

HEARING OF A MINOR IN CIVIL PROCEEDINGS

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Abstract. The study delves into the issue of the hearing of a minor in civil proceedings. The aim of the analysis is to discuss this right in terms of domestic and international law regulations. The act of hearing is described in terms of both constitutional and procedural regulations, including a historical outline. Additionally, an assessment is undertaken to ascertain the efficacy of the recent amendments of 2023 in safeguarding the rights of minors and addressing long-standing concerns expressed in jurisprudence.

Keywords: hearing of a minor; civil proceedings; child welfare; Convention on the Rights of the Child.

INTRODUCTION

Civil proceedings, frequently protracted and intricate, intertwine property and non-property claims, often delving into inherently sensitive domains such as family matters. The most vulnerable participants in these proceedings are always minors.¹ Despite comprehensive legal provisions requiring representation for minors, indirect modes of participation may not fully capture their genuine intentions or provide pertinent information crucial for case resolution. Consequently, minors, despite their limited maturity and comprehension of rights and responsibilities or the consequences of their own actions, are inherently entitled to the right to be heard.

Primarily, this right finds paramount importance within the nucleus of society – the family – and the unique bonds shared between minors and their parents, legal guardians, or de facto guardians. It is within this context that fundamental social predispositions are shaped, and it is precisely in this realm that significant factual negligence may occur [Haberkowicz 2015, 41-54]. The circle of individuals entrusted with the responsibility of listening to the child primarily encompasses key figures within the familial structure, such as parents, legal and de facto guardians, and other relevant parties who

¹ In this study, the term “child” will be used interchangeably with “minor”, reflecting the common practice found in numerous national and international instruments where these terms are used synonymously to denote the same legal entity.

may indirectly influence the rights of the child [Bucoń 2020, 24-25]. However, the right to be heard extends beyond the familial sphere to external entities, including public authorities such as courts, prosecutors, probation officers, family diagnostic and consultation centres, as well as other central and local authorities.

In the present study, the analysis will focus on the realisation of the right to a hearing at the stage of civil proceedings, where minors are guaranteed this right not only as a general directive but also in a number of specific provisions regulating the particular type of proceedings involving minors. The realisation of the hearing, introduced by the 2008² amendment to the content of Article 216¹ of the *Code of Civil Procedure*³ partially meets both the constitutional and the Convention standard. However, it is important to distinguish the right to be heard from the mere procedural act of interrogation, although it still enables the elucidation of a number of circumstances relevant to the ongoing judicial proceedings. This means that through the prism of the institution of hearing minors, the principle of directness comes to the fore, as well as the right to information, especially when there is evidence of neglecting the rights of the child [Bodio 2019, 409-11]. The discussed institution requires closer attention, especially in light of the latest amendment in 2023⁴, which expanded the regulation in question, partly bringing it closer to solutions in criminal proceedings.

1. CONSTITUTIONAL STANDARD

Pursuant to Article 72(3) of the Constitution of the Republic of Poland,⁵ in the course of determining the rights of the child, public authorities and persons responsible for the child are obliged to hear and, as far as possible, take into account the opinion of the child. The explanatory memorandum to the draft law of 2008 introducing the institution of hearing directly referred to the need to achieve the goals arising from the aforementioned constitutional norm. For this reason, it should be considered that Article 216¹ CCP in litigation or Article 576 CCP in non-litigious proceedings constitute the transposition of the constitutional norm. In the fundamental law, not only a general principle of protecting the rights of the child

² Act of 6 November 2008 on amending the Act, the Family and Guardianship Code and certain other acts, Journal of Laws No. 220, item 1431.

³ Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2023, item 1550 [hereinafter: CCP].

⁴ Act of 28 July 2023 on amending the Act, the Family and Guardianship Code and certain other acts, Journal of Laws of 2023, item 1606.

⁵ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 [hereinafter: the Constitution].

by state authorities was established, but also a part of the specific obligations that state authorities should fulfil was listed. It cannot be stated that each of the child's rights mentioned in Article 72 of the Constitution is guaranteed to the same extent because some regulations are outlined in a framework manner and their implementation is only found in ordinary legislation. Different emphasis is placed on protection against violence, cruelty, and demoralisation, and a different umbrella of protection is provided for procedural norms [Morawska 2007, 125-44]. Among these is the obligation to ensure the child's right to be heard as far as possible in the course of establishing their rights. The provision in question in the Constitution is also grounded in Article 30 of the Constitution, since one of the elements of the dignity of every human being and citizen is the right to be heard. Simultaneously, there is no conflict with the principle of equality expressed in Article 32 of the Constitution, even though several regulations grant the child a unique status, privileged over other citizens. The right to be heard applies to every child as long as they fall under the jurisdiction of the Republic of Poland within the meaning of Article 37 of the Constitution and is not subject to the limitations referred to in Article 81 of the Constitution [Knypl 2012, 13-17]. Consequently, the legislative system, in consideration of the content of Article 32 of the Constitution, does not differentiate legal protection depending on whether the child comes from marriage or another union, or whether the child possesses legal capacity [Bucoń 2020, 9-28]. The provision pertains to public authorities (vertical approach), although, as aptly highlighted in the literature, this does not preclude extending the scope to other private entities (horizontally). Additionally, the provision is unmistakably procedural in nature, serving the purpose of safeguarding the rights of the child [Morawska 2007, 125]. Therefore, the right to a hearing constitutes an integral part of the right to a fair proceeding, thereby constituting the right to a court, as stipulated in Article 45(1) of the Constitution [Bodio 2019, 406-23].

It should be noted, however, that the Constitution establishes a baseline level of protection regarding the consideration of the child's opinion, stipulating that public authorities are not bound absolutely by the child's viewpoint, but only "to the extent possible." This corresponds to the parental responsibilities and another constitutional norm contained in Article 48(1) or Article 53(3) of the Constitution, which recognises parental autonomy in the upbringing process, ensuring the direction of the child's upbringing in accordance with the parents' beliefs, their moral and religious teaching. Similarly, this is reflected in another procedural representation of the minor by a probation officer, where the minor can only be heard regarding the manner of representation, not the establishment of the probation officer in the proceedings.

This implies that the Constitution primarily safeguards the act of hearing the minor, rather than ensuring that the judicial decision aligns precisely with the minor's expressed position. The direction of the decision remains within the discretion of the judicial body and may not always, or even necessarily, correspond with the minor's expectations. This argument is further supported by the case-law of the Supreme Administrative Court. In one of the judgments, it was explicitly noted that the obligation of authorities to hear the position of the minor, whether expressed directly by the minor or through their representative, does not necessarily entail an obligation to consider the position in every decision-making process. The mere act of being heard depends on the minor's ability to form their own opinions, considering their age and level of maturity. Additionally, there are no specified forms of this hearing, which can also be expressed through a representative or in writing.⁶

As emphasised by the Constitutional Tribunal, the right to hear the child is a "self-standing constitutional value," nonetheless, it is subject to limitations since no legal sanctions are established for non-compliance with this obligation in the provision.⁷ Similarly, there is no such sanction under the *Family and Guardianship Code*.⁸ Pursuant to Article 95(4) FGC parents should listen to the child before making important decisions concerning the child's person or property, if the child's mental development, health condition, and level of maturity allow it, and to consider their reasonable wishes to the extent possible.

2. CONVENTION STANDARD

The minor's right to a hearing is also part of a number of norms of international law, constituting their procedural elaboration.⁹ In accordance with Article 19 of the *International Covenant on Civil and Political Rights*,¹⁰ every person has the right to hold their own opinions without interference, the right to freedom of expression, which includes the freedom

⁶ Judgments of the Supreme Administrative Court of: 29 August 2018, ref. no. II OSK 1041/18, Lex no. 2553581; 17 November 2020, ref. no. II OSK 3592/19, Lex no. 3173908.

⁷ Judgment of the Constitutional Court of 21 January 2014, ref. no. SK 5/12, OTK-A 2014, No. 1, item 2.

⁸ Act of 25 February 1964, the Family and Guardianship Code, Journal of Laws of 2023, item 2809 [hereinafter: FGC].

⁹ Cf. the description of successive amendments increasingly taking into account the best interest of the child and the comparative legal analysis from other countries: Kallaus 2015, 96; Stojanowska and Kosek 2018, 41-56; Wybrańczyk 2020, 49-65.

¹⁰ International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966, Journal of Laws of 1977, No. 38, item 167.

to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, orally, in writing, or in print, in the form of art or through any other media of their choice. The freedom of expression is also stipulated in Article 10 of the *European Convention on Human Rights*,¹¹ according to which everyone has the right to freedom of expression. As stated in the provision, this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

More specific regulations of international law directly addressing the rights of a child before a state body are contained in Article 3 of the *European Convention on the Exercise of Children's Rights*.¹² This article lists the right to be informed and to express one's views in the course of proceedings as the first procedural right of the child. According to its content, a child recognised under domestic law as having sufficient understanding of the proceedings concerning them before a judicial body should be granted and may demand the following rights: a) to receive all relevant information; b) to be asked for their opinion and to express their position; c) to be informed about the possible consequences of their position and of the possible effects of any decision.

Undoubtedly, a highly important norm of international law for the subsequent interpretation of national law is Article 12 of the *Convention on the Rights of the Child*.¹³ According to this provision, a child should have the opportunity to express themselves, directly or through a legal representative, in any judicial proceedings concerning them. The jurisprudence of Polish courts in family cases also clearly refers to the provisions of the aforementioned international treaty when discussing the advisability of taking into account the position of the minor by the court.¹⁴ A comprehensive interpretation of the child's right to be heard in the context of the Convention on the Rights of the Child is provided in the analysis conducted by the United Nations Human Rights Committee in General Comment No. 12 (2009) "The right of the child to be heard." The importance of the right to be heard under the Convention is evidenced by the fact that its implementation is recognised as one of the four paramount principles, alongside non-dis-

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, as amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284.

¹² European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on 25 January 1996, Journal of Laws of 2000, No. 107, item 1128.

¹³ Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, Journal of Laws of 1991, No. 120, item 526. Cf. Smyczyński 1994, passim. See also Wiśniewski 1999, passim.

¹⁴ Decision of the Supreme Court of 15 December 1998, ref. no. I CKN 1122/98, OSNC 1999, No. 6, item 119.

crimination, the right to life and development, and the principle of the best interest of the child [Andrzejczak-Świątek 2016, 112-21]. The provision of the Convention has a broader scope than the Constitution or the regulations of the *Family and Guardianship Code*. The Convention does not limit the right to be heard of the child only in cases before courts or administrative bodies, as this directive applies to all matters concerning the child [Gardziel 2022, 100-20]. This discrepancy was somewhat minimised in the 2009 amendment¹⁵ if the content of Article 95(4) FGC is taken into account.

The above regulations also correspond to Recommendation No. R/84/4 of the Committee of Ministers of the Council of Europe on parental responsibility, which in its third principle postulates that decision-making bodies in matters concerning children should be acquainted with their positions [Safjan 1994, 202]. In the case-law of the European Court of Human Rights,¹⁶ the issue of being heard was addressed when assessing a violation of Article 8 ECHR. The Court emphasises that it is necessary to maintain a balance between the interests of the child and those of the parents, and a parent cannot demand measures that could harm the health and development of the child, including contact against the child's will, which could seriously violate the child's emotional sphere [Nowicki 2005, 1311]. In criminal cases, the axis of disputes before the Court most commonly involves the collision between the right of the child to be heard and the right of the accused to defence.¹⁷

The guarantees of hearing the child are also fairly extensively regulated in Article 24 of the *Charter of Fundamental Rights*,¹⁸ according to which children have the right to protection and care necessary for their well-being. The provision particularly emphasises the right to freely express their views, which are taken into account in matters concerning children, according to their age and level of maturity. According to this provision, in all actions concerning children, whether taken by public authorities or private institutions, the best interests of the child must be the primary consideration. However, it is argued in the literature that Article 24 CFR only considers the context of the child in relation to public authorities and private institutions, while omitting their relationships with parents or legal guardians, which is a regulation consistent with the provisions of Polish civil procedure [Kuźniar 2000, 208].¹⁹

¹⁵ Act of 6 November 2008 on amending the Act – Family and Guardianship Code and certain other acts, Journal of Laws No. 220, item 1431.

¹⁶ Hereinafter: ECHR.

¹⁷ Judgment of the European Court of Human Rights of 20 December 2001, P.S. v. Germany, Application no. 33900/96, Lex no. 75869; of 19 June 2007. W.S. v. Poland, Application no. 21508/02, Lex no. 290069.

¹⁸ Charter of Fundamental Rights of 14 December 2007, OJ C. 2007. 303.1 [hereinafter: CFR].

¹⁹ Cf. Jurczyk 2009, 92.

3. STATUTORY REGULATION

The institution of hearing was also known in earlier legislation. Already in Article 15 of the decree on proceedings regarding incapacitation from 1945,²⁰ the requirement of hearing the person to be incapacitated during the trial, as needed in the presence of a medical expert, was introduced. For this purpose, the court could order the compulsory appearance of this person, or if it was not indicated, their hearing by the designated or summoned judge. In the content of Article 28 of the Act on non-contentious proceedings in family matters and guardianship matters from 1950,²¹ the provision had a narrowed character, without a punitive sanction against the minor. It required the hearing of the person to be adopted, who had reached the age of 13, regarding their consent to adoption, in the absence of such consent, to be informed of the reasons for refusal. This delineation of the age category raised several doubts, especially regarding the hearing of minors under the age of 13, which provided the basis for formulating this right in a more general way in subsequent amendments. Therefore, in contrast to these initial regulations, the legislature did not treat the institution of hearing as a general right, but incidentally used this form in individual proceedings. These regulations also equated the status of the person being heard with that of a participant in the proceedings, and the statements made had their direct consequences in the realm of guardianship case adjudication. It is worth noting that the original content of Article 576 CCP initially only dealt with hearing the legal representative of the person concerned by the proceedings, and in more important cases, the close relatives of that person to the extent possible. It was only in the amendment to Article 576 CCP in 1975²² that section 2 was added with the following content: “The hearing of a minor in the course of proceedings takes place outside the courtroom if educational reasons justify it.”

Currently, the institution of a hearing in civil proceedings is derived from the provisions of Article 216¹ and Article 576(2) CCP. The first of these provisions was introduced relatively recently, through the aforementioned amending act of 2008. In accordance with Article 216(1)¹ and (2) CCP, in cases concerning a minor, the court shall hear the child if their mental development, health condition, and level of maturity enable it. If the child refuses to participate in the hearing before the court, the court abstains

²⁰ Decree of 29 August 1945 regarding incapacitation proceedings, Journal of Laws No. 40, item 225.

²¹ Act of 27 June 1950 on non-contentious proceedings in family and guardianship matters, Journal of Laws No. 34, item 310.

²² Act of 19 December 1975 on amendments to the Act on the Family and Guardianship Code, Journal of Laws No. 45, item 234.

from this activity. Depending on the circumstances, mental development, health condition, and level of maturity of the child, the court shall consider their opinion and reasonable wishes. The provision delineates a catalogue of matters concerning only the person of the child, whereas Article 576(2) CCP clearly lists both matters concerning the person and the property of the child in non-litigious proceedings. Against this background, there is justified criticism of the law, significantly limiting the application of the hearing compared to international and constitutional standards, especially in civil proceedings. As a result, the majority of proceedings in which the hearing is applied concern guardianship matters or property matters handled in non-litigious proceedings.

The content of the discussed provision applies both to situations where the child acts as a party or participant in the proceedings, as well as when the child possesses information relevant to the case. As specified in the case-law, the application of Article 216¹ CCP is also independent of who is entitled to represent the child in the process.²³

However, national procedural regulations limit the application of the hearing in terms of the addressees of this norm. According to some representatives of legal literature [Ignaczewski 2010, 189],²⁴ civil procedure under Article 216¹ CCP provides for a hearing only before the court, whereas international law norms also consider so-called indirect hearing, with the participation of a probation officer, a specialist from a family diagnostic and consulting centre, or a mediator.

To some extent, the regulation in question, especially in the legal state prior to the latest amendment, introduced automatism, as it did not explicitly emphasise the premise of the child's welfare at any stage of the hearing.²⁵ This could lead to the conclusion that the hearing applies to every case, regardless of the assessment of the child's involvement in the conflict of their closest relatives and the resulting consequences. The only criterion limiting the hearing is the mental development, health condition, and level of maturity of the minor, which does not protect them from other negative aspects of the judicial process, regardless of their maturity level. In this context, the changes brought by the 2023 amendment to Article 216(1)¹ CCP, introducing the child's explicit refusal to participate in the hearing, binding the judicial authority and compelling them to refrain from this activity, should be positively assessed.

²³ Judgment of the Constitutional Court of 21 January 2014, ref. no. SK 5/12, OTK-A 2014, No. 1, item 2.

²⁴ Decision of the Supreme Court of 16 December 1997, ref. no. III CZP 63/97, OSNC 1998, No. 6, item 108.

²⁵ Cf. Wybrańczyk 2022, 33-56.

However, it should be acknowledged that shifting the burden of this decision to the minor alone does not provide sufficient guarantee, and it would still be appropriate to explicitly include the criterion of the “best interests of the child” to legitimise the initial hearing procedure.²⁶ Although the 2023 amendment introduces the criterion of the child’s best interests, it does so only at the stage of exceptional permissibility of repeating this activity, which, however, does not resolve the above-mentioned doubts. It must be noted with acceptance that the change introducing, in section 3, the principle of a one-time hearing is a step in the right direction. This solution, which has long been applied in criminal procedure, constitutes an additional guarantee against the abuse of the child’s hearing by the conflicting parties in civil proceedings. The criterion verifying the repetition of this activity is the child’s best interests but also ensuring that it should take place before the same court, unless the criterion of the child’s best interests opposes it. Supplementing these changes is also the necessity to clarify in the protocol of the session or hearing the reasons why the court refrained from hearing the child. This is an additional filter for controlling the actions of the civil court, which will allow verifying the implementation of the right to be heard without significantly prolonging the proceedings. The necessity for the court to explain its decision to refrain from this activity is not a sanction for not applying the hearing, but it is a good legislative move to make this activity more realistic in civil proceedings.

In the literature, however, there is an observation of the omission of the right to information as a prerequisite for the implementation of the child’s right to be heard under international regulations [Zajączkowska 2013, 65-67]. In the national context, such a solution would undoubtedly strengthen the use of this institution more frequently than only *ex officio*.

The institution of the hearing of a minor cannot be perceived as a procedural interrogation conducted during the evidentiary stage of the proceedings. For this reason, when submitting a motion for the hearing, the party is obliged to indicate the purposefulness of this activity and the grounds for its application arising from Article 216(1)¹ and (2) CCP. According to the content of this provision, the court shall consider the circumstances of the case and the extent to which it can take into account the position expressed by the minor in its decision.²⁷ While the case-law tends to more frequently deny this right in matters concerning property issues, it gains significance in cases involving non-property matters, such as guardianship, determining parental contact, potential child relocation abroad, giving consent

²⁶ In surveys conducted among judges, the aspect of individualising the hearing procedure depending on the subjective qualities of the child also emerges [Cieśliński 2017, 148].

²⁷ Judgment of the Court of Appeals in Gdańsk of 20 January 2016, ref. no. V ACa 607/15, Lex no. 2052629.

to medical procedures, or the right to know one's biological identity [Bosek 2008, 947-84].²⁸ The significance of this hearing is particularly emphasised after the minor reaches the age of 13. In addition to obtaining limited legal capacity, the court has an obligation to hear the minor based on other specific regulations, for example, in cases of adoption under Article 118 FGC or during placing the child in foster care under Article 4a of the Act on Supporting Families and Foster Care System.²⁹ In some situations, the hearing takes the form of qualified consent of the minor to perform specific actions, as is the case with changing the name and surname under Article 122 FGC (cf. Articles 88, 89, and 90 FGC) The impossibility of equating the hearing with interrogation is also defined by Article 430 CCP. According to its content, minors who have not reached the age of 13, and descendants of parties who have not reached the age of 17, cannot be interrogated as witnesses.

So far, according to Article 186 of the Rules Governing the Operation of Common Courts, the hearing of a minor was conducted, if possible, in a designated and adapted room for this purpose. If such a room was not available at the court's premises, the hearing could also be conducted in a suitable room located outside the court building, especially with the cooperation of non-governmental organisations dealing with children's rights protection. An official note was made of the hearing of the minor.³⁰ It is worth noting the content of the new Article 216² CCP introduced by the amendment of 2023, which regulates the course of a minor's hearing in a manner previously unseen in the CCP. It shall be held in closed session, in appropriately adapted premises at the seat of the court, or if the child's welfare requires it, outside the seat of the court. It is fully accepted to ensure, as stipulated in the amendment, that a psychologist expert may participate in the judge's hearing, subject to a number of statutory conditions. Similarly, the legislator addressed the demands to record the hearing using audio or audiovisual recording devices, which aligns with the principle of protecting the child from repeated hearings. An anticipated change, which cannot be denied its validity, is the detailed regulation of the preparation, conduct, and local conditions of this activity through the appropriate regulation of the Minister of Justice, guaranteed by the delegation contained in the content of Art. 216(4)² CCP.

²⁸ Cf. Feja-Paszkiwicz 2020, 182-95.

²⁹ Act of 9 June 2011 on family support and the foster care system, Journal of Laws of 2024, item 177. Cf. Łączkowska-Porawska 2020, 57-87.

³⁰ Regulation of the Minister for Justice of 18 June 2019 on Rules Governing the Operation of Common Courts, Journal of Laws of 2022, item 2514.

CONCLUSION

Undoubtedly, the right to hear a minor in civil proceedings is an expression of the child's subjectivity, regardless of the procedural role in which they appear. Nevertheless, until the entry into force of the 2023 amendment, the aspect of preparing, conducting this activity, including local conditions, remained at the discretion of the procedural authority, including the discretionary judicial power. Such a solution could not have favoured the guarantee of this activity and its frequency of use, when the law allowed almost the possibility of waiving it *in genere*. The standard guaranteed by the Constitution and a series of international law acts forced the legislator to involve the courts more in the implementation of the right to be heard, beyond the existing special provisions in guardianship cases. The lack of general conditions for the application of this institution, envisaged at least at the level of regulation, and a clear norm obliging the consideration of the child's welfare at each stage of this activity, was a catalyst for many abuses or the abandonment of the participation of minors in civil proceedings. Therefore, the recent regulations strengthening the role of this activity must be positively assessed. They contain guarantee provisions, limiting the discretion of the participants in the proceedings and the court deciding finally on the hearing in civil matters.

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