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## **Enforcement of the Obligation to Maintain Contact with a Child**

**Abstract:** A child needs contact with both parents to be able to live normally and develop properly. This contact is ensured when the parents are living together. In the event that the parents are separated, and in the event of disagreement as to maintaining contact with the child, the contact is determined by the courts. Sometimes, however, in order to enforce this contact, it is necessary to threaten or impose a financial sanction. The question arises whether such forced contact with the child fulfils its role and serves the child's well-being.

**Keywords:** contact with a child, enforcement of contact, enforcement proceedings, role of financial sanctions, welfare of a child

### **Introduction**

A child needs contact with both parents. The right and obligation to maintain contact with a child only becomes relevant when the family breaks up. However, when the parents of the child are separated, it is not always possible to maintain this contact. The purpose of maintaining contact with the child is to ensure the proper emotional development of the child, which is to serve the child's well-being. Only an extremely reprehensible attitude of the parents can justify the prohibition or limitation of this contact. In most cases, the child lives with one of the parents, usually the mother, while the other parent is granted the right and the obligation to keep in touch with the child. In this way, everything seems to be order. In practice, however, communication with the child does not always take place as determined in a court ruling or agreed upon by the parents. In order to prevent such situations, the legislator

introduced rules to force parents to maintain contact with the child under the threat of financial sanctions. We must not lose sight of the fact that it is not a matter of the well-being of the parent who wants or does not want to keep in touch with the child, but the well-being of the child. However, a question arises as to whether the threat of a financial sanction is the right tool by which the right relationship between parents and children can be ensured. This issue – important for the protection of the well-being of a child – poses a serious challenge for both the legislator responsible for the development of legal standards, as well as for courts responsible for implementing these standards in practice. The Ombudsman for Children, in his annual reports on the state of observance of children's rights submitted to both houses of parliament, repeatedly raised objections to the jurisprudence in the field of contact procedures and the effectiveness of applying financial sanctions to enforce compliance with judgements regarding the implementation of established contact.

To elaborate this issue, the following methods were used: dogmatic, appropriate for the analysis of legal provisions and judicial decisions, and a critical analysis of the literature on the subject in the range of the functioning of the institution of compulsory performance of the obligation to maintain contact with a child. Thanks to this, it was possible to verify the normative guarantees with the practice of their application, which allowed for the formulation of extensive final conclusions.

## **1. The Right to Maintain Contact with a Child**

According to Article 113 § 1 of the Law of 25 February 1964, the Family and Guardianship Code, 'Independent of parental authority, parents and their child have the right and obligation to maintain contact with each other.'<sup>1</sup> Rules concerning relations between parents and children are applied *mutatis mutandis* to contact with siblings, grandparents, kin in the direct line, as well as other persons, provided that they had custody for a longer period of time (Article 113<sup>6</sup> FGC). The right and the obligation to maintain contact essentially applies to the maintenance of the relationship between parents, as well as others, and the child in ways set out in Articles 113–113<sup>6</sup> FGC in the event of a family break-up. In such a case, this right acquires a new, much broader dimension in relation to the mutual relations existing between the child's parents, which boils down to the fact that the claim to exercise the right of contact with the child by one parent corresponds to the obligation of the other parent not to disturb this contact. It follows that parents have the right and duty to maintain contact with the child, both to the child himself and to each other, especially when they are living apart.

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1 The act of 25 February 1964 Family and Guardianship Code, unified text Dz. U. 2020, item 1359 (hereafter FGC).

The right and obligation to maintain contact with the child is natural, resulting from the parental bond. This means that they do not expire or cease as long as this bond lasts. Maintaining contact with the child is an expression of the closeness between parents and a child. It derives from an emotional bond that cannot be violated. This bond is not only a prerequisite for the proper development of a child and satisfies a natural instinct which cannot be denied to any of the sides of the relationship, but is also one of the fundamental factors in the upbringing of the child and their ability to develop future relationships in adult life. Behaviours related to maintaining contact with a child have the same content as other behaviours constituting components of caring for a child, in particular upbringing. Therefore, it is necessary to maintain contact with the child, which is a necessary condition for proper educational activities.<sup>2</sup> According to the social psychology theory of attachment styles, the relationship between a child and the parents influences the relationships the child develops as an adult. The kind of relationship thus determines the future way of establishing and building human relations and broadly understood socialisation. This observation is important because the rules of law in this case support mechanisms which are something natural in the family, and yet not always present. Moreover, a child's lack of contact with one of the parents may not only stifle the need to be close to that parent, but it is also likely that, as an adult, the child will duplicate a relationship shaped in this way with their children.<sup>3</sup> It follows that maintaining contact with both parents is a condition for the proper development of a child. A lack of contact or disrupted contact has a decisive negative impact on the child's mental development, his or her socialization, and his or her assimilation of correct attitudes and social roles.

'Contacts with a child include, in particular, being with the child (visitations, meetings, taking the child away from their habitual place of residence) and direct communication, maintaining correspondence, using other means of distance communication, including electronic means of communication' (113 § 2 FGC).<sup>4</sup> This means that the relationship between parents and children is not only a manifestation of the personal rights of the parents, but above all the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. This is determined by the wording of Article 9.3 of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November

2 T. Sokołowski, Charakter prawny osobistej styczności rodziców z dzieckiem, "Kwartalnik Prawa Prywatnego" 2000, z. 2, p. 282

3 J. Zajączkowska-Burtowy, Kontakty z dzieckiem. Prawa i obowiązki, Rozdział I. Zagadnienia ogólne związane z problematyką kontaktów z dzieckiem. 1. Istota oraz cele instytucji. 1.1. Istota instytucji, Warsaw 2020, LEX/el. 2021 .

4 This provision contains an open catalogue of ways to maintain contact with the child, which means that contact can also be made in forms other than those specified in its content.

1989, requiring States Parties to respect this right. Consequently, courts conducting proceedings concerning contact between parents and children are obliged to apply this perspective in the course of proceedings and to rule in such a way that the child is not treated as an object in the hands of the parents, but as a separate, rightful individual.<sup>5</sup> In passing, it should be noted that although the child is a kind of ‘subject of proceedings’ in contact cases, this does not translate into his or her position in court proceedings concerning his or her person.<sup>6</sup> In this context, it is also worth adding that there is a risk of using the provision of Article 113 § 1 FGC by applying some kind of coercion against the child, justified by his or her welfare, that is, ‘making him or her happy by force’, while de facto this is only done for the benefit of the parent who is anxious to have contact with the child. A child’s reluctance to maintain contact with a parent who wishes to exercise this right of contact is usually due to the behaviour of the parents or one of them. Hence, the court’s decision to refer both parents to family therapy and, if necessary, the child with them, would be allowed and desirable. Forcing a child to comply with the obligation to maintain contact with an authorised parent is inconsistent with his or her welfare.<sup>7</sup>

The right and obligation to maintain contact is a personal right. It is assumed that personal rights are non-material values, inherent in human beings and their nature, determining their uniqueness and integrity, their dignity and perception in society, enabling them to achieve self-fulfilment and carry out creative activities, which cannot be measured with economic means of measurement. These rights do not depend on human will or sensitivity.<sup>8</sup> Each personal right has two elements: a protected value and a right to demand that others respect it.<sup>9</sup> It is understood that all personal rights, understood as certain intangible assets connected with the existence and functioning of civil law entities, are considered to be significant and therefore worthy of protection.<sup>10</sup> Undoubtedly, the emotional relationship between a parent and a child, regardless of the mutual relationship between parents, is also such a value. A violation of the obligation to maintain contact with a child is a violation of a personal right. It should also be added that a failure to comply with the obligation to maintain contact with a child entails a failure on the part of the parent to make

5 Judgement of the Appeal Court in Katowice of 25 January 2001, I ACa 1258/00, LEX no. 1532490.

6 The issue of parent–child contact from the child’s perspective was presented in detail by J. Zajączkowska-Burtowy, *Kontakty z dzieckiem rodziców żyjących w rozłączeniu*, (in:) M. Andrzejewski (ed.), *Status osób małoletnich – piecza zastępcza, kontakty, przysposobienie*, Warsaw 2020.

7 W. Stojanowska, *Komentarz do art. 113*, (in:) W. Stojanowska, M. Kosek, *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza. Wykładnia*, Warsaw 2011, p. 265 i n.

8 Judgement of the Appeal Court in Białystok of 24 September 2014, I ACa 301/14, LEX no. 1526919.

9 Judgement of the Appeal Court in Katowice of 27 February 2013, I ACa 54/13, LEX no.1294775.

10 Resolution of the Supreme Court of 22 October 2010, III CZP 76/10, LEX no. 604152.

a personal effort to raise the child, which should automatically increase the amount of child maintenance payable to the hands of the parent making personal efforts to raise the child (Article 135 § 2 FGC).

## 2. Enforcement of Contact with a Child

In case of any hinderance or prevention of contact with a child as specified in a judgement of the court or agreement of the parents, the contact is enforced. The provisions concerning the enforcement of the obligation to maintain contact with the child are laid down in Articles 598<sup>15</sup>–598<sup>22</sup> of the Civil Procedure Code of 17 November 1964.<sup>11</sup> Pursuant to Article 598<sup>15</sup> § 1 thereof, ‘if a person who has custody of a child fails to perform or improperly performs the obligations expressed in a court order or a settlement agreement made before the court or a mediator with respect to contact with the child, the family court shall, having regard to the financial situation of such persons, warn the same person that they may be ordered to pay a specified amount of money to the person allowed to contact the child, for each breach of the obligation’. On the other hand, if a person allowed to contact a child or a person prohibited from contacting the child breaches their obligations expressed in a court order or a settlement agreement made before the court or a mediator with respect to contact with the child, the family court shall warn such a person that they may be ordered to pay a specified amount of money to the person who has custody of the child for each breach of the obligation (Article 598<sup>15</sup> § 2 of the CPC). This means that a violation of obligations may occur both on the part of the person under whose custody the child is and on the part of the person entitled to maintain contact, and in neither of these cases does it have to be a parent of the child. Consequently, the reasons for the court’s interference in the implementation of contact with the child are obstruction by the parent with whom the child lives, the exercise of the right of contact by the other parent, and the reluctance of an authorised parent to maintain this contact. In each case, the sum of money goes to the person whose right has been infringed, in the former case to the person authorised to contact the child, in the latter, to the person under whose custody the child is. Thus, the non-monetary obligation in the form of contact with a child is enforced by the threat of a financial obligation. It should be added that the threat of ordering payment relates only to an infringement of obligations relating to contact with the child which are laid down in a judgement or settlement concluded before a court or before a mediator.

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11 The act of 17 November 1964 Code of Civil Procedure, unified text Dz. U. 2020, item 1575 as amended (hereafter: CPC). These rules were added by the act of 26 May 2011 on changing the act – Code of Civil Procedure (Dz. U. 2011, no. 144, item 854) and placed in the first part in volume two, title II, chapter 2, section 6 ‘Matters Concerning Contact with Child’.

The legislator described two aspects which are necessary for the determination of the amount of the compulsory sum for a breach of the obligation to maintain contact with a child; firstly, a failure to perform or an improper performance of the obligations arising out of a decision of the court or from a settlement concluded before a court or before a mediator concerning contact with the child; secondly, the financial situation of the person who fails to perform or who improperly performs the obligations arising from that decision or the settlement. The amount of the compulsory payment corresponds to each infringement on a case-by-case basis, and is calculated for each infringement separately.

The amount of the compulsory sum is not fixed – neither the lower nor the upper limit is determined. Since it is dependent on the financial situation of the person who fails to perform or improperly performs the obligation to maintain contact with a child, the amount should be determined by a court at a level which takes into account the abilities of the obliged person, thereby guaranteeing the effectiveness of the enforcement. It should be noted that although the legislator referred only to the financial situation of the obliged person, the financial situation of the entitled person may also be of significant importance in certain circumstances. Furthermore, the amount of the compulsory sum may also be affected by the nature and character of the non-performed or improperly performed contact; it can therefore be argued that the greater the negative impact of a person's behaviour on the welfare of the child, the stronger the grounds for determining the compulsory amount at a higher level.<sup>12</sup>

'If the person who has been warned by a family court continues to violate their obligations, the family court shall order them to pay the amount due, calculated in proportion to the number of breaches. In exceptional cases, the court may change the amount referred to in Article 598<sup>15</sup> if circumstances change' (Article 598<sup>16</sup> § 1 of the CPC).<sup>13</sup> The provisions of § 1 apply *mutatis mutandis* if a person threatened by a family court with a payment order violates their obligations under a relevant contact order (Article 598<sup>16</sup> § 2 of the CPC). This means that if the obliged person – despite a prior threat of obligation to pay the determined amount – still fails to comply with the judgement of the court, the person entitled must again appeal to

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12 J. Gudowski, Komentarz do art. 598<sup>15</sup>, punkt 5, (in:) T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające, Warsaw 2016.

13 'The second sentence of Article 598<sup>16</sup> § 1 excludes the application of Article 359 § 1 in conjunction with Article 13 § 2 and Article 577 as a *lex specialis*. If sentence 2 were not the case, the guardianship court could, pursuant to Article 359 § 1 in conjunction with Article 13 § 2, not only amend but also repeal the order referred to in Article 598<sup>15</sup> § 1 and, moreover, not only in exceptional circumstances, but always in the event of a change in the circumstances of the case. On the other hand, under Article 577, the family court could amend this provision for the benefit of the child, even if the circumstances of the case were not changed.' J. Bodio, Komentarz do art. 598<sup>16</sup>, punkt 4, (in:) A. Jakubecki (ed.), Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–729, LEX/el. 2019.

the court so that it orders the obliged person to pay the amount which is the sum of the amount that the court has warned for each breach and the number of breaches.<sup>14</sup> The number of breaches means separable and countable acts which are contrary to the judgement concerning contact with the child. This means that the determination of the amount of the compulsory payment is calculated by multiplying the number of breaches by the amount indicated in the order which lays out the threat of this fine.<sup>15</sup> Consequently, the order of the payment of the compulsory sum is connected with each individual breach, which means that penalties will accumulate in the case of repeated breaches. The change of circumstances means a change in the financial situation of the person obliged to pay the said amount.<sup>16</sup> The conditions for a change in the compulsory amount are of qualified nature; the legislator requires not only a change in the circumstances, but also makes it dependent on the exceptionality of the case. It is up to the trial court to assess these conditions in each individual case.<sup>17</sup>

The amount of the obligatory payment should constitute significant pain for the obliged person so as to ensure the effectiveness of the correct performance of the obligation to maintain contact with the child in the future. The prospect of a compulsory payment should therefore be a deterrent from undue conduct, and the execution of the payment order, apart from it being painful, should be real (within the limits of the solvency of the obliged person).<sup>18</sup> However, the obligation to take into account the financial situation when determining the amount of the compulsory payment that can be imposed gives rise to dilemmas when the person to whom the sanction is applied has limited financial means. On the one hand, a payment order

14 Justification to the draft of the act of 26 May 2011 on changing the act – Code of Civil Procedure, Dz. U. 2011, no. 144, item 854, Sejm of the Republic of Poland of the sixth term, Sejm print no. 3063.

15 J. Gudowski, Komentarz do art. 598<sup>16</sup>, point 2, (in:) T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające, Warsaw 2016.

16 The change in the circumstances referred to in Article 598<sup>16</sup> §1 of the CPC consists of a change in the financial situation of the obliged person caused by, inter alia, loss of employment, serious illness, retirement or pension, and deprivation of liberty, whereas changes in the amount of the compulsory amount do not justify persistent failure to perform or improper performance of duties by the person obliged to pay, J. Gudowski, (in:) Kodeks postępowania cywilnego..., *op. cit.*, p. 329. A different position was taken by Ms Marszałkowska-Krześ, pointing out that the change in the amount of the compulsory sum from Article 598<sup>15</sup> of the PCC could also occur in the event of a persistent breach of the obligation, despite several infringements and payments of the imposed amount several times; Komentarz do art. 598<sup>16</sup> KPC, uwaga 3, (in:) E. Marszałkowska-Krześ (ed.), Kodeks postępowania cywilnego. Komentarz, Legalis 2012.

17 J. Gudowski, Komentarz do art. 598<sup>16</sup>, point 3, (in:) T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające, Warsaw 2016.

18 E. Holewińska-Łapińska, Postępowania w sprawach o wykonywanie kontaktów z dzieckiem umorzone na podstawie art. 598<sup>20</sup> k.p.c., Warsaw 2016, p. 26.

for a very low amount raises the concern that the very threat of it being imposed (or ordered) will not affect the behaviour of the obliged person. On the other hand, imposing a higher amount may call into question the effectiveness of its enforcement.<sup>19</sup>

The payment of the obligatory amount referred to in the court order should be made immediately after it becomes final. From that moment on, the compulsory sum is payable.<sup>20</sup> According to the legislator's intention, the finality of an order is a condition allowing the enforcement of a judicial order for the payment of the compulsory amount. A final court order for the payment of the compulsory amount is an enforceable title without the need to issue a writ of enforcement (Article 598<sup>16</sup> § 4 of the CPC), which greatly facilitates its execution and the collection of the sanctioned amount, as well as exacerbating the pressure imposed on the obliged person. That means that it can be referred to a bailiff, who has the authority to initiate the execution. The order itself, without the need to give it an executable clause separately, constitutes a writ of enforcement (Article 776, p. 2 *in fine* CPC). The doctrine emphasises that the use of the wording of an enforceable title raises terminological objections because, in the light of Article 776 of the CPC, an enforceable title is an execution title with an enforceability clause. However, Article 598<sup>16</sup> § 4 of the CPC applies to an execution title without a clause of enforceability.<sup>21</sup> The enforced amount should be executed in the manner provided for cash benefits. The application of enforcement measures should only result in a specific behaviour of the person exercising parental authority over the child.<sup>22</sup> This means that the payment of the determined amount of money constitutes a monetary measure of an indirect coercive, fully corresponding to the enforcement measure of Article 1050<sup>1</sup> and Article 1051<sup>1</sup> of the CPC.<sup>23</sup> The court declares the enforceability of the decision of its own initiative (Article 578<sup>1</sup> § 3 of the CPC).

The proceedings in cases involving the exercise of the obligation to maintain contact with the child are of a two-stage nature. This means that provisions concerning the obligation to keep in touch with a child provide for the grading of financial sanctions. In the first stage, a family court issues a threat of or the payment order

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19 E. Holewińska-Łapińska, Sędziowska ocena efektywności stosowania przepisów o wykonywaniu kontaktów z dzieckiem (art. 598<sup>15</sup>–598<sup>20</sup> k.p.c.) i ich adekwatności do potrzeb praktyki w świetle wyników badania ankietowego, "Prawo w działaniu. Sprawy cywilne" 2016, no. 25, p. 64.

20 Justification to the draft of the act of 26 May 2011 on changing the act – Code of Civil Procedure, Dz. U. 2011, no. 144, item 854, Sejm of the Republic of Poland of the sixth term, Sejm print no. 3063.

21 J. Bodio, Komentarz do art. 598<sup>16</sup>, point 6, (in:) A. Jakubecki (ed.), Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–729, LEX/el. 2019.

22 Resolution of the Supreme Court of 18 March 2011, III CZP 139/10, LEX no. 738033.

23 M. Krakowiak, Nakaz zapłaty sumy pieniężnej w nowym postępowaniu o wykonywanie kontaktów z dzieckiem, "Transformacje Prawa Prywatnego" 2013, no. 3, p. 68.



of a specified compulsory amount for each breach<sup>24</sup> in the second one, if breaches of the rules of contact with the child persist, a family court orders the payment of a predetermined compulsory amount. In other words, the first stage is to discipline the parent who violates the obligation to maintain contact with their child, while the second stage is already repressive. Article 598<sup>16</sup> § 1 of the CPC uses the words 'continues to breach their obligation', and therefore it means the same obligations as the order with a threat of a compulsory payment. The court is bound to determine the amount of the compulsory payment. The procedure imposing an obligation to pay the said amount is therefore not an independent procedure, but a continuation of the enforcement procedure previously initiated.<sup>25</sup> This means that it is not possible to move towards a stage where the court orders the compulsory payment without a prior order with a threat of an imposition of a compulsory payment. Only after the threat of ordering the payment and a subsequent failure to perform or an improper performance of the obligations arising from a court decision or a settlement concluded before a court or before a mediator concerning contact with the child, will the court order the payment. This means, therefore, that in accordance with the wording of the provisions of Articles 598<sup>15</sup> § 1–2 and 598<sup>16</sup> § 1 of the Code, in the order with the threat of payment of the compulsory amount the court determines the amount for each individual breach of the obligation, whereas in the order for the payment it determines the amount of the sum for which it has been obligatorily imposed based on the number of breaches.

The doctrine emphasises that a threat of an order for the payment of a compulsory amount and then a payment order is an incentive for the person who is obliged to behave in a certain manner. In this way, it becomes a kind of coercion. However, the nature of the compulsory payment is specific; it is not a fine, i.e. a penalty, or a typical means of coercion (coercive fine) applied in enforcement proceedings, especially as it works for the benefit of the entitled person and not the State Treasury. Nor does it constitute a compensation or redress within the meaning of the obligations for a failure to perform or an improper performance of the obligations provided for in the judgement on relations with the child. From the point of view of the person concerned, it is a financial pain, which increases in proportion to their delay and encourages the performance of their obligations. From the point of view of the entitled person, it is a payment that compensates the non-performance or improper performance of the obligation imposed by the court.<sup>26</sup>

24 The first stage can be omitted if the warning of ordering the payment of the compulsory sum was introduced when regulating contact with the child.

25 J. Bodio, Komentarz do art. 598<sup>16</sup>, point 1, (in:) A. Jakubecki (ed.), Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–729, LEX/el. 2019.

26 J. Gudowski, Komentarz do art. 598<sup>15</sup>, point 4, (in:) T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające, Warsaw 2016.

### 3. Proceedings in Cases for Contact with the Child

The court solely competent for examining matters relating to contact with a child is a family court of the place of residence or stay of the child (Article 569 § 1 of the CPC). In cases relating to the obligation to maintain contact with the child, the court takes action only on the basis of a petition, since the application of Article 570 of the CPC, providing for the possibility for the court to initiate proceedings of its own motion, is excluded (Article 598<sup>18</sup> § 1 of the CPC). The petition may be filed by a person concerned (parent, guardian), a prosecutor (Article 7 in conjunction with Article 13 § 2 of the CPC), the Ombudsman (Article 14 point 4 of the Act of 15 July 1987 on the Ombudsman) and the Ombudsman for Children (Article 10 paragraph 1 point 3 of the Act of 6 January 2000 on the Ombudsman for Children). At the same time, the applicant's identity is not required, which means that the prosecutor may ask for a decision with a threat of compulsory payment, and that the parent of the child may apply for an order enforcing the payment.

Such a petition should comply with the formal requirements for petitions with the change that the defendant should be mentioned in the case (Article 511 of the CPC). The petition should be accompanied by a copy of an enforceable court decision or an enforceable settlement concluded before a court or before a mediator on contact with the child. In matters relating to contact with the child, a family court rules with the judge sitting alone (Article 47 § 1 in conjunction with Article 13 § 2 of the CPC). The court decides about the threat of ordering the compulsory payment and ordering the payment in the form of an order which takes effect upon publication and, if there is no notice, at the time of its issue (Article 578 § 1 of the CPC).<sup>27</sup> The order of the payment of the compulsory amount may not be amended or repealed (Article 598<sup>21</sup> of the CPC). An exception is the case provided for in Article 598<sup>16</sup> § 1 of the CPC, according to which a court may change the amount of the compulsory sum in a case relating to maintaining contact with a child even when that order is final if there is a change in circumstances.

Before issuing an order, the court shall hear the participants in the proceedings (Article 598<sup>18</sup> § 2 of the CPC). They are heard, depending on the decision of the court, at a sitting or by making statements in writing (Article 514 § 1 sentence 3 CPC). This does not exclude the possibility of using other evidence, mainly from witnesses and private documents (e.g. the employment certificate and the amount of remuneration of the person obliged to maintain contact with the child). If evidence is necessary, it is mandatory to schedule a hearing.

Proceedings relating to the compulsory exercise of the obligation to maintain contact with a child is one of the guardianship proceedings that fall within the scope

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<sup>27</sup> An order on the warning of payment of a determined amount of money can be issued either at the same time as a decision regulating contact with the child or as a settlement of a separate case.

of family, guardianship and custody law. It is a *sui generis* exploratory procedure, but limited to the implementation stage. Unlike proceedings for the collection of a person subject to parental authority or in parental custody, the proceedings relating to contact with the child should not include the settlement stage. This stage is governed by the general provisions on guardianship proceedings.<sup>28</sup> This is a specific procedure introduced into the civil procedure in order to provide more effective solutions for the protection of parents' rights. However, given that the essence of the enforcement procedure is the application of a coercive enforcement measure in the form of a specified payment, it appears that this procedure does not differ significantly from the ordinary enforcement procedure for non-monetary benefits (Articles 1050<sup>1</sup> and 1051<sup>1</sup> of the CPC). As a consequence, proceedings for an enforcement of the obligation to maintain contact have features of enforcement proceedings.<sup>29</sup>

The order on the threat of the compulsory payment and the payment order are subject to a complaint (Articles 598<sup>15</sup> § 3 and 598<sup>16</sup> § 3 of the CPC). The content of those provisions means that such a complaint applies only to a positive decision, that is to say, approving the request for the compulsory payment order. However, the Supreme Court ruled that the complaint applies also to a negative order, i.e. dismissing the application for the threat of ordering the compulsory payment and the payment for a person who does not perform or improperly performs duties in relation to contact with the child.<sup>30</sup> The choice of an appeal in the form of a complaint means that the orders in question are treated as other orders of the court of the first instance within the meaning of Article 518 of the CPC. Anyway, it should be added that the court may also decide on the reimbursement of expenses incurred in preparing the contact (costs of travel to the place of residence of the child, purchase of tickets to the cinema, stay of the child, accommodation costs).

The order on the threat of the compulsory payment and the payment order is not a decision on the substance of the case terminating the proceedings referred to in Article 519<sup>2</sup> § 1 of the Code. The nature of the provisions aimed at carrying out the obligations relating to the determined contact with the child leads to the conclusion that such a provision is not an independent decision, but a continuation of the enforcement procedure previously initiated, and therefore does not terminate the proceedings in the case.<sup>31</sup> Only a decision to discontinue proceedings under Article 598<sup>20</sup> of the CPC is a decision terminating the case initiated under Articles 598<sup>15</sup> or 598<sup>16</sup> of the CPC. Proceedings concerning the obligation to maintain contact with

28 Resolution of the Supreme Court of 22 May 2013, III CZP 25/13, LEX no. 1400024; Judgement of the Supreme Court of 8 May 2015, II CNP 5/15, LEX no. 1683405.

29 M. Krakowiak, Nakaz zapłaty sumy pieniężnej w nowym postępowaniu o wykonywanie kontaktów z dzieckiem, "Transformacje Prawa Prywatnego" 2013, no. 3, p. 67.

30 Resolution of the Supreme Court of 22 May 2013, III CZP 25/13, LEX no. 1400024.

31 Judgement of the Supreme Court of 8 May 2015, II CNP 5/15, LEX no. 1683405; judgement of the Supreme Court of August 26, 2016, IV CNP 10/16, LEX no. 2095940.

the child are discontinued only if no further petition has been received on the subject (Article 598<sup>20</sup> of the CPC) within six months of the last order's validity. However, this does not mean that earlier provisions expire, and consequently, on the basis of them, the compulsory sum can be enforced even after six months.

## Conclusions

In conclusion, it should be said that the rules on the obligation to maintain contact with a child have been constructed using an enforcement model in which the threat and subsequent application of financial sanctions play a significant role.<sup>32</sup> The use of a compulsory payment structure in order to force a parent to comply with the obligation to maintain contact with a child is a form of court interference in the exercise of parental authority dictated by the protection of the child's well-being. Such action seems necessary in view of the increasingly serious problem of single-parent families and, consequently, children who are deprived of regular contact with one of the parents. After all, the obligation to keep in touch with a child is primarily meant to serve the child, who needs both a mother and a father to ensure their development, and not the parents, who are often in conflict with each other and who would do anything to make the other's life difficult. The aim of the legislator when threatening with the potential application and then subsequently applying the financial sanction is to enforce the obligation to maintain contact with a child, under a decision or a settlement concluded before a court or a mediator. Sometimes it is only then that many parents realise the needs that a child has.

The threat of the enforcement of a compulsory payment undoubtedly plays the role of a motivating function, so that a parent who has evaded the obligation to maintain contact with a child under a decision or a settlement concluded before a court or before a mediator would find it more beneficial to voluntarily comply with the order than pay the determined sum of money. However, there are doubts whether such forced contact serves its role. Exerting pressure in such a delicate area as feelings can be counterproductive. The essence of the right of contact is the protection of this contact as a form and expression of the closeness that exists between a parent and a child. While financial sanctions may result in parental contact with a child, they must not affect feelings. It is not possible to enforce natural relationships based on love, even with the most severe sanctions. This raises another question, namely whether such forced contact will proceed properly. The only basis for a parent's relationships with a child can be an emotional bond that cannot be forced in any way, since the law is powerless when it comes to feelings. Building the right relationships

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32 E. Holewińska-Łapińska, Sędziowska ocena efektywności stosowania przepisów o wykonywaniu kontaktów z dzieckiem (art. 598<sup>16</sup>-598<sup>20</sup> k.p.c.) i ich adekwatności do potrzeb praktyki w świetle wyników badania ankietowego, "Prawo w działaniu. Sprawy cywilne" 2016, no. 25, p. 38.

is a long-term process; if it is to be effective, it must be based on an internal need, the root of which lies in the well-being of the child.

An order demanding payment of the compulsory amount does not guarantee the effectiveness of meetings and the reconstruction of relations with the child. Moreover, there is a real danger of replacing the obligation to keep in touch with the child with money. It cannot be ruled out that a parent would rather pay than keep in touch with the child – ipso facto with the other parent with whom the child remained – which he or she does not want to continue. In addition, interference of the court in family relations may result in a conflict between the parents of the child and, consequently, might have a negative impact on the child's well-being.

Therefore, it seems necessary to seek answers to the question of what to do to make sure that the obligation to be in contact with a child is effectively fulfilled. One solution could be to amend the decision on parental authority by entrusting the parent who was previously allowed contact with the child to take direct custody of the child. This would entail a replacement of the current role of the aggrieved parent in terms of contact with the child with this parent who did not perform or improperly fulfilled the obligation to maintain contact with the child. The fear of such a potential role-change could lead to a careful satisfaction of the child's needs. Of course, this is only on the assumption that the parent whose contact with the child was hindered or prevented is interested in such an approach. Another solution may be to link the child's maintenance provisions, paid by the parent who was previously allowed contact with the child to the parent with the status of the primary guardian, with the proper performance of his or her duties in relation to contact with the child. Violations of contact with a child could result in the payment of maintenance being suspended for a given period. However, such a solution would be problematic due to the purpose of the payment of maintenance, which is to meet the legitimate needs of the child. Hence, even properly motivated actions resulting in withholding the payment of this benefit will ultimately be felt by the child, which is difficult to justify in terms of his or her welfare. A further solution is to penalise behaviour consisting of long-term, recurring and deliberate non-compliance with the obligation to maintain contact with the child. It seems that criminal sanctions could have a mobilising effect on a parent who fails to comply with the obligation to keep in touch with their child.

In order to make sure that procedures for compulsory enforcement of the obligation to maintain contact with a child lead to the desired results and make it possible for this contact to be carried out, they must proceed smoothly. The passage of time may have irreversible consequences for the relationship between a child and the parent with whom he or she does not live, without precluding the break-up of their relationship. However, the need to go through two proceedings, namely two court meetings, does not speed up the response to infringements relating to contact with the child. In addition, each decision of the court can be appealed against, which in the realities of the Polish judiciary extends this reaction to at least a few months. On

the basis of an examination of the case law in matters of contact with a child carried out at the Institute of Justice in 2015, it was found that the average duration of such proceedings, calculated from the date of receipt of the petition to the court until the date of the decision to discontinue proceedings pursuant to Article 598<sup>20</sup> of the CPC, was 14 months, whereas from the adoption by the court of the last order on sanctions prior to the decision to discontinue the proceedings pursuant to Article 598<sup>20</sup> of the PCC, the period of 6.4 months elapsed, on average.<sup>33</sup> Our own observations and professional experience show that the situation has not changed since the research, which means that the findings remain up to date and show that the involvement of the courts in the efforts to ensure the right to contact of both parents is ineffective. It seems that due to their executive nature, proceedings in cases concerning compulsory execution of the obligation to maintain contact with a child should be treated as a priority and run much more efficiently, and the taking of evidence should be limited to the minimum necessary so as not to duplicate the examination procedure on the basis of which the decision was issued, which, however, is not implemented in practice. Therefore, despite the undoubtedly right intentions of the legislator, the current shape of the provisions on maintaining contact with a child does not work in practice and in many situations is even contrary to the best interests of the child.

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33 E. Holewińska-Łapińska, Postępowania w sprawach o wykonywanie kontaktów z dzieckiem umoznione na podstawie art. 598<sup>20</sup> k.p.c., Warsaw 2016, p. 28

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