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THE SECURITY OF A MINOR IN MEDIATION PROCEEDINGS ON FAMILY MATTERS

This article attempts to scientifically examine issues related to the safety of a minor participating in family mediation. The main part aims to present the benefits of a minor's participation in mediation, and to analyze the arguments against this. The study also aims to assess whether Polish regulations regarding family mediation are appropriate and sufficient for adequate protection of the safety and rights of minors in mediation proceedings. Is it necessary and justified for a minor to participate in mediation proceedings to end a family dispute? When making decisions in this regard, not only is the age of the minor important, but also the fact that minors, due to their physical, mental, emotional, and intellectual immaturity, require special protection and treatment. For this reason, the article also describes the role the mediator should play in guaranteeing the minor's rights, while satisfying their need for security in the family.

Keywords: individual safety, minors, family mediation, mediation proceedings.

1. THE CONCEPT OF SECURITY OF A MINOR AND MEDIATION

According to the United Nations Development Program (UNDP) and the Human Development Reports published in 1994, the security of the individual means protection against constant threats such as disease, hunger, or oppression and protection against violent and harmful shocks in everyday life. This document was among the first to put the individual at the center of the science of security, highlighting that the concept of individual security refers to the protection of people against old and new security threats. It recognizes the links and interdependencies between human rights and national security. The concept of individual security is the protection of everyday life and human dignity, focusing primarily on protection against threats (Woźniak, 2018). It is a broader concept than human rights because, alongside rights, it also includes freedom from threats. This concept definitely goes beyond the traditional concept of national security and also includes the development and respect for human rights as well as the need to satisfy basic needs and freedoms, such as survival, identity, independence, peace, possession, certainty of development, freedom from fear, the right to live in dignity, and guarantees of functioning and belonging to the family (Rychły-Lipińska, 2017). Thus, today, security is not only a matter of politics, military, society, or economy; it represents a certain state that assures

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the individual's existence and potential for development, in the sphere of basic human needs, which rank high in the hierarchy of existential values (Tryboń, Grabowska-Lepczak, Kwiatkowski, 2011). It concerns an individual (i.e., an adult or a minor) functioning in a given environment (e.g., within a family).

For this reason, this study aims to investigate whether Polish regulations on family mediation are appropriate and sufficient for ensuring the adequate protection of the safety and rights of a minor in mediation proceedings. Is the participation of a minor in such mediation proceedings necessary and justified for the resolution of a family dispute?

Undoubtedly, family mediation is the best method for communication and conflict prevention, while satisfying the minor's need for safety, primarily in terms of self-acceptance and self-esteem. Consequently, conducting mediation with the participation of minors is necessary, taking into account their needs and ensuring the protection of minors' best interests and welfare, as stated in Council of Europe Recommendation No. R(98)1². Unfortunately, the Polish legislator has not established specific regulations regarding the youngest participants in mediation proceedings, even though they have already been established in substantive and procedural civil law. Therefore, it should always be borne in mind that when dealing with a minor in mediation, we are dealing with an individual who, due to physical, mental, emotional, and intellectual immaturity, requires special protection and treatment (Sitarz, Bek, 2014).

2. THE CONCEPT OF A MINOR IN CIVIL LAW

The Civil Code of April 23, 1964, defines a minor as a person under the age of 18 years³. The age requirement as a condition for reaching the age of majority is objective, although it is not absolute (Jaros, 2015). It should be noted that not every person under the age of 18 is a minor because a person under 18 who is married becomes an adult. Article 10 § 1 of the Civil Code provides a statutory definition of the term "adult"; however, this definition does not fully encompass the meaning adopted by the legislator. This is evident in Article 10 § 2 c.c., where the first sentence does not raise any doubts that he understands this term in a broader sense (the term "adult" used in Art. 10 § 1 of the Civil Code aligns with the concept of "adult" used in Art. 43 k.p.a.). It follows from the above provisions that the legislator's understanding of the term "adult" includes two categories of persons: those who have turned 18 and those who, despite being under 18, have entered into marriage. The quoted provision does not define the concept of the age of majority or indicate the legal consequences associated with its attainment; however, the undoubted legal consequence of attaining the age of majority is the acquisition of full legal capacity. However, the meaning of the age of majority goes beyond legal capacity and even beyond the sphere of civil law. By law, a natural person becomes an adult at the age of 18, acquiring both biological and mental maturity formally at this designated moment. From this point, a natural person becomes capable of independently shaping his legal situation and gains the ability to understand both the meaning of the actions taken and declarations of will made by other entities (Serwach, 2014).

The legislator decided that a person who has turned 18 is mature enough, in terms of psychophysicality, to grant him or her the status of an adult. This legislative conviction forms the ratio legis of the adopted solution because exceeding the above age limit results

² Human Development Report from 1994 [Access: 1.03.2023]. Access on the internet: <https://hdr.undp.org/content/human-development-report-1994>.

³ Article 10 of the Act of April 23, 1964. Civil Code, Journal Laws of 2022, 1360, i.e.

in reaching the age of majority, irrespective of the psychophysical maturity level of the individual (Gudowski, 2021). While the process of reaching maturity varies among individuals, the establishment of a uniform age limit for all natural persons is justified by the fact that this solution facilitates legal transactions (Książak, 2014).

Colloquially, a minor is considered to be a young person, often of school age, until he or she meets the criteria for adulthood. Due to their age, limited experience, and incomplete mental or physical development, minors do not possess the full rights of adult members of the community in which they live. For this reason, special protection is necessary, which, among others, is provided by the provisions of civil or family law, including in mediation proceedings.

3. PROVISIONS CONCERNING A MINOR IN A CIVIL PROCESS USED IN FAMILY MEDIATION

According to Art. 573 § 2 c.c.p., the court may limit or exclude the minor's personal participation in the proceedings if justified by educational reasons. In turn, Art. 152 § 2 provides that the chairman may allow minors to attend an open session. Article 430 c.c.p. states that minors under the age of 13 and descendants of the parties under the age of 17 may not be questioned as witnesses. This implies that the same principles apply in family mediation. If a minor is not emotionally mature enough to participate in mediation proceedings, his or her participation is not recommended. The provisions of the Code of Civil Procedure expressly state that minors under the age of 13 cannot be interrogated as witnesses, and, thus, should not participate in family mediation. The final decision in this regard rests with the minor's parents and the mediator conducting the proceedings, as there is no direct prohibition. However, it should be noted that it is the parents' responsibility to listen to the minor, and the mediator is responsible for ensuring that the minor is heard during mediation by the parents or other adults, or by the mediator. A minor has the right to express his or her own opinion, but such an obligation cannot be imposed on the minor (Nordhelle, 2010). It seems reasonable to apply the principle specified in Art. 216¹ CCP, from which it is clear that in cases concerning a minor child, the court will hear them if their mental development, health, and degree of maturity allow it. In addition, the hearing of a minor should take place outside the courtroom, and pursuant to § 2 of the quoted provision, the court, depending on the circumstances, mental development, health, and maturity of the child, should take into account his or her opinion and reasonable wishes. The mediator should use the same procedure toward a minor during family mediation if he decides to hear the minor in a given case. The mediator should indicate to the parents of the minor the purpose and reasonable grounds for hearing the minor because it is ultimately the parents who are responsible for the obligation to listen and, if possible, to take into account the opinion of the child. However, regarding taking into account the views of the child, the mediator, as well as the court, must consider the circumstances of the case in relation to the child and the extent to which the reasonable wishes of the minor can be taken into account. Purpose-based interpretation, therefore, requires relativizing the application of Art. 216¹ c.c.p. only to the facts for which the child's opinion is legally relevant⁴.

⁴ See: judgment of the Court of Appeal in Gdańsk of January 20, 2016, V ACa 607/15, LEX No. 2052629.

4. FOR AND AGAINST THE PARTICIPATION OF A MINOR IN FAMILY MEDIATION

An important argument against a minor's participation in family mediation, especially regarding alimony, determining residence, or regulating contacts, is the lack of control the minor has over the implementation of such an agreement. In addition, even though the legislator has imposed the obligation on the mediator to check the fulfillment of the parties' obligations, the mediator lacks the tools to do so. A minor caught in the middle of an adult conflict often continues to live with the two parties until the case concludes in a concrete settlement. However, supporters of involving minors in family mediation highlight the beneficial effects of properly conducted mediation on the relationship between conflicting parties, as well as their psychological well-being, including "calming down" the minor (Gójska, Huryn, 2007). The dangers associated with mediation in family matters are no greater than those associated with participation in court proceedings. However, the key issue in this case is the mediator's ability to conduct negotiations while maintaining the balance of the parties and providing some kind of protection for the minor (Święcicka, 2021). Therefore, mediation involving minors requires significant effort and skills from the mediator and should involve a psychologist or a mediator who has such education. Otherwise, it may lead to destabilization of family life and frustration due to the inability to actively participate in everyday family matters (Fiałkowski, 2017). The mediator conducting mediation with the participation of a minor should ensure, above all, the safety of the parties involved in the conflict, maintaining their balance and considering the interests and needs of the child participating in such mediation (Przybyła-Basista, 2006). According to Art. 436. k.p.c., if there are prospects for maintaining the marriage, the court may refer the parties to mediation. If the parties have not agreed on a mediator, the court directs them to a permanent mediator with theoretical knowledge or education, particularly in psychology, pedagogy, sociology, or law, and practical skills in mediation in family matters⁵. This means that such a mediator should have the necessary knowledge and practical skills in family mediation. Unfortunately, the regulations lack specific guidelines on the skills and qualifications a family mediator should possess. The knowledge acquired during studies in the aforementioned disciplines may be helpful in conducting family mediation with the participation of a minor, but it does not guarantee the proper protection of his or her interests and needs (Wybrańczyk, 2022).

Why should one consider involving a minor in family mediation if it is not necessary? From both procedural and family mediation perspectives, the most important aspect seems to be reaching a settlement as a necessity (Kaszczyszyn, 2015). Family mediation with the participation of a minor should primarily aim at meeting his or her psychological needs. This enables the minor to present his or her point of view on the matter, relieve tension, express anger, and, most importantly, understand why the parents are separating and the reasons behind the residence arrangements with one parent while the other has to pay child support. Such mediation often allows one of the parents to admit guilt or offer an apology. It enables forgiveness, which leads to the signing of an agreement. Although this does not always completely resolve the conflict, it is only an externalized manifestation of the emotional state (Wilejczyk, 2013). Sometimes, this mediation allows the minor to have initial contact with one of the parents. For these reasons, family mediation requires the ability to work with the emotions of both parties, including the minor, and with the

⁵ Article 436 § 1 and 4 of the Act of November 17, 1964. Code of Civil Procedure, Journal of Laws 2021, 1805, i.e.

mediator's own emotions (Helios, Jedlecka, 2019). It is necessary for the mediator to be very self-aware and to work through his own attitudes and conflicts so that they do not block an open approach to the parties in mediation. A family mediator inviting a minor to participate in mediation should be able to recognize and cope with situations of violence and addictions in the family. In such cases, the actual lack of control over the implementation of the settlement by the mediator poses a high risk of the minor returning to the previous situation, being a victim of various types of violence and often still living with the perpetrator (Gójska, Huryn, 2007). Throughout the entire mediation process, a well-trained mediator can support a minor, who is the weakest party to the proceedings, and provide them with a free opportunity to disclose their needs in a fear-free manner and motivate all parties in the conflict to reach a fair agreement, considering the interests and needs of the minor involved in adult conflict. Therefore, it is important for the mediator to have a basic understanding of the minor's developmental psychology and consider the expected future development of the situation. The family is a dynamic system that evolves through various phases, each with its own specificities and more or less typical problems. An experienced and properly prepared family mediator should assist the family in anticipating the development of their situation and finding at least basic protection in the event of basic problems. Besides knowledge of psychology or sociology, the mediator must possess knowledge of the law. The mere development of an agreement by the parties, without the possibility of its approval by the court, is not sufficient. The mediator should have detailed knowledge of applicable family law, especially in resolving contentious issues regarding divorce, separation, alimony, contacts regulating, exercising parental authority, or meeting family needs. Only then can the mediator construct an agreement subject to approval or transposition into a judicial decision. Failure to approve the settlement in these matters may lead to the disregard of arrangements previously worked out jointly by the parties, including the minor, with the mediator's participation. This can become a source of further conflicts that arouse intense emotions and have a destructive effect on the minor's relationship with one of the parents. Often, quarreling spouses accuse each other of manipulating the child and turning him or her against the other parent (Czayka-Chelmińska, Glegoła-Szczap, 2015).

Family mediation with the participation of a minor should be a procedure designed to assist the conflicting parties, particularly the most vulnerable individual in the conflict (Kaźmierczak, Kaźmierczak, 2015). Primarily, such mediation should avoid the escalation of the conflict (Purc-Kurowicka, 2019). This is a dispute resolution method intended to mitigate intense emotions between parents and stabilize the minor's situation (Seroka, 2014). The mediator's role is to safeguard the child's interests and establish a list of his or her most important current and future needs, which are the criteria for evaluating the proposed solutions. Repeated references to this list during discussions will allow the minor's perspective to be included in the arrangements. Encouraging parents to focus on parental duties and their responsibility for the child's well-being, rather than on parental rights, will highlight the minor's needs and the importance of caring for his or her present and future. The mediator's continuous emphasis on these aspects is likely to result in an improvement in the minor's family situation, a calmer atmosphere at home, and a greater sense of security for the minor within the family.

Therefore, one should question whether excluding a minor from mediation proceedings can be detrimental to him or her. The answer to this question may be in the affirmative because a lack of mediation would cause further harm to the child due to a failure to resolve the conflict between the parents. However, a minor's participation in mediation should not

be conditioned by fear or greater parental conflict. Therefore, while indirect or remote mediation is possible, with the minor actively participating from a distance without direct involvement in the parents' conflict, where the parents can at most communicate the minor's decision, the strictly personal and individual participation of the minor in mediation is not advisable and poses risks to his or her mental health (Purc-Kurowicka, 2020). In mediations where the minor does not participate directly, parents can consult potential solutions with the child through the mediator. The manner in which such consultation is carried out should be discussed in advance, primarily to avoid creating a situation where the minor must choose between parents, potentially putting him or her in a situation of danger. Parents can also, between mediation sessions, test specific ideas or temporary arrangements while observing and asking the minor about his or her satisfaction with them. It is also possible to involve a person in the family mediation process who will represent the interests of the child, such as a psychologist. Based on an earlier interview with the child about his or her feelings, fears, preferences, and opinions, this person can neutrally assess which of the solutions proposed by the parents will be most beneficial for the minor and not pose a threat to his or her interests (Czayka-Chełmińska, Glegoła-Szczap, 2015).

5. SUMMARY

In conclusion, one should inquire whether a minor, previously residing in a conflicted family, full of tension and negative emotions, can effectively participate in mediation as an equal partner in the discussion. In such situations, would it not be reasonable to refer the parties to family therapy, possibly preceded by mediation meetings? What is certain is that family mediation cannot replace working with a psychologist. In addition, the focus on the future in family mediation, while aiding conflict resolution, may lead to underestimating the minor's needs. Improperly conducted mediation may also exacerbate negative consequences for the minor (Gójska, Huryn, 2007). Given the above, there is no definitive answer on whether a minor's participation in mediation proceedings concerning family matters is necessary and guarantees the protection of his or her basic rights as mandated by law. This is influenced by many factors independent of the parties or the mediator. When considering the direct participation of a minor in family mediation, not only the minor's age but also his or her level of emotional development and the degree of physical, mental, and intellectual maturity are important. Hence, only a well-trained, educated, and experienced family mediator can minimize the risk of concluding an agreement that is harmful or does not take into account the interest of a minor in mediation. Such a mediator can easily interpret the symptoms of a "violent family" and evaluate the extent to which mediation proceedings provide safety guarantees for the parties, especially the minor, ensuring he or she does not feel anxious or threatened.

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