukowe*, Maciej Zieliński analyses the similarities and differences between scientific knowledge and judicial knowledge. He describes the role of the court expert, whose primary task is to provide the court with specialised knowledge – presented in a manner understandable to both the court and the parties, clarifying the facts or the dispute – necessary for establishing facts that fall outside the judge's expertise. However, it is ultimately the court that determines the usefulness and evidentiary value of this knowledge: "The final decision regarding the weight and significance of the expert's opinion always rests with the court, not the expert" (Zieliński 1979, 112).

The expert opinion is a particular type of evidence (Article 233 of the Code of Civil Procedure), which can and should be subject to critical assessment by the court according to the principles of logic and common knowledge, and based on criteria such as the level of the expert's knowledge, the scientific theory applied, the method of reasoning, and the decisiveness of the conclusions contained in the opinion. Furthermore, it is special personal evidence presented in the form of a written statement, which can be expanded and supplemented by oral expert testimony (more on this topic in Stanik 2013, 420–427). It is essential that the cooperation between the court and the expert should involve supplementing necessary data by the expert. The court has the obligation to assign specific tasks to the expert and cannot replace them, because it does not possess the specialised knowledge (e.g. Włodarczyk-Madejska 2017a) that the expert has, which is necessary for resolving the case. Therefore, the court expert bears a high level of responsibility for the integrity of their work, and adherence to ethical norms is of paramount importance, especially in cases involving children, whose rights should be respected and upheld in a particular manner. This is due to factors such as the child's procedural capacity, whether they are granted or not granted the status of a participant in non-litigious proceedings, as well as their intellectual maturity, emotional state, and knowledge.⁴

The literature repeatedly emphasises that court experts serve as a 'bridge' between the child and the court, helping judges understand the child's needs and what is in their best interest (e.g. Miller 2002; Op de Beeck et al. 2017). Particularly in cases involving child custody, expert opinions can be decisive for the final verdict. Both Polish and international literature on the role of court-appointed experts in protecting children's rights and welfare in civil proceedings offer a wealth of valuable insights on this topic.⁵

⁴ Supreme Court Decision of 24 November 2016, II CA 1/16, OSNC 2017/7–8, item 90 (see, e.g., Jaśkiewicz 2013, 98–107).

⁵ Domestic literature on this topic includes Flaga-Gieruszyńska (2020), Mróz-Szarmach (2020), Zajączkowska-Burtowy and Burtowy (2023, 564–607), Czerederecka (2016), Dzierżanowska and Studzińska (2015), Kalinowski (1994), Włodarczyk-Madejska (2017; 2018), Błaszczak and Markiewicz (2016). Related international literature on the role of court experts in protecting the rights and welfare of the child includes Saywitz, Goodman and Lyon (2002; 2017). The authors focus on the practice of interviewing children in both courtroom and non-courtroom contexts, offering significant insights into how expert assessments influence legal proceedings, particularly in child maltreatment cases (Saywitz, Goodman, Lyon 2017). Furthermore, they expand on how properly conducted interviews by court experts are crucial for ensuring both the accuracy of the child's testimony and their emotional protection during judicial processes. Their research is pivotal to understanding the role that court experts play in civil cases, especially in the context of child testimony; see also Brown, Craig, Crookes et al. (2015).

3. THE RIGHTS OF THE CHILD IN JUDICIAL PROCEEDINGS CONCERNING FAMILY MATTERS

The guarantees protecting children's rights in judicial proceedings are included in two important documents: in the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, (Journal of Laws of 1991, No. 120, item 526), as well as in the European Convention on the Exercise of Children's Rights of 25 January 1996 (Journal of Laws of 2000, No. 107, item 1128). The adoption of the Convention on the Rights of the Child by Poland, in accordance with Article 12, "guarantees the child capable of forming their own views the right to freely express them in all matters concerning the child, particularly by ensuring the opportunity to be heard in any judicial and administrative proceedings" (Journal of Laws of 1991, No. 120, item 526, as amended). The child's right to express their own views is considered as an essential aspect of their participation in social life, beneficial from the perspective of the child, the family, and society (Hodtkin, Newell 2006; also see: Committee on the Rights of the Child 2006). The European Convention on the Exercise of Children's Rights provides children with:

- the right to information about ongoing proceedings concerning them and the opportunity to express their opinion (Article 3 ECERC);
- the right to request the appointment of an independent representative of the child's interests (Article 4 ECERC);
- the right to demand the presence of selected persons in proceedings before the court and the right to be informed about the potential consequences of the child's position and the possible consequences of any decision (Article 5 ECERC).

The court should safeguard these rights, and this is currently the best possible way to ensure entitlements for the child as a participant in judicial proceedings.⁶

⁶ The protection of children's rights is guaranteed by a number of legal instruments at both the national and international levels, extending beyond the Convention on the Rights of the Child and the Convention on the Exercise of Children's Rights. Below are some key legal documents that ensure the protection of children's rights:

1) the European Convention on Human Rights (ECHR) – 1950. Article 8. The right to respect for private and family life, which includes the protection of children's rights within family relations. Article 6. The right to a fair trial, encompassing judicial procedures concerning child custody and care;

2) the Charter of Fundamental Rights of the European Union – 2000. Article 24. Rights of the child, recognising the child as a rights-holder, including the right to express their views in matters that affect them and ensuring that the child's best interests are a primary consideration;

3) the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children – 1996. This convention facilitates international cooperation in matters concerning parental responsibility and child protection, including cases of child abduction and custody disputes;

The European legislation guarantees the child's influence on non-litigious proceedings through their hearing and presentation of opinions, which are taken into account when resolving the matter. The rights and obligations of the child in non-litigious proceedings include:

- the right to be heard;
- the child's right to personal participation in guardianship proceedings;
- the right to refuse to testify and to refrain from answering questions.

The obligations of the child as a witness include: the duty of the child to appear in court as a witness (art. 574 § 2 k.p.c) and the obligation to give testimony (art. 261 § 1 w zw. z art. 13 § 2 k.p.c.). A child acting as a witness enjoys the same rights and obligations as an adult (except for the duty to take an oath – art. 267 § 13 § 2 k.p.c.; more on this topic in Bodio 2019).

In litigious proceedings, the child is subject to hearing in non-property matters concerning them (these are matrimonial matters, which decide on parental authority, i.e. divorce, separation, annulment of marriage, child's descent, dissolution of adoption) (art. 576 § 2 k.p.c). In non-litigious proceedings, unlike litigious proceedings, the child's hearing occurs in family and guardianship

4) the Hague Convention on the Civil Aspects of International Child Abduction – 1980. Its objective is to secure the prompt return of children wrongfully removed to or retained in another country, and to prevent situations that violate children's rights;

5) the International Labour Organisation (ILO), Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour – 1999. This convention targets the worst forms of child labour, such as forced labour, slavery, prostitution, and the recruitment of children for armed conflict;

6) the Act on the Ombudsman for Children (Poland) – 2000. This act outlines the competencies and responsibilities of the Ombudsman for Children, who works to protect the interests of children in Poland;

7) the Act on Counteracting Domestic Violence (Poland) – 2005. It contains provisions for protecting children from domestic violence and ensures legal measures to safeguard their safety and well-being;

8) the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) – 2011. Child protection is a key element of this convention, which also addresses the situation of children as witnesses to domestic violence;

9) the United Nations Security Council Resolution 1325 on Women, Peace, and Security – 2000. Although it focuses on the protection of women, it also includes the protection of children, particularly in the context of armed conflict and violence;

10) the Constitution of the Republic of Poland (1997). Article 72 establishes the principle of protecting children's rights, stating that everyone has the right to demand public authorities to protect the rights of the child. This provision serves as a foundation for broad protection of children's rights in the Republic of Poland.

Each of these legal instruments contributes to the protection of children's rights at various levels, both internationally and domestically. Through these regulations, the aim is to ensure the comprehensive protection of the best interests of the child and to guarantee their rights in various aspects of life.

cases concerning the person or property of the child (art. 261 § 1 w zw. z art. 13 § 2 k.p.c.; more on this topic in Bodio 2019).

The right to be heard, according to Walther J. Habscheid (the creator of this term), consists of three entitlements: the right to information, the right to take a position, and the right to consider factual allegations and legal claims. The court, by exercising this right, should be guided by the educational aim of instilling in the child primarily their co-responsibility for deciding on matters that concern them and making them aware that they are an active, not passive, subject – the central figure of the proceedings (Habscheid 1991, 263).

The implementation of the aforementioned rights is possible provided that the child is informed about the existence of these entitlements: information about rights related to the exercise of the right to be heard (Article 5 in conjunction with Article 13 § 2 of the Code of Civil Procedure), access to case files and the possibility of obtaining copies (Article 9 in conjunction with Article 13 § 2 of the Code of Civil Procedure), and ensuring the possibility of personal participation in individual activities during the proceedings (Article 149 and following in conjunction with Article 13 § 2 of the Code of Civil Procedure). Problems with implementing these rights most often arise when it comes to a child under the age of 13 (see Bodio 2019, 408).

In the Polish law, the child is obliged to personally participate in guardianship matters, unless the court exceptionally restricts or excludes their personal participation in the proceedings based on Article 573 § 2 of the Code of Civil Procedure, namely the child's right to be heard (Article 576 § 2 of the Code of Civil Procedure), the child's right to appeal decisions (Article 47 of the Family and Guardianship Code, Article 573 of the Code of Civil Procedure), or the child's right to appoint a legal representative in situations where the child cannot be represented by parents due to a conflict of interest (Article 99 of the Code of Civil Procedure in conjunction with Article 98 § 2 and 3 of the Code of Civil Procedure). Questions for the future include concerns about the direction of interpreting these rights and undertaking work to expand the procedural rights of children to other family matters, which have not yet found clear confirmation in legal acts or court practice.

4. THE STATUS OF THE CHILD IN JUDICIAL PROCEDURE CONCERNING FAMILY MATTERS

The role of an expert is different from that of the judge. The responsible role of court experts is to ensure the best conditions, which include providing information and ensuring good conditions for the child's participation in judicial proceedings when the child appears as an interested party or a participant in non-litigious proceedings. A question arises regarding the situations in which the right of the child to be heard is respected or overlooked in judicial proceedings.

The provisions of the European Convention on the Exercise of Children's Rights only outline general preferences regarding the child's right to express their views in judicial proceedings. According to Bodio, an analysis of norms arising from international law indicates that they do not provide sufficient grounds for formulating definitive principles determining the obligatory or discretionary nature of hearing the child in guardianship proceedings, nor do they establish standards for such hearings (Bodio 2019). As it turns out, according to Bodio, these norms do not require ensuring a direct hearing by the judge. They only define it as a strongly desirable element of the proceedings, fulfilling fundamental human rights and obliging the enactment of appropriate procedural safeguards (Bodio 2019). A child can be a participant in non-litigious proceedings because

anyone who has legal capacity, any interested party, i.e., a person whose rights are affected by the outcome of the proceedings, can be one. The participant status is acquired by this person if they take part in it. This is possible at any stage of the case until the end of the proceedings in the second instance (Article 510 § 1 of the Code of Civil Procedure). If it turns out that the interested party is not a participant, the court summons them to participate in the case. By summoning to participate in the case, the summoned person becomes a participant (Article 510 § 2 of the Code of Civil Procedure) (Słyk 2014, 10).

Legal capacity is the ability to be a party and a participant in non-litigious proceedings (from birth). Until the age of 18, individuals do not have full legal capacity. A child can be a party in a civil case or a participant in non-litigious proceedings, in which case they act through a legal representative (parents, guardian, or curator), unless the legislator has granted them procedural capacity based on specific provisions (Bodio 2019, 15).

Joanna Bodio determined the current status of the child in judicial proceedings and the subjective qualifications of the child as a participant in non-litigious proceedings: judicial capacity, procedural capacity, postulatory capacity, procedural *locus standi*, and legal interest as conditions for the child to obtain the status of a participant in non-litigious proceedings (Bodio 2019). It is worth mentioning them briefly.

Procedural capacity in non-litigious proceedings concerning family matters applies to juveniles with limited legal capacity (aged 13 or older, unless completely incapacitated). Exceptionally, the guardianship court may limit or exclude the personal participation of a juvenile in proceedings if there are educational reasons for it (Article 573 of the Code of Civil Procedure). Every minor is a participant in proceedings before the guardianship court, and a child with limited legal capacity in matters concerning themselves may also personally perform procedural acts. According to the decision of the Supreme Court, "refusal to grant a child the rights of a participant in the proceedings does not constitute an obstacle to the court hearing the child (Article 574 of the Code of Civil Procedure), with the court should refrain from this right only in exceptional

cases if such a hearing is not meaningful” (Resolution of 26 January 1973; Case No. III CZP 101/71; OSNCP 1973 No. 7–8, item 118).

The legal capacity and procedural capacity of a child do not in themselves determine their participation in non-litigious proceedings. A child’s acquisition of the status of a participant in non-litigious proceedings also requires having a legal interest (as understood in Article 510 of the Civil Procedure Code) and procedural legitimacy (becoming a participant). Evaluative criteria (the ability to perform procedural acts, nature of the case, psychological maturity, mental development, the age of the child) determine the child’s autonomy but do not constitute a determinant of the legal interest justifying the child’s participation in non-litigious proceedings (Bodio 2019, 460). It is, therefore, incorrect to link the status of a participant in non-litigious proceedings with evaluative criteria. It follows that a younger child who has not reached the age of 13 may also be a participant and should be guaranteed this participation, and thus to defend their rights just like an older child. Conclusions from the comparative analysis of selected European legal systems conducted by Joanna Bodio show that in all legal systems, obtaining the status of a party (participant) in proceedings is associated with the necessity of having legal and procedural capacity, although both capacities are not always distinguished in civil procedure codes (Bodio 2019, 112–113). In countries where capacity has been regulated, it usually refers to legal capacity (e.g. in Germany and Austria). In some European countries’ law, a list of persons with legal capacity is provided (e.g. in Spain and Switzerland, even conceived children acquire it). Procedural capacity is gradable – depending on age – to full, limited, or lack thereof. Similarly to Poland, the limited procedural capacity of a minor does not involve limiting procedural acts but, rather, limiting the cases in which a child can perform all procedural acts.

Postulatory capacity is the ability to act independently in civil proceedings without a legal representative and the ability to personally act in civil proceedings; however, it requires having procedural capacity (Bodio 2019a, 35–49). In summary, the current rights of a child in court include: procedural capacity of a minor with limited legal capacity, the requirement to be heard, and the possibility to appeal court decisions.

In future and more detailed considerations, it will be worth contemplating how the status of a child in non-litigious proceedings should be defined, i.e.:

- whether based on the rights of other participants in the proceedings – equating the child’s status with that of adult participants, or
- whether to attribute to them a special status, subject to broader protection (see Helios, Jedlecka 2019; 2017).

The current comparative analysis conducted by Joanna Bodio indicates that in most foreign legal systems, the status of a child in non-litigious proceedings has not been clearly distinguished from that of adult participants (Bodio 2019,

114). This is also the case in Poland, where the legal system lacks a clearly defined status for children in non-litigious proceedings, which, in turn, necessitates determining their participation based on general provisions (Article 510 of the Code of Civil Procedure). As Bodio states, these regulations guarantee the child's subjective treatment in non-litigious proceedings, but do not grant them the status of a participant in such proceedings. The author proposes "considering the introduction – following the German solution – of a catalog of participants in various types of non-litigious proceedings (especially those where the status of the child is most contentious, i.e., in guardianship proceedings)", because "in this way, the court and interested parties would gain legal certainty as to who should be a participant in the proceedings, removing the existing dissonance between statutory regulation, doctrinal views, and court practice" (Bodio 2019, 115). In this situation, the court expert would also have a more specified role and clearer tasks. Furthermore, criteria for the proper and conscientious conduct of court examinations, as determined by the status of the child in non-litigious proceedings, and criteria for the selection of research methods, would be more clearly defined. Additionally, the court could more precisely define the formulation of the evidentiary thesis and questions concerning minors to the expert (see Gurgul 2013).

5. THE HEARING OF A CHILD BY THE COURT

An important issue associated with the discussed topic concerns whether a child should be heard mandatorily or if it is relatively mandatory. In the legislation of European countries, the obligation to hear a child applies to children of various ages (see Cieśliński 2015; 2021). Generally, it is linked to the child obtaining limited legal capacity, typically after reaching the age of 12 or 13. In exceptional situations, considering the child's maturity, it is possible to hear them at an earlier age (in Germany, even as young as 2–3 years old). According to the current wording of Article 576 § 2 of the Polish Code of Civil Procedure, the court will hear the child in matters concerning their person or property if their mental development, health condition, and level of maturity allow it, taking into account their reasonable wishes as far as possible. The hearing takes place outside the courtroom. Therefore, the hearing of a child is conditioned by three prerequisites occurring together. The following factors must be taken into consideration: 1) the child's mental development, 2) the child's health condition, and 3) the child's level of maturity (cf. Czerederecka 2010; Stojanowska 2018). Analogous prerequisites arise from the applicable provision in litigious proceedings, Article 216¹ of the Code of Civil Procedure. Considering the child's wishes in non-litigious proceedings is, in turn, conditioned by the existing possibilities and the reasonable nature of the child's wishes. "Since the hearing of a child is conditioned by the

aforementioned prerequisites, in the literature, it has been defined as ‘relatively mandatory’, dependent on the ‘subjective values of the child’” (Gudowski 2012, 265; 2023). Marcin Cieśliński (2015; 2021) and Dominika Kuna (2024) also strongly advocate for the mandatory hearing of a child, provided that their mental development, health condition, and level of maturity allow it. The child’s participation in non-litigious proceedings can be as a witness or with a hearing of the child. It is worth emphasising that merely hearing a child in proceedings by the court does not grant them the status of a participant in non-litigious proceedings (Bodio 2019, 462–463). The role of the court expert in the hearing of a child is of fundamental importance, primarily because their knowledge and specialised expertise can ensure that the child’s voice and needs are properly understood, presented, and considered in judicial decisions. Moreover, the expert should have the capacity to safeguard the child’s best interests, rights, and specific emotional needs throughout the proceedings.

In the context of the aforementioned Code of Civil Procedure and the strengthening of the procedural position of children, it is also worth addressing Article 216². This refers in particular to the legislation known as the “Kamilek bill,” which reinforces the child’s voice in civil procedure through, for example, introducing a child representative. Also, the Family and Guardianship Code, Article 99 § 1, brought changes here in 2023. Still, the recent amendments are insufficient. As Dominika Kuna points out,

In answering the question: “How can the voice of the child be heard?” revision of the current provisions and regulations that do not raise interpretive doubts would be advisable. Interpretation of the law offers many practical solutions, but the pool of conceptions surrounding the right to be heard makes a single solution very difficult. The latter is primarily related to the nature of family matters and the very participation of children in court procedures. The low visibility of children in the social sphere, which has lasted for centuries, has also resulted in their rights requiring continuous evolution. (Kuna 2014, 89)

On the other hand, such shortcomings in domestic legal systems are addressed by the Expert Panel working at the Council of Europe on child-friendly justice standards and guidelines, based on an extensive consultation with almost 3,800 children throughout Europe. The European Committee on Legal Cooperation (CDCJ) recommends and supports their implementation in domestic legal systems. In general, child-friendly justice is justice that is:

- accessible;
- age appropriate;
- speedy;
- diligent;
- adapted to and focused on the needs of the child;
- respectful of the right to due process;
- respectful of the right to participate in and to understand the proceedings;

- respectful of the right to private and family life;
- respectful of the right to integrity and dignity

(Council of Europe 2024; see also the Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice 2011).

6. STRENGTHENING THE CHILD'S POSITION IN NON-LITIGIOUS PROCEEDINGS

How to ensure better implementation of children's rights in judicial proceedings? This is a matter for consideration in terms of strengthening the child's position in non-litigious proceedings. A comparison of legal systems by Bodio (2019) has shown that the most rights were granted to children in the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008, in the non-litigious laws of Serbia and Montenegro, as well as in the Lithuanian Code of Civil Procedure. Examples of good practices that are in line with the European Convention on the Exercise of Children's Rights (Articles 3, 4, and 5 of the ECECR) include:

- the institution of legal representation in the form of a legal guardian (legislation in Germany);
- the regulation of the legal capacity of children (Germany, Austria);
- a catalogue of participants in proceedings – providing legal certainty for the court and interested parties as well as determining who should be a participant in the proceedings (Germany).

In the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008, the procedural rights of children are equated with the rights of adult participants in proceedings. According to the German legislation, a minor child capable of legal action upon reaching the age of 14 has the opportunity to independently pursue their interests in proceedings before the family court and influence the proceedings. They are entitled to act on their own behalf in proceedings concerning guardianship, the place of residence, as well as in matters related to their education or medical treatment, and in proceedings regulating their contacts with other individuals (Bodio 2019, 78). The strengthening of the child's position in non-litigious proceedings in Germany has been achieved through the introduction of the institution of legal representation in the form of a legal guardian, who represents the child's interests in proceedings before the family court. Legal representation is associated with the child's participation as a party to the proceedings and is required when the child is to be separated from the person under whose care they remain. The legal representative also provides the child with information about the subject matter, the progress of the proceedings, and possible outcomes (Bodio 2019, 80–81). Such protection of the child as the weaker party – due to their lack of independence, less

life experience compared to adults, and less knowledge and skills – is in line with the European Convention on the Exercise of Children’s Rights.

Another proposal involves introducing a catalogue of participants in various types of non-litigious proceedings, especially those where the status of the child is most contentious, such as guardianship proceedings. Such a solution, by introducing a catalogue of participants to remove disputes over the proceedings in which the child should have participant status, would provide legal certainty for the court and interested parties. This would eliminate dissonance between statutory regulation, doctrinal views, and court practice.

In the German law, under the FGG (the Act on Family Matters and Non-contentious Jurisdiction), children were initially included as “material participants”. However, the FamFG (the Act on Family Proceedings and Non-Contentious Jurisdiction) designated them as formal participants who, like their parents, actively participate in all proceedings concerning them (Bodio 2019, 80–81). When the subject of the proceedings relates to a child’s personal rights, children are equal participants in the proceedings alongside their parents, and they are granted procedural status. They can be heard by the court and also actively influence the outcome of the proceedings – either personally or through their legal representative.

7. EVIDENCE FROM THE OPINION OF A COURT EXPERT TEAM – THE ROLE OF FORENSIC EXPERTS

Evidence from the opinion of the expert court team has been regulated in Article 290¹ of the Polish Code of Civil Procedure, added by the Act of 5 August 2015 on expert court teams (Journal of Laws of 2015, item 1418).⁷ The tasks of court experts include:

- preparing opinions in family and guardianship cases, as well as in juvenile matters, based on conducted psychological, pedagogical, or medical examinations;
- conducting mediations;
- conducting environmental interviews in juvenile cases;
- providing specialised counselling for minors, juveniles, and their families.

The knowledge and experience of a forensic expert determine the quality of their opinion. In the scope of the tasks mentioned above, the role of a forensic expert is that of a consultant and opinion giver, with the latter being most prominent in preparing opinions for the court. Both roles raise ethical dilemmas concerning the

⁷ II CSKP 1199/22 – The best interest of the child, as the primary directive in decision-making in matters concerning the child and in resolving conflicts of interest between the child and other parties – Supreme Court Ruling.

information contained in forensic opinions, their use, and the welfare of the minor. In both criminal and civil cases (such as divorce, guardianship, or incapacitation cases), during interviews, the expert often learns about drastic behaviours of the subject towards others (family members, neighbours), facts about their sexual life, pre-existing illnesses, etc., which are sometimes embarrassing. Consequently, doubts arise about what information should be included in the opinion. It seems that two conjunctive criteria are essential here:

1) whether a specific piece of information would cause moral harm to the subject (infringing upon their welfare) or to the minor;

2) whether a specific piece of information is of significant relevance to procedural decisions.

Furthermore, frequent ethical dilemmas arise concerning the threat to the subjectivity of the child resulting from their participation in legal proceedings. It should be emphasised that the subjectivity of the child is less protected or weaker compared to the protection of the subjectivity of adult participants in legal proceedings due to specific factors that affect the child during childhood and adolescence.

The role of a court expert in fulfilling their advisory and consultative role should be determined by ethical standards and the skilful observance of these standards, depending on the situational context of the case under examination. The most important ethical and professional principles of forensic work include:

- the principle of respecting human dignity and protecting human welfare;
- the principle of observing professional secrecy and selectivity of information;
- the principle of adhering to the field of special knowledge;
- the principle of methodological and methodical integrity;
- the principle of communicative language;
- the principle of appropriate initiative (more in Stanik 2013).

Adherence to the aforementioned principles is often entangled in the individual cultural and social context of the case under examination. The actual implementation of these norms should ultimately indicate the level of trust in the authority of the expert, which translates into a broader context of public trust in the justice system.

8. LIMITED RIGHTS OF THE CHILD IN LEGAL PROCEDURES AND OTHER FACTORS NEGATIVELY AFFECTING SUPPORT OF THE CHILD'S SUBJECTIVITY AND WELFARE

Children have limited rights in legal proceedings and are more susceptible than adults to various risks stemming from factors such as their level of cognitive, intellectual, and emotional development, as well as experiences shaped by social relationships and micro- and macro-cultural influences. The most important psychological and sociocultural factors include:

- the level of cognitive, intellectual, and emotional development (individual developmental differences);
- the level of ethical development (competence in ethical decision-making and resolving ethical dilemmas);
- the level of knowledge and understanding of the specifics of the judicial process – knowledge and understanding concerning: informed consent to participate in the proceedings; the right to withdraw from participation in the examination; the right to privacy; as well as the right to participate in family court proceedings regarding custody and parental authority. Significant limitations in these areas are observed in the functioning of children compared to adults. As a result, children and adolescents often have little control over many key aspects of their participation in legal proceedings, which are guaranteed to adult participants.

This is also due to the various limitations that minors have, such as:

- limited life experiences – limited knowledge and understanding of the specifics of the problem subject to the judicial procedure (in family cases regarding parental authority, the custody over minors, and the regulation of contacts);
- limited social competencies – limited communication skills in expressing their own thoughts, feelings, needs, etc.;
- limitations resulting from environmental influences (influence of the family environment and significant individuals – authorities, school, peer group influence; social stigmatisation; commonly held stereotypes in the perception of, for example, children from single-parent families, families going through separation or divorce, and after a divorce). It sometimes happens that despite their resistance, minors still participate in legal proceedings and in examinations by court experts despite manifesting negative emotions, fear, and anxiety, if the consent has been given by parents/guardians or other adults (teachers, therapists) who are significant to the child, and who encourage them to participate – in such situations, it is difficult for the child to refuse (Stojanowska 1997; Stankowska 2012; Czeredrecka 2020; Gruza 2021).

Furthermore, children as participants in judicial procedures have a dual status: on the one hand, child protection and acting in the child's best interests, and on the

other hand – children have limited rights. It is legal guardians who make decisions on behalf of children regarding their participation, and sometimes these decisions do not protect the minors' welfare, and the child is treated as an object in the battle between parents, i.e. the actual parties to the judicial proceedings (manipulating the child in divorce proceedings). In these situations, professional support for the child is highly recommended, i.e. external assistance from outside the family, in order for the minor to express their will to participate in judicial proceedings in the most autonomous way possible. It is a task for psychologists and educators, but also for professionals in the field of ethics, to strengthen decision-making processes in minors based on a deep understanding of their own thoughts and feelings as well as the development of ethical competencies in situations involving moral dilemmas. It follows from this that providing professional support to the child in judicial proceedings from various perspectives is essential: legal knowledge, psychological and pedagogical support, and ethical support. Nevertheless, the responsibility for providing this support lies with the judge and the court-appointed expert in judicial proceedings, as they are individuals in direct contact with the child, usually on an individual basis, thereby creating conditions for communication tailored to the child's age. It is important to emphasise the following common correlation: the younger the child is, the more abstract the judicial proceedings and examination are for them, not to mention the judgment and decision of the court. However, these factors directly affect the child's daily functioning, i.e. their thoughts and feelings as well as relationships with others (Słyk 2015; Błażek, Lewandowska-Walter 2017; Mercer 2018).

9. PUBLIC TRUST

In the discussed context, there arises the question of shaping public trust in the process of judicial cognition and the impact of practice on changes in legislation. In the light of the current regulations, the weaker procedural position of a child compared to an adult may stem from their age, lack of education, limited life experience, lack of legal knowledge, and familiarity with judicial practice. The existing provisions limit the child's ability to independently assert rights in non-litigious proceedings. Actions should be aimed at securing the child's procedural rights and ensuring proper legal protection, in line with the principle of equal treatment of participants in non-litigious proceedings.

Regarding regulations normalising the status of children in non-litigious proceedings, as Bodio (2019) observes, despite the existence of a general provision (Article 510 of the Code of Civil Procedure), case law often denies children the status of participants in non-litigious proceedings in many cases where the outcome concerns their legal sphere, such as cases concerning parental authority or contact with the child.

Current judicial regulations require supplementation that would explicitly grant children the status of participants in non-litigious proceedings, clearly indicating the child's status as an interested party or participant in the proceedings, as at present a child's participation as a witness or with their testimony does not confer upon them the status of a participant in non-litigious proceedings. The Code of Civil Procedure does not link the hearing of a child to a specific age limit but, rather, to their mental development, health status, and level of maturity. Therefore, ensuring the realisation of the child's right to be heard as a duty of the court is an expression of caring for their welfare (Czerederecka 2020; Gruza 2021; Skubik-Ślusarczyk 2018; Słyk 2015; 2013).

Expert opinion provides assistance for judicial decisions. The specialised trust between the court and experts extends to public trust as well. As mentioned earlier, the expert opinion can also benefit other specialists who care for the welfare of minors outside the court's work. The expert opinion should not only help in adversarial truth-finding but also in the efforts made by doctors, psychologists, educators, therapists, ethicists, and other specialists to seek practical solutions to minors' problems. The results of experts' work are, therefore, of particular importance and significance not only in the activities of the courts, but also in the broader social context, i.e. in the work of professionals whose tasks focus on safeguarding the rights and welfare of children and in maintaining the participants knowledge and self-awareness, which deepens and expands through explanations of the circumstances of their functioning. It is a process of collaboration among different individuals and specialists to seek the truth, solve problems, and then improve the quality of life; and that of building public trust based on the use of scientific knowledge, skills, and social competencies of court officials, including court experts (Lewicka 2021; Cudak 2023; Dzierżanowski 2010; Gluza, Kołakowska-Halbersztadt, Tański 2013).

10. CONCLUDING REMARKS

To sum up the analyses and explorations provided above, the role of court experts (including psychologists, psychiatrists, and educators) is crucial in safeguarding the rights and welfare of children in family law proceedings. This is particularly significant when parental resources for fulfilling their roles are severely diminished, such as during protracted divorce proceedings. In such situations, the professional assistance of court-appointed experts, i.e. individuals outside the familial system, often serves as essential support in defending the child's best interests. The manner in which the court expert conducts assessments involving a child plays a significant role in protecting the child's rights. These evaluations must be carried out to the highest substantive standards and in accordance with the most rigorous ethical and methodological guidelines, which

is essential for maintaining public trust in the justice system. When the expert testimony is conducted reliably, not only does the child receive support, but the entire judicial process also becomes more transparent and credible in the eyes of society, fostering public confidence in the domestic and international institutions responsible for safeguarding the child's rights. There remain a number of points to be examined and revised, for example relating to differences in child's cognitive competence and autonomy, which may privilege older children attending the hearing. Therefore, the right to be heard is not everything and should be complemented by the right to be assisted (e.g. Daly 2017), thus entailing the need for further legal institutions, standards, and practices; but these points deserve distinct considerations.

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