

Family court's decisions on a child's passport (Article 97 § 2 of the Polish Family and Guardianship Code)

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SUMMARY

The courts are making decisions concerning a child's passport in many different kinds of cases. Most often there are cases in which the court is asked to consent for issuing the passport in the event of lack of consent of another parent or to order that the already existing passport be handed over by one parent to another one. In Polish literature, the majority view is that one of the parent's fears of wrongful international abduction or retention of his or her child shall not prevent the court to consent for issuing the passport at the request of another parent. This article argues that this matter should be decided according to a child's best interest. It may be not in accordance with a child interest to consent for issuing the passport or to order that it must be handed over to another parent when it could expose the child to the risk of facing a dangerous situation or wrongful international parental abduction or retention.

Key words: Child's passport, Child's abduction, Hague Convention Parental authority/responsibility, Poland

A desire by the child's primary caretaker parent to change his or her habitual residence is often a consequence of a divorce or separation. One of the parents may want to relocate to another city or country with the child for various reasons, some of which deserve to be understood and accepted. This will be the case, for example, if the child's custodial parent, after separating with his or her partner and

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feeling lonely in or disappointed with a foreign city or country, wants to return to the family home or when new attractive career or other better life prospects arise elsewhere. Sometimes the desire to accompany a new partner or go to a new partner or to improve living conditions is also the reason for wanting to relocate. It may also be the case that the main reason behind the decision to relocate with the child is predominantly a reprehensible desire to hurt the other parent by making it difficult or impossible for him/her to have direct contact with the child¹.

There is no doubt that the right to change habitual residence is an important right of every adult. However, a similarly important right is the possibility of contact with one's own child. When both parents are holders of parental authority, at least as far as deciding about child's place of residence is concerned, the relocation of one of the parents with the child, especially abroad, sometimes leads to a conflict between the two values underlying these rights. Resolution of this conflict between the parents takes place under Article 97 § 2 of the Polish Family and Guardianship Code², usually in cases concerning:

- 1) the court's permission for the child to permanently relocate to another, distant place or internationally or to travel abroad temporarily;
 - 2) the family court's permission replacing the declaration of will of one of the parents in the proceedings for issuing a passport to a minor or the court's request to the competent voivode to invalidate the passport document of the minor pursuant to Article 38(3) of the Act on Passport Documents of 13 July 2006 (Journal of Laws of 2006 No. 143, item 1027 as amended);
 - 3) ordering that one parent should hand over the already issued passport or ID card of the child to the other parent;
- and

¹ See e.g. C.S Bruch, J.M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, "Family Law Quarterly" 1996-1997, No. 30, p. 245 et seq.; cf. J. Kosińska-Wiercińska, J. Wierciński, *International Relocation of Children in Poland*, (in:) *International Relocation of Children*, A. Worwood (ed.), London 2016, p. 179.

² Generally, on the family and guardianship court's decision on important matters of a child in the event of lack of agreement between the parents see W. Stojanowska, *Rozstrzygnięcie przez sąd na podstawie art. 24 i 97 § 2 k.r.o. o istotnych sprawach rodziny w braku porozumienia między małżonkami lub rodzicami* [Decision by the court pursuant to Articles 24 and 97 § 2 of the Polish Family and Guardianship Code on important family matters in case of disagreement between spouses or parents], "Nowe Prawo [New Law]" 1985, No. 7-8, p. 80 et seq.; J. Słyk, *Rozstrzygnięcie o istotnych sprawach dziecka w przypadku braku porozumienia rodziców (art. 97 § 2 k.r.o.)* [Deciding on the child's relevant matters in the event of disagreement between parents, (art. 97 § 2 of the Polish Family and Guardianship Code)], "Prawo w Działaniu [Law in Action]" 2013, No. 14, p. 177 et seq., idem (in:) *KRiO. Komentarz [Polish Family and Guardianship Code. Commentary]*, K. Osajda (ed.), edition 5, Warsaw 2019, art. 97.

4) determining the place of residence on the territory of Poland³ or to determine the place of residence of the child in each parent's place of residence.

In this paper, I would like to focus on the proceedings before the guardianship court in cases involving a minor's passport, as indicated in points 2) and 3) above, and discuss the criteria on the basis of which it is possible to resolve the conflict between the values mentioned earlier.

The basic category of cases being decided by the family and guardianship court, the subject of which is the decision on a minor's passport, are cases for the court to authorise in lieu of a declaration of will of one of the parents in the proceedings for issuing a minor's passport. In practice, there are relatively fewer cases for the invalidation of a passport, more specifically for the court to request the competent authority to invalidate the passport document of a minor or to order for the passport to be handed over to the other parent.

Where both parents have parental authority, the application for a passport for a minor child requires their concerted action. Making a decision in this respect qualifies as an important matter concerning the child within the meaning of Article 97(2) of the Polish Family and Guardianship Code, so in the absence of agreement between the parents the decision in this respect is made by the guardianship court⁴. In the course of a divorce case, the court hearing the case takes over the function of the guardianship court as regards parental authority. Within this framework, in a divorce decree, the court may limit the parental authority of one parent to certain powers and duties in relation to the child, including the authorisation to issue a passport for the minor child of the parties and the right to hold the passport by the parent. As indicated by the Appellate Court in Warsaw in its decision of 28 August 2019⁵, it is an element of exercising parental authority over a child, i.e. deciding on the child's matters. For the above reasons, the application for interim order lodged in the course of divorce proceedings should be examined in the

³ See the decision of the District Court in Toruń of 27 April 2016, VIII Ca 91/16 published in Portal for the Decisions of Common Courts (<https://orzeczenia.ms.gov.pl/>; hereinafter referred to as: "Portal"). In this case a mother living in Poland requested for determination the place of residence of her son, who had lived with her father in England for a long time, with her in Poland. See also the facts of the case pending before the District Court Poznań-Stare Miasto in Poznań, which is the basis for the CJEU judgment of 28 June 2018 in Case C-512/17 (ECLI:EU:C:2018:513).

⁴ Decision of the Supreme Court of 3 February 2012, I CZ 153/11, OSNC see additional 2013/B/39.

⁵ V ACz 557/19, unpublished.

course of those proceedings, which results directly from Article 445¹(1)(2) of the Polish Code of Civil Procedure⁶.

According to Article 3 of the Act on Passport Documents of 13 July 2006⁷, every Polish citizen has the right to get a passport. The deprivation or restriction of this right may only take place in cases provided for in the Act. Pursuant to Article 17(1) (1) of the Passport Act, a passport may be refused to be issued, among others, at the request of a court conducting civil proceedings and, pursuant to Article 38(3), at the request of a court conducting proceedings concerning the exercise of parental authority, the passport document of the minor in respect of whom a decision on the exercise of parental authority is to be issued is invalidated.

In light of the mentioned provisions, J. Ignaczewski formulated an opinion that the cases in which the passport authority refuses to issue a passport or invalidates an issued passport constitute a closed catalogue of exceptions based on premises that cannot be interpreted broadly. The catalogue of reasons for refusing or invalidating a passport shows that the restriction of a citizen's right to get a passport serves securing the proper course of proceedings, especially criminal ones. In J. Ignaczewski's opinion, the above shows that the cases concerning authorisation to issue a passport to a child are not about allowing the child to relocate abroad⁸. Meanwhile, parents often treat the cases in question as such. For this reason, the grounds to reject the application for a child's passport almost always (and, according to Ignaczewski, wrongly) are justified by the fear that the child will relocate permanently. Such concerns, according to the author, are not sufficient to deprive the child of the right to a passport. This right may be restricted only in strictly defined cases, provided for in the Act on Passport Documents. From the point of view of the grounds for restricting the right in question in cases of authorisation to the issue of a passport for a child, the basis set out in Article 38(3) of the Act on Passport Documents becomes essential, i.e. a parental dispute over the exercise of parental authority, usually resulting from unregulated, conflicting relationships

⁶ See also the decision of the Appellate Court in Poznań of 30 September 2015, I ACz 1586/13, which concerned the choice of school for the child. Positively on this direction of interpretation see comments of J. Pawliczak in *Sąd właściwy do rozstrzygnięcia o istotnych sprawach dziecka w toku procesu o rozwód lub separację [Competent court to decide on the child's relevant matters during the divorce or separation proceedings]*, MOP 2019, No. 1, p. 19 et seq.

⁷ Consolidated text, Journal of Laws of 2013, item 268 as amended, hereinafter referred to as the "Passport Act".

⁸ See also the decision of the District Court in Rzeszów of 13 September 2018, V Ca 205/18, the Portal.

between parents and children. Meanwhile, the anxieties referred to above concern matters where the exercise of parental authority is already regulated⁹.

However, the opinion expressed is questionable. Firstly, the rule under Article 3 of the Passport Act, according to which every Polish citizen has the right to get a passport, is addressed to the State. The rule's content prohibits any refusal by the State to issue a passport. This rule is not addressed to parents or one of the parents who, for various reasons, does not want to have a passport issued to the child. A parent's decision not to apply for a passport for the child should not be assessed from the perspective of the circumstances specified in the Passport Act excluding the right to get a passport, but from the perspective of the interest of the child as seen from the perspective of execution of parental authority, including the right to decide in the matters concerning the child¹⁰. The court's refusal to authorise one of the parents to obtain a passport and the court's request for the invalidation of the minor's passport does not, however, violate the parent's constitutional freedom of movement (Article 52 of the Polish Constitution), to which the right to the passport is linked¹¹. Such judgments only limit the possibility for one parent to decide unilaterally whether or not the child is to travel abroad¹².

⁹ J. Ignaczewski (in:) H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *Komentarz do spraw rodzinnych [Commentary on family matters]*, edition 2, Warsaw 2014, chapter 14. A similar position is expressed by J. Słyk: "It should also be noted that, according to Article 3 of the aforementioned Act, every Polish citizen has the right to get a passport, and the deprivation or restriction of this right may only take place in the cases provided for in the Act. In this context, it seems doubtful that the guardianship court could issue a ruling preventing the issue of a passport to a child", J. Słyk (in:) *KRiO. Komentarz [Polish Family and Guardianship Code. Commentary]*, op. cit., art. 97, nb. 5.

¹⁰ This is the direction of the considerations of the Supreme Court in the justification of the decision of 9 July 1998, II CKN 887/97, Lex No. 1232450, in which it was decided that, in the case of a request for the court to authorise in lieu of a declaration of will of one of the parents in the proceedings to the issue a passport for the child, correctly treated as de facto authorisation to relocate abroad, a circumstance which was decisive was that "as a result of the scarcity of previous contacts between the father and the child, no close psychological ties have been established so that the child does not experience the stress caused by the absence of the mother", so that "at present, it is unacceptable for the party to propose that he/she would stay with the child while the applicant relocates abroad". A positive opinion on this resolution was seemingly expressed by G. Jędrejek, *KRiO. Komentarz aktualizowany [Polish Family and Guardianship Code. Revised commentary]*, Lex/el. 2019, art. 97(12). A foreign courts also assume that the decision on authorisation to issue a passport for the minor should be based on the premise of the child's best interest. For American decision-making practice see e.g. *Nagle v. Nagle*, 871 A.2d 832 (Pa. Super.Ct.2005), p. 837, *Van Osdell v. Van Osdell*, No. CA2007-10-123, 2008 WL 4839667, s. 16 (Ohio App. Nov. 10, 2008); *Muscarella v. Muscarella*, Nos. 2010-T-0091, 2010-T-0098, 2011 WL 861153, p. 18 (Ohio App. March 11, 2011), *Patrawke v. Liebes*, 285 P.3d 268, (Alaska, 2012), p. 272.

¹¹ H. Zięba-Załużka, *Wolność przemieszczania się w ustawodawstwie międzynarodowym i polskim [Freedom of movement in international and Polish legislation]*, "Przegląd Prawa Konstytucyjnego [Review of Constitutional Law]" 2013, No. 2, p. 47.

¹² In foreign (US) jurisprudence see e.g. *Racsko v. Racsko*, 91 Conn.App. 315, 881 A.2d 460 (2005).

Secondly, the provisions of the Passport Act do not specify at all the circumstances in which a family court may request the passport authority to refuse or invalidate the minor's passport. Article 17(1)(1) of the Act only indicates that a passport is refused to be issued, *inter alia*, at the request of the court conducting civil proceedings, and Article 38(3) indicates that the minor's passport is invalidated at the request of the court conducting proceedings on the execution of parental authority. These provisions do not regulate the situations in which the family court may formulate such a conclusion, leaving the matter to the discretion of that court. Likewise, it is necessary to assess the situation in which the court has to decide whether or not to give the permission to the issue of a passport. In all these cases, the court makes a decision based on its assessment of the child's best interest¹³.

On the side note it may be indicated that only the invalidation of a passport already issued is subject to an additional condition. Only the court conducting the proceedings for the exercise of parental authority, *i.e.* the court which decides on the case for deprivation, limitation, suspension or retention of parental authority, may apply to the competent administrative authority for the passport's invalidation. Such case must be pending. The fact that the procedure for the execution of parental authority is not being effectively conducted at a given time because it has been suspended does not prevent the issue of an appropriate order in that case. Article 38(3) of the Passport Act aims at determining the authority competent to submit an application to the public administration body, and not the phase or stage of the proceedings in which such an application can be submitted¹⁴. The court, accepting the request of the party, issues an order requiring the competent voivode to invalidate the passport document of a minor. This order may be issued either *ex officio* or at the request of the party and it is not a decision referred to in Article 730 *et seq.* of the Polish Code of Civil Procedure, although the analogous application

¹³ See the decision of the District Court in Kielce of 21 August 2015, II Ca 745/15, the Portal, where it was indicated that: "The provision of Article 3 of the Act on Passport Documents of 13.07.2006 is not a sufficient justification for the issue of a passport (...). In any case of dispute between parents about the issue of such a passport, the Court should assess the merits of both parties' arguments and relate them to the best interests of the child, bearing in mind that it is in the child's interest to maintain contact with both parents. As well as the decision of the District Court in Oborniki of 14 July 2017, III Nsm 197/17, the Portal; the decision of the District Court in Wieliczka of 21 June 2017, IV Nsm 343/17, unpublished.

¹⁴ See the decision of the District Court in Warsaw, 6th Appellate Division of Family and Civil Affairs of 19 January 2016, VI Cz 941/15, unpublished: "It cannot be regarded that a literal interpretation of the term 'court conducting proceedings' implies that cases which have been ordered to be suspended are excluded from that concept. In the opinion of the District Court, the above means that the provision of Article 38(3) may be applied to cases that are 'pending', also suspended ones, as the essence of the matter is whether the court making the application has jurisdiction and whether there are grounds for making the application in question (...)".

of some of the provisions on the interim orders is not excluded¹⁵. Submitting this order to the competent voivode initiates administrative proceedings, which should result in an administrative decision to invalidate the passport.

Returning to the main course of considerations, it should be emphasized that the refusal of the court to give permission to request for the issue of a passport for a minor by one of the parents on his or her own or to request the invalidation of the passport may therefore only be justified by special circumstances, which in the case of minor citizens means a threat to their best interest.

Thus, although it is correctly observed that obtaining a decision authorising the issue of a passport does not replace an authorisation for the child to relocate abroad and does not give the right to decide freely on the possibility of taking the child away from the territory of the country of the child's residence, nor does it make the abduction of the child legal, understood as an act of transferring the child to another country without the consent of the custodial parent¹⁶, it cannot be overlooked that in fact is often making the abduction and retention of the child permanently or for a longer period of time abroad possible. Once the child has been wrongfully abducted or retained abroad, it can be extremely difficult to determine where the child is at that moment and to obtain an effective decision ordering the child's return to Poland. Therefore, a much better solution is to prevent the child from being taken away from Poland. This can be achieved by requesting the court to prohibit the child from travelling abroad. If a potential abductor were in doubt as to whether he or she could travel abroad with the child, a decision prohibiting the child from travelling abroad would clearly settle the question negatively. However, it would not prevent taking the child out of Poland. A much more effective tool to achieve this result would be, depending on the circumstances, taking away the child's passport from the parent who plans abduction, invalidating the child's passport or refusal to authorise the issue of the passport¹⁷.

As a consequence, authorisation to issue a passport, in principle, should be granted unless it is not in the best interest of the child, i.e. as a result of the authorisation and the issue of the passport, the following risks arise:

¹⁵ See the decision of the Supreme Court of 23 October 1991, III CZP 103/91, Lex No. 5348.

¹⁶ See the decision of the District Court in Rzeszów of 13 September 2018, V Ca 205/18, the Portal.

¹⁷ Cf. J. Herring, *Family Law*, ed. 5, London 2011, p. 560-561. The English practice also the passport issued to the child by a foreign state may be retained (see decision Re A-K (Foreign Passport) [1997] 2 FLR 569). For more on the importance of and methods of preventing parental child abduction in US law see L. Elrod, *Uniform Child Abduction Prevention Act*, "Family Law Quarterly" 2007, No. 41, p. 23 et seq.; A. Dowd, *International Parental Kidnapping: Combatting Abduction through Prevention*, "Creighton International & Comparative Law Journal" 2017, No. 8, p. 136 et seq.

- a) exposing the child to danger (e.g. travel to countries at war, epidemic or cataclysm) or even
- b) occurrence of situation contrary to the child's interest¹⁸, in particular
- c) parental abduction or retention¹⁹ involving the risk of breaking or weakening the family relationship between a parent and the child²⁰ or of making it impossible or difficult for a parent to build up an emotional bond with the child²¹.

The burden of proving the circumstances for refusing authorisation lies with the parent who opposes the issue of the passport. Concerns about the issue of a passport should be formulated by indicating the specific circumstances that may indicate a threat to the child's best interest or a threat of parental abduction or retention, and not in general terms.

The child's best interest is generally not threatened by a single holiday travel abroad planned by one of the parents. In such a situation, the court's substitute permission to the issue of the passport is not opposed by one of the parents' position, according to which the children do not need to travel abroad²², and the more so

¹⁸ See the decision of the District Court in Kielce of 31 August 2015, II Ca 745/15, where the Court pointed to, inter alia, "the need to examine whether getting a passport by a minor poses a justified threat to his or her best interest, whether there are reasonable grounds to claim that the issue of the passport may have a negative impact on the situation of the minor". The trial court did not find such obstacles to the issue of a passport in this case. On the contrary, it decided that holding a passport is beneficial to the minor, as it would enable the child to contact the maternal grandmother. The circumstances of this case were quite differently assessed by the Appellate Court. See below the text accompanying footnote No. 38.

¹⁹ Sometimes it may involve an abduction or retention already made. Cf. the decision of the District Court for Warszawa-Żoliborz in Warsaw, 6th Family and Minor Division of 26 February 2016, VI Nsm 338/15, unpublished: In this case, the court decided to request the voivode to invalidate the child's passport kept by the parent who had previously abducted the child to Poland and refused to give the child back despite the judgment ordering him/her to ensure the return of the child to the country where the child had previously lived and to initiate the enforcement stage of the case for taking the child away.

²⁰ See the decision of the District Court in Kielce of 21 August 2015, II Ca 745/15, the Portal, where the court indicated that there is a concern that the child will relocate abroad and linked the application for a passport to the fear of the other parent that as a result of obtaining the passport by the child, he/she would not be able to maintain contact with his/her son. Similarly, the decision of the District Court for the capital city of Warsaw in Warsaw, 6th Family and Minor Division of 15 June 2016, VI Nsm 27/15, the portal:

²¹ See the decision of the District Court Warszawa-Praga in Warsaw of 29 June 2018, II C 545/16, unpublished.

²² See the decision of the District Court in Zamość of 19 June 2013, I Ca 210/13, the Portal. This court even decided that the father's position that his 14- and 15-year-old children should spend their holidays in Poland and not abroad should be regarded as an abuse of parental rights. The court perceived it as a desire to deprive children of the joy and opportunity to explore the world. However, this seems to be too a far-reaching generalisation. There may be different motivations of parents who want their children to learn about Poland in the first place, and they do not always deserve such a firm condemnation.

the objection is likely to be an expression of malice²³ or motivated by other reasons not worthy of acceptance (e.g. a demand to lower the expectations of the primary parent as to the extent to which the second parent is to contribute to the child's maintenance²⁴). However, sometimes even a one-off trip, if it makes it significantly more difficult for the child to fulfil his or her compulsory education, may be considered to be contrary to the child's best interest. An example would be a several-week trip to Australia, which together with the period of acclimatization after the return would be inadvisable for a child with difficulties with the Polish language²⁵. A threat to the child's best interest also arises when having a passport would give the child's parent the opportunity to destabilise the child and to take him or her away from his or her environment and life centre too often (e.g. constant taking the child with parent on business trips abroad)²⁶.

The assessment of the risk of parental abduction must be based on totality of the circumstances specific to the case. If the application for a minor's passport is submitted by a parent who is a Polish citizen and who has a stable income, professional (e.g. permanent job), educational (is in the course of studies) and personal situation (e.g. has a stable relationship with a Polish citizen who also has a permanent place of residence in Poland), then in the absence of other circumstances of the case the threat of parental abduction can be assessed as insignificant or even non-existent²⁷. For example, the conclusion that there is no real threat of abduction or retention of the child abroad can be drawn from the stable professional and residential situation of the mother of the minor in Poland, who has no relatives abroad with whom she has constant contact, and from the fact that the care and upbringing of the two-year-old daughter is assisted by her parents, which together indicate that she has located her life centre in Poland²⁸. The absence of risk of abduction may also be supported by the fact that the applicant has proved that all her plans are tied with Poland and that her testimony in this regard should have been considered credible because she has started her studies and is currently in her second year of studies, "which is convincing that she is planning to obtain a higher education in Poland

²³ Cf. the position of the trial court referred to in the decision of the District Court in Kielce of 21 August 2015, II Ca 745/15, the Portal.

²⁴ Cf. also the decision of the District Court in Kielce of 20 December 2016, II Ca 1301, the Portal, where the father's initial declaration made to the mother that he would agree to have his daughter's passport issued if "they agree on the amount of alimony" did not escape the court's attention.

²⁵ The decision of the District Court Warszawa-Praga in Warsaw of 29 June 2018, II C 545/16, unpublished.

²⁶ Aptly: the decision of the District Court in Wołomin of 18 November 2015, III Nsm 236/13, unpublished.

²⁷ Cf. the decision of the District Court in Wieliczka of 21 June 2017, IV Nsm 343/17, unpublished.

²⁸ The decision of the District Court in Kielce of 20 December 2016, II Ca 1301/16, the Portal.

and that going abroad permanently could make it impossible or at least very difficult for her to do so”, while at the same time the participant bases his knowledge on her plans to relocate only on the stories told by a four-year-old child who has little capability to understand reality²⁹.

On the other hand, it is impossible to see in the applicant’s position, who permanently lives and works abroad (in the Netherlands) and meets his daughter only in Poland, a desire to take her abroad against her mother’s wishes, if with his previous and established conduct he did not give cause for concern that he will retain his daughter abroad despite the existence of such an opportunity (i.e. lack of control of ID cards in connection with crossing the border of the European Union), when holding a passport by the child will only make the applicant’s contacts with his daughter easier, notably that he had already been guaranteed these contacts anyway³⁰.

However, the risk of parental abduction does not exist if the court has previously granted one of the parents an authorisation to relocate the child abroad. Travelling abroad will not constitute wrongful abduction or retention of the child within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980³¹ (Article 13(1)(a)), as a consequence, it will enable the petitioner for an effective request to order the child to return to Poland. A similar situation will occur when a minor already has a permanent residence abroad. In such a situation, where the child is habitually resident (as defined by Article 8(1) of Council Regulation (EC) No 2201/2003³²) in another Member State of the Euro-

²⁹ The decision of the District Court in Słupsk of 9 August 2013, IV Ca 362/13, the Portal. This decision referred to an application for authorisation to issue an ID card for a minor. At present, parents’ cooperation is not required for submitting an application for issuing an ID card for a minor, (Article 4 of the Ordinance of the Minister of Internal Affairs on the template of an ID card and the manner and procedure in cases of issuing ID cards, their loss, damage, invalidation and return of 29 January 2015, Journal of Laws of 2015, item 212). However, it remains valid as to how to assess the risk of parental abduction.

³⁰ The decision of the District Court in Oborniki of 14 July 2017, IIII Nsm 197/17, unpublished.

³¹ Journal of Laws of 1995, No. 108, item 528 as amended. For more details on the authorisation see J. Wierciński, *Zgoda na uprowadzenie lub zatrzymanie dziecka. Cywilnoprawne aspekty uprowadzenia dziecka za granicę [Consent to the abduction or retention of a child. Civil law aspects of international child abduction]*, (in: *Rozprawy z prawa prywatnego oraz notarialnego, Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi [Cases from private and notarial law, Memorial Book dedicated to Professor Maksymilian Pazdan]*, A. Dańko-Roesler, A. Oleszko, R. Pastuszko (ed.), Warsaw 2014, p. 423 et seq.

³² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338 of 23.12.2003, special Polish edition, chapter 19, vol. 6, p. 243 as amended; hereinafter: “Regulation No 2201/2003”, pursuant to its Article 8(1) the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

pean Union, there may arise the problem of lack of jurisdiction of the Polish court to decide on a case for authorisation to get a passport for a minor. In one of the cases, a mother who lived permanently in the United Kingdom with her children who wanted to travel applied for authorisation to request the renewal of her sons' passports without the children's father consent. The court appointed a curator for the father who had unknown place of residence and accepted the mother's application as being in the best interest of the children³³. However, the mother's application should have been rejected by the court due to the lack of jurisdiction to resolve the case (Article 1099 § 1 of the Polish Code of Civil Procedure). As the Court of Justice of the EU explained in its judgment of 21 October 2015 in the case of *Vasilka Ivanova Gogova v. Ilia Dimitrov Iliev*³⁴, an action in which one parent asks the court to remedy the lack of agreement of the other parent to a passport being issued in the child's name and to their child travelling outside the Member State of his/her habitual residence is within the material scope of Regulation No 2201/2003 (as it concerns the exercise of parental responsibility in relation to that child within the meaning of Article 1(1)(b) of Regulation No 2201/2003) in conjunction with Article 2(7) of that regulation), even though the decision in that action will have to be taken into account by the authorities of the Member State of which the child is a national in the administrative procedure for the issue of that passport. The jurisdiction of the courts with which a claim or an application in matters of parental responsibility has been lodged may not be regarded as having been 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings' within the meaning of Article 12(3)(b) of Regulation No. 2201/2003 solely because the legal representative of the defendant, appointed by those courts of their own motion in view of the impossibility of serving the document instituting proceedings on the defendant, has not pleaded the lack of jurisdiction of those courts³⁵. It seems that, by analogy, it is necessary to assess the situation in which the child's father who lives in Poland while the child has his habitual residence in another Member State of the European Union within the meaning of Article 8 of

³³ The decision of the District Court in Bielsko-Biala of 16 December 2014, III Nsm 281/14, the Portal.

³⁴ C-215/15, EU:C:2015:710, Lex No. 1813487.

³⁵ T. Bielska-Sobkowicz expressed her positive opinion on the ECJ's belief that the court of the child's place of habitual residence has jurisdiction in such proceedings, *Zagadnienia procesowe w najnowszym orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej [Procedural issues in most recent case-law of the Court of Justice of the European Union]*, (in:) *Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu [Jubilee book dedicated to Professor Tadeusz Wiśniewski]*, T. Ereciński, J. Gudowski, M. Pazdan, M. Tomalak (ed.), Warsaw 2017, p. 1018; see also J. Dominowska, *Jurysdykcja w zakresie odpowiedzialności rodzicielskiej i obowiązku alimentacyjnego a jurysdykcja w postępowaniu rozwodowym [Jurisdiction over parental responsibility and maintenance obligations and jurisdiction in divorce proceedings]*, EPS 2017, No. 1, p. 24.

Regulation No 2201/2003 did not actively participate in the proceedings, did not present his written position in the proceedings and only from the report prepared by court curator in the father's place of residence in Poland it appeared that he did not have any objections to renew his son's passport³⁶.

However, the risk of the child being abducted outside the European Union may be proven by the fact that the mother has already arbitrarily decided to relocate with her daughter from Poland to another country, has not consulted this decision with the father of the minor and has deprived him of personal contact with the daughter for three years. In such a situation, it is reasonable to assume that the child's mother, in possession of the daughter's passport, may, without consulting the father, decide to relocate outside the European Union and, consequently, lead to the complete breaking of family ties between the minor and her father³⁷. A situation where the reason for a trip given by petitioner (e.g. visiting the child's grandmother who lives abroad at her invitation) turns out to be false during the course of the proceedings and the petitioner has not given any other reasons that could justify obtaining a passport for her son should be assessed similarly. The participant's concerns regarding concealment of the mother's actual intentions and plans to relocate with her child after the passport has been issued can then be considered legitimate, especially if her current partner is a foreigner, so it seems likely that she may want to move in with him abroad³⁸.

The above review of decisions of courts indicates that the factors indicating the credible risk of parental abduction or retention may be different, including in particular:

- 1) previous abduction of the child, attempted abduction or threats that the child may be abducted;
- 2) engaging in activities that may indicate planned abduction, such as abandoning employment, selling a house or terminating a tenancy agreement, closing bank accounts, destroying or hiding financial documents, liquidation sale of property, applying for documents that enable a child to travel abroad (e.g. foreign passport³⁹, visa);

³⁶ See the decision of the District Court for the capital city of Warsaw in Warsaw, 6th Family and Minor Division of 13 September 2018, VI Nsm 862/18, the Portal:

³⁷ See the decision of the District Court for the capital city of Warsaw in Warsaw, 6th Family and Minor Division of 15 June 2016, VI Nsm 27/15, the Portal:

³⁸ The decision of the District Court in Kielce of 21 August 2015, II Ca 745/15, the Portal.

³⁹ Cf. American judgment in the case of *Bojilov v. Bojilov*, 425 S.C. 161, 819 S.E.2d 791 (S.C. Ct. App. 2018), where it was found, among other things, that the father was hiding his property in Bulgaria, wanted to relocate there with his son and apply for Bulgarian citizenship for the child. The court assessed that under such circumstances, if the father can apply for a US passport for his son and travel to Bulgaria with him, the child may not return to the US.

- 3) lack of strong family, financial, emotional or cultural ties with Poland, or strong ties of such nature with another country, especially one which is not a party to the Hague Convention on the Civil Aspects of International Child Abduction, or even if it is a party to this Convention, there are no mechanisms to ensure the effective enforcement of a return order to the country from which the child was abducted, or to prevent the other parent from obstructing the applicant's contact with the child;
- 4) attempting to obtain a passport, visa or any other document enabling travel by means of a criminal offence or misleading the competent authorities or without the required authorisation of the other parent⁴⁰.

The more factors referred to above, or other circumstances which the court deems relevant to assess the risk of abduction in a given case, the greater is the risk of abduction, although the mere presence of such circumstances does not mean per se that there is certainty that an abduction will occur, just as the absence of such circumstances does not guarantee that an abduction will not take place⁴¹.

A separate category of cases pending before the family and guardianship courts involving the decisions on a minor's passport, are cases where one of the parents is to be ordered to hand over the child's passport or ID card to the other parent. In the current state of the law, there are no any special provisions explicitly stipulating which parent should keep the child's passport in the event of a divorce. There are no such regulations in the Act on Passport Documents of 13 July 2006. Nevertheless, the scope of parental authority entitles each parent with that authority to keep the child's identity documents.

The child's ID card is the primary document of the child's identity allowing the actual execution of parental authority, in so far as this document is required by administrative and other authorities. The right to have an ID card is vested in every citizen of the Republic of Poland (Article 5 of the ID cards Act of 06.08.2010, consolidated text, Journal of Laws of 2017, item 1464 as amended). On behalf of a person without capacity to perform legal actions or with limited capacity applying for an ID card, the application is submitted by a parent, guardian or curator. An application for an ID card in the minor's name is submitted by one of the parents or a guardian (Article 4 of the Ordinance of the Minister of Internal Affairs cited

⁴⁰ Cf. Article 7 of the Uniform Child Abduction Prevention Act, 9 Pt. IA U.L.A. 43 available on the website of Uniform Law Commission, <https://www.uniformlaws.org>; cf. also Article 3048(b)(1) of the California Family Code, <https://codes.findlaw.com/ca/family-code/fam-sect-3048.html>. See also: J. Morley, Parental Tug-of-War: Preventing International Child Abduction, GP Solo 2011, No. 28, p. 52 et seq.

⁴¹ L. Elrod, *Uniform...*, op. cit., supra 17, p. 40-41.

in footnote 29). In the procedure leading to the issue of an ID card in the minor's name, unlike in the case of the aforementioned Act on Passport Documents, no cooperation between both parents is required⁴². Although the ID card is a specific document entitling a child to move around EU Member States, given its primary identification function, it can be assumed that the child's ID card, as his or her primary identification document, should, in principle, remain with the parent with whom the child is to live on the daily basis.

As to whether this reasoning also applies to a passport which is not a basic ID card, two positions can be found in the court's practice. According to the first one, if there are two identity documents that would make exercising of parental authority possible in a similar manner (including travelling with the child abroad), it would be justified to maintain the situation where one parent has one of the documents and the other parent has the other one. Such a state of affairs would seem fair, since it prevents one parent who keeps both documents, from deciding unilaterally, independently and without restriction in those areas of parental authority where both parents have equal rights⁴³.

According to the second position, within the context of the general rules on the execution of parental authority over the child, the passport should be with the child. The principle that every adult has the right to dispose of his or her ID card and to hold such document with herself or himself should also apply to children and when a child is under the direct care of one of the parents (let's say: mother), the passport should be in her hands. If the child is handed over to the father and their contacts will involve a trip abroad as agreed by the parents, or are based on the consent of the family and guardianship court, if the parents do not agree on this matter, then the child's mother will be obliged to hand over the passport to the child's father. In other words, it should be stated that the identity documents belong to the child⁴⁴ and should be handed over by parents to each other with the child. However, in principle, if the child has an established place of residence with the child's mother, she should keep the passport⁴⁵.

This view is questionable, since there are no particular reasons why the principle of holding a passport with an adult should also apply to a minor whose matters, including where his or her passport will be, are to be decided by both parents. There

⁴² J. Słyk (in:) *KRiO. Komentarz [Polish Family and Guardianship Code. Commentary]*, op. cit., art. 97, nb. 6.

⁴³ This position was adopted by the trial court (District Court in Elk) in the case decided on by the District Court in Suwałki of 19 June 2017, I Ca 168/17.

⁴⁴ This statement can only be understood in a colloquial sense, because the passport is the property of the Republic of Poland during its period of validity (Article 5 of the Act on Passport Documents).

⁴⁵ So: District Court in Suwałki in its decision of 19 June 2017, I Ca 168/17.

is also no particular reason to tie the right to decide which parent will actually keep the child's passport on a regular basis to the established residence of the child. After all, it is rather a derivative of parental authority, and an identification function is not the primary function of a passport. Rather, a passport serves to enable travel outside the Member States of the European Union. It is also difficult to agree that the child's mother will only be obliged to hand over the passport to the child's father if she has agreed to the child's travel or if her refusal is broken by a court order. If one of the parents who keeps the passport can actually cross the border with the child without anyone's consent, why then deny the other parent this right? For these reasons, it should rather be assumed that where both parents retain the right to decide which of them will keep the passport (parental authority in this respect), the mere fact of who the child is living with can only be regarded as one of the circumstances that would influence the decision, not in the decisive factor alone. However, even if one would concur with this opinion, it must be stressed that this rule should be subject to exceptions for reasons analogous to those I mentioned earlier with regard to the case for authorisation to issue a passport. An application for an order that a passport is to be handed over by one parent to the other one should therefore be rejected if it is established that there is a risk that the child might be put in danger or even that another situation contrary to the child's interests would occur, in particular parental abduction, which could be prevented by keeping the ID card. In addition, such an application would be rejected if the parent requesting handing over the passport had previously abused its keeping (e.g. without good reason by refusing to hand over it to the other parent or otherwise hindered the child's travel)⁴⁶.

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STRESZCZENIE

Sądy rozstrzygają kwestie dotyczące paszportu dziecka w różnych typach spraw. Wśród nich najczęściej pojawiają się sprawy o wyrażenie zgody przez sąd na wyrobienie paszportu w razie braku zgody drugiego z rodziców oraz sprawy o nakazanie jednemu z rodziców wydania drugiemu z nich paszportu już wcześniej wystawionego. W polskiej literaturze dominuje pogląd, zgodnie z którym obawa jednego z rodziców przed bezprawnym uprowadzeniem dziecka za granicę nie przemawia za orzeczeniem o odmowie wyrażenia zgody na wyrobienie paszportu przez jednego z rodziców. W tym artykule Autor dowodzi, że te sprawy powinny być rozstrzygane w oparciu o kryterium dobra dziecka. Sprzeczne zaś z dobrem dziecka może okazać się wyrażenie zgody na wydanie paszportu lub nakazanie wydania go drugiemu z rodziców, gdy może to wystawić dziecko na niebezpieczeństwo lub narazić na bezprawne uprowadzenie lub zatrzymanie rodzicielskie.

Słowa kluczowe: paszport dziecka, uprowadzenie dziecka, Konwencja haska, władza rodzicielska, Polska