

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN POLAND

Katarzyna Kościów-Kowalczyk, Judge in the District Court in Jawor, Poland (kashakaka@wp.pl)

Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on child participation in family and protection matters. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in Poland.

Key words: child participation; family law; child protection; children's rights; justice system; Poland.

The excerpt from the Polish constitution

Art. 72. of Polish Constitution about the protection of children's rights

1. The Republic of Poland ensures the protection of children's rights. Everyone has the right to demand that the organs of public authority protect children against violence, cruelty, exploitation and demoralization.

2. A child deprived of parental care has the right to the care and assistance of public authorities.

3. In the course of establishing the rights of the child, **public authorities and persons responsible for the child are obliged to hear and, if possible, take into account the child's opinion.**

By defining that a specific situation concerns the child, does he/she becomes a party to the proceedings? Does he/she have the right to legal representation by a lawyer? Are there limits to the intervention of this lawyer in comparison with the other parties? The lawyer has an ethical duty to represent only the child's opinion, including cases where he/she does not consider the child's opinion in accordance with his or her best interests?

Writing the answers to the questions, I will discuss the position of a child in the civil and the criminal procedure.

As a rule, the parents represent the child, unless there is a conflict of interest. And that rule applies to both procedures.

In the Polish Family and Guardianship Code, article 98 about representation of the child, states:

§ 1. The parents are the statutory representatives of the child under their parental responsibility. If the child remains under the parental responsibility of both parents, each of them may act alone as the legal representative of the child.

§ 2. However, neither parent may represent the child:

- 1) at legal actions between the children under their parental authority;
- 2) at legal actions between the child and one of the parents, or their spouse, unless the legal action consists in the free acquisition of an object by the child, or concerning means of the child's maintenance and upbringing owed by one parent to the child.

§3. The provisions of the preceding paragraph apply accordingly in proceedings before the court or other state authority.

Art. 99. If neither parent is able to represent the child under their parental responsibility, the child is represented by a custodian appointed by the court.

How does the child participate in Court proceedings? Directly, in front of the judge, or through an intermediary, either the lawyer or another professional? If it is another professional, can you identify it and specify its responsibilities, please?

There are some new provisions stating who can represent the child. They were introduced in 2019. Art. 99¹ § 1. A custodian representing a child may be an attorney-at-law or a legal adviser who shows particular knowledge of matters relating to the child, of the same type or corresponding to the case in which the child's representation is required or has completed training on the principles of representation the child's rights or needs. § 2. Where the degree of complexity of the case does not require it, in particular when the family court specifies in details

the content of the action, a guardian representing the child may also be appointed by another person with a higher legal education and demonstrating knowledge of the child's needs. If special circumstances justify it, a custodian may also be appointed by a person without higher legal education.

The guardian representing the child is authorized to perform all actions related to the case, also in terms of appealing and executing the judgment. The custodian obtains from the parents information about the child, its health, family situation and environment, to the extent necessary for the correct representation of the child. For obtaining information about the child, the guardian representing the child may also apply to bodies or institutions as well as associations and social organizations to which the child belongs or which provide assistance to the child. If the mental development, health and maturity of the child allow it, the person representing the child establishes contact with the child and informs him/her about the activities undertaken, the course of the proceedings and the manner of its completion and the consequences of the actions taken for his/her legal situation, in an understandable and adapted to the degree of child's development manner. The officer representing the child is obliged to keep secret the circumstances of the case, about which he learned due to the activities performed, with the exception of reliable information about crimes committed to the detriment of the child. In the event that an advocate or legal advisor has been appointed the guardian representing the child, this secrecy is a professional secrecy.

If the participation is direct, is it voluntary? In this case, who consults the child if and how he/she wants to participate? Are there any institutional protocols on how to do that? Are there any informative materials specially prepared for children about its participation? Can you share it with our members?

The judge is conducting the hearing. The judge should start the hearing by introducing himself to the child, presenting an expert psychologist if he / she participates in the activities, explaining to the child the purpose of the hearing and the role of the child in court proceedings. The judge should ask the child for consent to the interview. If the child does not agree, the hearing should be abandoned without putting pressure on the child.

Art.216 ¹ of the Code of Civil Procedure about the hearing of a minor in litigation proceedings states: § 1. In cases involving a minor, *the court shall hear the minor if his mental development, health condition and maturity so permit. The minor shall be heard outside the courtroom.* § 2. Depending on the circumstances, mental development, health condition and maturity of the minor, *the court shall take into consideration the minor's opinion and reasonable wishes.*

Art. 576 of the Code of Civil Procedure about hearing of a statutory representative in non-contentious proceedings states: § 1. Before issuing a decision on the merits, the family court shall hear a statutory representative of the person involved in the proceedings. In more important cases, the court shall also, if possible, hear such person's relatives. § 2. In cases involving the person or property of a child, *the court shall hear the child if his mental development, health condition and maturity so permit, taking into consideration, if possible, the child's reasonable wishes. A minor shall be heard outside a courtroom.*

The manner of hearing minors in civil proceedings was developed by judges as part of their own practice. Uniform rules are still being prepared by the Ministry of Justice.

The rules of hearing minors are much more elaborated in the criminal procedure and described in more detail.

Art. 185a. (Verification of an aggrieved party in the capacity of a witness.)

§ 1. In cases concerning offences committed with the use of violence of illegal threat or defined in Chapters XXIII, XXV and XXVI of the Criminal Code, an injured party who is below the age of 15 at the time of the examination testifies as a witness only once, unless important circumstances come to light, the clarification of which requires a second examination, or unless the accused who was not assisted by a defence counsel during the first testimony so demands.

§ 2. The examination is conducted by the court with the attendance of an expert psychologist. The public prosecutor, the defence counsel and the attorney of the aggrieved party may participate in the examination. The person mentioned in Article 51 § 2 or an adult person indicated by the aggrieved party referred to in § 1 may attend the examination, if this does not limit the freedom of expression of the person giving testimony. If the accused notified of this procedure does not

have a defence counsel of his own choice, the court appoints for him a defence counsel ex officio.

§ 3. The transcript from the examination is read at the main trial. If the vision and sound of the hearing were recorded, they should be played.

§ 4. In cases concerning offences referred to in § 1, a minor injured party who at the time of the examination has attained 15 years of age, is examined in the conditions specified in § 1-3, if there is a justified concern that the examination carried out in different conditions might have a negative impact on his mental state.

Art. 185b. (Conditions of examination of a minor.)

§ 1. In cases concerning offences committed with the use of violence or illegal threat or offences defined in Chapter XXV or XXVI of the Criminal Code, a witness who, at the time of testifying, is not yet 15 may be subject to an examination upon conditions defined in Article 185a § 1-3, if his testimonies may be of vital importance to the case.

§ 2. In cases concerning offences referred to in § 1, a minor injured party who at the time of the examination has attained 15 years of age, is examined in the conditions specified in Article 177 § 1a, if there is a justified concern that a direct presence of the accused might hinder the witness's testimonies or have a negative impact on his mental state.

§ 3. The provisions of § 1 and 2 do not apply to a witness, who co-perpetrated the offence, with which criminal proceedings are concerned, or to a witness, whose offence is connected with the offence, with which criminal proceedings are concerned.

Interrogation of a child should be conducted in a manner: compliant with applicable legal regulations and standards, corresponding to the development potential of the interviewed child, ensuring the implementation of the child's rights during the interview, providing the child with special protection measures in the course of preparatory and court proceedings, ensuring proper representation of the child in the course of criminal proceedings, guaranteeing the child no contact with the perpetrator, consistent with the proper use of the premises and technical possibilities of the Friendly Child Interview Room, ensuring the elimination of all

circumstances that may result in re-interviewing the child and his secondary victimization.

If the child does not want to participate directly, what alternatives are there in your country to ensure indirect participation? If there are doubts about what the child really wants or if his/her opinion is really expressed, what's the solution in your country?

In the criminal procedure the hearing of the child should be preceded by an expert psychologist preparing the child for participation in it. When preparing a child for questioning, an expert psychologist should obtain as much information as possible about him/her, useful for the procedural activity, and assess the level of his/her intellectual development in terms of functions significant for making reliable testimony. An expert psychologist should assess the emotional state of the child in terms of the possibility of its participation in the procedural activity and inform all participants of the interviewing activity about this assessment. A contraindication to a child's participation in the interview is the symptoms of post-traumatic stress disorder, which limit the possibility of obtaining valuable evidence from him. An expert psychologist should provide the judge with information obtained about the child during the preparation of the child for questioning. In particular, this information should concern: the manner of formulating questions, the possibility of the child answering questions and indications to help in conducting procedural activities with the child's participation. In exceptional circumstances, the judge may consent to an expert psychologist playing a leading role in the child's interview, which should be reflected in the content of the prepared report.

In cases of direct participation, in what procedural phase does it take place? Is there a quantitative limit on consultation with the child? The child participates in this delimitation? How? When the opportunity to participate in the child is offered, what is the extent of options available to the child? I mean, should the child be limited to the aspects considered important by the adults or can the child bring other questions and possibilities?

During the hearing there is time for different questions and of course the child may bring up other aspects, important for the child. There is always a possibility for the child to be heard on the aspects which the child finds important.

How is the courtroom where participation takes place? And the formalities of the child's participation in front of the judge? Is the participation taking place in the regular courtroom or in the office? Who is present in the courtroom/cabinet? How are the people dressed? Can you present a photo of such an atmosphere?

The picture of the room you can find here:

<https://konin.sr.gov.pl/przyjazny-pokoj,m,mg,1,121>

All rooms are rather similar. Some samples:

<http://www.gdansk.so.gov.pl/aktualnosci/przyjazny-pokoj-przesluchan>

<http://www.sieradz.so.gov.pl/site/przyjazny-pokoj-przesluchan-5>

<https://walbrzych.sr.gov.pl/przyjazny-pokoj-przesluchan,m,m2,291>

<https://slupsk.sr.gov.pl/index.php?p=m&idg=mg,3,102>

There is a link with all useful materials prepared by the foundation, for example how to create child-friendly rooms.

<https://www.edukacja.fdds.pl/course/view.php?id=164>

Or a guide with tips on how to organize the child's hearing.

<https://www.edukacja.fdds.pl/course/view.php?id=164#section-6>

The regulation of the Minister of Justice on the preparation of an interview conducted in accordance with Art. 185a-185c of the Code of Criminal Procedure z 28.09. 2020 (previous regulation was in 2013) clarifies the conditions of the hearing, how the interrogation room should look like.

Before the interrogation begins, the expert psychologist conducts an initial interview with the witness in the interrogation room in order to establish contact with him, determine the individual needs of the witness and, if necessary, reduce the level of fear and anxiety of the witness. Before the interrogation of a minor who is under 15 years of age at the time of the interrogation, or a person suffering from mental retardation, and in other cases justified by the emotional state or personal characteristics of the witness, the judge, prosecutor, defense lawyer and

representative of the aggrieved party may agree with an expert psychologist on the way of formulating questions to a witness, in particular concerning the intimate sphere. If the witness is a minor who at the time of questioning is under 15 years of age, or a person suffering from mental retardation, or in other cases justified by emotional state or personal characteristics, an expert psychologist, if necessary, provides the judge with assistance in explaining the rules of the questioning in a manner that is understandable to the witness. The judge explains the rules of the hearing to the child including the right to refuse to testify, if the witness is entitled to it, the obligation to tell the truth and the fact of recording activities in the form of recording on media.

For the purpose of conducting an interview, an interview room and a technical room are separated. An interview room located in a court, prosecutor's office or police building should have a separate entrance or be located in such a way that access to it does not lead through parts of the building where accused, detained or victims of other acts are present. There should be a toilet in the immediate vicinity of the interview room; as close to the interview room as possible. A waiting room should be separated. The waiting room allows the witness to wait for the hearing in a place where unauthorized persons are not allowed to participate. The waiting room is equipped with books, magazines, crayons, paper and other items that enable the witness, including those under the age of 15, to spend time actively. There are no educational and information materials on violence and sexual abuse in the waiting room. The interview room should be sufficiently insulated from outside noise to ensure the proper quality of the sound recording. The colors of the interview room should be light and subdued. The interview room is equipped with furniture adapted for adults and furniture adapted for children, and the floor is carpeted.

Is there a protocol on how to address questions to the child in family and child protection issues? Who developed it? Can you share it with our members? If there is not, how do you do it?

There is a very professional and helpful on the field of child protection issues, foundation in Poland: The Empowering Children Foundation. The foundation does really a lot to improve our justice system and to build the child-friendly justice system. You can read on their page:

“We care about children's matters by actively engaging in the process of enacting Polish law. Our goal is to provide the youngest with protection in selected areas of legislation. We carry out advocacy activities by preparing speeches addressed to decision-makers, giving opinions on new and amended legal acts, participating in the work of selected parliamentary committees, diagnosing areas requiring the creation or amendment of law, and increasing politicians' awareness of the issues related to the legal protection of children.”

There is a very interesting report on their page concerning the practice of hearing the children by the Polish judges.

<https://fdds.pl/Resources/Persistent/2/2/e/1/22e15fbd0fa749413bec e58d3874687ac2a56a56/Raport-Praktyka-przesluchiwania-dzieci-w-Polsce.pdf>

At the end of the report there are THE RECOMMENDATIONS FOR CHANGES BASED ON THE RESEARCH RESULTS

In order to recognize the situation of threat to the child's well-being and take appropriate action, we recommend:

1. The introduction of protection of minor victims and witnesses under the age of 18 in the form of a uniform procedure of questioning regardless of age in Art. 185a and b of the CCP.

2. Changing the content of Art. 185a and b of the CCP in such a way that the minor's probation officer has the right to participate in the interrogation activities under the same conditions as the prosecutor, defense counsel and representative.

3. Ensuring the protection of a minor victim so that he does not have contact with the suspect / accused person during the interview.

4. Introducing obligatory information by the legal representative of the child about the child's health, mental condition, disability, functioning and special needs in order to assess the possibility of his participation in the interview.

5. Regulating the legal instruction of minors on the rights and obligations depending on the age of the child, including: abolishing the instruction on the right to refuse to testify, preparing the instruction sent to minors on the rights in a manner adapted to the age, level of mental development and health, in accordance with Directive 2012 / 29 / EU.

6. Providing juvenile victims with full information about the course of the proceedings, including interrogation activities, rights during the proceedings, in a manner adapted to their age, level of mental development and health.

7. Information materials for children who will be interviewed and their guardians should be available in electronic form, for example: a website, an application for a telephone, so that they can be transferred also when contact with the family is only by telephone or remote.

8. The probation officer representing the child in the proceedings should provide educational materials on the interview, in writing or using electronic means of communication, to the aggrieved child or to the child's parents who does not participate in the proceedings.

9. The minor aggrieved party should be prepared to interrogate, inter alia, by showing the room in which he will be interrogated.

10. Introduction of a scientifically proven methodology for interviewing children (on the NICHD protocol and 10 steps by Thomas D. Lyon), consisting of the provision of instructions on rights and obligations, exercises in the narrative of a neutral event, reporting the event with open questions.

11. Introduction: regular checking of the standards of interview rooms for minors and the equipment used in them, instructions for creating and equipping a friendly interview room, a minimum level of technical quality of equipment used in the interview room and promoting the creation of interview rooms in such a way as not to distract the child, e.g. by placing toys in the room.

12. Introducing the specialization of judges in the field of interviewing children, abandoning the selection of judges to conduct the activities of interviewing minors and, instead, selecting judges specializing in such hearings, who have the necessary competences and skills to carry out such an action.

13. Regular, cyclical, repeated training of judges, experts and prosecutors on juvenile interviewing. Introducing the methodology of interviewing children at university and legal apprenticeships.

14. Undertaking activities aimed at improving the quality of experts' work and the working conditions of court experts in proceedings involving children, incl. through: specialization of court experts in juvenile cases, creating lists of court experts with specialization marks, higher remuneration for experts, the possibility of working in teams

Who is allowed to ask questions the child? Are the questions asked directly by the party or are they intermediated by the judge? What are the concerns adopted by the judge to avoid questions that may embarrass or violate the rights of the child? How does the debate unfold around the regularity of questions if the child is present in the atmosphere?

The Empowering Children Foundation helps judges by preparing advice on how to conduct the hearing to protect the child during the procedure and to really let the child speak freely.

The judge is conducting the hearing. The judge should start the hearing by introducing himself to the child, presenting an expert psychologist if he / she participates in the activities, explaining to the child the purpose of the hearing and the role of the child in court proceedings. The judge should ask the child for consent to the interview. If the child does not agree, the hearing should be abandoned without putting pressure on them. During the hearing, neutral topics should be raised first, which do not burden the child emotionally and cognitively, and then essential issues concerning the case. The hearing judge should provide the child with freedom of expression and use language that he / she understands. During the conversation with the child, one should: use the active listening technique, paraphrase the child's statements in order to understand the content expressed by them, avoid judging the child, his statements and people close to him. Questions asked of the child should be open-ended. The degree of difficulty of the questions should be graded (from the easiest to the most difficult). Avoid direct questions about the outcome of a pending case.

When selecting an expert psychologist, one should take into account his qualifications, confirmed by documents confirming the completion of relevant training, experience in working with a child, as well as knowledge of interviewing procedures. Before the child is interviewed, an expert psychologist should receive the prosecutor's / court's decision to admit evidence based on his opinion. An expert psychologist prepares a child to participate in the interview. An expert psychologist assesses the emotional state of the child, the level of his intellectual and social development. The expert psychologist provides the judge with the conclusions resulting from the psychological assessment of the child. An expert psychologist watches over the emotional state of a child during the interview and obtains information about the event from him. The participation of an expert

psychologist in the interviewing of a child should be active. After the child has been interviewed, an expert psychologist prepares a psychological opinion with due diligence, containing all the important observations in the field of the child's functioning.

Is the decision taken in front of the child? If the child wants to, can he/she stay in the room?

No, the decision is not taken in front of the child. As the hearing takes place outside the courtroom, the child doesn't have the possibility to participate in the court hearing.

The responsibility for court decisions cannot be shifted to the child. The hearing judge should answer the child's questions and if possible, provide him with information about the further procedure in a way that he understands. The hearing should be concluded with a short conversation on neutral, emotional and non-cognizably non-burdensome topics, and thank the child for the conversation.

Are there any special rules about the consideration of the child's opinion in the context of the reasons for the decision? What's the weight given to the child's opinion? Is it the age a criteria? Which one? If the child's degree of maturity is taken into account, how is this maturity assessed? By whom? What are the criteria considered?

There are no specific rules. The child's opinion is very important to the final result of the case. Usually it's over 9 years old. The level of maturity is assessed by the judge on the basis of the knowledge acquired during the training and his own life and professional experience. If in doubt, he consults a psychologist. The Polish law leaves it to the judges to assess the degree of maturity of a child as the ability to express their opinion in the case, which may rely on the opinions of an expert psychologist. This assessment determines whether the court finds it justified to hold the hearing at all, and if it does, the degree of maturity will determine whether the court takes into account the child's opinion and his reasonable wishes. In matters relating to the child, the child has the capacity to act in the case when he or she is 13 (acquires limited legal capacity with this age), but for important reasons, the court may exclude even the minor from participating in such proceedings (Article 573 of the Code of Civil Procedure).

How is the decision communicated to the child? Are there any protocols for this communication? If the child has doubts or questions, is he/she allowed to speak with the judge? How do you do that?

No, the decision is not communicated to the child. In general after the case is over, the judge has no contact with the child. The decision may be communicated to the child by the parents involved in the case, if there is such a need. The child who has doubts, can come to the judge and ask questions. Sometimes it happens that a child writes letters to the court with questions. While the case is pending, letters are attached to the case, but usually such questions are answered by the inspecting judge - who has access to the case.

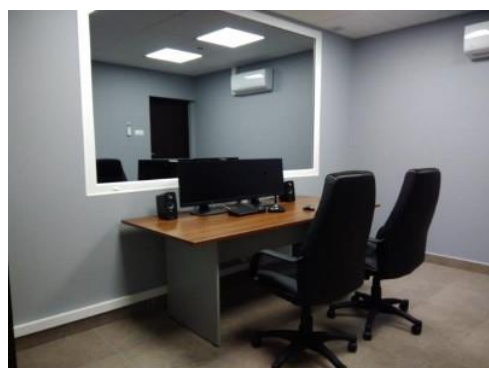
We want to know the child's opinion, but the child cannot be left with the conviction that its opinion is decisive. We don't want the child to feel overwhelmed.

Does the child have the right to appeal the decision?

No.

ATTACHMENTS – PHOTOS

Poland



There are some pictures of our so called "friendly rooms" from two courts (Warszawa and Hrubieszów) and links with pictures of other rooms (Konin, Gdańsk, Sieradz, Wałbrzych, Słupsk,). It is easy to find if you google the phrase: przyjazny pokój .

<https://konin.sr.gov.pl/przyjazny-pokoj,m,mg,1,121>

<http://www.gdansk.so.gov.pl/aktualnosci/przyjazny-pokoj-przesluchan>

<http://www.sieradz.so.gov.pl/site/przyjazny-pokoj-przesluchan-5>

<https://walbrzych.sr.gov.pl/przyjazny-pokoj-przesluchan,m,m2,291>

<https://slupsk.sr.gov.pl/index.php?p=m&idg=mg,3,102>

There is a link with all useful materials prepared by the foundation, for example how to create child-friendly rooms.

<https://www.edukacja.fdds.pl/course/view.php?id=164>

Or a guide with tips on how to organize the child's hearing.

<https://www.edukacja.fdds.pl/course/view.php?id=164#section-6>