

Lecture

The Legal Position of a Child in Polish Family Law and English Family Law

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The main purpose of this article is to show the child's position in Polish and English family law. The first part contains a presentation about Polish family law institutions that deal with the child's legal position. Then, solutions of English law are presented, which are quite different.

I. INTRODUCTION TO POLISH INSTITUTION OF PARENTAL AUTHORITY

Discussing the legal position of a child in Polish family law requires the presentation of some institutions of family law, which are related to the issue indicated in the title. The Polish Family and Guardianship Code is of key importance. It regulates the origin of the child and parental authority. The aim of this article is not to provide a meticulous analysis of each of these legal institutions, but rather to present a general outline, emphasizing the child's legal position in the context of these institutions.

At the outset, it is worth pointing out that every human being establishes relations with other people. We may place them in two categories:

- **Legally irrelevant relationships.** These relationships are not regulated by law. For example, the law does not regulate rights and obligations between friends. Similarly, the law does not regulate rights and obliga-

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tions between people living in cohabitation, an informal relationship.

- **Legal relations.** These are relationships that are regulated by law. An example of such a relationship may be the relation between people who have entered into a civil contract. The rights and obligations included in the contract have legal significance. Similarly, marriage is a legal relationship because the law regulates the rights and obligations of the spouses.

Polish family law regulates seven legal relationships:¹⁾

- marriage (as a relationship between husband and wife)
- kinship (as a relationship between related persons)
- adoption (as the relationship between the adoptive parent and adopted child)
- affinity (as the relationship between the spouse and relatives of the other spouse)
- parental authority (as between a father or mother towards a child, serving to protect the child)
- maintenance relationship²⁾ (as a relationship by which one family member is obliged to pay a certain amount of money to another family member because of a lack of state, in other words a commitment to financial support),

1) J. M. Łukasiewicz in J. M. Łukasiewicz (ed.), *Instytucje prawa rodzinnego*, p. 20, the same, *Podstawy obowiązku alimentacyjnego na gruncie art. 144 § 1 kro* [in:] M. Nazar (ed.) *Prawo cywilne – stanowienie, wykładnia i stosowanie. Księga pamiątkowa dla uczczenia setnej rocznicy urodzin Profesora Jerzego Ignatowicza*, Lublin 2015, p. 219.

2) S. Grzybowski, *Prawo rodzinne*, Warszawa 1980, p. 13, the same, *Pojęci i cechy charakterystyczne socjalistycznego prawa alimentacyjnego*, *Zeszyty Naukowe Uniwersytetu Jagiellońskiego* 1957, *Prawo* nr 4, p. 21. J. M. Łukasiewicz [in:] J. M. Łukasiewicz (ed.) *Instytucje*, p. 20. Alimony can exist as the relation of affinity between stepparent and stepchild.

- as well as the relationship of the property system between spouses (the system of commonality, the system of separation).³⁾

What is interesting is that only the three first of the previously presented legal relations—marriage, kinship and adoption—constitute the basis of the existence of the remaining legal relations. That is why there is an explicit division in literature between

- **basic source relations (such as marriage, kinship, and adoption)** and
- **depending relations (affinity, parental authority, alimony relation, and property relation between spouses).** These relations are dependent in the sense that they usually arise from a basic source relation. For example, alimony does not exist independently; it arises from kinship (art. 128 of the Family and Guardianship Code), marriage (art. 27 of the Family and Guardianship Code), or adoption (art. 131 and 121 §1 and 2 of the Family and Guardianship Code). Another example is parental authority, which also does not exist independently but rather from the relation of kinship (parenthood) or adoption.⁴⁾

In addition, there are some atypical relations—known as autonomous legal relations—because they exist independent of basic relations. These are:

- alimony relation between divorced spouses on the grounds of art. 60 of the Family and Guardianship Code
- alimony relation between people whose previous adoption relation was dissolved on the grounds of art. 125 of the Family and Guardianship Code

3) G. Jędrejek, *Intercyzy. Pojęcie. Treść. Dochodzenie roszczeń*, Warszawa 2010, p. 25, 29 i 30.

4) J. M. Łukasiewicz, *Ewolucja stosunku alimentacyjnego* [in:] J. Bryk, E. W. Pływaczewski (ed.) *Meandry prawa – teoria i praktyka. Księga jubileuszowa prof. zw. dra hab. Mieczysława Goettela*, Szczytno 2017, pp. 307–308.

- affinity relations existing after the cessation of marriage on the grounds of art. 61(8) of the Family and Guardianship Code
- alimony relation between the mother of an illegitimate child and a man not being her spouse on the grounds of art. 141 of the Family and Guardianship Code. Alimony can exist as the obligation of father to pay financial support for A pregnant mother despite the lack of marriage between them. She can demand three months of financial support within three months of pregnancy.

In addition alimony can arise from a relation of affinity between stepparent and stepchild (art. 144 of the Family and Guardianship Code).

II. RELATIONS OF PARENTS AND CHILDREN (PARENTHOOD) UNDER POLISH FAMILY LAW

There is a legal relationship of kinship between parent and child (**parenthood**). Only if the child's parents are indicated is it possible to indicate further relatives (siblings, grandparents, great-grandparents, etc.). Therefore, the question arises as to how one knows who the parent of a particular child is. In order to answer such a question, the content of the birth certificate should be determined. The parents of the child are indicated in the birth certificate.⁵⁾

At the birth of the child, the doctor issues a **birth card** to the child, which is sent to the registry office of the place of the event. The child's mother is indicated on this card. Within 21 days from the date of drawing up the child's birth card, the child's parents must report to provide their child's name.⁶⁾

5) P. Kasprzyk, Podręcznik urzędnika stanu cywilnego. Podstawowe instytucje prawa o aktach stanu cywilnego. Tom I, Lublin 2018, p. 127.

6) P. Kasprzyk, Podręcznik urzędnika stanu cywilnego. Podstawowe instytucje prawa o aktach stanu cywilnego. Tom I, Lublin 2018, p. 133. In the case of a dead child, the period is three years.

Then, the head of the registry office can draw up a child's birth certificate. If the parents fail to report within 21 days, the head of the civil registry office chooses a name for the child and the parents have the right to change it within six months.

According to art. 61 (9) of the Family and Guardianship Code, the mother of the child is the woman who gave birth to the child. This provision means that the mother is always certain (in Latin: *mater semper certa est*). In other words, the head of the civil registry office enters the birth certificate as that of the child of the woman who gave birth to him or her. Sometimes, however, unusual situations happen. For example, in the case of a surrogacy agreement, one woman gives her genetic material (the so-called genetic mother) and another woman gives birth to a child (the so-called biological mother). However, surrogacy agreements are not allowed in the Polish law, and there are no exceptions to the above rule. As a result, a mother is always a woman who gave birth to a child, even if a genetically different woman is a mother.⁷⁾

According to art. 62 of the Family and Guardianship Code, the child's father is, in principle, the husband of the child's mother.⁸⁾ This means that such a man will be recorded in the child's birth certificate as the child's father. The situation is more complex when there is no presumption of the child's origin from the mother's husband, *i.e.*, the father of the child is not the husband of the child's mother. In that case, the child's father may make a statement that he is the father of the child (the so-called recognition of paternity), and the mother of the child has three months to consent to such a statement. If the child's father does not want to make a statement, or the

7) J. M. Łukasiewicz, W. Kosior, *Family law*, Rzeszów 2018, p. 41.

8) If the child was born during the marriage or before the expiration of 300 days from its termination or annulment, the child is presumed to be from the mother's husband. This presumption does not apply if the child was born after 300 days from the decision of separation.

mother does not want to consent, the court may issue a decision on the child's fatherhood.⁹⁾

To sum up, the child's father in the birth certificate of the child is either the man toward whom the presumption of the child's birth originates from the mother's husband, or the man who recognized the child, or the man indicated by the court.

It should be noted that Polish law does not accept so-called **unknown fatherhood**. If the child's mother does not know the father of the child (*e.g.*, accidental sexual contact with an unknown man), then the head of the civil registry office enters the mother's surname in the "father's surname" column. In addition, the head of the civil registry office enters in the "name of the father" column the name indicated by the person reporting the birth of the child. These are so-called covering data, thanks to which the embarrassing fact is hidden: the lack of knowledge about the personal data of the child's father.¹⁰⁾

In the case of a child of **unknown parents**, the court issues a decision defining the content of the child's birth certificate. As a result, the court indicates to the head of registry what name and surname should be entered in the birth certificate of the child under the headings "child's name," "child's surname," "mother's name," "mother's surname," "father's name," and "father's surname." These too are covering data, thanks to which the embarrassing fact of lack of knowledge about personal data of both parents of the child is hidden.¹¹⁾

Finally, it should be pointed out that in the Polish legal system a child

9) J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2016, pp. 426-466, J. F. Strzebińczyk, *Prawo rodzinne*, Warszawa 2016, pp. 219 - 245.

10) J. M. Łukasiewicz [in] J. M. Łukasiewicz (ed.) *Instytucje*, p. 180.

11) P. Kasprzyk, *Podręcznik urzędnika stanu cywilnego. Podstawowe instytucje prawa o aktach stanu cywilnego*. Tom I, Lublin 2018, p. 139.

must have parents of different genders. As a result, in the birth certificate of a child there is a section “father of child” and “mother of child.” This results in the following practical consequences:

- In the event of a change in the gender of one of the child’s parents, this fact shall not be disclosed in the child’s birth certificate.
- It is unacceptable to adopt a child by two men, or two women, because that would mean having two fathers or two mothers.
- Finally, it is impossible to transcribe a foreign birth certificate of a child disclosing two fathers or two mothers of a child. In other words, the head of the civil registry office should refuse to draw up a Polish birth certificate on the basis of a foreign birth certificate that indicates two fathers or two mothers.¹²⁾

It’s interesting to note that in some European countries, the term “parent” can be substituted for “father” and “mother” without specifying the gender of the child’s parent. This avoids the problem that Polish family law creates.

As mentioned above, surrogation is prohibited in Poland. The mother is the woman who gave birth to the child. Even in the case of a surrogation agreement, such agreement is void.

It is worth pointing out, however, that according to Polish law, a couple may

12) This matter is the subject of practical problems and various court decisions. P. Kasprzyk [in:] P. Kasprzyk (ed.) *Podręcznik urzędnika stanu cywilnego. Obrót prawny z zagranicą w zakresie rejestracji stanu cywilnego, Tom 2*, Lublin 2019, pp. 87–88, P. Mostowik, *O planach ujednoczenia reguł dowodzenia oraz wzajemnej skuteczności rejestracji stanu cywilnego w państwach członkowskich Unii Europejskiej (Zielona księga z 14 grudnia 2010 r.)*, *Metryka* 2011, no 1, p. 93, the same, *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka od „rodziców jedнопłciowych” na tle orzecznictwa sądów administracyjnych w 2018 r.*, Warszawa 2019, p. 7 and next.

adopt a frozen embryo that has not been used in the fertility treatment process.

III. PARENTS, RELATIONS WITH CHILDREN (PARENTAL AUTHORITY) ACCORDING TO POLISH FAMILY LAW

In the light of the above remarks, it can be stated that a child's parents are the persons indicated in the birth certificate of the child under the headings "father of the child" and "mother of the child." These people are connected to the child by a relation of kinship (parenthood) or adoption. The relationship of parental authority is a dependent relationship, so it can only exist between persons who are connected by kinship or adoption. Therefore, if a particular man is indicated in the birth certificate of the child as the "father of the child" and the determined woman is indicated in the birth certificate as "mother of the child," these persons, as a rule, automatically obtain parental authority if they have full legal capacity.¹³⁾ The legal status of the child's

13) In English law, the case looks completely different because inclusion as a father of a child in the birth certificate of the child is not determinative. Also, the circumstances surrounding the birth certificate are important. In the case of parents who are spouses, both parents indicated in the birth certificate have parental responsibility. Even if the parents are not married, they will automatically have parental responsibility if both of them are designated as the child's parents at the time of drawing up the child's birth certificate. However, if the registration is made by the mother, without indicating the father, then the father will be forced to apply to the court for re-registration of the child's birth certificate. This will allow disclosure of personal data of the child's father in the child's birth certificate, but this will not automatically create parental responsibility. The father will be forced to sign a parental agreement with the mother or apply to the court to grant him parental responsibility. See J. M. Łukasiewicz, W. Kosior, *Władza rodzicielska nad pasierbem - ujęcie modelowe na przykładzie angielskiego ustawodawstwa*, *Przegląd Prawniczy Uniwersytetu Warszawskiego* 2017, rok XVI, no 2, pp. 308–321, J. M. Łukasiewicz, W. Kosior, *An agreement as the source of parental responsi-*

parents (spouses or not spouses) is not important; therefore, it is irrelevant whether they are spouses. Thanks to this, the legal situation of children born of marital and extramarital relationships is the same.

In view of this, other persons who are not related to the child relationship of parentage or adoption may not exercise parental authority over such a child. The best example for explaining this principle is the relationship between a stepfather or stepmother and stepson. The stepfather or stepmother is the spouse of the child's biological parent. The stepfather or stepmother is not connected to the child by relationship of parentage (kinship) or adoption.¹⁴⁾ Therefore, the stepfather or stepmother cannot exercise parental authority over the child. This is interesting because in some legal systems a stepparent can receive parental responsibility despite the fact that he or she is not connected to the child by a relationship of parenthood or adoption. For example, in the English law, a stepfather or stepmother can obtain parental responsibility through a "child arrangements order," either through a "parental responsibility order" or through "parental agreement." The final option involves the biological parent, with the consent of the other parent having parental responsibility (usually the other biological parent) concluding with the stepparent a parental agreement. Through this agreement, the stepparent obtains parental responsibility. As a result, the child is subject to parental responsibility of more than two persons. For example, the parental responsibility over the child could be exercised by his biological mother, the spouse of that mother (stepfather of the child), and the biological father. Such an arrangement is inadmissible under Polish law. Only two people have

bility over a stepchild – a model approach on the example of british legislation, Law and Forensic Science 2017, Volume 13, no 1, pp. 126–133.

14) The relation of a stepfather or a stepmother with a stepson relies only on affinity.

parental authority: the father and mother indicated in the birth certificate.¹⁵⁾

At the risk oversimplification, we can say that parental authority consists of three elements: **custody over a person, custody over property, and competence to represent the child**. Parental authority is exercised by both parents on the basis of equality. In the event of a conflict, they may request a court decision by the court (art. 97 of the Family and Guardianship Code).¹⁶⁾

The family court (which is actually a regional court department) may in some cases interfere with parental authority.¹⁷⁾

1) **Deprivation of parental authority** of one or two parents on the grounds of art. 111 of the Family and Guardianship Code. The court issues such a decision if there is a permanent obstacle in the exercise of parental authority (*e.g.*, the parent is permanently imprisoned), or if the parents abuse their parental authority (*e.g.*, beating the child), or if they grossly neglect their duties towards the child (*e.g.*, do not feed the child or send him or her to school). In the event that the court deprives one of the parents of responsibility, the other parent continues to exercise parental authority. If the court deprives both parents of parental authority, the child receives a legal guardian who exercises what is called legal protection. It is not parental authority, because only the child's parents can have such.

2) **Suspension of parental authority** pursuant to art. 110 of the Family and Guardianship Code. The court issues such a ruling if one of the parents

15) J. M. Łukasiewicz, W. Kosior, *Władza rodzicielska nad pasierbem - ujęcie modelowe na przykładzie angielskiego ustawodawstwa*, Przegląd Prawniczy Uniwersytetu Warszawskiego 2017, rok XVI, no 2, pp. 308–321.

16) J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2016, pp. 513–523.

17) J. M. Łukasiewicz [in:] J. M. Łukasiewicz (ed.) *Instytucje*, pp. 169–200.

cannot exercise parental authority for some time (*e.g.*, a parent's departure abroad for a long period) and the child is deprived of care. In this situation, the court suspends parental authority of the parent and appoints a legal guardian. Of course, such a ruling is pointless if the other parent exercises parental responsibility and cares for the child. If the other parent cannot take care of the child because, for example, of death or deprivation of parental authority, a legal guardian must be appointed. The supervisor may be a stranger, but most often it is a person close to a child, such as a grandparent.

3) **Limitation of parental authority** of one of the child's parents pursuant to art. 58 or 107 of the Family and Guardianship Code. This judgment is issued by the court if the parents decide to live separately. In such a situation the court vests full parental authority in one of the parents; the other receives limited authority. The court specifies the situations in which the limited parent will have parental authority (*e.g.*, co-deciding on the choice of school, method of medical treatment, or how to spend the holidays). Because the natural consequence of divorce is the separation of parents, the court issues a ruling on the restriction of parental authority of one of the parents on the grounds of art. 58 §1a of the Family and Guardianship Code in the case of divorce. It may happen, however, that parents may separate but not divorce, or may choose not to marry. In such instances, *e.g.* issues a decision limiting parental responsibility of one of the parents on the grounds of art. 107 of the Family and Guardianship Code.

It should be noted that for a very long time the limitation of the parental authority of one of the child's parents in the event of separation of parents was a rule. However, according to the currently binding art. 58§1a of the Family and Guardianship Code, the court will limit the parental authority of one of the child's parents if the interest of the child supports it. In other cases, the court will leave parental authority to both parents if the parents submit to the court an agreement on the manner of exercising parental authori-

ty. In the absence of such an agreement, the court may limit the authority of one of the parents, or it may allow authority in both parents on the basis of their own discretion under art. 58§1 of the Family and Guardianship Code. Despite full authority in both parents, the child actually lives with only one of them. This justifies a need for the court to determine the manner and frequency of contact with the child for the other parent. Moreover, if a court vests full parental authority in both parents, it may provide for alternating care, in which the child alternates with each of the parents for a period of time specified in the agreement. An absolute condition of such custody, however, is the submission of an agreement by the parents. In the absence of such an agreement, the court may leave parental authority to both parents but can never determine alternate custody.

In addition to the above-mentioned cases, the court may interfere in parental authority by issuing specific orders pursuant to art. 109 of the Family and Guardianship Code. This provision allows the court to issue any order that is necessary. It is difficult to list all the orders that a court may issue under this legal regulation because it has the latitude to formulate an order that is necessary under specific facts. Such orders can be classified as:

- incidental (for example, parents do not want to consent to a child's blood transfusion, and the court issues an order for the transfusion), or
- permanent (*e.g.*, a child requires placement in a home (institutional home or foster home), so the court issues such an order).

Such regulations can affect parental authority. In the event of an incidental order, the court intervenes only in a specific case; the parents still have full parental authority. With a permanent order though, the power of the parents is permanently limited.

Decisions such as these (deprivation of parental authority, suspension of parental authority, limitation of parental authority, and specific orders about parental authority) are made by a family court. A district court can make de-

cisions about parental authority during the divorce process. Apart from the dissolution of the marriage, the district court issues the following decisions in the divorce decree.¹⁸⁾

- **A decision on the guilt of the breakdown of marriage** (*ex officio*). According to art. 57 § 2 of the Family and Guardianship Code, when issuing a decision on the dissolution of the marriage, the court decides at the same time whether and which of the spouses is to blame in the breakdown of the marriage. Three types of solutions are possible: only one spouse is to blame for the breakdown, both spouses are to blame, or neither is to blame. Other decisions are unacceptable. In particular, a court may not find one spouse responsible because he or she is more blameworthy. Upon a request of the spouses for compassion, the court can refrain from adjudicating blame. Of course, the question arises as to why blameworthiness ever needs to be determined. Apart from purely psychological aspects, blameworthiness may affect the scope of alimony obligations between former spouses and may be significant in the eventual demand for inequality of percentage of ownership of joint property.
- **Paternal authority over joint minor children** (*ex officio*). Decisions regarding parental authority over joint minor children are made irrespective of the arrangements for the fault of the breakdown. When determining parental authority, the court does so in relation to each of the children individually. The district court acts as a family court during the duration of adjudication of a divorce. Therefore, it has competence to make all decisions regarding parental responsibility. However, as indicated earlier, the court in principle leaves full parental authority to both spouses. Only if the welfare of a minor child requires it will a court re-

18) J. M. Łukasiewicz [in:] J. M. Łukasiewicz (ed.) Instytucje, p. 147, J. Ignatowicz, M. Nazar, Prawo rodzinne, Warszawa 2016, p. 359 and next.

strict the authority of one of the parents pursuant to art. 58 of the Family and Guardianship Code.

- **Decision concerning contacts** (*ex officio*). Such a decision can occur both in restricting authority of one parent and in maintaining authority in both parents. Even in the case of full parental authority of both parents, a child usually lives with one of them. This requires determining the manner and frequency of contacts of the other. Nevertheless, if the parents feel that the issue of contacts will not cause conflicts and will take place spontaneously, art. 58 § 1 bc.r. allows them to request the court to refrain from ruling on maintaining contact with the child.
- **Alimony for common minor children** (*ex officio*). This decision applies only to minor children. Adult children may, on the other hand, claim maintenance by separate proceedings in a separate proceeding under art. 133 of the Family and Guardianship Code.
- **The court also issues a decision on an apartment or house on the grounds of art. 58 of the Family and Guardianship Code.** If the actual use of the apartment is determined, the decision is made *ex officio*. In a case of domestic violence, the court may, upon request of one of the spouses, decide on the eviction of the other one. At the request of both spouses, the court may decide on legal division of the residence or granting complete rights over it to one of the spouses.
- **Alimony for a former spouse based on art. 60 of the Family and Guardianship Code** (upon request of one of the spouses). At the outset, it should be emphasized that a blameworthy spouse can never demand alimony from an innocent spouse after divorce. However, the court may order alimony in three cases: a blameworthy spouse may demand alimony from a blameworthy spouse if in poverty, an innocent spouse may demand alimony from an innocent spouse if in poverty, an innocent spouse may request alimony (from a blameworthy spouse) if

his financial situation has significantly deteriorated (even if it is not as severe as poverty).

- **Division of joint property** (upon request). The court rules on the division of joint property if the division is undisputed between the spouses. Otherwise, divorced spouses must engage in separate proceedings concerning its division.

When a child is involved, it is better for a unified proceeding to adjudicate all issues regarding parental authority, contacts, and maintenance. However, in the event of separation of parents who are not spouses, separate proceedings for maintenance and parental authority (including contacts) are required. The impossibility of combining these matters results in a different way of examining them. Issues relating to maintenance are evaluated in contentious proceedings whereas the matters of parental authority and contacts are in non-contentious proceedings.

Regardless of parental authority, parents have the **right to contact the child** and may be required to **support the child**. The scope of parental authority does not change the marital status of the child's parents. So, the father still appears in the birth certificate as a father, and the mother still appears in the birth certificate as a mother. The interference of the court with respect to parental authority does not affect other family and legal relationships.

The innovation of alternating custody has arisen in accordance with modern standards of providing parents with a maximum equal position in relation to the child. It affords the child 'two houses' while living alternately in them. Both parents have full parental authority and submit a parental agreement defining the conditions for alternating custody. Parents, therefore,

have to determine how long the child will be at each parental home and how they will implement this form of custody. In the case of older children, alternating custody raises fewer concerns. Some Polish writers, however, have worried about a diminishment of emotional stability for younger children. A small child needs one center of life. Even if the parents have full parental authority, it is advisable for the child to have one home. The introduction of this institution to the Polish legal order took place without regulating specific issues. Thus, it is not clear whether in such a situation the right to contact the child is to be determined and whether it is advisable to include the scope of child support in considerations.¹⁹⁾

There seem to be no obstacles for the court to determine, for example, a parent's right of contact with a child who, in a given week or month (or another period), stays with the other parent. Similarly, alternating custody should not be an obstacle to determining of maintenance. Of course, if the parents have similar financial situations and the child stays in the same alternate periods of time with each of them, adjudication of maintenance payments would be unnecessary. Nevertheless, if one parent has longer periods of alternating custody or significantly worse finances than the other, child support may be appropriate.

The institution of alternating custody was introduced in a poorly thought-out way, without regulating the significant issues accompanying such a form

19) J. M. Łukasiewicz, Uwagi na temat pieczy naprzemiennej w sprawach o rozwód [in:] J. M. Łukasiewicz, M. A. Arkuszewska, A. Kościółek (ed.) *Wokół problematyki małżeństwa w aspekcie materialnym i procesowym*, Toruń 2017, p. 374 and next, the same, *Obowiązek alimentacyjny przy pieczy naprzemiennej*, *Monitor Prawniczy* 2018, no 7, p. 247 and next, the same, *Problemy praktyczne związane z instytucją pieczy naprzemiennej*, *Forum Prawnicze* 2018, no 2 (46), p. 53 and next.

of custody. In addition, alternating custody seems to protect parents' interests too much while marginalizing the child's interests and emotional stability. Thus, this approach should be used in practice in relation to small children with extreme caution. A statutory age restriction for alternating custody is worthy of consideration.

IV. INTRODUCTION TO ENGLISH INSTITUTION OF PARENTAL RESPONSIBILITY

At first, it should be pointed out that in English family law the term "parental responsibility" is used instead of the term "parental authority." According to section 3 of the *Children Act* of 1989 (hereinafter referred to as 1989) parental responsibility means "all the rights, duties, powers, responsibilities and authority which by law, a parent of a child has in relation to the child and his property."²⁰⁾ In this sense it refers to all kinds of decisions,²¹⁾ including;

20) The parent can be distinguished in the genetic and biological sense (related to pregnancy) and also in socio-psychological sense. Traditionally, the mother combines all three types of parenting, while the father has a maximum of two. Cf. *Re G (Children) (Residence: Same – Sex Partner) [2006] UKHL 43, 2 FLR 629*, and also *Re B (Child) (Residence) [2009] UKSC 5, [2010] 1 FLR 551*. The most important thing should be the parents' commitment to raising a child and the love they have for a child, not whether the source of that love is genetic or social. K. Standley, P. Davis, *Family Law*, p. 234. As a consequence, the term "parentage" should be distinguished as a genetic relationship between a child and a parent. The term "parenthood" informs who from the point of view of law is recognized as a child's parent. Finally, "parental responsibility" means rights and duties toward the child. J. Masson, *Parenting by Being; Parenting by Doing - - in search of principles for founding families* [in:] *A Pedain & J Spencer (eds.), Freedom and Responsibility in Reproductive Choice. Hart Publishing, pp. 131–155*.

21) The Children Act 1989 Guidance and Regulations Volume 1 Court Orders, London 2008, p. 12, <https://childlawadvice.org.uk/information-pages/parental-responsibility/> (checked on July 21, 2018).

- Decisions related to the child's upbringing (determining the child's religious affiliation, determining the direction of education)²²⁾
- Influence as to the name of the child
- Choosing a future legal guardian in case of death²³⁾
- Consent to various types of medical treatment²⁴⁾ or consent to provide a child's medical records
- Representation of the child in all proceedings before public administration bodies and also before judicial authorities.²⁵⁾

22) Cf. *R v Hopley (1860) 2 F & F 202, A v United Kingdom (Human Rights: Punishment of Child) [1998] ECHR 85, [1998] 2 FLR 959*, quoted in K. Standley, P. Davis, *Family Law*, p. 215, section 58 *Children Act 2004*, section 548 *Education Act 1996*.

23) Cf. s. 5 CA 1989.

24) Cf. also *Re R (Minor) (Blood Transfusion) [1993] 2 FLR 757, Re B (A Minor) (Wardship: Medical Treatment) [1990] 3 All ER 927, Re T (Wardship: Medical Treatment) [1997] 1 FLR 502, Local Authority v SB, AB and MB [2010] EWHC 1744 (Fam), [2010] 2 FLR 1203, A National Health Service Trust v D [2000] 2 FLR 677, Re C (HIV Test) [1999] 2 FLR 1004, Re A (Conjoined Twins: Medical Treatment) [2001] 1 FLR 1, NHS Trust v A [2008] 1 FLR 70, Portsmouth NHS Trust v Wyatt and Wyatt, Southampton NHS Trust Intervening [2005] 1 FLR 21*.

25) Cf. H. Reece, *The degradation of parental responsibility* [in:] R. Probert, S. Gilmore, J. Herring, (eds.) *Responsible Parents and Parental Responsibility*, Oxford 2009, pp. 85–102; H. Reece, *From parental responsibility to parenting responsibility* [in:] Freeman, Michael, (ed.) *Law and Sociology: Current Legal Issues*, Oxford 2006, pp. 459–483; T. Bond, J. M. Black, A. Jane Bridge, *Family Law 2008*, Oxford 2008, p. 418ff.; H. Palmer, *Rights and Responsibilities Towards Children: Does the current law do enough to ensure that unmarried fathers can access parental responsibility?* [in:] <https://www.aber.ac.uk/en/media/departmental/lawcriminology/pdf/publications/auslcj2014/10—Rights-and-Responsibilities-Towards-Children—Does-the-current-law-do-enough-to-ensure-that-unmarried-fathers-can-access-parental-responsibility.pdf> [access May 18, 2017]. In accordance with the Convention on the Rights of the Child of 1989 under *Children Act 2004* a special office of

A parent who has parental responsibility under English family law has the right to receive child support²⁶⁾ being due. By contrast, in the Polish legal order, a parent who receives child support payments acts as the child's statutory representative, so he acts not on his own behalf but rather on behalf of the child.

According to s. 3 (4) CA 1989 "The fact that a person has, or does not have, parental responsibility for a child shall not affect (a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or (b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property."

According to s. 1(1) CA 1989 the court that makes the decision regarding upbringing of the child, management of the child's property, as well as an income from the property, is obliged to take into account the child's good as the most important element of the decision.²⁷⁾ The indicated regulation is the equivalent of the Polish principle. In addition, according to s. 1 (2) CA 1989 "In any proceedings in which any question with respect to the upbringing

the Commissioner for Children's has been appointed *Children's Commissioner for England* (next to *Children's Commissioner for Wales*, *Scotland's Commissioner for Children and Young People* and *Northern Ireland Commissioner for Children and Young People*), whose main duty is to "represent the views" and "interests of children." Unlike other commissioners operating in the UK *Children's Commissioner for England* does not have the competence to deal with individual matters in the field of protection of children's rights. K. Standley, P. Davis, *Family Law*, p. 206.

26) In England and Wales, an application cannot be made on behalf of a child, because children can not apply for child support by virtue of their own law. http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_eng_pl.htm

27) Cf. K. Standley, P. Davis, *Family Law*, 266. At the same time, the principle of minimizing interventions in the scope of parental responsibility for parents is assumed. Cf. s. 1 (5) CA 1989.

ing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.”

A breakthrough of particular importance in the context of parental responsibility occurred in *Gillick vs. West Norfolk and Wisbech Health Authority (1986) AC 112, [1986] 1 FLR 224*, in which the children obtained more rights concerning self-determination in the context of medical treatment. The case concerned the use of contraception, without consent of the parent, by a girl whose age prevented her from initiating sexual intercourse. The House of Lords in the case in question stated that parental authority is not absolute and gets weaker as a child develops. Parental rights should be exercised in that respect, in which they are needed to protect a child. A child has an independent competency (so-called *Gillick* competency), provided that he or she can adequately assess the medical actions taken on the basis of development and intelligence. This, however, does not exclude possible interference by the court in terms of decisions made by the child.²⁸⁾

In the context of s. 3 (1) CA 1989, it is unclear which rules should govern a child’s property. The indicated provision only specifies that in the scope of parental responsibility the following are included: “*all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in rela-*

28) <https://www.lawteacher.net/cases/gillick-v-west-norfolk.php> (checked on July 17, 2018). Cf. also *R (Axon) v Secretary of State for Health [2006] EWHC 37 (Admin)*, [2006] 2 FLR 206, K. Standley, P. Davis, *Family Law*, 210. In the context of *Gillick competency* cf. also s. 1 (3) (a), section 8, section 10 (8) and section 38 (6) *Children Act 1989*, and also section 8(1) *family Law Reform Act 1969*. Whatmore; *Re R (A Minor) (Wardship: Medical Treatment) [1992] Fam 11 R*, *Re W (A Minor) (Medical Treatment: Court’s Jurisdiction) [1993] 1 FLR*, *South Glamorgan County Council v W and B [1993] 1 FLR 574*. Competence *Gillicka* has become a standard in assessing the child’s autonomy in terms of process capacity cf. K. Standley, P. Davis, *Family Law*, p. 219.

tions (...) to the child's "property," i.e., the right to administer the child's assets, although the scope of this right has not been clearly defined.²⁹⁾ It is only assumed that the parent has the right to control the income derived from the child's property (excluding the components to which the child has the exclusive right, such as clothes or remuneration for the work done).³⁰⁾

According to the content of the s. 2 (7) CA 1989 in cases in which more than one person has parental responsibility over a child, each of them is independent. Nevertheless, in the light of case law, certain matters require decisions to be made jointly. These may include changing schools or performing a specific operation on the child³¹⁾ as well as determining the child's activities during the holiday season or vacation period. In the event of conflict, one of the parents may apply for a decision regarding a specific matter—*specific issue application*—or may apply for a ban on certain activities—*prohibited steps application*.

In Polish law, the relationship of parental authority is always dependent on the relation of kinship or adoption. In the case of English law, different rules apply.

- Parental responsibility can occur regardless of the relationship of kinship or adoption.

The source of parental responsibility can be *parental agreement* as well as a court order granting parental responsibility to persons actually raising a child. This means that parental responsibility may be exercised by grandparents, uncles, aunts or third parties who have neither a kinship

29) N. Lowe, *Parental Responsibilities, National Report: England and Wales*, <http://ceflonline.net/wp-content/uploads/England-Parental-Responsibilities.pdf> (of July 26, 2018).

30) N. Lowe, *Parental Responsibilities*.

31) <https://fnf.org.uk/law-information-2/children/parental-responsibility> (of July 24, 2018).

nor an adoptive relation to the child.³²⁾

- In English family law, more than two people can exercise parental responsibility over a child.³³⁾
- The relationship of kinship and adoption is not a condition *sine qua non* in terms of a parental responsibility relation. This means that indicated relationships may cross or may occur independently.³⁴⁾ This kind of approach may be thought to strengthen the protection of the child's good. For a child, the formal relationship between the child and the person exercising parental responsibility is not important.

What really matters is that a specific person is ready to take on the responsibility of the child's parent.

- In English law, it is possible to have same-sex parents.

For example, in the birth certificate of a child, the term "parent"³⁵⁾ may be used instead of the term "father." Furthermore, substitute surrogate contracts and the adoption of children by single sex couples are also allowed.

V. REGISTRATION, PARENTHOOD AND PARENTAL RESPONSIBILITY ACCORDING TO ENGLISH FAMILY LAW

The first part of the *Births and Deaths Registration Act*, 1953 regulates the issue of birth registration of the child. The second contains provisions regarding the registration of deaths. According to the regulations of this Act,

32) J. Shapiro, *Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children* in M. Maclean (ed.) *Family Law and Family Values*, Oxford 2005, p. 93.

33) s. 2 (2A) (5) Children Act 1989.

34) S. Harris-Short, J. Miles, R. George, *Family Law, Text, Cases, and Materials*, Oxford 2015, p. 667.

35) Cf. Registration of Births and Deaths (Amendment) (England and Wales) Regulations 2009, form 1.

every child born in England and Wales should be registered in the office competent for the child's place of birth. This also applies if the child was born dead. According to s. 2 of the above-mentioned Act, the registration of a child born in England or Wales should take place **within 42 days from the day of the child's birth**. If registering a child in the district of the place of birth is impossible, the child must be registered by the appropriate authority of another district with the required 42-day period.

The issue of parental responsibility is closely related to the circumstances that accompany the registration of the child.³⁶⁾

1. In the case of a marital child, both parents are registered in the child's birth certificate and both of them automatically get parental responsibility.³⁷⁾ According to s. 2 (1) CA 1989 '*Where a child's father and mother were married to each other at the time of his birth they shall each have parental responsibility for the child.*'

2. In the case of the child born out of the wedlock, according to s. 2(2) (a) CA 1989 parental responsibility is due to the mother.³⁸⁾ The acquisition of parental responsibility by the father of an illegitimate child depends on the moment of registration of his surname in the birth certificate of the child and in the case of other circumstances indicated below:

36) Many thanks to all the people who agreed to verify the information given below, *i.e.*, Mr Andre Hill from Deed Poll Office Ltd., and Mrs. Dorota Beange, Consultant Solicitor, Setfords Solicitors, London.

37) In a marriage, the child's presumption of origin derives from the mother's husband. J. Herring, R. Probert, S. Gilmore, *Great Debates in Family Law*, Basingstoke 2012, p. 31. *Cf.* also section 10 Births Registration Act 1953, section 20 (1) Family Law Reform Act 1969, *Re H and A (Paternity: Blood Tests) [2002] EWCA Civ 383, [2002] 1 FLR 1145*. <https://childlawadvice.org.uk/information-pages/parental-responsibility/> (was used on March 3, 2018).

38) K. Standley, P. Davis, *Family Law*, 240, <http://www.familylawweek.co.uk/site.aspx?i=ed28120> (was used on May 5, 2018).

a) If the father of a child being born out of wedlock **was registered in the birth certificate of the child at the time of drawing up the act**, then, automatic parental responsibility arises on the child's father's side [s. 4 (1) (a) and 4 (1A) CA 1989].³⁹⁾ However, parents must be physically present when drawing up a child's birth certificate. In the event that one of the parents is not able to be present at the office in order to register the child, he or she is obliged to complete a special declaration in the form required by law (*Statutory Declaration Of Acknowledgement Of Parentage*) [s. 10 (1)(b)(c) of the Births and Deaths Registration Act 1953].⁴⁰⁾ The automatic acquisition of parental responsibility by a father registered in the birth certificate of a child applies only to children born after 2003, because before that date the registration of paternity did not give the father attributes of parental responsibility.⁴¹⁾ In such a situation, it was necessary for the father to conclude an agreement on parental responsibility or to apply to the court to grant parental responsibility towards the child.

b) The father of a child born out of wedlock may obtain parental responsibility before registering the child on the basis of a *parental responsibility agreement* or *parental responsibility order*. In this case, the child may be reg-

39) Cf. also R. Probert, S. Gilmore, J. Herring, *Responsible Parents and Parental Responsibility*, Oxford 2009, pp. 51–53.

40) <https://childlawadvice.org.uk/information-pages/parental-responsibility/> (was used on March 3, 2018), <https://www.gov.uk/register-birth/who-can-register-a-birth> (July 6, 2019). A child's mother can register a child without the presence of his father by submitting a Statutory Declaration Of Acknowledgement Of Parentage completed by a father on the basis of s. 10 (1)(b) of the Births and Deaths Registration Act 1953. It is also possible for a father to register a child without the presence of a mother by submitting a Statutory Declaration Of Acknowledgement Of Parentage completed by a mother on the basis of s. 10 (1)(c) of the Births and Deaths Registration Act 1953.

41) S. Gilmore, L. Glennon, *Family Law*, Oxford 2014, pp. 355–356.

istered according to s. 10 (1)(d) Births and Deaths Registration Act of 1953 on the basis of *parental responsibility agreement* or according to s. 10 (1)(e) Births and Deaths Registration Act of 1953 on the basis of a *parental responsibility order*. However, this type of solution is rather rare, because the child must be registered within 42 days, which does not give the father too much time to obtain a *parental responsibility order*. In turn, registration on the basis of a *parental responsibility agreement* makes no sense, because of the ease of registering a child together or through a Statutory Declaration Of Acknowledgement of Parentage.

c) If the father of a child born out of wedlock has not been registered on the birth certificate of the child at the time of preparing this act, then, in the birth certificate, there must be made a horizontal line in the “child’s father” column. However, the child’s father may automatically obtain parental responsibility if he has re-registered the birth certificate together with the mother⁴²⁾ (or via her consent⁴³⁾) by completing the GRO 185 form. The automatic acquisition of parental responsibility by a father registered in the birth certificate of a child applies only to children born after 2003, because before that date the registration of paternity did not give the father attributes of parental responsibility. In such a situation, it was necessary among others for the father to conclude an agreement on parental responsibility, or it was necessary to apply to the court to grant parental responsibility towards the child.

d) If the father of a child born out of wedlock is omitted from the birth certificate, re-registration of the child’s birth certificate is possible. In this

42) Cf. s. 10 A (1)(a) Births and Deaths Registration Act 1953 and s. 4(1)(a), 4(1A)(a) CA 1989.

43) Cf. s. 10 A (1)(b), s. 10 A (1)(c) Births and Deaths Registration Act 1953 and s. 4(1)(a), 4(1A)(a) CA 1989.

case, according to s. 55 A of the Family Law Act 1986,⁴⁴⁾ the child's father (or other persons with the right of action) can submit an application for judicial determination of paternity (declarations of parentage⁴⁵⁾). The court, after issuing the judicial determination of paternity within 21 days, informs The General Registry Office about the need to re-register the child's birth certificate.⁴⁶⁾ However, the re-registration does not automatically grant the father parental responsibility⁴⁷⁾ due to it not being the registration referred to in s. 4 (1) CA 1989 in accordance with s. 10A of the Births and Deaths Registration Act 1953. Therefore, it is necessary to take one of these two steps:

- conclude with the child's mother of a *parental responsibility agreement*,
or
- obtain a *parental responsibility order*.

One of the basic conditions for re-registration of the child's birth certificate is the lack of father data in the original version of that certificate. Therefore, in the indicated cases, the child's birth certificate is not re-registered.

e) The child's father can **obtain parental responsibility through a *parental responsibility agreement* without re-registering the child's birth**

44) <http://www.legislation.gov.uk/ukpga/1986/55/contents> (checked on 5 June 2017).

45) It is also possible to issue an application for declaration non-parentage.

46) Cf. 55A FLA 1986, 14 A Births and Deaths Registration Act 1953, K. Standley, P. Davies, Family Law, p. 238. A similar re-registration occurs on the basis of art. 56 Family Law Act 1986 as a result of the release of declaration of legitimacy or legitimation. However, only the child has an active ID.

47) According to the s. 4 (1)(a) CA 1989, the father obtains parental responsibility if registered under one of the legal acts indicated in the s. 4 (1A)(a) CA 1989. So if registration takes place on the basis of s. 10 (1)(a), (b) and (c) or re-registration on the basis of art. 10A(1)(a), (b) and (c) Births and Deaths Registration Act 1953, then the father automatically obtains parental responsibility. Consequently, re-registration on the basis of art. 14A Births and Deaths Registration Act 1953 does not automatically give the father parental responsibility.

court in which this proceeding takes place. Next, through the GRO185 form, an optional and independent re-registration of the child's birth certificate [s. 10A (1) (e) Births and Deaths Registration Act 1953]⁴⁹⁾ is possible.

g) It may happen that the child's father was disclosed in the child's birth certificate before December 1, 2003. In this situation, the child's father will not be entitled to parental responsibility. Of course, the father will be able to obtain parental responsibility as a result of concluding *parental responsibility agreement* with the mother or as a result of obtaining *parental responsibility order*, however, re-registration will no longer be possible due to the fact that the child's father is on the child's birth certificate.

h) According to s. 9 of **The Legitimacy Act 1976**, there is a legal obligation to re-register the child's birth certificate (on the form L1) if the biological parents of the child after the birth of the child have been married or registered a partnership. This obligation also exists when the biological father of a child is indicated in the child's current birth certificate. The argument for the re-registration of a child by his biological parents after marriage in the past was the inability of inheritance by illegitimate children. Currently, the regulation indicated above is of marginal significance. The sanction for the lack of re-registration is a symbolic fine of £2, which in practice is not enforced.⁵⁰⁾ Re-registration in the above case causes the father to acquire parental responsibility [s. 4 (1) (a) CA 1989].⁵¹⁾

i) The child's father may also be granted parental responsibility by appointing him with the legal guardian of the child in the event of death of the

49) Information confirmed by Coram Children's Legal Centre.

50) <https://www.ehsolicitors.co.uk/why-do-you-have-to-re-register-the-birth-of-your-child/>

51) <https://childlawadvice.org.uk/register-and-re-register-a-childs-birth/>, M. Gheera, Parental responsibility, Social Policy Section, SN/SP/2827/2014, p. 2, *Re H (Parental Responsibility) [1998] 1 FLR 855*.

holder of parental responsibility, unless the child is the subject to parental responsibility of another person (s. 5 and 6 CA 1989).⁵²⁾ In addition, the father may adopt a child and may obtain parental responsibility by determining the child's place of residence on the basis of a Child Arrangements Order. The indicated decision may also specify the so-called alternating custody. Finally, the basis of parental responsibility can be a *special guardianship order* (s. 14A-14G CA 1989).⁵³⁾

In the case of a child of unknown parents, the parents of the child are not disclosed because the birth certificate is made on form No. 8, constituting an attachment to the Registration of Births and Deaths Regulations 1987.

Importantly, declaration of parentage allows registry father in child's birth certificate, it is necessary for the father to become obliged to the so-called *child maintenance* for the child, as well as for the rights arising from the inheritance law or for the child to obtain citizenship.⁵⁴⁾

A peculiarity of English law is the possibility of obliging the father to a maintenance obligation, if he is not registered in the child's birth certificate.⁵⁵⁾ As an example, a child's mother may apply for maintenance in relation to the person whom she considers to be the child's father. If the person wants to evade the maintenance obligation, DNA⁵⁶⁾ tests should be performed.

In the case of a child who has been conceived by artificial insemination, according to s. 33 (1) of the *Human Fertilisation and Embryology Act 2008 (HFEA 2008)*, **the mother is the woman who gave birth to the child.**

52) The legal guardian is not obliged to pay maintenance to the child, nor does he or she inherit from the child. K. Standley, P. Davies, *Family Law*, p. 252.

53) Cf. s. 3A Births and Deaths Registration Act 1953.

54) K. Standley, P. Davis, *Family Law*, 238. O *child maintenance* cf. Strengthening families, promoting parental responsibility: the future of child maintenance, London 2011, p. 24 ff.

55) Cf. s. 1 and 3 Child Support Act 1991.

56) Cf. s. 26 Child Support Act 1991.

This includes a woman who gave birth to a baby as a result of the transfer of an embryo or semen and oocytes. Such a mother has parental responsibility.⁵⁷⁾ Determination of the second parent of a child born by a woman using assisted procreation depends on the marital status.⁵⁸⁾

a) According to s. 41 (1) HFEA 2008, **assigning fatherhood to an**

57) O. Bobrzyńska, *Macierzyństwo zastępcze w prawie Zjednoczonego Królestwa*, Instytut Wymiaru Sprawiedliwości, Warszawa 2017, p. 5. If the mother is married to the father, then she will have parental responsibility under s. 2(1) CA1989. If she is not married to (or entered a civil partnership with) the man, she will have parental responsibility under s. 2(2)(a) CA1989. If the mother of a child is married to (or entered a civil partnership with) the woman under s. 42 HFEA, the mother will have parental responsibility under s. 2(1A)(a) CA1989. In addition the mother of a child will have parental responsibility regardless of whether the second parent got married to (or entered a civil partnership with) the mother after the time of the fertility treatment in question (s. 43 HFEA and s. 2(1A)(b) CA 1989) or the second parent not got married to (or entered a civil partnership with) the mother (s. 43 HFEA and s. 2(2A)(a) CA1989).

58) Cf. A. Bainham, *Arguments about Parentage*, Cambridge Law Journal 2008, nr 62 (2), p. 322, the same, *Bainham What Is The Point Of Birth Registration*, Child and Family Law Quarterly 2008, nr 4, p. 449ff., A. Bainham, S. Day Sclater, M. Richards, *What is a Parent? A Socio-Legal Analysis*, Oxford 1999, p. 17ff., J. Eekelaar, *Rethinking Parental Responsibility*, Family Law 2001, p. 426, S. Gilmore, *Parental Responsibility and the Unmarried Father – A New Dimension to the Debate*, Child and Family Law Quarterly 2003, nr 1, p. 21ff., J. Hill, *What does it mean to be a “parent”? The claims of biology as the basis for parental rights*, New York University Law Review 1991, nr 66, p. 353, J. Mccandless, S. Sheldon, *The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form*, Modern Law Review 2010, nr 72, p. 176–177, R. Probert, *Families, Assisted Reproduction and the Law*, Child and Family Law Quarterly 2004, nr 3. p. 273ff., L. Smith, *Clashing symbols? Reconciling Support for Fathers and Fatherless Families After the Human Fertilisation and Embryology Act 2008*, Child and Family Law Quarterly 2010, nr 22, p. 46, A. Zanghellini, *A v B and C [2012] EWCA Civ 285: Heteronormativity, Poly-parenting, and the Homo-nuclear family*, Child and Family Law Quarterly 2012, nr 24, p. 475ff.

anonymous sperm donor is impossible.

- b) **The child's mother's husband, as a result of the presumption, will be the father of the child**, although he can deny paternity if the birth of a child was the result of assisted procreation for which the mother's husband did not express his consent [s. 35 (1), (2) HFEA 2008, 2(1) CA 1989].⁵⁹⁾ However, if the birth occurs due to assisted procreation with the consent of the mother's husband, then both parents are registered in the birth certificate of the child and both have parental responsibility towards the child.
- c) On analogous principles, parental responsibility arises **in the case of a same-sex marriage of two women**, one of whom benefited from assisted procreation with the prior consent of the other woman [s. 42(1), (2) HFEA 2008, s. 2(1A)(a) CA 1989].⁶⁰⁾ The civil partner of the child's mother does not become the father of the child, because English law did not allow the opposite sex partnerships. In June 2018, the Supreme Court ruled that allowing only same-sex couples to enter a civil partnership is incompatible with the European Convention on Human Rights. The UK Government later pledged to allow opposite-sex couples in England and Wales to enter into civil partnerships. Legislation enabling this passed the Parliament in March 2019 and went into effect on 26 May 2019. The Secretary of State is required to issue regulations allowing opposite-sex civil partnerships by 31 December 2019.⁶¹⁾
- d) If a woman in a partner relationship benefits from assisted procre-

59) R. Gaffney-Rhys, *Concise Questions and Answers Family Law*, Oxford 2016, p. 60, <https://www.inbrief.co.uk/child-law/parenthood/> (was used on February 1, 2018).

60) O. Bobrzyńska, *Macierzyństwo zastępcze*, p. 6.

61) Cf. s. 15 The Civil Partnership (Opposite-Sex Couples) Regulations 2019.

ation—*civil partnership*—with the consent of her female partner, then **the partner will obtain parental responsibility on the principles indicated above** [s. 42 (1), (2) HFEA 2008], and next by meeting the conditions according to s. 4ZA and s. 2(2A) (a) CA 1989.⁶²⁾

- e) If assisted procreation is used by a woman who is informally connected with another woman, the creation of parental responsibility on the part of the other woman may occur by giving her prior consent to treating her as the child's parent (agreed parenthood) [s. 43 HFEA 2008, 4ZA CA 1989].⁶³⁾
- f) If the assisted procreation is used by a woman who is **in an informal relationship with a man who was not a donor of semen**, then, this man will be treated as the child's father if he has previously agreed to be treated as the child's parent (agreed fatherhood) [s. 36 HFEA 2008].⁶⁴⁾ There must be no links between the man and the child's mother preventing marriage (s. 36 (1) (e) HFEA 2008).

In this case, the father does not acquire parental responsibility due to the lack of proper regulation in CA 1989. However, the father may acquire parental responsibility on the general principles set out in s. 2(2) (b) CA 1989. This means that according to art. 4 CA 1989 he acquires a parental responsibility order by registering a child or by entering into or obtaining a parental responsibility agreement.

In the above-mentioned cases, a woman using assisted procreation can fulfill the function of the so-called **surrogate mother**. If a child genetically de-

62) O. Bobrzyńska, *Macierzyństwo zastępcze*, p. 6, cf. also section 2 (1A) (a) CA 1989 and section 42 HFEA 2008.

63) Provision s. 2 (1A) (b) CA 1989 allows instead to acquire parental responsibility by getting married or entering into a partnership with the mother after the date of infertility treatment.

64) O. Bobrzyńska, *Macierzyństwo zastępcze*, p. 6.

scends from a specific father ordering surrogation, he will be considered the child's father if the foster mother is unmarried, or her husband or partner did not agree to a medical procedure leading to fertilization. However, the mere fact that the contracting woman is an egg donor is not enough to recognize that woman as the other parent of the child (section 47 HFEA 2008). The mother of a child is a woman who gave birth to the child. Therefore, a surrogate motherhood contract can be concluded, although English law does not provide for such a requirement. Moreover, this contract is not binding and there is no possibility of enforcement, even if parents ordering surrogate motherhood have incurred certain expenses related to pregnancy and childbirth.⁶⁵⁾ As a consequence, the most important thing is to get a *parental order*⁶⁶⁾ (which should not be confused with a *parental responsibility order*) under which persons can obtain the status of legal parents of the child. According to s. 77 of the Adoption and Children Act 2002 after issuing a *parental order*, the child is re-registered with new parents in a separate register, the Parental Order. There are five registers in England and Wales: register of live births, register of still births, register of abandoned children, register of adopted children and children born as a result of surrogate motherhood based on Parental Order. The existing birth certificate in the live birth register still exists and, as with adoption, a copy may be issued to reveal the identity of the biological parents.⁶⁷⁾

According to s. 54 (2) HFEA 2008, an application for parental *order* may be

65) O. Bobrzyńska, *Macierzyństwo zastępcze*, p. 6 and 10.

66) The proceedings ended with the issuing of *parental order* constitutes a special procedure, expressly provided for cases where the child was born by a surrogate mother under a contract with the ordering parents. O. Bobrzyńska, *Macierzyństwo zastępcze*, p. 10.

67) Cf. <https://deedpolloffice.com/change-name/law/birth-certificates> [was used on 26 July 2019].

submitted by one- or two-sex marriages, a partnership, or a factual relationship, unless there are obstacles to marriage⁶⁸⁾ between persons in such a relationship. The court that issues the judgment examines a number of legal and factual circumstances. The application for a ruling may be submitted up to 6 months from the day of birth of the child; the surrogate mother has to agree to *parental order* after 6 weeks from the birth of the child; and that consent must be expressed by the other parent of the child. A *parental order* can be issued only if the pregnancy is the result of artificial insemination and not the sexual intercourse of the surrogate mother with the father ordering the delivery.

In addition, there must be a genetic relationship between at least one of the ordering parents, which excludes the case where the gametes of the surrogate mother or the donor are fertilized by the seed of an anonymous donor of semen. As a result, a *parental order* will be issued when:

- a) the embryo was created from the gametes of the surrogate mother and the father of the ordering party, or
- b) the surrogate mother does not have a genetic relationship with the child, but a child has relationship with one of the ordering parents (meaning the embryo was created either from the gametes of the ordering mother and the donor of the semen or from the gamete donor of the egg cells and the ordering father).⁶⁹⁾

The court's decision will allow parents who engage surrogate mothers to change the birth certificate in such a way that they will be registered as the child's natural parents. In the context of the presented issue, the case related to affinity relations between stepfather or stepmother and stepson or step-

68) Cf. also Surrogacy Arrangements Act from 1985 and Human Fertilisation and Embryology Act from 1990.

69) Cf. also Surrogacy Arrangements Act from 1985 and Human Fertilisation and Embryology Act from 1990.

daughter is interesting.⁷⁰⁾ The spouse of a parent is called in English a *step-parent*, and this term should be literally translated as the adoptive parent of the child.

Depending on the gender, the parent may be *step-mother* or *step-father*. As in Poland, a step-parent is the spouse of the biological parent after divorce or the death of one of the child's biological parents.⁷¹⁾ Of course, the mere fact of cohabitation with a biological parent of a child and the child does not itself result in the acquisition of a stepfather or stepmother's status towards a child. A marriage is necessary and then adoption, although English law permits parental responsibility without the adoption of the institution through other legal instruments.⁷²⁾ These include a *child arrangements order*, *parental responsibility order* [4A (1) (b) CA 1989] or *parental responsibility agreement* [4A (1) (a) CA 1989]. In the case of a *parental responsibility agreement*, the step-father or step-mother is obliged to stay in a marriage (or in a partnership relation on the basis of *Civil Partnership Act of 2004*) with the holder of parental biological parent of the child and must obtain the consent of all other persons having parental responsibility over the child and property of the child (usually the second biological parent of the child).⁷³⁾ Of course, neither a *parental responsibility order* nor a *parental responsibility agreement* provides grounds for re-registration of a child's birth certificate because a stepfather or stepmother is not the stepchild's biological parent.

The court in the divorce proceedings does not make decisions regarding

70) K. Standley, P. Davis, *Family Law*, 245.

71) Oxford English Dictionary, Oxford, 2012, p. 715 (s. v. stepparent, stepfather stepmother).

72) B. Mitchels, T. Bond, *Legal Issues Across Counselling & Psychotherapy Settings: A Guide for Practice*, London 2011, p. 128.

73) Wider J. M. Łukasiewicz, W. Kosior, *Władza rodzicielska nad pasierbem - ujęcie modelowe na przykładzie angielskiego ustawodawstwa*, Przegląd Prawniczy Uniwersytetu Warszawskiego 2017, year XVI, nr 2, pp. 308-321.

the parental responsibility order. The problem of divorce institutions under English law exceeds the scope of the deliberations under consideration. However, if the parents cannot agree, it is possible to apply to the court for conducting separate proceedings. In these proceedings the court may issue **a prohibited steps order—a ban on taking specific actions towards a child, a residence order—an order determining the permanent place of residence of the child**, or eventually a **contact order—an order to contact the child**.⁷⁴⁾

Conclusions

To sum up the above considerations, Polish family law is based on rather conservative axiology. The institution of parental authority is always associated with kinship or adoption. Moreover, there is a prohibition of concluding surrogate agreements, and there must be a gender difference between parents. On the other hand, a very liberal approach can be observed in English law because the institution of parental responsibility is not related to kinship or adoption. Substitute motherhood is allowed, and parenthood may be allowed in the case of parents of the same sex. Awareness of these differences is valuable for several reasons. First of all, the question arises as to how far each country should recognize foreign legal solutions while maintaining the

74) In England and Wales there are no regulations regarding the matrimonial property regime as such; therefore, there is no joint property, and marriage generally has no property consequences. Cf. A. Stępień-Sporek, *Wspólne prawo majątkowe małżeńskie dla Unii Europejskiej, Stan integracji – perspektywy*, Gdańsk 2014, p. 37 and <http://www.coupleseurope.eu/pl/united-kingdom/topics/2-czy-istnieje-ustawowy-malzenski-ustrój-majątkowy-i-jeśli-tak-na-jakich-zasadach-taki-ustrój-działa> [was used on: 25 July 2019]. However, in the event of divorce, the court has wide discretion to apply various orders (regarding the provision of livelihoods, as well as the division of previously gathered assets). Cf. Matrimonial Causes Act 1973.

relative consistency of its own national law. Secondly, we should ask ourselves about the future of family law and the values that are worthy of protection. Sometimes the same values (for example the basic principle of the child's good) may be perceived differently depending on the historical, cultural, and moral context. Finally, comparing completely different family law systems has educational value. It allows us to adopt a relatively broad perspective of perceiving the extremely varied situations that the legislator, judge, and scholar must face.