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Placing a Child in Foster Care from a Legal Perspective

ABSTRACT: This article describes placing a child in foster care from a legal perspective. This legal instrument cannot be viewed in isolation from the fundamental rights of a child, most notably the right to care and upbringing in a natural family. Hence, this paper attempts to demonstrate the relationship between a child's right to care and upbringing in a natural family and the right to be provided foster care. In addition, if – for various reasons – a child is not able to permanently reside with his or her natural family, the rules of conduct related to placing the child in foster care are discussed. It should also be noted that, when making a competent decision about out-of-home placement of a child, the child's welfare must be taken into account and weighed against the welfare of the child's natural family, while foster care should be considered a "subsidiary" measure.
KEYWORDS: child, foster care, human rights, law regulations.

Introduction

This legal instrument of foster custody cannot be viewed in isolation from the fundamental rights of a child, most notably the right to care and upbringing in a natural family. These rights are directly or indirectly established in both international acts and Poland's family law (for the sake of clarity, the list of the relevant legal documents shall be limited to only a few examples). Noteworthy, the child's rights can also be indirectly derived from the provisions of the law establishing the right of a child to be placed in foster care. It should be made clearl that a child can be placed out of his or her natural environment only when the parents are unable to perform their parental tasks of providing proper care and upbringing. To make this complex

and problematic issue simpler, this parental dysfunction may essentially be attributed to reasons which are either within or beyond the control of the parents. Notwithstanding the nature of these reasons, it is beyond doubt that a child who is temporarily or permanently deprived of his or her family environment or can no longer stay in this family environment for its own sake should – for obvious reasons – be provided foster care.

The procedure of placing a child in foster care is inserted within a legal framework, but some of the rules of contact are not explicitly defined in statutory provisions. The issue of the principles of law has already been widely described in the legal literature (refer to, for example, Gizbert-Studnicki, 1988, pp. 16–26; Wróblewski, 1965, pp. 17–38). This aspect is not extensively addressed in this article and it is sufficient to conclude that the principles of law can be either formulated *expressis verbis* in legal acts or they can be decoded from the provisions of law (see Morawski, 2012, p. 58). The latter case is true for the rules of conduct to be followed when placing a child in foster care. These rules can be derived from the Act on Family Assistance and Alternative Care of June 9, 2011 (consolidated text of 2020, Item 821), (hereinafter: Family Assistance Act), and the Family and Guardianship Code Act of February 25, 1964 (consolidated text, Journal of Laws of 2020, Item 1359), (hereinafter: the Family Code), but the list is not exclusive. It should be pointed out, however, that all of the principles that are discussed in this paper are, in fact, intended to serve the best interests of a child.

Having said that, this article attempts to illustrate the relationship between the child's right to care and upbringing in a natural family and the child's right to be placed in foster care. Moreover, this paper aims to present the rules of conduct when placing a child in foster care.

A child's right to care and upbringing in a natural family and the right to foster care

Based on an analysis of international documents, in particular the Convention on the Rights of the Child adopted by the United Nations General Assembly on November 20, 1989 (Journal of Laws of 1991, No. 120, Item 526, as amended), (hereinafter: the Convention), as well as provisions of Polish law, including the Act of April 2, 1997, the Constitution of the Republic of Poland (Journal of Laws No. 78, Item 483 as amended), the provisions of the Family Assistance Act and Family Code, it can be concluded that a child has the primary right to care and education in its natural family, which precedes all other rights. This right is expressed either directly or indirectly. The right

of a child to foster care is valid only when parents are unable to provide proper care and upbringing, when the child can no longer stay in his or her current family environment, and provided that out-of-home placement is in the minor's best interest. In light of the foregoing, it can be assumed that the child's right to foster care is secondary (subsidiary) in relation to the child's right to care and upbringing in a natural family, something that I hope to demonstrate further in this paper. Before we proceed, it seems reasonable to discuss the term "foster care", which has already been mentioned several times, and to establish the meaning of the term "child's welfare", which was also referred to here.

In the relevant legal regulations, the term "foster care" is to be understood as entrusting the care of a child to persons other than the child's parents. However, this can only take place when parents cannot provide their child with care and upbringing. Moreover, foster care is – by essence – only a temporary measure (unlike adoption) and is an institutionalized form of custody (see Łakoma, 2008b, pp. 48–61). This understanding of the term is derived from, for example, Art. 2 Sec. 2 and Art. 32 Sec. 1 of the Family Assistance Act. Additionally, foster care may be either family-based or institutional (Article 34 of the Family Assistance Act). Forms of family foster care are as follows: foster families (kinship foster care, non-vocational foster families, professional foster families, including professionals serving as an emergency family shelter and specialist professional foster care), and family children's homes. Institutional forms of foster care include: care and education centers (of the following types: socialization, interventional, specialist and therapeutic, family-based), regional care and therapy centers, and pre-adoption intervention centers. For example, placing a child in a shelter for minors or another facility of this type does not constitute a form of foster care (refer to, for example, the judgment of the Provincial Administrative Court in Poznań of 26/02/2015, IV SA/Po 575/14, LEX 1653590).

Placing a child outside their natural family is considered a measure of the last resort. This ultimate measure interferes with the rights of the affected family and those of the child and must be primarily driven by the necessity to safeguard the rights and welfare of the child. The term "child's welfare" is a legal and judicial concept not covered by any legal definition. It can be understood in a variety of ways, depending on the scientific discipline and the subject of research. There have been attempts in the legal literature to clarify its meaning. According to one of the most popular definitions coined by Wanda Stojanowska – "the welfare of a child within the meaning of family law means a complex of intangible and tangible values necessary to ensure the

proper physical and spiritual development of a child and to properly prepare the child for professional work according to his or her talents; these values are determined by many different factors, the structure of which depends on the content of the applicable legal norm and the current situation of the child, assuming the convergence of the child's welfare with the social interest" (1999, p. 98). This concept was also stipulated in the case law. In particular, the decision of the Supreme Court of November 24, 2016, reads: "this expression should be understood in the context of specific factual circumstances, wherein it is necessary to specify here the right of protection of the life and health and any actions taken by other individuals aimed at ensuring conditions conducive to peaceful, proper, undisturbed development, respect for dignity and participation in the process of deciding about the child's situation" (II CA 1/16, OSNC 2017/7-8/90). Consequently, the term "child's welfare" lacks a precise and universal definition in law. The differences that emerge from these definitions can be mainly attributed to putting forward only selected elements of the child's welfare which are considered most important at the given moment. That being said, it can be assumed that: "the child's welfare incorporates anything that, in the objectified scale of values, promotes the proper physical and mental development of the child, taking into account the child's individual needs and the specific circumstances" (Łakoma, 2004a, pp. 90–91). The best interests and welfare of a child seem to be achieved, in particular, by exercising and respecting the child's rights. This can be achieved, for example, by creating conditions for the implementation of these rights, including the child's right to care and education in the natural family and, failing that, the child's right to foster care.

To return to the core of this analysis, the preamble to the Convention explicitly states that a child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding. This statement is further reinforced by Art. 7 Sec. 1, according to which a child has the right to be cared for by his or her parents. This right can also be derived indirectly from other regulations of this act of law, indicating the priority of parents in caring for a child, as laid down in, for example, Art. 3 and Art. 27 Sec. 2–3. Additionally, pursuant to Art. 9 Sec. 1 of the Convention, the States Parties to the Convention are to ensure that a child shall not be separated from his or her parents against their will, except when such separation is necessary for the best interests of the child. If this is the case, Art. 20 of the Convention should be followed, requiring that a child be temporarily or permanently deprived of his or her family environment, or in whose own best interests should not be allowed to

remain in that environment, shall be entitled to foster care. Such care could include, among others, foster placement, *kafalah* of Islamic law, adoption, or, if necessary, placement in suitable institutions for the care of children.

In Poland's law, the right of a child to care and upbringing in a natural family can be derived, among others, from Art. 72 Sec. 1–2 of the Polish Constitution, although indirectly (in terms of the protection aspect). In its light, the Republic of Poland is bound to ensure the protection of children's rights. A child deprived of parental care has the right to care (and assistance) provided by public authorities. It is worth noting that parental care is mentioned in the first place to emphasize its priority, which is uncontested. The child's right to care (and assistance) by public authorities is only mentioned in the context of children without parental care. In consideration of the foregoing and, in my opinion, the legislator considers the right to foster care as a necessary auxiliary measure supplementary to parental care, the latter being the primary one.

The right of a child to be brought up in a natural family also stems from Art. 4 Item 1 of the Family Assistance Act. Accordingly, when executing the Act, the subjectivity of the child and the family should be taken into account, as well as the child's right to care provided by his or her family, and if it is deemed necessary that the child is placed outside of his or her family, the child has the right to be provided care and upbringing in family forms of foster care, if it is in the best interests of the child. This provision clearly confirms the priority of parental care over foster care, which should be considered a subsidiary measure. Moreover, the child's right to be cared for and brought up by parents indirectly results from Art. 32 of the Family Assistance Act, indicating that the care provided by natural parents comes to the fore.

The indirectly expressed right of a child to care and upbringing in a natural family is also instituted in other provisions of the Act on Family Assistance and Alternative Care. It follows from this Act, and particularly its section II "Family Assistance" or the title of the act itself, that the greatest emphasis is placed on the broadly understood support of the natural family. The underlying idea is to reduce out-of-home placements of children. Without going into further detail, according to Art. 2 Sec. 1 of the Family Assistance Act, supporting a family experiencing difficulties in providing care and performing educational functions are among a set of planned measures aimed at restoring the family's ability to fulfill these parental functions. Following an analysis of the family's situation and the family environment, as well as the causes of the family's crisis, this type of support specifically relies on strengthening the role and functions of the family, developing its care and educational functions, counteracting its marginalization and social degradation, as well as striving

for its reintegration. Family support is delivered with the consent of the family and with its active participation, taking into account its resources and external sources of support. Family support can be carried out in the form of work with the family and assistance in the care and upbringing of a child. Work with the family is conducted, in particular, in the form of consultations and specialist counseling, therapy and mediation, legal assistance, especially in the field of family law, and also services for families with children, including care and specialist services. This form of family support is also carried out when a child is provisionally placed in foster care for justified reasons. A family assistant can also be assigned to a family, following an analysis of the family's situation by a social worker. According to Information of the Council of Ministers on the implementation in 2019 of the Act on Family Assistance and Alternative Care of June 9, 2011 (hereinafter: Information of 2019), a total of 3,934 family assistants were employed in 2019 and assigned to 44,324 families (pp. 4–5). Another form of family support provided is assistance in the care and upbringing of children. A child can be provided care and upbringing in a day support facility, or a family experiencing difficulties can be supported in its care and educational functions by a support family (these are people from the child's immediate environment who meet specific requirements). A support family – with the support of a family assistant – helps the family in crisis fulfill its childcare and upbringing functions, run the household, as well as in shaping and exercising the family's basic social roles. According to the relevant data, 104 support families were operating in 2019, offering assistance to 118 families (p. 6). It is apparent that the measures taken to support a family experiencing difficulties – through the use of legal instruments adequate to the family's needs – is intended to restore the family's ability to fulfill its care and educational functions. Such measures are consistent, among others, with the Commission Recommendation of February 20, 2013 – Investing in children: breaking the cycle of disadvantage (Journal of Laws UE L 59 of 02/03/2013, p. 5) Should a family fail to carry out its role or underperforms, the first measure is to support it. Placing a child in any form of foster care is the measure of last resort to be employed after all possible forms of support for the natural family have been exhausted. If despite the support provided, a child needs to be placed outside their family, support should continue so that the child can return to his or her natural family as soon as possible (see Łakoma, 2014c, pp. 334–336).

The Family Code holds references to the Act on Family Assistance and Alternative Care and confirms our previous conclusions. According to Article 112^3 § 1 of the Family Code, placement of a child in foster care can only be

contemplated when the previously used other measures as provided for in Art. 109 § 2 Items 1–4 and forms of assistance to the child's parents, referred to in the Act on Family Assistance and Alternative Care, have not led to the removal of risks to the child's welfare. As an exception, one of the forms of foster care can be implemented if the need to promptly provide alternative custody derives from a serious threat to the welfare of the child, in particular a threat to their life or health. At the same time, it must be pointed out that, at least under certain circumstances, placing a child in one of the forms of foster care can also be considered a form of family support. In my opinion, such a measure – apart from providing a child with the necessary care – can in some way be considered as a form of assistance provided to the natural family, as a remedy in the event of transient dysfunctions in parental guardianship. This is the conclusion drawn from the provisions of Art. 100 of the Family Code in conjunction with Art. 109 § 1–2 Item 5 and § 4 of the Family Code.

These conclusions provoke some thoughts. It is hard to resist the impression that the aforementioned provisions of the law are underpinned by the principle of subsidiarity and are intended to put it into effect. In light of the principle of subsidiarity, the family life should not be interfered with unless for justified reasons. This should be understood, in particular, as a prohibition of relieving the family of duties that it can cope with independently and unassisted, including childcare. If the family fails to fulfill its functions, it is entitled to support. Support should be preceded by an in-depth diagnosis of the family's needs, and then monitored and adjusted on an ongoing basis, so that it reflects the current family needs. These measures aim to make the family independent, that is to help and prepare the family to resume its basic functions. It is important not to make people dependent on the support provided. Therefore, after the family is again prepared to resume relative independence, its support should cease (see Andrzejewski, 2010a, pp. 159––161; Andrzejewski, 2011b, pp. 416–417).

Rules of conduct when placing a child in foster care

The principles on which the procedure aimed at placing a child in foster care is based can be derived mainly from the provisions of the Act on Family Assistance and Alternative Care, and the Family Code. The relevant acts of law also include the Convention, as well as the caselaw of the European Court of Human Rights (hereinafter: the ECtHR), based on Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on November 4, 1950, subsequently amended by Protocols No. 3, 5

and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, Item 284, as amended) (hereinafter: the ECHR).

The principles that will be discussed are closely interrelated, often complement each other and intertwine, influencing each other to a greater or lesser extent. It is often the case that one principle is derived from another, and following a certain principle is aimed at placing another principle into effect. There is no doubt, however, that their primary objective is to respect the child's rights and to safeguard the child's welfare weighed against the best interest of a natural family; as a result, foster care should be considered a subsidiary measure to the natural and primary parental care. In my opinion, this paves the way for the following rules of conduct to be complied with when placing a child in foster care.

The basic principle is that a child can only be placed in foster care based on a court decision, as stipulated in Art. 35 Sec. 1 of the Family Assistance Act (for example, refer to the judgment of the Supreme Administrative Court of November 13, 2018, I OSK 1090/18, LEX 2598995; judgment of the Provincial Administrative Court in Gdańsk of March 28, 2019, III SA/Gd 102/19, LEX 2650613; judgment of the Provincial Administrative Court in Łódź of November 14, 2019, II SA/Łd 505/19, LEX 2745635; judgment of the Provincial Administrative Court in Gdańsk of December 5, 2019, III SA/Gd 552/19, LEX 2761401). At the same time, however, the cited provision also lays down other options for placing a child in foster care. A child can be placed in one of the family-based forms of foster care in a state of urgency, at the request or with the consent of the child's parents, based on an appropriate agreement. Without going into detail, this agreement can be concluded in the event that a child needs urgent alternative care due to a dysfunctional family situation. In this case, however, a court is to be immediately notified of the concluded agreement, and the court either confirms or denies that a child needs to be placed in foster care. If the court confirms the legitimacy of placing the child in foster custody, the agreement expires because establishing foster care for the child is mandated by a court decision.

The principle of placing a child in foster care based on a court decision can also be derogated if the Police or the Border Guard bring a child to a professional foster family acting as an emergency family shelter, or where a child is placed there at the request of his or her parents, of the child itself or another person, in the case referred to in Art. 12a of the Act of July 29, 2005, on Counteracting Domestic Violence (consolidated text, Journal of Laws of 2020, Item 218), (Article 58 Sec. 1 of the Family Assistance Act). In the first case, a child is brought to a foster family if the child's welfare, especially life

and health, is at risk, or if a child is abandoned by parents, or if the parents' identity cannot be established. This may apply to both a child with Polish citizenship and a child who is a foreigner under the Polish law. The second case involves a direct threat to the life or health of a child due to domestic violence. Here, a social worker performing official duties has the right to take the child from his or her family and place the child with another relative not residing with the child, a foster family, or a care and educational institution. According to the judgment of ECtHR in the case *D.M.D. v. Romania* of October 3, 2017, 23022/13 (LEX 2363076), "[…] The fundamental dignity of the child means that there can be no compromise in condemning violence against children, whether or not it is accepted as "tradition" or justified by "discipline". […] The uniqueness of children – their potential and sensitivity, their dependence on adults – absolutely requires them to have greater, not lesser, protection against violence, including corporal punishment in the home environment […]".

It should only be mentioned that similar regulations can also be found in the provisions relating to intervention-type care and educational institutions (see Art. 103 Sec. 2 Items 2–3 and 8 of the Family Assistance Act).

Notwithstanding the circumstances in which a child is placed in foster custody, the competent court is informed immediately of such a measure, not later than within 24 hours. The court examines the legitimacy of placing the child outside the family and if this measure is deemed justified, an appropriate decision is issued.

To reflect the provisional nature of foster care, a child placed in one of the forms of foster care should stay there only for a certain period of time, usually until the situation in the child's natural family improves to the extent that it can resume its childcare duties. The European Court of Human Rights issued a similar opinion on this issue in the caselaw based on Art. 8 of the ECHR. In one of the more recent judgments, it expressly confirmed that: "[…] The placement of a child in foster care should, in principle, be regarded as a provisional measure that must be terminated as soon as circumstances allow, and the enforcement of any provisional guardianship measures should correspond to the final purpose of reuniting the biological parent with the child […]" (ECtHR judgment in the case *RMS v. Spain* of June 18, 2013, 28775/12, www.echr.coe.int). "[…] For a parent and a child, living together is an essential element of family life […]" (ECtHR judgment in the case *Santos Nunes v. Portugal* of May 22, 2012, 61173/08, LEX 1164649). "[…] Art. 8 lays down the right of parents to obtain means that would enable them to be reunited with their children and an obligation on the part of national

authorities to do so. The lapse of time may have irreversible consequences for the relationship between the child and the parent with whom the child does not live […]" (ECtHR judgment in the case *Malec v. Poland* of June 28, 2016, 28623/12, LEX 2061135; see also ECtHR judgment in the case *Oller Kamińska v. Poland* of January 18, 2018, 28481/12, LEX 2427010). Admittedly, it follows from Art. 37 of the Family Assistance Act that placing a child into one of the forms of foster care may continue until they reach the age of majority, or even until they reach the age of 25 years (with certain requirements being met), but this possibility is an exception to the mentioned rule (see for example the judgment of the Provincial Administrative Court in Szczecin of May 11, 2017, II SA/Sz 329/17, LEX 2297655; judgment of the Provincial Administrative Court in Szczecin of May 31, 2017, II SA/Sz 439/17, LEX 2314419; judgment of the Provincial Administrative Court in Szczecin of June 6, 2019, II SA/Sz 436/19, LEX 2703602). The principle of provisional foster care is to be implemented primarily through the child's return to the natural family, which is facilitated through family support, which is to continue also when a child is placed in foster care. This principle is confirmed and specified in the subsequent provisions of this legal act. According to Art. 4 Item 2, when applying the Family Assistance Act, the right of the child to return to the natural family should be taken into account. However, according to Art. 33 Item 1 of the Family Assistance Act, foster care inherently involves working with the family to enable the return of the child to his or her natural family or when it is impossible – the adoption of a child, and if adoption is not an option – delivery of care and education in a foster environment. The principle in question can also be derived from the regulations strictly relating to family-based foster care. For example, according to Art. 47 Sec. 6 of the Family Assistance Act, if the reason for placing a child in a foster family or a family home for children has ceased to exist, the organizer of family foster care informs the competent court that the child's return to the family can be considered. Likewise, this option is also expressed in Art. 58 Sec. 4 of the Family Assistance Act. The principle of foster care as a provisional measure also applies to children placed in one of the institutional forms of foster care. Both care and education centers of any type, as well as regional care and therapy centers and pre-adoption intervention centers, have the statutory duty to take measures in this regard (see Art. 93 Sec. 4 Item 4, Art. 113, Art. 136 Item 6 of the Family Assistance Act). Accordingly, it follows from Art. 112 (4) of the Family Code that a child is placed in foster care until the conditions for his or her return to the family (or adoption) are met.

These provisions of law confirm the provisional nature of foster care and the necessity to take actions that will, in effect, allow the child to return primarily to his or her natural family environment. In practice, the implementation of this principle is by no means easy. It is not uncommon for a child to stay in foster care until he or she reaches the age of majority, and sometimes even longer, for justified reasons. However, this is not the underlying assumption (for more on this topic, see for example Prusinowska-Marek, 2019, pp. 43–78).

Another procedural rule to be followed is that a child should be placed in foster care located as close as possible to the child's current place of residence. This principle is explicitly expressed for example in Art. 112^7 § 2 of the Family Code, according to which the court is to place the child in foster care in the *powiat* municipality of the child's place of residence, as far as possible. This is important for at least two reasons. The first one is attributed to a specific method of financing a child's stay in foster care (see Art. 191 of the Family Assistance Act). The second, however, stems from the need to maintain contacts between a child placed in foster care and his or her parents, but also other relatives. Maintaining these contacts – as long as it is in the child's best interest – can be considered a separate rule of conduct when placing a child in foster care. For the child to maintain contact with his or her family is one of the conditions for successful family reintegration. In particular, a child can personally keep in touch with his or her family members (visits, telephone calls) or maintain contact by e-mail, telephone, etc. These contacts – in whatever form – are of major importance to both the child and his or her parents. However, in every case in which these contacts are not in the best interest of a child, there is a need to restrict or even prohibit them. A more detailed description of this issue can be found in the provisions of the Family Code (see Art. 113–113^6). ECtHR also recognized the need to maintain contact between the child and his or her parents in particular. Several judgments from the ECtHR have highlighted that, as a rule, it is in the best interest of the child to maintain contact with both parents, except in cases of lawful restrictions, justified on the grounds of the child's best interests (see for example ECtHR judgment of January 10, 2017, in the case *Nowakowski v. Poland*, 32407/13, LEX 2184932). Maintaining mutual contact between parents and children is a fundamental element of family life (see ECtHR judgment in the case *A. Schultz and M. Schultz v. Poland* of January 8, 2002, 50510/99, LEX 50239). As a general rule, contact between parents and children should be maintained so that the ties between them are not completely severed (see ECtHR judgment in the case *PM v. Great Britain* of July 19, 2005, 6638/03,

LEX 154376), because: "[…] it is in the best interest of the child to maintain the ties with the family, except in cases where the family has been found to be particularly dysfunctional […]" (ECtHR judgment in the case *Tlapak and others v. Germany* of March 22, 2018, 11308/16, LEX 2459262; see also ECtHR judgment in the case *Wetjen and others v. Germany* of March 22, 2018, 68125/14, LEX 2459283).

The Act on Family Assistance and Alternative Care also points out that foster care should enable a child to establish and maintain close personal contacts with their family (Article 33 Item 2c). According to Art. 4 Item 3 of this Act, the child's right to maintain personal contacts with his or her parents should be taken into account when the provisions of this Act are put into effect, except where the court has prohibited such contacts. This right, although indirectly, is also confirmed by other regulations of this Act (see, for example, Article 40 Sec. 1 Item 7). The importance of maintaining family contacts is also explicitly confirmed in a Regulation of the Minister of Labor and Social Policy of December 9, 2011, on training for candidate foster parents (Journal of Laws No. 274, Item 1620). Accordingly, the training program for candidate foster parents includes knowledge about the importance of biological family in the child's life and guidelines for the participation of the foster family in the plan of working with a natural family, with particular emphasis on direct and indirect contacts with this family and measures aimed at its reintegration. Institutional forms of foster care are also required to enable contacts between a child and his or her parents and other relatives unless the court decides otherwise (see Art. 93, Sec. 4, Item 3, Art. 113, Art. 139a Sec. 1 of the Family Assistance Act). Moreover, formal inspections of these forms of foster care include, in particular, activities aimed at maintaining child–family contact (see Article 122a of the Family Assistance Act).

Another rule – the principle of appropriate selection of foster care for a specific child – is complex. This principle incorporates specific elements that are, in fact, essential to put it into effect. One of them is the priority of family-based foster care (see, for example, Art. 4 Item 1 and Art. 109 Sec. 1 of the Family Assistance Act) over its institutional forms. A child who is to be placed outside the natural family should be taken care of primarily in one of the family-based forms of foster care, preferably in the appropriate type of foster family. This usually serves the child's best interests. This principle is also incorporated in the Family Code. For example, according to Art. 112^6 of the Family Code, foster custody over a child with a disability certificate or a statement of a moderate or significant degree of disability is entrusted primarily to a professional foster family. In addition, according to Art. 112^7

§ 1 of the Family Code, the court places the child in institutional custody if the child cannot be placed in a foster family or if this is not reasonable for other material reasons. This confirms that, when deciding to place a child in a specific form of foster care, one should act with caution, striving to provide the child with optimal care, i.e. care determined by and tailored to the child's needs in the broad sense of the word. Apparently, this is how the best interests of the child can be safeguarded.

Another element of this principle is that, in exercising foster care, priority is given to the child's relatives. Recognizing the advantages of professional foster care, it is difficult not to notice the importance of foster families or other family forms of foster care created by persons related to a child. The preference for kinship foster care results primarily from the need to minimize the discomfort that a child may feel when placed in a foreign environment. Nevertheless, surrounding the child with relatives is not in itself sufficient to justify placing a child in kinship foster care. Still, it is important that these persons meet the requirements specified by the law, which to some extent warrant proper delivery of foster care.

Another element of this principle, which applies mainly to family-based foster care, is that foster parents need to accept taking a child in their custody. Placing a child in a foster family – regardless of its category and (in principle) of the procedure under which a child is placed in foster care – can only be put into effect after obtaining the consent of the foster parents (Art. 36 of the Family Assistance Act). This means that, if candidate foster parents withdraw their consent to perform the function of a foster family for a specific minor, the guardianship court conducting *ex officio* proceedings concerning the care of a minor should – pursuant to Art. 355 § 1 in conjunction with Art. 13 § 2 of the Act of November 17, 1964, the Code of Civil Procedure (consolidated text: Journal of Laws of 2020, Item 1575, as amended), (hereinafter: the Code of Civil Procedure) – discontinue the proceedings concerning the candidate foster family who refused to grant their consent, and then – under Art. 570^1 § 3 of the Code of Civil Procedure and Art. 71 of the Family Assistance Act – the court asks a local family support center to indicate other candidate foster parents and conduct further proceedings with their participation (see the decision of the Supreme Court of January 16, 2014, IV CZ 135/13, LEX 1430575). It can be argued that the proper functioning of a foster family largely depends on whether foster parents accept the child to be placed with them. Prior consent also allows a foster family to properly prepare for the arrival of a child, which is another important precondition for successfully exercising foster care. This applies in particular to foster families or family homes for

children established by persons who are not the child's relatives (see Art. 47 Sec. 1–2 of the Family Assistance Act). Also, a child who is to be placed in a specific form of foster care (with some exceptions) should be allowed to express his or her opinion on this matter. If the child has sufficient knowledge (depending, among others, on the child's age, mental development, or emotional state), his or her opinion may significantly influence the proper selection of foster care. The right of the child to express their opinion can be drawn from Art. 72 Sec. 3 of the Polish Constitution. Accordingly, in the course of establishing the rights of a child, public authorities, and persons responsible for the child are obliged to hear and, if possible, take into account the child's opinion. This issue is discussed in more detail for example in Art. 4 Item 8 of the Family Assistance Act, from which it follows that when exercising the Act, the child's right to information and to express opinions on matters that concern him or her should be taken into account, to the extent appropriate to the child's age and level of development. There is no doubt that the acceptance by a child of a specific form of foster care at this stage provides good perspectives for the child's proper functioning. This is also confirmed in Art. 576 § 2 of the Code of Civil Procedure, which states that, before issuing a ruling in cases concerning, in particular, a child, the court hears the child, as far as the child's mental development, health, and degree of maturity allow it, and takes into account the child's reasonable wishes, as far as possible. As laid down in caselaw, a court placing a child in foster care should perform a comprehensive casuistic examination of the child's needs and to adapt to them not only the form of foster care but also the people who will exercise this care. This approach seems to be of importance especially in the case of family foster care (see the resolution of the Supreme Court of November 14, 2014, III CZP 65/14, OSNC 2015/4/38).

As part of the principle of selecting an appropriate foster care, one must not prescind the need to respect the child's right to maintain their religious and cultural identity, as laid down in, among others, Art. 20 Sec. 3 of the Convention. That said, if a child was to be placed, for example, in a foster family, it seems appropriate to choose a family that will be able to ensure continuity of the child's upbringing and preservation of the child's ethnic, religious, cultural, and linguistic identity (for more on this issue See, for example, Burtowy, Zajączkowska-Burtowy, 2020, pp. 101–115).

Another rule has to do with the optimal number of children placed in foster care. It also involves the principle of not separating siblings, which will be discussed later. In particular, Art. 53 of the Family Assistance Act stipulates that no more than 3 children or persons who have reached the age

of majority in foster care (in the circumstances laid down in Article 37 Sec. 2) may stay in a professional foster family or a non-professional foster family at the same time. In the case of a sibling placement, more children are allowed with the consent of the foster family and after obtaining a positive opinion from the coordinator of family foster care. Art. 61 and Art. 67 Sec. 2–3 of the Family Assistance Act also govern this issue. By introducing such restrictions while maintaining the possibility of placing more children in a foster family, under certain circumstances, the legislator validly took into account the actual capacities of an individual foster family against the burden of tasks to be fulfilled by the people providing foster care. No restrictions on the number of children legitimately apply to kinship foster care. This is obviously attributed to the specificity of a kinship foster family, which can only be created by the people closest to the child, i.e. relatives or siblings. The rule in question is also reflected in the provisions relating to institutional foster care (see, in particular, Article 95 Sec. 3 to 3a, and Article 95 Sec. 4–4a of the Family Assistance Act). For example, no more than 30 children in total can be placed in a regional care and therapy center at the same time. This is fully justified and mandated by the specificity and tasks of this institution, which is oriented at providing care to children with special needs resulting from their state of health (Article 109 Sec. 2–3 of the Family Assistance Act).

Bearing in mind the already mentioned principle of not separating siblings, the first step is to look for a form of foster care that could be offered to all siblings. Where, for various reasons, another child is taken from his or her natural family, the best form of foster care for that child would be that in which the remaining siblings are already present. Respecting the principle of not separating siblings is enshrined in many legal regulations, including in the Act on Family Assistance and Alternative Care, as already mentioned in connection with restrictions on the number of children who may be placed in foster care. Also, Art. 112^8 of the Family Code confirms that siblings should be placed in the same foster facility unless this would be contrary to the best interests of a child. However, this principle is not absolute, as can be concluded from the wording of Art. 112^8 of the Family Code. Separation of siblings may be justified, for example, if one of the children (with a regulated legal situation) qualifies for adoption or needs to be placed in a specialized institution due to their health. Compliance with this rule may also be difficult in the case of multiple siblings or siblings with a large age span. In all these situations, decisions to separate siblings should be made in the best interests of all children (see Łakoma, 2014c, pp. 346–347). However, separating siblings does not have to mean severing all contact between them. On the contrary,

the role of foster care is to support such family ties, unless it is contrary to the best interests of a child.

The principle of payment for a child's foster care is governed by Art. 193 Sec. 1–2 and 6 of the Family Assistance Act. Parents are to pay a monthly fee for a child placed in foster care. They are jointly and severally responsible for this payment (see, for example, judgment of the Provincial Administrative Court in Szczecin of February 23, 2017, II SA/Sz 1420/16, LEX 2252601; judgment of the Supreme Administrative Court of June 19, 2019, I OSK 2323/17, LEX 2707133; judgment of the Provincial Administrative Court in Gliwice of January 23, 2019, IV SA/Gl 909/18, LEX 2617132). Solidarity means that payment can be claimed in whole or in part from both parents together or from each of them separately. Payment of the entire amount by any of the parents releases the other parent from this obligation (see Tryniszewska, 2012, p. 432). In this respect, it is important to underline that the parents' payment obligation accrues from the moment the child is placed in a specific form of foster care (see, for example, judgment of the Supreme Administrative Court of February 21, 2018, I OSK 672/16, LEX 2491545; judgment of the Provincial Administrative Court in Wrocław of November 7, 2019, IV SA/Wr 312/19, LEX 2743711). The payment obligation also applies to parents deprived of parental authority or whose parental responsibility has been suspended or limited (see, for example, judgment of the Provincial Administrative Court in Poznań of April 10, 2019, IV SA/Po 1266/18, LEX 2654084). Exceptionally, payment obligation does not apply to parents who disown their child immediately after birth. The established obligation to bear the costs of maintaining a child in foster care stems from the parents' maintenance obligation towards the child (see judgment of the Provincial Administrative Court in Poznań of April 18, 2019, II SA/Po 1095/18, LEX 2654277). This means that parents cannot transfer the burden of maintaining their own child to a municipality, which deserves full approval. Nevertheless, a proper balance must be maintained. Putting excessive financial burden on parents may discourage them from cooperating and taking actions aimed at restoring the child to the natural family. Hence, the decision on this matter should be preceded by a precise determination of the parents' current situation. It is necessary to balance the arguments and find the optimal solution that will primarily serve the child's best interests.

There are exceptions to the principle of covering the costs of a child's foster care by parents in cases specified in the Family Assistance Act. However, as laid down in Art. 194 Sec. 3 of this Act, placing the lowest financial burden on the child's parents takes precedence over placing the highest financial

burden. Decisions in this respect are discretionary (see, for example, judgment of the Supreme Administrative Court of June 14, 2017, I OSK 2370/15, LEX 2338564; judgment of the Provincial Administrative Court in Szczecin of March 1, 2018, II SA/Sz 1357/17, LEX 2466577; judgment of the Provincial Administrative Court in Gliwice of October 30, 2019, II SA/Gl 829/19, LEX 2744003). The authority shall not exceed the limits of administrative discretion if it manages to prove, in the event of a negative decision, that it has considered and comprehensively assessed all the circumstances relevant to the case, and the adopted decision is a consequence of the established facts (see, for example, judgment of the Provincial Administrative Court in Rzeszów of January 18, 2018, II SA/Rz 797/17, LEX 2444290; judgment of the Provincial Administrative Court in Szczecin of March 1, 2018, II SA/Sz 121/18, LEX 2466584).

The accepted practice to date has been that this payment is imposed on only a small fraction of parents. As a rule, expenses for the care and upbringing of a child placed in foster care are borne by the competent *powiat* municipality with territorial jurisdiction over the child's place of residence before the child was placed in foster care for the first time. The relevant Act also requires lower-tier municipalities (*gmina*) to co-finance these expenses. In the past, *gmina* municipalities were under no such obligation. Currently, under Art. 191 Sec. 9 of the Family Assistance Act, where a child is placed in foster care, the *gmina* municipality competent for the child's place of residence before the child was placed in foster care for the first time contributes to these expenses. This is to motivate the *gmina* municipalities to employ preventive measures with respect to natural families to prevent children from being placed in foster care. If a child is placed in foster care despite the support provided to their family, the expenses incurred by the *gmina* municipality in the first and subsequent years of the child's placement outside the family increase. This is justified by the necessity to prompt the *gmina* municipal authorities to undertake actions for the benefit of the family so that the child can return to the natural family as quickly as possible. This solution undoubtedly, albeit indirectly, contributes to the implementation of the child's right to care and upbringing in the natural family as the *gmina* municipality is motivated to take measures to eliminate the financial responsibility for the child's stay in foster care as soon as possible.

Conclusion

Laws governing the placement of a child in foster care directly or indirectly confirm that this form of custody is supplementary and secondary

to the child's right to care and upbringing in a natural family. First of all, a child has the right to be brought up in a natural family as it usually serves the child's best interests. Using one of the forms of foster care is mandated by the necessity to protect the rights of the child and his or her welfare and best interests. Besides exceptional circumstances, this measure can only be implemented after all possible forms of support for the natural family have been exhausted. The Act on Family Assistance and Alternative Care is intended to reduce the number of dysfunctional families and the number of children placed outside the family. According to data from 2019, the number of children placed in foster care in 2019 totaled 72,450 (p. 7), compared to 78,519 children in 2013 (see Information of the Council of Ministers on the implementation of the Act on Family Assistance and Alternative Care of June 9, 2011), (p. 12). There is no doubt that this Act will not eliminate all cases where, despite the support provided to a troubled family, it becomes necessary to separate a child from the parents. If either form of foster care needs to be instituted, the prescribed rules of procedure must be followed. Respecting them is primarily aimed at securing the child's welfare. Moreover, the underlying assumption is to serve the child's best interests. However, this analysis demonstrates that it is often difficult or impossible to follow all of the prescribed rules. This can be attributed to the fact that a very individual approach to each child and his or her family situation must be adopted. In my opinion, however, this should not be viewed as a disadvantage. On the contrary, it seems that ensuring the child's welfare requires determination of the child's individual situation; hence, the measures to be taken should be specifically tailored to suit the individual needs and requirements of the child concerned and the circumstances of a specific case.

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