

Katarzyna Kamińska¹

PhD, University of Silesia in Katowice

orcid.org/0000-0002-4438-0127

katarzyna.kaminska@us.edu.pl

Putting children's welfare first in parental kidnapping and parental abduction cases

Introduction

Parental and divorce-related conflicts are often accompanied by the phenomena of alienation, parental kidnapping and abduction. Parental alienation (*alienacja rodzicielska*) is a situation where one parent, with their behavior, disrupts the child's relationship with the other parent, either consciously or not. This kind of phenomenon most often takes the form of obstructing the child's contact with the other parent, manipulating the child's beliefs and behavior, resorting to emotional blackmail or creating a negative image of the other parent. Parental alienation is an aggravating situation for the entire family. It causes stress and all sorts of emotions, including anxiety, grief, anger, sadness, and destroys the existing order, thus shattering the sense of security. Above all, it affects the child themselves, for whom the bond with both parents is a basic need and right².

¹ Assistant Professor at the Faculty of Law and Administration of the University of Silesia in Katowice (Poland), attorney-at-law.

² W. Nowiak, M. Jakoniuk, A. Trela, *Poradnik psychologiczny dla rodzin zagrożonych sytuacją porwań rodzicielskich* [Psychological guide for families at risk

If one parent (usually the one who has day-to-day custody of the child and raises them) isolates the child from the other parent, making contact with the child difficult or impossible, it happens that the other parent wants to enforce contacts themselves. It is also not uncommon to take last resort, i.e. to arbitrarily take the child to an unknown place. This is then a case of parental kidnapping or abduction³. Parents often do not realize the consequences of such a decision – what harm they are doing to the child. There is a common belief that a child staying with one parent is inherently safe. In practice, however, it is different. This paper aims to identify the phenomena of parental kidnapping and abduction in national as well as international aspects, to place them in a broad legal context. At the same time, it highlights methods of preventing and counteracting these phenomena, with a special focus on mediation – which is effective, though still underestimated in Poland. Special attention is paid to the welfare of the child, who is the most vulnerable victim of the ruthless struggle of adults. Alienation, parental kidnapping or abduction are crisis situations that result in the child, who is most often the one who suffers, being a kind of bargaining chip between former partners. The paper aims to demonstrate that the most important thing is the actual, real perception of the child's welfare in terms of contacts with both parents.

of parental kidnapping situations], Warszawa 2022, p. 9, porwaniarodzicielskie.pl/wp-content/uploads/2022/10/broszura_psycholog_cwim_2022.pdf.

³ Other causes of parental kidnapping also include: intra-family conflict, revenge against a former partner, psychological pressure, patriarchal power, at the request of the child, rescue of the child from danger, influence of others, socio-cultural conditions, religious conditions, emotional blackmail, alcoholism, mental disorders, intimidation of the victim, misjudgment of circumstances, see D. Dajnowicz-Piesiecka, *Porwanie rodzicielskie w ujęciu prawnym i kryminologicznym* [Parental kidnapping from the legal and criminological points of view], Toruń 2017, p. 195.

Kidnapping vs. abduction of a child by a parent

Although the terms 'parental kidnapping' (*porwanie rodzicielskie*) and 'parental abduction' (*uprowadzenie rodzicielskie*) are often used interchangeably, there is a subtle difference between the two. The term 'parental kidnapping' lacks a statutory or scientific definition. An attempt to define this concept was made in Order No. 48 of the Chief of Police⁴, indicating that it is an event whereby one parent with parental authority, without the will and knowledge of the other parent, under the pretext of a short-term stay, permanently takes or keeps the child, thereby depriving the other parent – also with parental authority – of the opportunity to maintain contact with the child to the extent to which they are legally entitled. Children missing due to parental abductions are a special group of missing children. Parental kidnapping occurs when the kidnapping parent has full parental authority. In contrast, such conduct, as will be discussed further below, is not treated as an offence under Polish law. Therefore, agencies and institutions often refuse to provide search assistance in cases of parental abductions, treating them as a kind of intra-family conflict that should not be interfered with. As a result, many kidnapping parents with full parental rights, feel they have impunity.

Parental abduction differs from parental kidnapping mainly in that it is an offence sanctioned by the Criminal Code⁵. Under Article 211 of the Criminal Code, one "who, against the will of a person appointed to provide care or supervision, abducts or detains a minor

⁴ Zarządzenie nr 48 Komendanta Głównego Policji z dnia 28 czerwca 2018 r. w sprawie prowadzenia przez Policję poszukiwania osoby zaginionej oraz postępowania w przypadku ujawnienia osoby o nieustalonej tożsamości lub znalezienia nieznanych zwłok oraz szczątków ludzkich [Order No. 48 of the Chief of Police of 28 June 2018 on the conduct of the police search for a missing person and conduct in the event of the discovery of a person of undetermined identity or the discovery of an unidentified corpse and human remains], Dz.Urz. KGP 2021 [Journal of Laws of the National Police Headquarters of 2018], poz. [item] 77.

⁵ Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny [Act of 6 June 1997 – Criminal Code], Dz.U. [Journal of Laws] 2024, poz. [item] 17 [with subsequent amendments].

under 15 years of age or a person who is incapacitated due to their mental or physical condition, shall be punished by imprisonment from 3 months to 5 years". In view of the research field of this work outlined above, further consideration will be limited to proceedings relating to minors under 15 years of age. Article 211 of the Criminal Code describes abduction and detention as two separate self-contained forms of criminal activity. As for abduction in the strict sense, its essence is understood in the literature as a change in the place of residence of the child, combined with the actual deprivation of the authorized person's ability to exercise custody over the child, or an act, as a result of which the child finds themselves in another place against the will of the person appointed to have custody of the child, who is thus deprived of the ability to exercise authority over the child. Detention, on the other hand, is understood as inducing or forcing a child to remain in their previous place of residence against the will of the person appointed to have custody over them⁶. Child abduction is a common offence that can be committed by any perpetrator. It is considered that the perpetrator can only be the parent who has been deprived of parental authority or for whom it has been suspended or limited. At the same time, there is a divergence in the doctrine on the question of whether it is possible to speak of having elements of the offence under Article 211 of the Criminal Code in the case of abduction of a child by one parent against the will of the other parent, if both exercise parental authority together.

According to the view prevailing in the literature and judicial decisions, as long as a parent has full parental authority, they cannot be the perpetrator of an offence under Article 211 of the Criminal Code. They can become such a perpetrator only when they have been deprived of parental authority, have had that authority suspended or limited⁷. As an analysis of Supreme Court decisions and literature shows, this refers to the limitation of parental authority

⁶ J. Kosonoga, *Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny. Komentarz* [Criminal Code. Commentary], red. R.A. Stefański, Warszawa 2023, Legalis.

⁷ *Postanowienie Sądu Najwyższego z dnia 5 września 2019 r.* [Decision of the Supreme Court – Criminal Chamber of 5 September 2019], I KZP 7/19.

both under the provisions of Article 58 § 1a or Article 107 § 2, as well as Article 109 of the Family and Guardianship Code⁸. The latter contains an open catalog of possible court rulings on parental authority and is a means of protecting the threatened welfare of the child – in contrast to the limitations of parental authority under Articles 58 § 1a and 107 § 2 of the Family and Guardianship Code, which can be a method of ‘arranging’ parent-child relations in conflict situations, i.e. during divorce, separation or in the situation of parents living apart for other reasons⁹. The restriction in the sense of Article 58 § 1a or Article 107 § 2 of the Family and Guardianship Code consists in entrusting the exercise of parental authority to one parent with the simultaneous restriction of the authority of the other parent to certain rights and duties with respect to the child, such as to making joint decisions on the important matters of the child. This restriction is not caused by a threat to the welfare of the child or by a negative assessment of the previous exercise of parental authority by the parent whose parental authority is being restricted, but by the lack of actual possibility of exercising rights and duties resulting from the fact of separation¹⁰.

Referring to Article 109 of the Family and Guardianship Code, in its judgement dated 5 February 1987, the Supreme Court expressed the view that every order issued by a guardianship court issued under that provision, constitutes some sort of restriction of parental

⁸ Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy [Act of 25 February 1964 – Family and Guardianship Code], Dz.U. [Journal of Laws] 2023, poz. [item] 2809 [with subsequent amendments]. See uchwała Sądu Najwyższego z dnia 21 listopada 1979 r. [Resolution of the Supreme Court – Criminal Chamber of 21 November 1979], VI KZP 15/79; M. Kaczmarek, J. Kaczmarek, *Urowadzenia rodzicielskie, czyli wojna o dzieci. Problem czy marginalizacja zjawiska* [Parental abductions – the war for children. The problem or marginalization of the phenomenon], [in:] *Prawo rodzinne* [Family law], red. D. Wetoszka, Warszawa 2022, p. 81.

⁹ K. Kamińska, *Komentarz do art. 109 k.r.o.* [Commentary to Article 109 of the Family and Guardianship Code], [in:] *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code. Commentary], red. M. Załucki, Warszawa 2023, pp. 537–538.

¹⁰ *Eadem, Piecza naprzemienna a władza rodzicielska rodziców żyjących w rozłączeniu* [Joint physical custody and parental authority after divorce or separation of parents], Warszawa 2022, pp. 318–321.

authority, but not every such order constitutes a restriction that provides grounds for holding a person who disobeys such an order criminally liable under Article 188 of the Criminal Code [now Article 211 of the Criminal Code]¹¹. This view is also reflected in the decision of the Supreme Court dated 30 September 2013, where it was pointed out that the condition for committing an offence under Article 211 of the Criminal Code is to act “against the will of the person appointed to exercise custody”. A person appointed to exercise custody cannot be a perpetrator of an offence under Article 211 of the Criminal Code. The issue of deprivation, restriction or suspension of parental authority is therefore, in the Court’s opinion, only indirect in this context of and, so to speak, only indicative. Indeed, the essence of the problem boils down to the need to determine whether a person has the subjective characteristic of ‘being appointed to exercise custody’ over a minor¹².

With the above in mind, supporters of the view in question particularly emphasize the argument that adopting an expansive interpretation of Article 211 of the Criminal Code, under which parental abduction can also be committed by a parent with full parental authority, risks violating the principle of subsidiarity of criminal law, which should interfere in the sensitive sphere of family relations *ultima ratio*. It cannot be used as a means to enforce the will of one parent. The resolution of conflicts between parents in the exercise of parental authority, including as to the whereabouts of the child, should be ensured by family law institutions and family courts¹³.

¹¹ Wyrok Sądu Najwyższego z dnia 5 lutego 1987 r. [Judgment of the Supreme Court – Criminal Chamber of 5 February 1987], V KRn 468/87.

¹² Postanowienie Sądu Najwyższego z dnia 30 września 2013 r. [Decision of the Supreme Court – Criminal Chamber of 30 September 2013], IV KK 232/13.

¹³ J. Kosonoga, *Komentarz do art. 211 k.k., op. cit.*; see S. Hypś, *Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny*, t. 2, *Część ogólna. Komentarz do art. 117–221* [Criminal Code. Volume II. General Part. Commentary to Articles 117–221], red. M. Królikowski, R. Zawłocki, Warszawa 2023, Legalis; B. Gadecki, *Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny. Art. 1–316. Komentarz* [Criminal Code. Articles 1–316. Commentary] red. *idem*, Warszawa 2023, Legalis.

The Supreme Court has consistently expressed a similar position in its rulings¹⁴.

However, in the doctrine one can encounter a different view, according to which neither the *ratio legis* nor the grammatical interpretation of Article 211 of the Criminal Code provide grounds for exculpating a parent who, while having full parental authority, abducts a child against the will of the other parent, who is also exercising full parental rights¹⁵. It follows from the wording of Article 97 § 1 of the Family and Guardianship Code that if parental authority is vested in both parents – regardless of whether they live together or are divorced or otherwise living separately – each parent is obliged and entitled to exercise it. An exception to the principle of autonomy and independent action of each parent is provided for in Article 97 § 2 of the Family and Guardianship Code, which requires them to work together, since the important matters of the child should be decided jointly by parents with full parental rights, and in the absence of agreement between them – it is the guardianship court that will make that decision. The important matters of the child undoubtedly include issues related to the child's whereabouts¹⁶. The right to decide on the child's whereabouts falls within the scope of custody of the child, which is one of the most essential attributes of parental authority¹⁷. Parents are obliged to jointly decide on the whereabouts of the child, who should stay in a place agreed upon

¹⁴ Postanowienie Sądu Najwyższego z dnia 18 grudnia 1992 r. [Decision of the Supreme Court – Criminal Chamber of 18 December 1992], I KZP 40/92; postanowienie Sądu Najwyższego z dnia 9 grudnia 2003 r. [Decision of the Supreme Court – Criminal Chamber of 9 December 2003], III KK 116/03; postanowienie Sądu Najwyższego z dnia 14 lutego 2019 r. [Judgment of the Supreme Court – Criminal Chamber of 14 February 2019], V KK 42/18; postanowienie Sądu Najwyższego z dnia 28 czerwca 2021 r. [Decision of the Supreme Court – Criminal Chamber of 28 June 2021], IV KK 260/21.

¹⁵ *Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny. Komentarz* [Criminal Code. Commentary], red. M. Mozgawa, Warszawa 2021, p. 747.

¹⁶ Postanowienie Sądu Najwyższego z dnia 14 października 1970 r. [Decision of the Supreme Court of 14 October 1970], III CRN 181/70.

¹⁷ Postanowienie Sądu Najwyższego z dnia 7 czerwca 1967 r. [Decision of the Supreme Court of 7 June 1967], III CR 84/67.

by both parents with parental authority. If a parent with full parental authority abducts a child, i.e. changes the child's whereabouts without the consent of the other parent, and thus prevents the latter from exercising his right to custody of the child – to raise them and direct it – that behavior meets the features of the offence under Article 211 of the Criminal Code.

The latter view, although currently held by a minority in the literature, is accurate and deserves acceptance. The opposite position, M. Mozgawa adds, provides impunity for arguing parents until at least one of them is deprived of parental authority, or until it is restricted¹⁸. Going further, it is worth noting that the interpretation of Article 211 of the Criminal Code has not been significantly modified over the past several decades, while the social conditions, including the situation of the family and freedom of movement in Poland have changed a lot. When a child is abducted by one parent against the wishes of the other, whether or not both parents exercise parental authority, the rights of a parent are violated, and as a result of this situation the health and psychological well-being of the child being deprived of the possibility to contact the other parent, often suffers significantly. Therefore, it is difficult to find a rational justification for the fact that when a child is abducted by a parent with full parental authority, agencies and institutions refuse to help, and court decisions are unfavorable to the party aggrieved by the state of affairs¹⁹.

Also in favor of an expansive interpretation of Article 211 of the Criminal Code is the purpose of criminalizing child abduction, which is to ensure the proper functioning of the family in the scope of fulfilling its functions related to custody and upbringing, and to ensure the proper functioning of the very institution of family. The prerequisite for the performance of the duties stipulated within their framework is the actual contact of the parents with the child,

¹⁸ *Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny. Komentarz* [Criminal Code. Commentary], red. M. Mozgawa, Warszawa 2021, p. 747.

¹⁹ Z. Kołakowska, P. Gluza, *Kiedy rodzic porwał dziecko. Podstawowe informacje prawne* [When a parent kidnapped the child. Basic legal information], Warszawa 2015, p. 7.

expressed in real influence over the fate of the child and in deciding on important matters of the child²⁰. In addition, the offense under Article 211 of the Criminal Code is penalized as a result of the duty to protect, under the Constitution of the Republic of Poland²¹ and the Convention on the Rights of the Child²², ratified by Poland in 1991. These are primarily Article 71 section 1 of the Constitution of the Republic of Poland, which indicates that the State shall take into account the well-being of the family in its social and economic policies, and Article 72 section of the Constitution of the Republic of Poland, according to which the Republic of Poland shall ensure the protection of children's rights. The above corresponds with the prohibition of separating children from their parents against their will, as stipulated in Article 9 section 1 of the Convention on the Rights of the Child, and the prohibition of child abduction carried out for any purpose and in any form, as stipulated in Article 35 of that Convention.

International abduction of a child by a parent

In the case of international child abduction by one parent against the wishes of the other parent, the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: Hague Convention), ratified by Poland in 1992, is applied²³. It is clear from the preamble and Article 1 of the Hague Convention that it was introduced 'to protect children' internationally from the harmful effects of their wrongful abduction and to establish proceedings to ensure their prompt return to their country of habitual residence. In other words, the proceedings initiated under its provisions are intended to restore the factual and legal status that existed before the wrongful

²⁰ S. Hypś, *Komentarz do art. 211 k.k., op. cit.*

²¹ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Act of 2 April 1997 – Constitution of the Republic of Poland], Dz.U. [Journal of Laws] 1997, poz. [item] 483 [with subsequent amendments].

²² Convention on the Rights of the Child – adopted by the UN General Assembly on 20 November 1989 and entered into force in September 1990.

²³ Convention on the Civil Aspects of International Child Abduction – concluded 25 October 1980 and entered into force on 1 December 1983.

abduction. It should be emphasized that the wrongful abduction of a child is already in itself detrimental to the child's well-being, and in accordance with the tenets of the Hague Convention, only ordering the return of the child to the country from which they were abducted will ensure the realization of the broad interests of the child. In addition, the Hague Convention also aims to protect the jurisdiction of the child's country of habitual residence in cases of child abduction²⁴.

In the case of international child abduction, a parent may demand the return of a child under the age of 16 who has been wrongfully abducted from one state party to the Convention to another state – also a party to the Hague Convention. It should be pointed out that the vast majority of countries in the world have acceded to this Convention, including all countries of Europe²⁵. According to Article 3 of the Hague Convention, abduction of a child is illegal if it is in breach of rights of custody attributed under the statutory law (court order or administrative decision or a legally valid settlement) of the State in which the child was habitually resident immediately before the abduction and if, at the time of abduction, that right was being effectively exercised. To compare it to the Polish realities, the 'right of custody' should be considered to be parental authority.

The Convention adopts as a principle of immediate return of the child to the country of permanent residence. It is clear from the wording of Article 12 of the Hague Convention that the adjudicating authority of the country to which the child has been wrongfully abducted is obliged to order the child's immediate return if the child is still present in that country, and the application was received

²⁴ M. Białecki, *Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzonej w Hadze w dniu 25 października 1980 r.* [Adjudication of child recovery cases under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction], Warszawa 2021, p. 59, iws.gov.pl/wp-content/uploads/2021/04/IWS_Bialecki-M._Orzekanie-w-sprawach-o-wydanie-dziecka-w-trybie-Konwencji.pdf.

²⁵ The parties to the Convention do not include: Afghanistan, Algeria, Angola, Saudi Arabia, Bangladesh, Egypt, Ethiopia, Indonesia, Iran, Jordan, Cameroon, Qatar, Kenya, Congo, North Korea, Cuba, Kuwait, Lebanon, Libya, Pakistan, Sudan, Uganda, Vietnam and the United Arab Emirates.

before expiry of one year after the abduction. However, it is possible to refuse to surrender the child if a period of more than one year has elapsed since the receipt of the application in this regard, and at the same time it is determined that the child has already adapted to the new environment. The Hague Convention provides several exceptions to the general rule of Article 12, with any of the following conditions being sufficient for refusal to surrender the child.

Thus, the adjudicating authority of the country to which the child has been abducted is not required to order the child to be surrendered even in the face of finding that the abduction was unlawful, if the parent opposing the surrender demonstrates that the other parent (who is seeking the child's return) who had custody rights at the time of the abduction: did not exercise those rights in a factual manner, i.e. had parental rights but was not interested in the child, had no contact or only had sporadic contact with the child, or consented for the child to leave to a country other than the one where the child had a permanent residence, either at the time of that departure or at a later date. Another negative premise is that there is a serious risk that the child's return would expose them to physical or mental harm or otherwise place them in an intolerable situation (Article 13 of the Hague Convention). An example would be a finding that a child has been subjected to physical or psychological violence at their permanent residence by the parent demanding their return. In addition, the surrender of a child can also be refused if the surrender would be inadmissible in light of the fundamental principles of the state receiving the request, concerning the protection of human rights and fundamental freedoms (Article 20 of the Hague Convention).

Particularly noteworthy is the negative premise for the surrender of a child provided for in Article 13 of the Hague Convention, when the child objects to returning to the country of permanent residence, and at the same time the child's age and degree of maturity dictate that their opinion should be taken into account in deciding the case. The Supreme Court also addressed that issue, stating in its judgement of 14 January 2021 that the child's expression of will to remain, or consent to return, is not binding on the court, and it is up to the court hearing the case on merits to assess that issue, taking

into account the circumstances of the specific case, including the maturity of the child, their attitude to both parents, the regularity of contacts, the emotional bond, independence in expressing their views and their own will, as well as the influence of the parent under authority the child actually remains. In each case, the well-being of the child should be assessed objectively in the realities of the particular case²⁶.

How to prevent parental kidnappings and abductions?

In the context of the phenomena of parental abductions and kidnappings, there is a lot of talk (and rightly so) about activities aimed at recovering the child. The general model for dealing with a situation of parental child abduction is as follows: first of all, one should report it to the police. The next step should be to submit to the court the request for recovering the child. In practice, however, it is rare for a parent who has abducted a child to return the child to the entitled parent in accordance with a court order. In the above situation, the court that has issued the order will order the court enforcement officer to forcibly recover the child. If the child's whereabouts are unknown, it will be necessary to issue a request to determine them. It is important to remember that the offence of parental abduction is prosecuted *ex officio*. Thus, law enforcement agencies – the prosecutor and the police – are obliged to initiate and pursue criminal proceedings in the case, regardless of the activities taken by the aggrieved party themselves. If it is a case of international abduction of a child by a parent, it is necessary to request the return of the child under the Hague Convention. Such a request shall be submitted through the Polish central authority, i.e. Ministry of Justice.

Although under Polish law the kidnapping of a child by a parent is not an offence, the other parent, whose right to be with the child has been wrongfully taken away, may take action to recover the child and legally establish the child's relationship with both parents. Thus, it is possible to report a missing child, as well as to initiate

²⁶ Postanowienie Sądu Najwyższego z dnia 14 stycznia 2021 r. [Decision of the Supreme Court – Civil Chamber of 14 January 2021], I CSKP 35/21.

proceedings for removing the child, depriving or limiting parental authority, and determining contacts with the child. In the light of the above, the consequences for a parent who has kidnapped a child can be severe. However, all of this entails attending hearings, spending time and incurring expenses. This is undoubtedly a stressful situation, both for the parent and the child, who, in addition to the indicated risks, feels the stress of the parent.

With the above in mind, the question then arises as to what should be done so as to avoid a legal dispute, in which the child is often a bargaining chip and a victim. A legal dispute, whether domestic or international, is, in Polish realities, the final stage of a previously growing parental or divorce-related conflict. Meanwhile, such extreme situations of the character of an extended dispute being resolved in court, need not occur at all. If there is a family breakup, divorce or separation, and the parents are unable to reach an agreement, it is worth to use the institution of mediation. Family mediation is a conflict resolution process in which a professional, independent and impartial mediator, with the consent of each parent and with confidentiality, helps them deal with the problem on their own. In mediation, the parties are allowed to identify issues in dispute, reduce difficulties in communication, develop proposals for child custody arrangements, and reach an agreement that satisfies both parents²⁷.

Mediation is becoming increasingly popular in Poland, due to the fact that it is effective, resolves conflicts much faster than litigation, and generates lower costs. However, resolving family disputes through mediation is still more of a postulate for the future than a present solution²⁸. Moreover, the first attempts at family mediation only occur when the law is broken, or when the case goes to court and the child becomes a bargaining chip in the proceedings or an instrument of revenge against the partner. Thus, the process

²⁷ Z. Kołakowska, P. Gluza, *Kiedy rodzic porwał dziecko...*, op. cit., p. 18.

²⁸ A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania mediacji oraz przyczyn zbyt niskiej w stosunku do oczekiwanej popularności mediacji* [Diagnosis of the use of mediation and of the reasons for its lower than expected popularity], Ministry of Justice, Warszawa 2015, p. 14.

of slow parental alienation develops, and reaches its peak in the course of litigation. Meanwhile, early use of family mediation allows to put the child at the center of the crisis situation, in particular to hear them and take into account their needs. A child has the right to both parents and to maintain a relationship with them; they need to have a home (or two homes) that is a source of stability, to feel important and loved, for example by having both parents actively involved in their life²⁹. It should be emphasized that the purpose of mediation is not to formally maintain the relationship or to decide which parent is right, but rather the well-being of the child in the context of their right to both parents, even after the formal or actual breakup of the relationship. This helps avoid extreme situations in the future.

There is no way to prevent a child from being kidnapped or abducted by a parent in every situation, but it is possible to reduce the risk of them occurring. If the family situation raises fears of child kidnapping or abduction, especially if:

- there are frequent disagreements between the parents over custody of the child,
- the parent has a history of extending the meetings with the child without prior arrangements or leaving with the child for an extended period of time without the other parent's express consent,
- the parent threatens to take the child away, or
- the parents are citizens of different countries and each wants to raise the child in a different country,

the first thing to do is to make the former partner aware of the risks of taking the child away on their own. This mainly involves the child protection instruments discussed above aimed at recovery of the child. It should be emphasized that parental kidnapping and abduction is always a manifestation of abuse of parental authority. In no case can parental authority be exercised to the detriment of the child's welfare. The most distinctive feature of parental authority

²⁹ W. Nowiak, M. Jakoniuk, A. Trela, *Poradnik psychologiczny...*, op. cit., p. 6.

is its function of protection of the child³⁰. Taking into account the content of Article 95 § 3 of the Family and Guardianship Code, it should be pointed out that the welfare of the child is the overriding value which determines both the content and exercise of parental authority³¹. In addition, in the context of the issue at hand, it is important to ensure that the child has regular contact with the other parent after the separation and that the rights of both of them are respected.

Concluding thoughts

The conclusion from the above considerations is that Polish law is currently insufficient to protect the welfare of children from parental kidnapping and abduction. Nor does it provide adequate criminal penalties for committing such acts. The *de lege ferenda* postulate is, first of all, to step away from the current position of the Supreme Court, according to which a parent deprived of parental authority, or with parental authority limited or suspended, can be held criminally liable under Article 211 of the Criminal Code. It should be assumed that the perpetrator of the offence of child abduction can also be a parent who has full parental rights.

Despite the similarity between parental abduction and kidnapping, the latter is not criminalized, and therefore does not constitute a prohibited act under criminal law. It is only an act contrary to the position of the other parent. At the same time, it should be added that any and all the acts of a parent who does not respect the arrangements in the scope of parental authority and contacts with the child, that is, contrary to the suitable agreement between the parents, a court decision, a court or mediation settlement, who, without the knowledge and will of the other parent,

³⁰ A. Partyk, *Dobro dziecka jako wartość nadrzędna przy orzekaniu o władzy rodzicielskiej* [The welfare of the child as an overriding value in the adjudication of parental authority], LEX/el. 2020.

³¹ J. Gajda, *Komentarz do art. 92 k.r.o.* [Commentary to Article 92 of the Family Code], [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, [Family and Guardianship Code. Commentary], red. K. Pietrzykowski, Warszawa 2021, p. 819.

or despite their objection, takes the child away to a place other than their current place of residence, or does not inform the parent of the child's current whereabouts, falls under the 'definition' of parental kidnapping. This kind of conduct blatantly violates the child's right to have both parents, as well as the other parent's right to personal contact with the child.

Protection of the child's welfare commands to assume that parental kidnapping and abduction are always a manifestation of abuse of parental authority. To prevent these phenomena, there is a need for increased awareness of the risks of taking a child away without consent. Even kidnapping parents cannot feel impunity, as the court can at least deprive them of parental authority or limit it. It is also worth encouraging divorcing or separating parents to go to mediation before the conflict escalates or expands and the case goes to court. Earlier use of family mediation makes it possible to place the child at the center of the conflict situation between the parents, and especially to hear and consider the child's needs in terms of contacts with both parents.

Bibliography

Legal acts

Convention on the Civil Aspects of International Child Abduction – concluded 25 October 1980 and entered into force on 1 December 1983.

Convention on the Rights of the Child – adopted by the UN General Assembly on 20 November 1989 and entered into force in September 1990.

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Act of 2 April 1997 – Constitution of the Republic of Poland], Dz.U. [Journal of Laws] 1997, poz. [item] 483 [with subsequent amendments].

Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy [Act of 25 February 1964 – Family and Guardianship Code], Dz.U. [Journal of Laws] 2023, poz. [item] 2809 [with subsequent amendments].

Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny [Act of 6 June 1997 – Criminal Code], Dz.U. [Journal of Laws] 2024, poz. [item] 17 [with subsequent amendments].

Zarządzenie nr 48 Komendanta Głównego Policji z dnia 28 czerwca 2018 r. w sprawie prowadzenia przez Policję poszukiwania osoby zaginionej oraz postępowania w przypadku ujawnienia osoby o nieustalonej toż-

samości lub znalezienia nieznanego zwłok oraz szczątków ludzkich [Order No. 48 of the Chief of Police of 28 June 2018 on the conduct of the police search for a missing person and conduct in the event of the discovery of a person of undetermined identity or the discovery of an unidentified corpse and human remains], Dz.Urz. KGP [Journal of Laws of the National Police Headquarters of 2018] 2021, poz. [item] 77.

Jurisdiction

Wyrok Sądu Najwyższego z dnia 5 lutego 1987 r. [Judgment of the Supreme Court – Criminal Chamber of 5 February 1987], V KRN 468/87.

Wyrok Sądu Najwyższego z dnia 14 lutego 2019 r. [Judgment of the Supreme Court – Criminal Chamber of 14 February 2019], V KK 42/18.

Postanowienie Sądu Najwyższego z dnia 7 czerwca 1967 r. [Decision of the Supreme Court of 7 June 1967], III CR 84/67.

Postanowienie Sądu Najwyższego z dnia 14 października 1970 r. [Decision of the Supreme Court of 14 October 1970], III CRN 181/70.

Postanowienie Sądu Najwyższego z dnia 18 grudnia 1992 r. [Decision of the Supreme Court – Criminal Chamber of 18 December 1992], I KZP 40/92.

Postanowienie Sądu Najwyższego z dnia 9 grudnia 2003 r. [Decision of the Supreme Court – Criminal Chamber of 9 December 2003], III KK 116/03.

Postanowienie Sądu Najwyższego z dnia 30 września 2013 r. [Decision of the Supreme Court – Criminal Chamber of 30 September 2013], IV KK 232/13.

Postanowienie Sądu Najwyższego z dnia 5 września 2019 r. [Decision of the Supreme Court – Criminal Chamber of 5 September 2019], I KZP 7/19.

Postanowienie Sądu Najwyższego z dnia 14 stycznia 2021 r. [Decision of the Supreme Court – Civil Chamber of 14 January 2021], I CSKP 35/21.

Postanowienie Sądu Najwyższego z dnia 28 czerwca 2021 r. [Decision of the Supreme Court – Criminal Chamber of 28 June 2021], IV KK 260/21.

Uchwała Sądu Najwyższego z dnia 21 listopada 1979 r. [Resolution of the Supreme Court – Criminal Chamber of 21 November 1979], VI KZP 15/79.

Literature

Białecki M., *Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzonej w Hadze w dniu 25 października 1980 r.* [Adjudication of child recovery cases under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction], Warszawa 2021, iws.gov.pl/wp-content/uploads/2021/04/IWS_Bialecki-M._Orzekanie-w-sprawach-o-wydanie-dziecka-w-trybie-Konwencji.pdf.

- Dajnowicz-Piesiecka D., *Porwanie rodzicielskie w ujęciu prawnym i kryminologicznym* [Parental kidnapping from the legal and criminological points of view], Toruń 2017.
- Gadecki B., *Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny. Art. 1–316. Komentarz* [Criminal Code. Articles 1–316. Commentary], red. B. Gadecki, Legalis 2023.
- Gajda J., *Komentarz do art. 92 k.r.o.* [Commentary to Article 92 of the Family Code], [in:] *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code. Commentary], red. K. Pietrzykowski, Warszawa 2021.
- Hypś S., *Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny*, t. 2, *Część ogólna. Komentarz do art. 117–221* [Criminal Code. Volume II. General Part. Commentary to Articles 117–221], red. M. Królikowski, R. Zawłocki, Warszawa 2023, Legalis.
- Kaczmarek M., Kaczmarek J., *Urowadzenia rodzicielskie, czyli wojna o dzieci. Problem czy marginalizacja zjawiska* [Parental abductions – the war for children. The problem or marginalization of the phenomenon], [in:] *Prawo rodzinne* [Family law], red. D. Wetoszka, Warszawa 2022.
- Kamińska K., *Komentarz do art. 109 k.r.o.* [Commentary to Article 109 of the Family and Guardianship Code], [in:] *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code. Commentary], red. M. Załucki, Warszawa 2023.
- Kamińska K., *Piecza naprzemienna a władza rodzicielska rodziców żyjących w rozłączeniu* [Joint physical custody and parental authority after divorce or separation of parents], Warszawa 2022.
- Kołakowska Z., Gluza P., *Kiedy rodzic porwał dziecko. Podstawowe informacje prawne* [When a parent kidnapped a child. Basic legal information], Warszawa 2015.
- Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny. Komentarz* [Criminal Code. Commentary], red. M. Mozgawa, Warszawa 2021.
- Kosonoga J., *Komentarz do art. 211 k.k.* [Commentary to Article 211 of the Criminal Code], [in:] *Kodeks karny. Komentarz* [Criminal Code. Commentary], red. R.A. Stefański, Warszawa 2023, Legalis.
- Nowiak W., Jakoniuk M., Trela A., *Poradnik psychologiczny dla rodzin zagrożonych sytuacją porwań rodzicielskich* [Psychological guide for families at risk of parental kidnapping situations], Warszawa 2022, porwaniarodzicielskie.pl/wp-content/uploads/2022/10/broszura_psycholog_cwim_2022.pdf.
- Partyk A., *Dobro dziecka jako wartość nadrzędna przy orzekaniu o władzy rodzicielskiej* [The welfare of the child as an overriding value in the adjudication of parental authority], LEX/el. 2020.

Rudolf A., Cichowicz-Major M., Matysiak M., Pałka S., Pieniążek W., Przybył C., *Diagnoza stanu stosowania mediacji oraz przyczyn zbyt niskiej w stosunku do oczekiwanej popularności mediacji* [Diagnosis of the use of mediation and of the reasons for its lower than expected popularity], Warszawa 2015, docplayer.pl/18813209-Raport-koncowy-diagnoza-stanu-stosowania-mediacji-oraz-przyczyn-zbyt-niskiej-w-stosunku-do-oczekiwanej-popularnosci-mediacji.html.

Abstract

Putting children's welfare first in parental kidnapping and parental abduction cases

Children missing as a result of parental kidnapping are a special group of missing children. Very often services and institutions refuse to provide assistance with the search, because parental kidnapping in Poland is not a crime. Parental kidnapping is treated as a form of family internal conflict that should be resolved without involving additional services. In addition, there is a common belief that a child staying with one of their parents is safe by definition. The reality, however, often ruthlessly verifies the imagination. It all makes children vulnerable, especially in high conflicted custody cases, when they are often used as a bargaining chip.

The article discusses the problem of parental kidnapping cases in Polish law with particular reference to the principle of the child's welfare. It presents the differences between parental kidnapping and parental abduction. The latter is a crime under Article 211 of the Penal Code. The question is, whether the parent whose parental authority has not been limited, suspended or who has not been deprived of it may become the offender in regard to the criminal offence from Article 211. However, above all, taking up the subject of parental kidnapping and parental abduction cases, this is not about deciding which of the parents is right. The overriding goal is to help the child whose right to be with their parent has been unlawfully taken away, and bring about the legal regulation of the child's relationship with both parents. In the paper the remedies and procedures against parental kidnapping and parental abduction are presented, with particular emphasis on family mediation. One of the key conclusions is that both parental kidnapping and parental abduction are always a form of the abuse of

parental authority, or even more broadly – parental responsibility. Under no circumstances this ‘authority’ can be used in a way that is detrimental to the child’s welfare.

Key words: parental kidnapping, children, parental abduction, family mediation