

THE ROLE OF COURT GUARDIANS IN PROCEEDINGS UNDER THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION. ISSUES SELECTED IN THE LIGHT OF A CASE FILES' RESEARCH*

dr Anna Natalia Schulz

Institute of Law Studies, Polish Academy of Sciences, Poland

ORCID: 0000-0001-7207-7320

email: annanatalia.schulz@op.pl

ABSTRACT

The 1980 Hague Convention on the Civil Aspects of International Child Abduction¹ only regulates in a very general way certain elements of the proceedings pending under this treaty. Each state-party regulates procedural details in this respect mainly in accordance with their own domestic law. The article furnishes facts and data about results of the state of the application of the Convention in Poland and tasks carried out by a court guardian and a state official.

Cross-border Hague proceedings are not a classic guardianship process. However, an appointed court guardian applies steps similar in nature to those derived from typical domestic guardianship and family cases. The office acts as an information source, it supervises the course of contacts and, if necessary, it is responsible for the compulsory collection of a child. Those tasks are not strictly regulated in the Convention. This article aims to show the actual level of participation of court guardians in Hague proceedings in Poland, and to examine to what extent the best interests of children might be affected by the actions of court guardians.

KEYWORDS

court guardian, 1980 Hague Convention, guardianship courts, child

* This work was supported by the National Science Centre Poland under Grant No UMO-2014/15/B/HS5/03305.

1 The 1980 Hague Convention on the Civil Aspects of International Child Abduction [1995] JoL 528, correction of the translation – [1999] JoL 1085.

1. INTRODUCTION

The 1980 Hague Convention on the Civil Aspects of International Child Abduction regulates a number of issues related to ensuring that a minor returns to the state of his or her habitual residence as soon as possible following unlawful detention or removal. Its basic aim is to protect the child, as well as the right to custody and the right to maintain contact with the child. The basic assumption of the Convention is the paramount importance of the child's best interests in proceedings relating to his or her care and protection.²

Accordingly, the treaty generally outlines such issues as the conditions for the proceedings pending in the requested countries or the tasks of the authorities examining the applications (depending on the domestic law of each country – either judicial or administrative authorities)³ as well as central institutions which, *inter alia*, coordinate the cross-border flow of information and documentation related to these types of matters,⁴ circumstances that give rise to an obligation to order the return of a child⁵ and those that relieve that obligation.⁶

Outside of the scope of the Convention are, for example, issues such as the method of collecting information on the child's situation or the methods of obtaining the child's opinion. Both the Convention and the EU law⁷ modifying the treaty for the majority of the EU Member States leave the state-parties a degree of freedom on how to shape many procedural details under the applicable domestic law.

In Poland, many of the auxiliary activities undertaken in the course the proceedings based on the Convention are entrusted to court guardians. What is the level of their participation in Hague proceedings, and to what extent do the best interests of the children concerned depend on tasks which are not regulated in the Convention?

In order to answer the questions posed, this article examines some of the tasks entrusted to family court guardians in connection with the application of the Hague Convention in Poland using partial results of file research carried out by the author.⁸

2 Preamble of the Convention, sentence 1.

3 E.g. Art. 11, 14–15 of the Convention.

4 E.g. Art. 6–7, 9–10 of the Convention.

5 Art. 3–4, 12, sentence 1 of the Convention.

6 Art. 12, sentence 2, Art. 13 of the Convention.

7 Mainly the 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 [2009] OJ UE L 70/19 and the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ UE L 178/1.

8 The files' research on Hague cases in Poland was carried out under the grant National Science Centre no UMO-2014/15/B/HS5/03305. These cases mainly covered instances examined before 2014, that is before the reform of the procedure for considering the Hague Convention in Poland introduced by the Act of 26 January 2018 on the exercise of certain activities of the central authority in family matters with regard to legal turnover under European Union law and international agreements. The query covered selected district court cases and included a total of 176 Hague proceedings. Most of the files were from the years of 2008–2013. Of the available cases, 36 were from before 2008. Due to the outbreak of the pandemic, work on cases dealt with under the amended procedure was limited to the Regional Court in Poznan. A detailed discussion of the research and its results can be found in a book publication being prepared for printing, which is to be published by the Publishing House ILS PAS at the end of 2021.

2. A COURT GUARDIAN

A family court guardian in Poland is a state official⁹ who supports the work of a judge deciding on family, guardianship and juvenile matters. Though this institution has evolved, from its very beginning its nature has been characterized by a functional connection with courts as well as the wide range of tasks that it is bound to perform.¹⁰

Since 2001, the system of family guardianship in Poland has been regulated by the Act of 27 July 2001 on court guardians (hereinafter: 2001 Act).¹¹ It specifies, among other things, the requirements for candidates wishing to become court guardians (Art. 5 and 84), the rules based on which they may perform their tasks¹² as well as the issues related to the organization of the wider court guardian service, including its self-government, court guardian centres, issues of professional responsibility and remuneration of court guardians.¹³ Until 2001, a number of issues related to the organization and performance of such curatorial tasks had been regulated, *inter alia*, by the Ordinance of 1986.¹⁴

The structure of the profession of court guardians in Poland is dualistic in nature and covers the work of both vocational as well as social court guardians (Art. 2(1) of the 2001 Act). Moreover, this division is compounded by specialization into family court guardians and adult probation officers (Art. 2(2)), however only the first group is engaged in Hague Convention cases.

Every candidate for such position is required to complete university or postgraduate studies, with only sociological, pedagogical, psychological and legal faculties being taken into account (Art. 5(4) and 5(6) of the 2001 Act). It is also necessary to undertake a curatorial apprenticeship and pass the final exam (Art. 76–83). By the definition, therefore, court guardians are vocationally prepared to fulfil their mission and their occupation is a profession of public trust.¹⁵

The admission to service and the referral to a specific court as well as to a specific team of court guardians takes place through a separate appointment by the President of the District Court in question (Art. 4 of the 2001 Act). According to the Art. 147 §2 of Act on the System of Common Courts, court guardians work in courts.¹⁶

The vocational court guardians, apart from other duties, supervise the work of assisting social court guardians, who in turn perform their functions honourably and are not employees of the courts.¹⁷ Social court guardians are also not subject to the same professional requirements

9 K Stasiak, 'Wprowadzenie' [Introduction] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 25.

10 K Jadach, *Praca kuratora w sprawach rodzinnych, nieletnich i karnych* [Work of court guardian in family, juvenile justice and criminal matters] (WN UAM 2011) 24–31. The institution of a court guardian representing a child in a civil trial, pursuant to Art. 99(1) of the Family and Guardianship Code, is beyond the scope of this work.

11 Ustawa z dnia 27 lipca 2001 r. o kuratorach sądowych [Act of 27 July 2001 on court guardians and probation officers] [2021] JoL 1071; uniform text – [202] JoL 167.

12 Art. 6, 9–11, 13, 85–90 of the Act of 27 July 2001 on court guardians.

13 Chapters from II to V of the Act of 27 July 2001 on courts guardians.

14 Rozporządzenie Ministra Sprawiedliwości z 24 listopada 1986 r. w sprawie kuratorów sądowych [Ordinance of the Minister of Justice of 24 November 1986 on court guardians] [1986] JoL 212.

15 A Prusinowska-Marek, 'Kuratela rodzinna – proces profesjonalizacji, współczesne wyzwania i potrzeby' [Family guardianship – the process of professionalization, contemporary challenges and needs] (2020) *Dziecko Krzywdzone. Teoria, badania, praktyka* 19(3), 108 and subsequent, <<https://dzieckokrzywdzone.fdds.pl/index.php/DK/article/download/778/629>> accessed 19 Dec 2021.

16 Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych [The Act on the System of Common Courts] uniform text [2020] JoL 2072; K Gromek, *Ustawa o kuratorach sądowych. Komentarz* [Act on court guardians. Commentary] (Lexis Nexis 2005), LEX – commentary on Art. 1 and 11.

17 A Prusinowska-Marek (2020) 113.

as vocational court guardians, and they can actually represent various professions. In light of the research, the tasks related to Hague proceedings are usually entrusted to vocational court guardians.

All court guardians work primarily at the place of residence of those people on behalf of whom they fulfil their tasks (Art. 3(1) of the 2001 Act). Their working time is determined by the type and number of duties (Art. 13(1)). The scope of activities of family court guardians is regulated in more detail by the Ordinances of 12 June 2003 on the detailed manner of exercising the powers and duties of court guardians¹⁸ and of 9 June 2003 on the workload standards of vocational court guardians.¹⁹

3. HAGUE PROCEEDINGS IN POLAND

The Hague Convention has been in force in Poland for nearly 30 years.²⁰ Its application (including some issues not covered by the Hague Convention) is governed by the rules of the Code of Civil Procedure,²¹ which has changed several times during this period. In the period from 1 November 1992, when it entered into force in Poland,²² until 26 August 2018, applications submitted under it were examined by district courts. Most of these courts had family and guardianship departments (there are around 300 of them nationwide).²³ This meant that Hague cases were considered by judges specializing in family and guardianship matters.

The courts of second instance were initially 49 voivodeship courts. On 1 January 1999 they were replaced by 46 regional courts, which took over the handling of Hague cases in the second instance.²⁴ Until 1 July 2000, it was possible to bring a cassation appeal to the Supreme Court against the decisions of the second instance courts issued in Hague cases.

In Poland, the situation where district courts could settle Hague cases was maintained until 2018.²⁵ This was justified by the argument that such courts were closest to the children concerned. That is why the courts often knew about the situation of a given family, because Hague cases were often preceded by other trials, usually initiated by those with whom the children involved had been staying. However,

18 Rozporządzenie Ministra Sprawiedliwości z 12 czerwca 2003 r. w sprawie szczegółowego sposobu wykonywania uprawnień i obowiązków kuratorów sądowych [Ordinances of Polish Ministry of Justice of 12 June 2003 on the detailed manner of exercising the powers and duties of court guardians uniform text] [2014] JoL 989.

19 Rozporządzenie Ministra Sprawiedliwości z 9 czerwca 2003 r. w sprawie standardów obciążenia pracą kuratora zawodowego [Ordinances of Polish Ministry of Justice of 9 June 2003 on the workload standards of vocational court guardians] [2003] JoL 1100.

20 Convention was ratified on 10 August 1992 and entered into force in Poland 1 November 1992.

21 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure] [1964] JoL 96, uniform text: [2021] JoL 1805 with amendments (hereinafter: CCP).

22 ‘Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – status on: 5 June 2021’, <<https://assets.hcch.net/docs/33bba6da-cb14-4c0e-bdc0-826c56051633.pdf>> accessed 5 Jun 2021.

23 H Haak, ‘Rola kuratora rodzinnego w realizacji ochrony prawnej udzielanej przez sąd rodzinny’ [The role of a family court guardian in the implementation of legal protection granted by the family court] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 650–664.

24 Art. 2.1 of Ustawa z dnia 18 grudnia 1998 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych [Act of 18 December 1998 r. amending the Act on the common courts system] [1998] JoL 1064 and Rozporządzenie Ministra Sprawiedliwości z 30 grudnia 1998 r. w sprawie utworzenia sądów apelacyjnych, sądów okręgowych i sądów rejonowych oraz ustalenia ich siedzib i obszarów właściwości [Regulation of the Minister of Justice of 30 December 1998 on the establishment of courts of appeal, district courts and regional courts and establishing their seats and areas of jurisdiction] [1998] JoL 1253 with amendments.

25 Compare with *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part I. *Central Authority Practice* (Hague Conference on Private International Law 2003) 37, <<https://assets.hcch.net/docs/31fd0553-b7f2-4f34-92ba-f819f3649aff.pdf>> accessed 27 Dec 2018.

as regards the higher level of the judiciary, not all regional courts had established family departments and there was the concern that matters related to such delicate issues as the removal of children would be entrusted to judges who had no experience in resolving family and guardianship cases.

This situation resulted in problems with the application of the Convention. These were related, *inter alia*, to the lack of knowledge and preparation of individual judges deciding in Hague cases, particularly as regards the substance of the Convention itself and the general nature of cross-border proceedings. An additional difficulty was posed by the shortage of the Supreme Court's judgments, which, due to the inadmissibility of reviewing cassation appeals as of 1 July 2000, limited the issuance of its decisions in Hague cases.

The heterogeneity of the case law concerning the Convention and its autonomous interpretation as well as certain problems related to the speed of the proceedings were two examples of serious problems that resulted in several complaints being brought before the ECHR in Strasbourg and unfavourable judgments being consequently passed against Poland.²⁶

An attempt to remedy this situation was the adoption of the Act of 26 January 2018 on the performance of certain activities of the central authority in family matters in the field of legal transactions under the European Union law and international agreements.²⁷ This law espoused the concentration of Hague cases entrusting them to eleven regional courts. The Court of Appeal in Warsaw was designated as the court of second instance. The legislator also decided to admit the lodging of cassation appeals to the Supreme Court by the Ombudsman for Children, the Ombudsman and the Prosecutor General.²⁸

The new Act introduced into the Code of Civil Procedure a number of provisions regulating certain issues related to Hague cases.

4. TASKS CARRIED OUT UNDER HAGUE PROCEEDINGS BY COURT GUARDIANS IN POLAND

4.1. BACKGROUND SURVEYS IN THE COURSE OF HAGUE CASES

In connection with applications requesting the return of a child or the establishment and maintenance of contact under the Hague Convention, in the majority of cases the deciding court (previously the district court, and now one of the designated regional courts) has ordered a court guardian to conduct background surveys in order to determine the situation of the child concerned and all the circumstances of the case at hand.²⁹

According to the file research conducted by the author, the courts ordered a survey in over 80% of cases. The research performed under the auspices of the Institute of Justice, which

26 For Example, Judgement of the ECHR 7710/01 [2005] HUDOC; Judgement of the ECHR 30813/14 [2016] HUDOC; Judgement of the ECHR 2171/14 [2016] HUDOC; Judgement of the ECHR 28481/12 [2018] HUDOC.

27 Ustawa z dnia 26 stycznia 2018 r. o wykonywaniu niektórych czynności organu centralnego w sprawach rodzinnych z zakresu obrotu prawnego na podstawie prawa Unii Europejskiej i umów międzynarodowych [Act of 26 January 2018 on the exercise of certain activities of the central authority in family matters with regard to legal turnover under European Union law and international agreements] [2018] JoL 416.

28 Art. 519¹⁹ § 2² CCP as amended by the Act of 26 January 2018.

29 T Jedynak, K Stasiak, *Ustawa o kuratorach sądowych. Komentarz* [The Act on court guardians. Commentary] (Wolters Kluwer 2014), LEX – commentary on Art. 11; H Haak, *Ochrona prawna udzielana przez sąd opiekuńczy* [Legal protection granted by the guardianship court] (Dom Organizatora TNOiK 2002) 249 and subsequent.

covered the material collected in 30 Hague cases decided under the new procedures,³⁰ shows a percentage decrease in the number of surveys commissioned by regional courts. In light of the results published by the Institute of Justice, such interviews were commissioned in 40% of cases.³¹ However, this could have been influenced by the percentage of cases discontinued or rejected due to the failure to complete formal deficiencies at the application stage. The data is presented in a way that does not allow for a more precise evaluation.

Pursuant to the Art. 6(1) of Ordinance of 12 June 2003, a court guardian should determine and make a report about the circumstances indicated by the court, in its order to conduct a background survey. Art. 5 of the Ordinance of the Minister of Justice of 11 June 2003 currently in force do not contain any template for such a survey, imposing only an obligation to apply the method of conducting criminal intelligence interviews appropriately in family matters.³² Art. 570¹(1) CCP can also be applied here. Thanks to the work of the court guardian, the court should learn, *inter alia*, about the conditions in which the child in question lives and is brought up, about his or her health, the living situation of the family concerned, about the minor's behaviour, the way the child spends their free time, about his or her contacts, their attitude towards both parents, other relatives or guardians, and if the child goes to school, about the course of his or her education.

Due to the specificity of cross-border cases, the court (especially in newer cases) usually expects the court guardian in question either to confirm or deny the fact that the child had been staying in the place indicated in the application. Another piece of information expected from the court guardian was how long the child had been staying in Poland. It is also important for the court to determine whether any proceedings are pending in the country of the child's habitual residence or in Poland, whether and what decisions have been already made in these proceedings, and how the minor in question had been taken care of before leaving the country of permanent residence.

In order to determine the unlawfulness of the child's departure from the country of his or her habitual residence, the court guardian in question should set up whether a return is being planned and whether the parent or guardian under whose care the child has been staying in Poland in fact intends to return to that country. It is also important to establish whether the parent or relevant person in question has the written consent of other entities authorized to care for the minor.

In the course of the proceedings, the court must also determine whether the conditions set forth in Art. 13(b) of the Convention exist. The strong conviction of a grave risk of physical or psychological harm or placing the child in an intolerable situation if returned is grounds for refusing to order the minor's return. The court also examines how the applicant has behaved during the child's stay in Poland. This analysis includes, in particular, questions as to whether he or she is in contact with that child and if so, in what form, how often and whether they contribute towards the child's maintenance.

30 M Białecki, *Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzona w Hadze w dniu 25 października 1980 r.* [Adjudication in cases for the return of a child under the Convention on the Civil Aspects of International Child Abduction drawn up in The Hague on 25 October 1980] (IWS 021), poz. 616, <<https://iws.gov.pl/analizy-i-raporty/raporty/#rodzinne21>> accessed 19 Dec 2021.

31 Ibid.

32 Art. 5 of the Ordinance of the Minister of Justice of 11 June 2003 on the regulations of activities in the field of conducting a background survey and a model questionnaire for the interview [2003] Journal of Laws 1018 in connection with Art. 6(2) of the Ordinance on the detailed manner of exercising the powers and duties of courts guardians [2014] Journal of Law 989.

The scope of the matters covered by the survey is finally determined by the court in its order. The information is collected on the basis of targeted conversations and observations, carried out with the child's parents or guardians in the place indicated in the court's order, but also by seeking information from other sources, for example kindergartens or schools attended by the child, as well as on the basis of case files which the court guardian should thoroughly read.³³

In some of the files made available to the author for examination, there was information on certain interviews that court guardians had performed with children covered by Hague applications. In some of these cases, this was the child's only conversation with any government official throughout the proceedings. Regardless of the age and maturity level of the minor in question, an issue that still remains unregulated is how to assess the information so obtained and whether the statements of the child expressed before the court guardian (often in the presence of other household members) can be treated as an authoritative source of information about that child's opinion on his or her situation.

From the point of view expressed in Art. 72 of the Constitution of the Republic of Poland,³⁴ the right of a child to express their opinion in any proceedings concerning that child is an issue of great importance. For years clear postulates have been formulated in the literature on the subject, so as to specify the tasks and methods of their implementation by court guardians in matters related to the work for persons subjected to various educational, corrective or preventive decisions by guardianship courts. It seems justified that such a postulate, specifying the requirements for court guardians with regard to collecting information from underage children, should also be developed.³⁵

The court guardian shall within 14 days draw up a written report on the activities they carried out. In most Hague cases, however, the court sets a shorter time limit for the survey and the preparation of a written report. Although it should be indicated that in the cases examined not all reports met the formal requirements (Art. 7 of the Ordinance of Justice of 12 June 2003) and were undated, in about 10% of cases the report was prepared and received by the court on the same day.

It should be mentioned that in more or less the same percentage of cases, the 14-day period prescribed by law was significantly exceeded, sometimes taking even more than 31 days. The justifications for these delays varied, although they were usually associated with the difficulties in determining the whereabouts of the minor in question. It might be concluded that preparation for the surveys related to the need to read the files (although the interview is one of the first steps recorded in the files, in Hague cases, the application is often accompanied by a number of documents that contain information requiring further verification by court guardians), the interviews themselves, as well as the preparation of reports are time-consuming activities. The very fact that a survey was prepared on the same day on which it was commissioned in such a large percentage of Hague cases merely proves the awareness of the importance of the tasks at hand.

33 T Jedynak, 'Rola kuratora rodzinnego w realizacji ochrony prawnej udzielanej przez sąd rodzinny. Wywiady środowiskowe' [Role of the court guardian in realisation of the family court' legal protection. The Background surveys] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 688–699.

34 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483.

35 M Andrzejewski, 'O specyfice kurateli rodzinnej' [About the specifics of family guardianship], in A Barczykowska, M Muskała (eds), *Horyzonty pedagogiki resocjalizacyjnej. Księga Jubileuszowa Profesora Wiesława Ambrozika* [Horizons of rehabilitation pedagogy. Jubilee Book of Professor Wiesław Ambrozik] (WN UAM 2017) 347 and subsequent.

4.2. COMPULSORY COLLECTION OF A CHILD

The purpose of the Hague Convention is the prompt return of a child to the country of his or her habitual residence.³⁶ If the court in question orders the return, and the person obliged to return the child abroad fails to comply with this obligation, proceedings may be initiated for the compulsory collection of the child (Art. 598⁶ CCP). The court guardian has an executive function here. The provisions on this matter introduced in 2001 replaced the previous regulations, according to which compulsory collections of children were carried out by court bailiffs, whereas the provisions themselves were located in the part of the code on enforcement proceedings.³⁷ Since then, however, certain elements of this procedure have been gradually clarified, including, for example, the participation of the police and other authorities in the course of the activities undertaken by court guardians.

The provisions regarding the assistance offered to the court guardians in the course of undertaking the activities of collecting children have raised certain objections for a long time. It was not fully known, for example, what assistance activities social welfare authorities were specifically entitled to and what tangible assistance court guardians might expect from the police. There were serious legal doubts concerning the legitimacy of forceful police intervention when the person obliged to surrender the child did not open the door of the apartment where he or she, and (probably) the child, had been staying.³⁸ The 2018 Act amended a large part of the regulations in this respect, among others providing a legal basis for the police to search the apartment in order to find the child concerned (Art. 598¹⁰ and Art. 598^{11a} CCP).

Since the enforcement proceedings for collecting a child are initiated at the request of the entitled person, Art. 598⁹ CCP requires that he or she be present during the activities, which should ensure the child's safety by taking over from the court guardian following the collection. This result may not be achieved in situations when the applicant is not present, even where he or she is replaced by someone duly designated (for example a consular officer of their state).³⁹ In the course of the current research, the files of nine cases contained information about the initiation of a procedure for the collection of a child. Five cases were successfully completed, whereas in three of them, it was necessary to repeat the activities at least once (one case) or twice (two cases) due to the failure of previous attempts or the non-arrival of the parent entitled to collect the child. In the files examined under the new procedures, there was no case that necessitated conducting proceedings to take the child away.

In the published research conducted under the auspices of the Institute of Justice, enforcement proceedings were initiated in two cases out of 30.⁴⁰ There is no information on the results of these proceedings. It is only known that in one of these cases, the child concerned was kept in hiding, because the court ordered a search by the police and allowed them 'to determine the location of the mobile phone used by the person responsible'.⁴¹

The current procedural provisions impose an obligation on the court to indicate the date (but no longer than two weeks) by which the obligated person should return the child to state that within two weeks of the decision becoming final, the obligated person should return with the minor to

36 Preamble, sentence 2, Art. 1 (a) of the Convention.

37 J Gajda in K Pietrzykowski (ed), *Komentarz do Kodeksu rodzinnego i opiekuńczego* [Commentary to Guardianship and Family Code] (C.H. Beck 2021) pt. 21 i subsequent – commentary on Art. 100.

38 M Pawlak, *Informacja o działalności Rzecznika Praw Dziecka oraz uwagi o stanie przestrzegania praw dziecka* [Information on the activities of the Ombudsman for Children in the year 2020 and comments on the state of observance of the children's rights] (2021) 229–236.

39 Art. 598⁹ sentence 2 CCP.

40 M Białecki (2021) 64–68.

41 Ibid – case no 22.

the minor's country of habitual residence (Art. 598⁵ § 2 CCP). Failure to comply with the order will result in the initiation of a compulsory collection at the request of the entitled applicant.

When implementing a court's order for compulsory collection, the court guardian must take into account the best interests of the child and protect the minor against any physical and moral harm (Art. 598¹² § 1 sentence 1 of CCP). For this reason she/he may select the appropriate services and bodies to help in order to minimize the risk of events that may have negative consequences for the morality and health of the child concerned (Art. 598⁵ § 5 CCP). The guardian is obliged to stop the activities if it is decided that their completion would cause serious harm to the child. It is up her/him to assess whether the level of risk to the child in question has reached a level that justifies the interruption of activities. Quite often, it is so difficult to determine this aspect that some court guardians have complained about their lack of training in this area. However, if leaving the child in the place to which he or she was unlawfully brought poses a greater risk, it is the duty of the court guardian to arrange for that child to be collected (Art. 598¹² § 2 CCP). The court guardian shall draw up a written note reporting on the course of activities during the collection (§ 9(3) of the Ordinance of 12 June 2003).

While the Act of 2018 introduced the concentration of jurisdiction in Hague cases, the performance of tasks by court guardians is normally transferred from the regional courts to the court guardians service in the district court in whose jurisdiction the child is located. If the child's place of stay changes, the collection will be redirected to the appropriate local court guardian (Art. 598⁷ CCP).

If the child is not collected and the obligated person has not complied with the order to return the minor within 3 months from the issuance of the decision, while other circumstances in the case have not changed, the proceedings may be resumed under the previous decision (Art. 598¹²(a) CCP). Contrary to the suggestions of the Ombudsman for Children, as a result of the 2018 amendment, it is not possible in Hague cases to apply for a change of the collection decision due to some new circumstances (such as, for example, a child's illness which prevents the execution of the ruling or the illness of the entitled applicant).⁴²

4.3. CONTACTS

In the course of Hague proceedings, court guardians also perform control functions, supervising the course of contacts between the entitled person and the child (§ 10(1) of the Ordinance of 12 June 2003). The decision on securing contacts for the duration of the proceedings is taken at the request of the person concerned if, in the opinion of the court, this does not threaten the child's welfare. Establishing the supervision of a court guardian over such contacts in Hague cases faces similar problems as in the case of other guardianship matters.

Contact in the presence of a court guardian is usually ordered when there is a conflict between the parties to the proceedings over the possibility of seeing the child.⁴³ The supervision of the court guardian is to prevent the risk of another abduction by the person entitled to contact, and to allow to observe the relationship between that person and the child in order to determine whether it poses any threat to the child's welfare, including his or her development.⁴⁴

⁴² Art. 598⁵ § 5 of the CCP.

⁴³ J Zajączkowska-Burtowy, *Kontakty z dzieckiem, Prawa i obowiązki* [Contacts with the child. Rights and duties] (Wolters Kluwer 2020) 142–144.

⁴⁴ T Jedynak, N Górńska, 'Odebranie osoby podlegającej władzy rodzicielskiej lub pozostającej pod opieką oraz udział kuratora w sprawach o umieszczenie dziecka w środowisku' [Role of the court guardian in realisation of the family court' legal protection] in T Jedynak, K Stasiak (eds), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 793–808.

When it comes to the investigated cases, the place of contact was very differently specified: at the house of the obligated person, on the premises of an nongovernmental organisations, on the premises of the court, but also at supermarkets and playgrounds. The court guardian shall make notes regarding the course of the contact.

Paragraph 10(1) of Ordinance provides that the presence of a court guardian during the contact is to prevent exceeding the time limit of the meeting. Meanwhile, in the cases examined, the main problem was instead the short duration of the meetings due to the presence of other household members and their comments towards the person entitled to contact, and even the complete failure to meet due to this reason. In one case, the meeting was terminated early by the court guardian when the entitled person took the child into the corridor of the court guardians centre so that the child could greet their grandparents who had not been granted permission to attend the meeting. This behaviour was treated as an attempt to kidnap the child again and a violation of the terms of the meeting.

As regards the examined files, the court considered applications for securing contact during Hague proceedings in 25 situations out of 140 cases from the years 2008–2013. Most of the requests for a court guardian's supervision were made by the party obligated to allow the contact with the child as a response to the request for access to see the child. The decision to allow a meeting with a court guardian usually resulted from the rejection of more extreme requests by the parties.

As in domestic cases, court guardians in Hague proceedings demand that the scope of their own duties be more detailed when it comes to the implementation of the provisions on contacts and the obligations of the parents as well as other persons participating in the meetings in order to prevent incidents occurring during that time. They also postulate to specify their own rights as well as the rights of the persons entitled to contact and other concerned entities.⁴⁵

5. CONCLUSIONS

The true scope of the tasks of court guardians is wide and includes diagnostic, information, control and executive functions.

The way the guardians perform the mission entrusted to them, and how they present the results of their activities to the court, will very often affect the assessment of the facts by the judge, and consequently also the protection and implementation of the rights of the children in question together with those of other entities affected by the outcome of the proceedings.

Considering the scope and time-consuming nature of the activities that court guardians perform in connection with Hague cases at the request of the court, it should be stated that they are probably the state officials who spend the most time with the children concerned. Without their participation, the fulfilment of the state's obligations related to the application of the Hague Convention would be impossible. From this point of view, the office of court guardianship is an indispensable and irreplaceable body and, although its tasks for the application of the Convention are not very prominently exposed in the text of the treaty itself, without this service the court would be unable to observe the provisions binding upon each state-party.

In carrying out the tasks entrusted to them in Hague proceedings, court guardians act as the eyes and ears, and sometimes also as an arm of the judiciary. Not to mention that, as the person who is potentially the first (and sometimes the only) state authority to meet with a child covered by an application, they are the face of the justice system in Poland.

45 T Jedynek, N Górská (2018) 793–808; A Prusinowska-Marek (2020) 119.

REFERENCES

LITERATURE

- Andrzejewski M, 'O specyfice kurateli rodzinnej' [About the specifics of family guardianship] in A Barczykowska, M Muskała (eds), *Horyzonty pedagogiki resocjalizacyjnej. Księga Jubileuszowa Profesora Wiesława Ambrozika* [Horizons of rehabilitation pedagogy. Jubilee Book of Professor Wiesław Ambrozik], (WN UAM 2017) 347–368.
- Białecki M, *Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzona w Hadze w dniu 25 października 1980 r.* [Adjudication in cases for the return of a child under the Convention on the Civil Aspects of International Child Abduction drawn up in The Hague on 25 October 1980'] (IWS 2021), <<https://iws.gov.pl/analizy-i-raporty/badania-instytutu-wymiaru-sprawiedliwosci-w-ujeciutematycznym/prawo-rodzinne-i-zagadnienia-zwiazane-z-jego-funkcjonowaniem/>> accessed 19 Dec 2021.
- Pietrzykowski K (ed), *Komentarz do Kodeksu rodzinnego i opiekuńczego* [Commentary to Guardianship and Family Code] (C.H. Beck 2021).
- Gromek K, *Ustawa o kuratorach sądowych. Komentarz* [Act on court guardians. Commentary] (LexisNexis 2005).
- Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Hague Conference of International Private Law 2003).
- Haak H, *Ochrona prawna udzielana przez sąd opiekuńczy* [Legal protection granted by the guardianship court] (Dom Organizatora TNOiK 2002).
- Haak H, 'Rola kuratora rodzinnego w realizacji ochrony prawnej udzielanej przez sąd rodzinny' [The role of a family court guardian in the implementation of legal protection granted by the family court] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 650–664.
- Jadach K, *Praca kuratora w sprawach rodzinnych, nieletnich i karnych* [Work of a court guardian in family, juvenile and criminal matters] (WN UAM 2011).
- Jedynak T, 'Rola kuratora rodzinnego w realizacji ochrony prawnej udzielanej przez sąd rodzinny. Wywiady środowiskowe' [Role of the court guardian in realisation of the family court' legal protection. The Background survey] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 688–699.
- Jedynak T, Górka N, 'Odebranie osoby podlegającej władzy rodzicielskiej lub pozostającej pod opieką oraz udział kuratora w sprawach o umieszczenie dziecka w środowisku zastępczym' [Removal of a person subject to parental authority or guardianship and participation of the guardian in cases of placement of a child in a foster environment] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 793–808.
- Jedynak T, Stasiak K, *Ustawa o kuratorach sądowych. Komentarz* [Commentary on the act on court guardians] (Wolters Kluwer 2021).
- Prusinowska-Marek A, *Kuratela rodzinna – proces profesjonalizacji, współczesne wyzwania i potrzeby* [Family guardianship – the process of professionalization, contemporary challenges and needs] (2020) *Dziecko Krzywdzone. Teoria, Badania, Praktyka* 19(3), 102–127, <<https://dzieckokrzywdzone.fdds.pl/index.php/DK/article/download/778/629>> accessed: 19 Dec 2021.
- Stasiak K, 'Wprowadzenie' [Introduction] in K Stasiak (ed) *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 25–37.

Zajączkowska-Burtowy J, *Kontakty z dzieckiem, Prawa i obowiązki* [Contacts with the child. rights and duties] (Wolters Kluwer 2020).

Pawlak M, *Informacja o działalności Rzecznika Praw Dziecka oraz uwagi o stanie przestrzegania praw dziecka* [Information on the activities of the Ombudsman for Children in the year 2020 and comments on the state of observance of the children's rights] (2021) DS 1104.

LEGAL ACTS

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure] [1964] JoL 96, uniform text: [2021] JoL 1805 with amendments.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction [1995] JoL 528, correction of the translation – [1999] JoL 1085.

Rozporządzenie Ministra Sprawiedliwości z dnia 24 listopada 1986 r. w sprawie kuratorów sądowych [Ordinance of the Minister of Justice of 24 November 1986 on court guardians], [1986] JoL 212.

Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483.

Ustawa z dnia 27 lipca 2001 r. o kuratorach sądowych [Act of 27 July 2001 on court guardians and probation officers] [2021] JoL 1071; uniform text – [202] JoL 167.

Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych [The Act on the System of Common Courts], uniform text [2020] JoL 2072.

Rozporządzenie Ministra Sprawiedliwości z 9 czerwca 2003 r. w sprawie standardów obciążenia pracą kuratora zawodowego [Ordinances of Polish Ministry of Justice of 9 June 2003 on the workload standards of vocational court guardians] [2003] JoL 1100.

Rozporządzenie Ministra Sprawiedliwości z 11 czerwca 2003 r. w sprawie regulaminu czynności w zakresie przeprowadzania wywiadu środowiskowego oraz wzoru kwestionariusza tego wywiadu [The Ordinance of the Minister of Justice of 11 June 2003 on the regulations of activities in the field of conducting a background survey and a model questionnaire for the interview] [2003] JoL 1018 in connection with Art. 6(2) of the Ordinance of 12 June 2003.

Rozporządzenie Ministra Sprawiedliwości z 12 czerwca 2003 r. w sprawie szczegółowego sposobu wykonywania uprawnień i obowiązków kuratorów sądowych [Ordinances of Polish Ministry of Justice of 12 June 2003 on the detailed manner of exercising the powers and duties of court guardians uniform text] [2014] JoL 989.

Council Regulation (EU) 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 [2009] OJ UE L 70, 19.

Ustawa z dnia 26 stycznia 2018 r. o wykonywaniu niektórych czynności organu centralnego w sprawach rodzinnych z zakresu obrotu prawnego na podstawie prawa Unii Europejskiej i umów międzynarodowych [Act of 26 January 2018 on the exercise of certain activities of the central authority in family matters with regard to legal turnover under European Union law and international agreements] [2018] JoL 416.

Council Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ UE L 178, 1.

JUDGEMENTS

Judgement of the ECHR 7710/01 [2005] HUDOC.

Judgement of the ECHR 2171/14 [2016] HUDOC.

Judgement of the ECHR 30813/14 [2016] HUDOC.

Judgement of the ECHR 28481/12 [2018] HUDOC.

ONLINE SOURCES

‘Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – status on: 5 June 2021’, <<https://assets.hcch.net/docs/33bba6da-cb14-4c0e-bdc0-826c56051633.pdf>> accessed 5 Jun 2021.