

# THE PRIMACY OF PARENTS IN CHILD-REARING FOR A CHILD IN FOSTER CARE

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## ABSTRACT

*This study investigates the legal status of parents of children placed in foster care, in view of the constitutional principle of the primacy of parents in child-rearing. It analyzes the legal status of parents in all possible cases when a child has been placed in foster care or in a childcare facility, especially the case based on a ruling that restricts parental authority, which is the most common circumstance and the most ambiguous in terms of the research problem explored here. Moreover, this study examines the thesis that both parents and foster carers jointly affect the child, making it difficult to defend the position that parents should enjoy the primacy. Nevertheless, the purpose of the provisions of the Family and Guardianship Code and the Act on Family Support and Foster Care System is clearly to restore the primacy of parents.*

## KEYWORDS

*parental primacy  
parental authority  
foster care  
family court  
family law  
limitation of parental authority  
termination of parental authority*

## 1. Introduction

### 1.1. Research problem

Parents enjoy primacy in child-rearing. This is guaranteed by Article 48 item 1 of the Constitution of the Republic of Poland of April 2, 1997<sup>1</sup> (hereinafter, the

1 | Journal of Laws 1997, item 483 as amended.

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Polish Constitution). This study specifically analyzes atypical situations—those of parents whose children have been placed in foster care, that is, outside the family unit. It is crucial to establish whether and to what extent this primacy is then removed, restricted, or modified. It is also important to scrutinize the scope of the powers and duties of parents with respect to the child in foster care, and their legal status in relation to those who exercise foster care of the child. In terms of theory, considerations focus on the constitutional aspects of family law.

### | 1.2. *The primacy of parents in child-rearing*

The following quotation from Article 48 § 1 of the Polish Constitution is helpful in fully understanding the principle of the primacy of parents:

Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of the child, as well as his freedom of conscience and beliefs and his convictions.

Similarly, this standard of protection of rights of a human who is a parent had previously been expressed, in, among others, Article 26 of the UN Universal Protection of Human Rights, Article 18 § 4 of the UN International Covenant on Civil and Political Rights,<sup>2</sup> Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>3</sup> Articles 5 and 18 of the UN Convention on the Rights of the Child<sup>4</sup> (hereinafter, UNCRC), and Article 4 § 3 of the Charter of Fundamental Rights of the European Union.<sup>5</sup> In the aforementioned legal acts on the primacy of parents in the upbringing of their children, the guarantee of the primacy of parents is rooted in respect for the natural relationship between parents and their children, which is worthy of protection. This is clearly demonstrated in the UNCRC, whose message may be expressed in the claim that to protect the rights of children, the state is obliged to support their parents.<sup>6</sup> This consensus on the legal status of parents, universal until recently, is worth emphasizing here because lately, the position of the family in the context of parent-child relations has been openly contested by gender ideology and philosophical currents referred to as neo-Marxism and the content of international documents and laws adopted in some countries (not only European), created under the influence of these trends.

The principle of the primacy of parents implies the state's special role, which is to respect the subjectivity of the family and support it, particularly the parent-child relationship.<sup>7</sup> Moreover, the state is obliged to 'guarantee constitutional protection of the rights of the parents against any arbitrary interference of public

2 | Journal of Laws 1977, item 167.

3 | Journal of Laws 1995, item 175 83.

4 | Journal of Laws 1991, item 526.

5 | Journal of Laws of the European Union 2016 C 202.

6 | Contradicting Art. 20 of the UNCRC and Art. 7 of the Act of June 9, 2011 on Family Support and Foster Care System (hereinafter, AFSFC). Cf. Preamble Art. 5 and Art. 18 of UNCRC; Smoczyński, 1997, pp. 293–303; Smoczyński, 1999, pp. 149–166; Andrzejewski, 2012, pp. 41–58.

7 | Borysiuk, 2016, pp. 475–495, 1196–1204.

authority.<sup>8</sup> The result of such an approach is a respect for the autonomy of the family manifested in restraint in control over parents who enjoy parental authority, as opposed to imposing court supervision of the exercise of legal guardianship.<sup>9</sup> However, experience teaches us that state authorities, whether communist (as they once were in Central Europe) or those proclaiming themselves liberal, tend to intervene excessively in the relationship between parents and children, censuring the position of the former and weakening family ties. This is confirmed by the jurisprudence of the European Court of Human Rights<sup>10</sup> that indicates the over-hasty removal of children from their parents, their placement in foster care hundreds of kilometers from the parents' home, or the placement of children raised in the religious tradition of, for example, the Orthodox Church, in a Muslim foster family.<sup>11</sup>

### | 1.3. Foster Care: Characteristics

The purpose of placing a child in foster care (foster-care family or child-care facility) is to ensure appropriate conditions for the child in circumstances when the child cannot remain in the family unit. It is also the intention of foster care to support such families when, owing to a variety of difficulties, parents are unable to fulfil their roles in caring for and rearing the child. Support for the family must be carefully planned and preceded by a thoughtful diagnosis of the family and its situation, in which many divergent aspects—including pedagogical, psychological, and economic aspects—are considered. The ultimate goal of providing support is to enable the parents to restore their ability to fulfil their child-rearing duties.<sup>12</sup> The related tasks are conducted at a local level,<sup>13</sup> by local welfare agencies, including several types of foster-care families and child-care facilities. The child's time in foster care should be as short as possible (the time should be determined by the severity of the family crisis),<sup>14</sup> and it must end when the child reaches the age of majority at the latest.<sup>15</sup>

As a rule, before placing a child in foster care, all less severe forms of intervention with the family should have been employed and found ineffective; nevertheless, there are cases in which the child must be quickly separated from their parents.<sup>16</sup>

Regulations favor family-foster care, indicating that the placement of a child in a child-care facility, such as a residential children's home, should take place only if it is impossible to place a child in a foster family because none is available

8 | Borysiuk, 2016, p. 1185.

9 | Ignatowicz, 1985, pp. 851–855.

10 | Andrzejewski, 2003, pp. 200–204; Nowicki, 2010, pp. 539–555.

11 | Ct. Journal of Laws of 2022, item 447; Nitecki, 2016, p. 47; Andrzejewski, 2020, pp. 49–56; Kuźnicka, 2016, pp. 181–198; Świtło, 2021, pp. 55–70; Zajączkowska-Burtowy and Burtowy, 2020, pp. 101–115.

12 | Maluccio, 1999, pp. 185–195; Hellinckx, 1999, pp. 125–132.

13 | Art. 2 of AFSFCS; Nitecki, 2016, pp. 25–42.

14 | Art. 112<sup>7</sup> of Family Guardianship Code (hereinafter, FGC).

15 | Słyk, 2017, pp. 1313–1315; Zajączkowska-Burtowy, 2021, pp. 109–1102.

16 | 112<sup>3</sup> of FGC; Słyk, 2017, pp. 1313–1315.

or it would run counter to the good of the child. Notably, the superiority of foster families over foster-care facilities holds only for those foster families that function properly. Otherwise, a child will experience harm far greater than that it may experience in a poor foster-care institution.

## 2. Constitutional context

### | 2.1. *Duties of the state in relation to the family: the principle of subsidiarity*

The Polish Constitution's regulations concerning the family also apply to parents whose children have been placed in foster care. The Polish Constitution posits that the state is obliged to protect and support the family,<sup>17</sup> and the good and welfare of the child should be considered in the state's social and economic policies. This duty should be fulfilled primarily in relation to poor families.<sup>18</sup> In turn, a child bereft of a family has the right to care and assistance from public authorities.<sup>19</sup>

The system of foster care in its current form (operating in Poland for a quarter of a century)<sup>20</sup> is a tool of state social policy aimed at supporting families in crisis, specifically those unable to fulfil duties related to the care and upbringing of a child.<sup>21</sup> This is indicated by the content of the AFSFCS, whose regulations, inspired by the principle of subsidiarity, prescribe support (in this case to families) to help them become independent, that is, leading to the parents' resumption of duties toward the child.<sup>22</sup> Foster care, as a method of family support, should be a mechanism that leads to the family's reintegration (reunification) at the earliest opportunity, that is, the return of the child to the parents and the resumption by the parents of their parental responsibilities. In no case should foster care make the beneficiary dependent on the assistance received or lead to a situation in which the parents become accustomed to others taking care of the child instead of them.

Subsidiarity does not apply when foster care has been established for a child placed in a foster family or foster care to protect the child from his or her parents (for their aggression, the consequences of gross neglect, or indifference) or to provide support for the family as a unit.

### | 2.2. *Limits of family autonomy*

In dealing with the issue of parent-child relations addressed in the context of the primacy of parents in child rearing, Article 47 of the Polish Constitution, which guarantees everyone the protection of privacy, including the legal protection of family life, is of key importance. State intervention in this relationship is permitted only in cases specified in legal statutes (FGC)<sup>23</sup> and only based on the final court

17 | Art. 18 of the Polish Constitution.

18 | Art. 71 § 1 of the Polish Constitution.

19 | Art. 72 § 2 of the Polish Constitution.

20 | Chudnicki, 2016, pp. 177–194.

21 | Andrzejewski, 2011, pp. 421–435.

22 | Art. 4 items 1, 2, and 3 of AFSFCS. Dylus, 1995, pp. 52–61; Nitecki, 2008, pp. 58–87, 95–102.

23 | Ct. Journal of Laws of 2020, item 1359.

decision.<sup>24</sup> The state is also obliged to protect children against violence, cruelty, abuse, demoralization, and delinquency.<sup>25</sup> These regulations allow us to conclude that the autonomy of family life and the primacy of parents in the upbringing of children are not absolute, but are protected as they serve both the good of the family as a unit and the good of its individual members, especially the children. In no case may the autonomy of the family be a smokescreen that allows a violent person to act against other household members, especially children.<sup>26</sup>

### 3. Intervention in parental authority and other modifications thereof and the legal status of parents of children in foster care

#### | 3.1. Introductory remarks

The research problem requires us to indicate the legal basis for placing children in foster families or foster-care institutions. This legal basis is determined by the type and scale of the crisis that affects the family. It also determines the status of parents in relation to their children, as well as in relation to the institutions established to provide social, legal, pedagogical, and economic support to the family of the foster child (family court, social assistance, counseling centers, therapeutic centers of distinct types, etc.).<sup>27</sup>

The two most common situations that call for a child to be placed in foster care are the court's decision to either limit parental authority<sup>28</sup> or to terminate it,<sup>29</sup> and it is mainly these situations that are examined here.

The few other legal bases referred to are as follows:

1. Article 100 of FGC obliges the court and administrative authorities to support parents in the exercise of parental authority, even by placing a child in foster care;
2. Article 35 items 2 to 4 of AFCFCS, posits that should such a need arise at the request of parents or with their permission, their children may be placed in foster care based on an agreement concluded by the foster family and the county chief official. The county chief official is obliged to inform the court immediately about this agreement, and the court will then issue a decision based on Article 100 of FGC, Article 109 of FGC, or Article 111 of FGC (until which point, the parents have full parental authority and they may, in particular, take the child out of foster care);

24 | Art. 48(2) of the Polish Constitution.

25 | Art. 72 item 1 of the Polish Constitution.

26 | Ignatowicz, 1985, pp. 808–812; Sokołowski, 1987, pp. 41–57.

27 | Andrzejewski, 2020, pp. 22–26; Sokołowski, 2019, pp. 209–211.

28 | Art. 109 § 2 item 5 and Art. 109 § 4 of FGC.

29 | Art. 111 § 1 and Art. 111 § 1a of FGC.

3. Articles 58 and 103 of AFCFCS regulate the placement of a child in foster care as a result of intervention by the police, the Border Guard, or a social worker (based on Article 12a of the Act of July 29, 2005, on Counteracting Family Violence<sup>30</sup>). In such circumstances, the foster family and the director of the institution both should inform the court and social welfare agencies 'immediately, no later than within 24 hours.'<sup>31</sup> The court will then rule on the child's possible stay in foster care based on the FGC's provisions;<sup>32</sup>
4. Article 110 of FGC concerns the suspension of parental authority;
5. Article 7 item 3 of the Act of June 9, 2022 on the Support and Resocialisation of Juveniles (hereinafter, ASRJ);<sup>33</sup> and
6. Articles 11 to 16 of the Civil Code<sup>34</sup> concern legal capacity, including the prerequisites and effects of incapacitation that causes, among other things, the expiration of parental authority.

### | 3.2. Limitation of parental authority

This is by far the most common legal basis for placing a child in foster care and is a response to a crisis in the family that threatens the good of the child. Its purpose is to rectify the family crisis, and later on, to repeal the restrictions by restoring to the parents their full parental authority.<sup>35</sup> The restriction of parental authority should be short-lived. After all, the rectification of any crisis should ideally be carried out quickly.

The restriction of parental authority is the result of family dysfunction in child care and upbringing. Although not infrequent, especially as reported in the media, it is semantically wrong to refer to these families as pathological. The social sciences have adopted the term 'pathology' from medicine, where 'pathological' is used to describe tissue that needs to be excised from the body. The word has a similar meaning in the social sciences. Meanwhile, the intended result of reducing parental authority is to consolidate the family (reintegration<sup>36</sup>), and not to separate a healthy tissue (the child in this metaphor) from the allegedly pathological tissue of the parents.

Although placing a child in foster care is the most decisive (onerous) form of restriction of parental authority, given that it is the only one that involves placing the child outside the family unit, its decisiveness may be compared, if we extend the medical metaphor, to a strong drug whose task is to cure the sick family, and not to a procedure that signifies an irreversible separation of the child from the family unit. Based on family law, the term 'pathological family' is appropriate only with reference to families in which the parents meet the conditions for the termination of parental authority, as discussed below.

30 | Ct. Journal of Laws, 2021, item 1249.

31 | Nitecki, 2016, pp. 301–307, 513–521.

32 | Art. 100, Art. 109 § 2 item 5, Art. 111 of FGC.

33 | Journal of Laws of 2022, item 1700.

34 | Act of April 23, 1964 Civil Code, Ct. Journal of Laws of 2020, item 1360.

35 | Smyczyński and Andrzejewski, 2022, pp. 279–282; Słyk, 2017, pp. 1287–1291; Długoszewska, 2012, pp. 175–186.

36 | Andrzejewski, 2011, pp. 432–433.

Article 109 § 2, § 3 and § 4 of FGC specify several ways in which parental authority might be limited: the referral of a child to a day-care center, referral of parents to therapy, establishment of family guardianship supervision, and placement of a child in foster care. The catalogue of methods is open, and the forms indicated directly in the legislation are only examples. It may be expanded in jurisprudential practice depending on (1) the resources of the local family-support infrastructure (day-care centers, family assistants, therapy centers, social welfare centers, and non-governmental and religious organizations), as well as (2) the background knowledge of family judges regarding educational, social, and psychological problems, and their ability to interact with institutions working in support of the family in the community.<sup>37</sup> The importance of these two factors cannot be overestimated, as the circumstances that form the basis for limiting parental authority by placing a child in foster care are sometimes more complex than those that prompt judges in other cases to terminate such an authority. These rulings shape the child's future, and an important criterion for choosing one of the methods is to assess the chances of rectifying the situation in the family. If, for example, the family may count on the support of the immediate family (grandparents of the child, siblings of the parents, and responsible adults from the circle of friends) and local support institutions, then the chance of achieving the desired effect by supporting the family is greater. However, in the absence of such support, the chance of returning the child to the family greatly diminishes. The cases emphasize the professional responsibility of family judges for the fate of children and their families, they and indicate the fundamental importance of developing their ability to work with family support institutions in the local environment.

To describe the legal status of such parents, we need to distinguish between the competencies, duties, and rights toward the child between foster carers (foster family or people employed in foster-care facilities) and the parents.<sup>38</sup> Foster-care facilities have been vested with the power of exercising day-to-day custody over the child, raising the child and representing the child in, among other things, cases to assert the child's rights to collect maintenance money, social security benefits, or pensions. Meanwhile, the child's parents are left with all other rights and duties resulting from parental authority.<sup>39</sup> We learn what falls within the scope of these 'other rights and duties' from the provisions delineating the scope of the rights and duties constituting parental authority, that is, primarily, Article 95 § 1 of FGC, which states that

Parental authority shall, in particular, include the obligation and the right of parents to take care of the person and property of the child and to raise a child with respect for its dignity and rights.

37 | Andrzejewski, 2011, pp. 432–433.

38 | Art. 112' § 1 of FGC.

39 | Zajączkowska-Burtowy, 2021, pp. 1066–1078; Słyk, 2017, pp. 1305–1310.

Then to Article 96 §1 of FGC, which states that

Parents raise a child under their parental authority and guide it. They are obliged to care for the physical and spiritual development of the child and to prepare it properly to work for the good of society according to his or her ability.

Of the elements listed, those not attributed to foster-care providers fall within the scope of the powers and duties of the parents of the child. Article 112<sup>1</sup> §1 of FGC mentions neither the management of the child's property, which is, however, irrelevant in these considerations, since the vast majority of foster children come from poor families and have no property, nor the power to guide the child (listed in Article 96 §1 of FGC), in addition to parenting. This allows us to conclude that the guidance of a child is an entitlement of the parents of a foster child.

Broadly, 'guiding' a child involves deciding on matters important to the child (the term used in Article 97 §1 of FGC) such as forming a worldview, choosing an educational path, consenting to planned medical procedures, belonging to social organizations, leisure-time activities (decisions on extracurricular education, e.g., in music school or playing competitive sports) or taking religious or ethical instruction as part of school education.<sup>40</sup> The scopes of the meaning of the terms 'upbringing' and 'guiding' overlap to some extent. After all, decisions on important matters are relevant to the child's upbringing. Parents have the right, for example, to choose a school for their children and the impact of the form of 'guiding' a child on the process of bringing up the child is in accordance with the educational program of the institution.

The *ratio legis* of giving parents authority over key issues concerning the child in spite of the child being removed from the family lies in understanding the limitation of parental authority—as a means to help rectify family issues—in order to restore parental authority and reintegrate the family. A prerequisite for achieving family reintegration is the widest possible involvement of parents with the child.<sup>41</sup> If the parents are stripped of these prerogatives, then this correction becomes more difficult, if at all possible. The local foster-care system must therefore focus both on the child and on corrective actions with respect to the child's parents. If a child is in foster care to serve the purpose of returning the child to his or her family, then those in charge of foster care must not be granted the entire sphere of influence over the foster child.

The corrective nature of limiting parental authority also implies that despite the limitation, parents retain the right to contact the child,<sup>42</sup> and the child continues to enjoy the right to contact their parents.<sup>43</sup> Respect for the right of the child in foster care to maintain contact with the parents is treated in Article 4 item 3 and Article 33 of AFSFCS as an obligation of foster-care providers.

40 | Sokołowski, 1997, pp. 94–95; Strzebińczyk, 2011, pp. 265–283.

41 | Art. 8 of AFSFCS.

42 | Art. 113<sup>1</sup> § 2 of FGC.

43 | Art. 113 of FGC and Art. 9 § 3 of the Committee for the Protection of Children's Rights.



These rights of the parents of foster children are correlated with the responsibilities of foster families and those employed in foster-care institutions. In addition to the duty of the latter to allow parents' contact with the child, they must also respect the parents' decisions on matters that fall under the management of the child. It is also their duty to maintain a dialogue with the parents, especially on issues affecting the child either directly or indirectly. This injunction stems from the division of powers set forth in Article 112<sup>1</sup> §1 of FGC and the pedagogical demand, reflecting the principle of the good of the child,<sup>44</sup> for consistent educational interaction between the foster environment and the parents, and the realization of the idea of pedagogical influence on the parents to strengthen their parental competence (the so-called pedagogization of adults).<sup>45</sup> The passivity, even hostility, of the foster environment in relation to the parents of foster children would stand in axiological contradiction to the good of the child and in praxeological contradiction to the court ruling on the restriction of parental authority, as it would nullify the chances of realizing the purpose of such a ruling.

For the parents—of a child in foster care as a result of the limitation of parental authority—to improve their parental competence, the relevant local government institutions established to support the family and create a system of foster care are obliged to provide appropriate assistance to the child's family and report to the court on these matters.<sup>46</sup>

Because it is the duty of the family court and family foster-care institutions to work for the reintegration of the family, these institutions are prohibited from any actions that pull apart the family (e.g., obstructing contact or failing to inform parents about important matters of the child). Foster families and foster-care institutions may face criticism for engaging in such actions. This may particularly lead to the dissolution of the foster family or the imposition of labor law sanctions (for the improper or unlawful performance of labor duties) and even, in exceptional situations, criminal sanctions<sup>47</sup> against employees of foster-care institutions.

It may not be ruled out that the decisions of the parents concerning their guidance for the child may be contrary to the good of the child. In such a case, the foster family or the director of the foster-care facility is obliged to inform the court.<sup>48</sup> The director has the power to modify the custody of a child in foster care based on a ruling that restricts parental authority,<sup>49</sup> and the director may do so by issuing a ruling on the resolution of controversial issues (e.g., substituting parental consent for the child's education in a special school if the parents deny it) or by delegating the authority to make decisions on controversial issues to foster carers. The director may also delegate the authority to foster carers to decide on specific issues concerning a child (e.g., giving permission for medical treatment in emergencies). As such, the decisions of parents may be taken in stride because, if the decisions

44 | Sokołowski, 1997, pp. 94–95; Strzebińczyk, 2011, pp. 265–283.

45 | Ziółkowski, 2016, pp. 107–156.

46 | Art. 109 § 4 of FGC; Art. 33 of AFSFCS.

47 | Art. 231 of the Criminal Code. Ct. Journal of Laws of 2022, item 1138.

48 | Art. 572 of the Code of Civil Procedure. Ct. Journal of Laws of 2021, item 1805 as amended.

49 | Art. 112<sup>1</sup> § 2 of FGC.

are irrational, the child may be protected against them by informing the court about it.

State intervention may be said to break the autonomy of the family. This happens when the statutory condition of 'a threat to the good of the child'<sup>50</sup> is fulfilled. To the extent that the court has limited the authority of the parents, the primacy of the parents in raising the child is restricted. However, if a restriction takes the form of the child's placement in foster care (and possibly to a much lesser extent with the establishment of guardianship), the question of parental primacy arises in earnest because such a situation opens the door to the so-called divided custody, that is, the division of competencies regarding the child between the parents and foster-care providers.

Once the custody is divided, it is difficult to defend the notion that parents are entitled to primacy in raising their children. However, it may be argued incontrovertibly that the purpose of limiting parental authority is to restore this primacy to parents. This requires a change in the attitude of the parents themselves with the support of community-assistance institutions and the family court. Therefore, the realization of the child's right to live in a family and the family's right to receive support from the state appears to be a difficult, multifaceted task, requiring the participation of professionals from several fields, and fraught with the risk of failure. If it occurs, Article 111 § 1 of FGC will apply and this concerns the so-called optional termination of parental authority of parents of children in foster care based on a court decision to limit it, which is discussed below.

### | **3.3. Foster care as a corrective measure in relation to a child and the legal status of parents**

There is a similarity between the legal status of parents whose children are in foster care because of a restriction of parental authority and that of parents whose children have been placed in foster care because of Article 7 item 9 of the ASRJ.<sup>51</sup> The provisions of this law mean that the court applies educational and corrective measures in the cases of children (referred to in this law as 'juveniles') who show characteristics of delinquency or have committed acts prohibited by criminal law.

The ruling is thus not directly addressed to the parents. However, it may also happen that the court hearing the juvenile's case will collect evidence critical of the parents and will initiate *ex officio* proceedings for the restriction or termination of parental authority. When deciding to place a juvenile in foster care, the court tacitly expresses criticism of the conduct or attitude of the juvenile's parents. Indeed, one of the educational measures the court may select for a juvenile is responsible parental supervision.<sup>52</sup> This is adjudicated if the parents not only want to protect their children but also have the personality competence to do so. That the court adjudicates no responsible parental supervision but places the children outside the family unit in foster care means that it has no confidence in the parents' ability to

50 | Art. 109 § 1 of FGC.

51 | Ignatowicz and Nazar, 2016, pp. 540–542.

52 | Art. 7 item 3 of ASRJ.

influence their children's rehabilitation effectively and positively. In other words, the court finds that the parents are unable to raise their children properly, at least to the extent that they might prevent further delinquency and the commission of criminal acts. However, formally, the placement of a child in foster care under the ASRJ is not a form of intervention into parental authority (its restriction). Hence, it is the parents of the juveniles who are their legal representatives, who make decisions related to the management of the children, and who manage their property. Other issues such as the exercise of day-to-day custody and the upbringing of the child are the responsibility of foster-care providers.

### 3.4. Termination of parental authority

There are many children in foster care whose parents have been deprived of parental authority.<sup>53</sup> Among those parents who have had their parental authority restricted, many have a strong emotional bond with their children, and they try, albeit often ineptly, to fulfil their parental responsibilities. However, there are parents who meet the criteria to be stripped of parental authority and are morally charged and discredited to such an extent that it has become the duty of public authorities to take measures to protect the children from their own parents. In most cases, the behavior of these parents toward their children may rightly be described as pathological.

There are two forms of termination of parental authority: obligatory and voluntary.

The court is obliged to terminate parental authority if: a) there is a permanent obstacle to the exercise of parental authority, b) the parents abuse their parental authority, or c) they commit gross neglect of the child.<sup>54</sup>

Regarding item a) above, the only example of a long-term obstacle to the exercise of parental authority is when a parent serves a long-term prison sentence. A parent who commits a criminal act punishable by severe punishment deserves condemnation not only because of the crime he or she has committed but also because of the rupture he or she has caused in the relationship with his or her children by his or her own inappropriate conduct.

The decision to strip long-term mentally ill parents of parental authority on the grounds that they are unable to perform the duties of exercising parental authority runs counter to the idea of the administration of justice by the courts,<sup>55</sup> as it categorizes these parents as morally discredited, displaying an inappropriate attitude toward their children. In such cases, the authorities may apply for incapacitation on the grounds of a mental disorder that renders the sick person incapable of functioning independently, and therefore even less capable of fulfilling parental duties toward the child.

Regarding item b) above, the exercise of parental authority involves parental behavior characterized by concern for the good of the child and respect for the

53 | Art. 111 § 1 and § 1a of FGC.

54 | Art. 111 § 1 of FGC.

55 | Judgement of the Supreme Court of January 19, 1998, II CKN 744/98 published LEX 529706.

child's dignity, which are both crucial in the child's physical and psychological development.<sup>56</sup> Parental authority, as a subjective right, seeks to realize the interests of the child, which typically coincide with the interests of parents who want the best for their child. However, there are atypical situations characterized by behavior that is an abuse of parental authority. Abuse of the law is not an exercise of the subjective right and deserves no protection but instead, censure from the law.<sup>57</sup> This includes the termination of parental authority. In practice, behavior that is an abuse of parental authority sometimes manifests itself in the form of criminal acts (verbal and physical aggression, abuse, and sexual abuse). These acts not only involve the termination of parental authority ordered by the family court but are also subject to the scrutiny of the criminal court.

Regarding item c) above, gross neglect in the exercise of parental authority refers to the behavior of parents that involves a consistent failure to show concern for the child—the child's proper development, health, educational development, ability to live in society, and so on.

If the grounds set forth in Article 111 § 1 of FGC occur, the court is obliged to issue a ruling terminating parental authority. However, optional deprivation of parental authority, regulated in Article 111 § 1a of FGC, may be issued against parents whose children are in foster care based on the limitation of parental authority, but despite the support provided to them, the reasons for removing the child from the parents persist. Their inappropriate behavior manifests itself in this case in the lack of cooperation with the providers of the support, meaning that circumstances in which children might return to the family have failed to occur. This results from the failure of the actions taken to support the parents, which is probably due to the inappropriate attitude of the parents, but perhaps sometimes also the result of insufficient professional support failing to help reintegrate the family.

All the reasons for the removal of parental authority mandate the protection of the child from the consequences of the parents' inappropriate attitude. In essence, this attitude is characterized by violence (psychological, physical, or economic), as referred to in 19 of UNCRC. In such cases, the law imposes no obligation on public institutions to take measures to reintegrate children's families along the lines of Article 109 § 4 of the FGC concerning the restrictions of parental authority.

As a result of the termination of parental rights, parents are unable to make decisions about their children in any circumstances. Moreover, the need arises to provide legal assistance and appoint a guardian for the children.<sup>58</sup>

The right of parents to maintain contact with their children implies no right to decide about the children and, as such, is not a feature of exercising parental authority. Therefore, this right is accorded to parents even though their parental authority has been terminated. If this right was realized in a way that

56 | Arts. 87, 95, 96 of FGC.

57 | Pyziak-Szafnicka, 2007, pp. 771–828; Radwański and Olejniczak, 2011, pp. 240–249; Szczekala, 2018.

58 | Arts. 145 and the following of FGC.

is contradictory to the good of the child, then the court might limit the right to contact the child or even terminate it completely.<sup>59</sup>

Parents who have been deprived of parental authority are not relieved of their obligation for child support or the duty to pay for children's foster care. Meanwhile, institutions that form the local foster-care system are not obliged to conduct planned activities for the reintegration of the family of children whose parents have been stripped of parental authority. There is no regulation in the provisions on the termination of parental authority similar to Article 109 § 4 of FGC that prescribes such activities in the case of the establishment of foster care when parental authority is limited. However, when both parents are stripped of their parental authority, institutions that form the local foster care system (among others, directors of residential children's homes) are obliged to report the children to an adoption center<sup>60</sup> to initiate the adoption procedures. The decision regarding adoption of the child leads to the dissolution of the legal relationship between the children and their parents.

Therefore, if parents are deprived of parental authority, then it is not so much that they lose the primacy in the upbringing of the children but rather, that they are removed from the circle that may influence the child's upbringing.

### | **3.5. Incapacitation of parents: expiration of parental authority**

The expiration of parental authority as a result of the incapacitation of the parent(s) is distinct from the removal of parental authority. The former occurs when the prerequisites for the removal of parental authority set forth in Article 111 of FGC are absent; the parents nonetheless cease to exercise parental authority, even to a limited extent. As in the case of the removal or limitation of parental authority, in the case of the incapacitation of one of the parents, placement of a child in foster care may take place if the other parent has had his or her parental authority limited, has been stripped of it, has died, or has also been incapacitated.

The prerequisites for incapacitation are mental illness, intellectual disability, or other mental disorders if they have resulted in a situation in which the person is unable to function independently.<sup>61</sup> Because the person cannot cope with the duties to fulfill his or her own needs and protect his or her own interests, he or she is even less able to cope with the responsibilities of exercising parental authority. Therefore, one of the effects of a ruling on incapacitation is that parental authority is terminated, and this happens by dint of the law. The law states that a parent lacking full legal capacity (incapacitation limits or abrogation of this capacity) may not exercise parental authority.<sup>62</sup>

The expiration of parental authority as a result of incapacitation leads to the establishment of guardianship for the child and the appointment of a guardian. However, this is not a form of intervention in the parental authority as it is

59 | Art. 113<sup>2</sup>–113<sup>4</sup> of FGC.

60 | Art. 164(1) of AFSFCS.

61 | Domański, 2014, pp. 9–48.

62 | Art. 94 § 1 of FGC.

not mentioned in Article 48(2) of the Polish Constitution but rather, the duty of the family court to provide protection for the child if the parents are unable to provide it.

Article 96 § 2 of FGC in turn posits that the parents of a child who have limited legal capacity because of partial incapacitation, among other reasons, have the right to participate 'in the day-to-day custody of their children and in the children's upbringing, unless the guardianship court decides otherwise for the sake of the child.' They also have the power to consent to the adoption of their children. However, under unusual circumstances, the court may rule on the adoption of their children despite the lack of consent, if it determines that the refusal to consent 'is manifestly contrary to the good of the child'.<sup>63</sup> This possibility should be ruled out if the prognosis of mental illness or other mental disorders that form the basis of partial incapacitation makes it possible to predict improvement of the condition, and revocation of the incapacitation and restoration of parental authority take place.

It may not be assumed that the incapacitation will be revoked within a brief period, and it may not be ruled out that this may never take place. Because the case defies any scheme, prudence is required when adjudicating incapacitation, determining the custody of the child of the incapacitated parent, and settling the situation of the child after incapacitation has been revoked. If this happens, the parent acquires full legal capacity, which constitutes grounds for revoking the guardianship established for the child and for the possible restoration of parental authority, but the guardianship court will then seek a solution that is in the best interests of the child.

Not only does total incapacitation remove from the parent the primacy in upbringing, but it also prohibits the parent from exercising any rights, duties, or competencies implied in parenting. It only secures the right to maintain contact with the child.

### *3.5.1. Suspension of parental authority*

The essence of the suspension of the right lies in the temporary non-exercise of the right despite the fact that the parent is entitled to it. The rationale for the suspension of parental authority is that there may be an obstacle to its exercise, which, at the time of adjudication, is known not to be temporary (or is short-lived). In practice, this concerns obstacles that involve no criticism of parental competencies that would justify the limitation or removal of parental authority (a work trip abroad that has been planned for several months or the need for a single parent to undergo surgery and convalescence, which, according to doctors, will terminate in a similar period).

The consequence of suspending parental authority is the establishment of legal guardianship for the child and the appointment of a guardian. The guardian should maintain contact with the parents and respect their will in decisions concerning the child, especially given that modern technology allows long-distance communication with the parents, to get to know what they want in the event of difficult circumstances.

63 | Art. 119 § 2 of FGC.

Owing to the short-term nature of the suspension of parental authority, parents do not lose primacy in raising their children. This is verified by the fact that adoption proceedings may not then be initiated with respect to their children. That the suspension of parental authority is not mentioned in Article 48(2) of the Polish Constitution is noteworthy. It is not listed there as a form of judicial intervention in the rights of parents. The fact that regulating the suspension of parental authority in Article 110 of FGC follows the limitation of parental authority,<sup>64</sup> but precedes the termination of parental authority,<sup>65</sup> erroneously suggests that it is a form of intervention and stricter than limitation.

If the grounds for the suspension cease to exist, it is revoked, and the parents then exercise full parental authority. However, if the court revokes the order suspending parental authority (e.g., in the face of the parents' prolonged absence from the country, lack of contact with parents, and failure to contribute to the maintenance and upbringing of the child) and decrees a restriction or removal of parental authority, then the situation changes, and their primacy will either cease or be modified.

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## 4. Summary

The family is an asset that merits assistance and protection, and parents are the first carers of their children. This is a constitutional standard adopted in Poland from international documents cataloguing human rights. The standard requires that efforts be made to protect these values, especially in circumstances in which parental authority is improperly exercised, particularly regarding the fulfilment of the duties of a custodial and educational nature. However, distinctions must be drawn between those cases in which a child is placed in foster care but it may return to the family after it is provided professional support, and those that compel the placement of a child in foster care to provide the child with protection from parental violence. The former case applies to parents whose children have been placed in foster care by dint of a court decision to limit parental authority, and the latter to parents who have been stripped of parental authority.

If a child is placed in foster care based on a limitation of parental authority, the parents are deprived of their autonomy in decisions concerning the child, and their primacy in raising the child is challenged. However, it should be borne in mind that the purpose of limiting parental authority is to restore fully the primacy of the parents in raising the child.

Removal of parental authority from parents and its expiration take primacy away from parents in terms of raising their children. However, the primacy of parents does not cease while the child is in foster care at the parents' behest, the juvenile court's decision, or the suspension of parental authority.

64 | Art. 109 of FGC.

65 | Art. 111 of FGC.

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