



# The psychologist's diagnostic competences in issuing psychological and judicial opinions in divorce cases involving children

## Kompetencje diagnostyczne psychologa w opiniowaniu psychologiczno-sądowym w sprawach o rozwód z udziałem dzieci<sup>1</sup>

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**Abstract:** Divorce cases where divorcing spouses have minor children pose a particular challenge for psychologists and lawyers. The court decides on important matters regarding the child and the family, but formally does not have sufficient knowledge of the psychological functioning of family members, and the decision is based on a psychological and judicial opinion. The psychologist does not make legally binding decisions regarding the family, but acts as an expert with so-called special information in selected areas of psychology, which allows preparing a psychological and judicial opinion on the functioning of the family to support the court's decision-making process. Particular diagnostic competence of a psychologist: knowledge, skills and ethical attitude increase the likelihood of accurate and reliable psychological diagnosis and contribute to making the psychological and judicial opinion more useful to the court. The article presents selected legal and psychological issues related to the role of a psychologist and the process of diagnosing in providing psychological and judicial opinion on divorce matters where the partners are parents of minor children. It presents the psychologist's diagnostic competences: (a) knowledge, including the knowledge of research areas important in making psychological diagnoses and specific issues (including the concept of resilience, parentification, parental alienation, the child's adaptation, conflict between partners, the child's best interest clause as a principle of family law, evidence-based diagnosis), basic legal principles on divorce, the status of an expert psychologist and psychological and judicial opinion, as well as other provisions which are not source of law in the form of guidelines and standards; (b) skills relating to effective planning and execution of multi-person diagnosis, the construction of the psychological and judicial opinion, the selection of diagnostic tools, the presentation of hypotheses, transparent and comprehensive data analysis and the formulation of conclusions; (c) an ethical attitude taking into account the special status of the psychologist and diagnostic relationship in divorce matters, taking into account ethical dilemmas and separateness of diagnosis conducted out of court.

**Keywords:** psychological diagnosis, diagnostic competences, psychological and judicial opinions, divorce

**Abstrakt:** Sprawy o rozwód, w których rozwodzący się małżonkowie posiadają wspólne małoletnie dzieci stanowią szczególne wyzwanie dla psychologów i prawników. Sąd decyduje o istotnych sprawach dziecka i rodziny, ale formalnie nie posiadając wystarczającej wiedzy w zakresie psychologicznego funkcjonowania członków rodziny, rozstrzygnięcie opiera na opinii psychologiczno-sądowej. Psycholog nie podejmuje prawnie wiążących rozstrzygnięć dotyczących rodziny, ale występuje jako ekspert posiadający tzw. wiadomości specjalne w wybranych obszarach psychologii, co umożliwia sporządzenie opinii psychologiczno-sądowej dotyczącej funkcjonowania rodziny, wspierającej proces podejmowania decyzji przez sąd. Szczególne kompetencje diagnostyczne psychologa: wiedza, umiejętności i postawa etyczna zwiększają prawdopodobieństwo trafnej i wiarygodnej diagnozy psychologicznej oraz przyczyniają się do tego, że opinia psychologiczno-sądowa staje się bardziej użyteczna dla sądu. Artykuł prezentuje wybrane zagadnienia prawne i psychologiczne związane z rolą psychologa oraz procesem diagnozowania w opiniowaniu psychologiczno-sądowym w sprawach o rozwód, gdy partnerzy posiadają wspólne małoletnie dzieci. Kolejno przedstawione zostały kompetencje diagnostyczne psychologa: a) wiedza, obejmująca znajomość ważnych dla diagnozowania psychologicznego w sprawach rozwodowych obszarów badawczych oraz szczegółowych zagadnień (m.in. koncepcja rezyliencji, parentyfikacji, alienacji rodzicielskiej, adaptacja dziecka, konflikt między partnerami, dobro dziecka jako zasada prawa rodzinnego, diagnozowanie oparte na dowodach), podstawowych przepisów prawa dotyczących rozwodu, statusu biegłego psychologa i opinii psychologiczno-sądowej oraz innych regulacji nie stanowiących źródeł prawa zawartych w formie wytycznych i standardów; b) umiejętności związane z efektywnym planowaniem i przeprowadzaniem diagnozy wieloosobowej, konstruowaniem opinii psychologiczno-sądowej, doбором narzędzi diagnostycznych, prezentowaniem hipotez, przejrzystą i kompleksową analizą danych oraz formułowaniem wniosków; c) postawa etyczna uwzględniająca szczególnie status psychologa oraz relacji diagnostycznej w sprawach o rozwód, z uwzględnieniem dylematów etycznych i odrębności wobec diagnozy prowadzonej w warunkach pozasądowych.

**Słowa kluczowe:** diagnoza psychologiczna, kompetencje diagnostyczne, opiniowanie psychologiczno-sądowe, rozwód

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## Introduction

According to GUS data in Poland in 2020, more than 51 000 marriages ended with divorce, which means that the divorce rate was 1.3 ‰. Although the rate has decreased in the last two years, the number of marriages (GUS, 2021) has also decreased significantly. Of all divorced marriages, nearly 30 000 couples had common minor children. This data shows that in around 60% of families the divorce crisis concerned at least three family members – partners and their children. When observing the case-law of the common courts, it can be assumed that psychologists participated in the majority of cases, and on the basis of the diagnosis of divorcing partners and their children, they provided an opinion on the order of the court.

Divorce proceedings have been dealt with by the legislator as a matter of particular importance, which is reflected in substantive and procedural rules. They are proceeded in district courts by judiciary composed of three members, i.e., a professional judge and two lay judges (Article 47(2)(2)(a) of the Act of 17 November 1964, the Code of Civil Procedure, hereinafter referred to as CCP). Court sitting shall normally take place in camera (Article 427 CCP). For the purposes of issuing a psychological opinion, the court usually appoints consultative teams of court experts or an expert psychologist (Article 2901 CCP, Wicherek, 2018). From the legal point of view, the requirement for formulating the opinion by the psychologist<sup>2</sup> is the legal capacity for issuing opinions (need for special attention, Article 278 (1) CCP), empowering the expert to issue an opinion (the court has made a provision to establish evidence from the expert opinion, Article 236 (1) CCP, in the case of a judicial expert the promise is made in accordance with § 15 of the Ordinance of the Minister of Justice of 24 January 2005 on judicial experts, there are no circumstances preventing the expert from drawing up an opinion, Article 281(1) in connection with Article 48 CCP) and meeting

the formal criteria by the opinion (Articles 285, 290 CCP). The judicial and psychological opinion is non-mandatory (which means that no opinion is necessary in case of divorce) and non-binding (Szustrowa, 2003; Stemplewska-Żakowicz, 2016). The court is not obliged to rule according to the opinion. The evidence from the opinion of the expert psychologist shall be analysed on the same basis as other evidence gathered in the case (Article 233 CCP, the principle of free assessment of evidence).

The evidence from the expert's opinion is admitted by the court primarily in divorce cases where the parties have common minor children. In such cases, the expert's opinion includes: an examination of the minor care and child-rearing situation, an analysis of the projected impact of parents' divorce on the child's welfare, an assessment of the parties' competence to exercise parental authority, and an assessment of the child's contact with a parent with whom the child will not have a permanent residence (Stróziak, 2016; Pisarska, 2020). The legal provisions (Annex to the Ordinance of the Minister of Justice of 1 February 2016 on determining standards of the opinion-preparation methodology in consultative teams of court experts) and *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych*, (2016) [Eng. Standards for psychological opinions in family and care matters – translator's note] indicate two main areas of opinion-making: characterisation of the family environment, taking into account the care and child-rearing situation and the psychological characterisation of the subjects.

The main activity of a psychology expert witness is diagnosing which, in a narrower sense, relates to the work-related effect that is the opinion, while in the wider sense, also includes the diagnosis process that led to issuing the opinion (Stemplewska-Żakowicz, 2016). Psychological diagnosis is “a complex process, including the formulation of diagnostic questions, the selection of appropriate tools, the collection of data, their evaluation and integration, and as the result the formulation of responses to diagnostic

2 In this work, the concept of a psychologist refers to a judicial expert on the list kept by the President of the District Court, an ad hoc expert appointed for a particular case, a scientific institute, a scientific research institute or a psychologist who is a member of a consultative team of court experts (CTCE), set up in accordance with the Law of 5 August 2015 on consultative teams of court experts.

questions (...)” (K. Stemplewska-Żakowicz, 2016, p. 15). Diagnosis in the domain of divorce cases where the parties share minor children requires special diagnostic skills<sup>3</sup>: specialist knowledge, skills and display of an appropriate ethical attitude (Stemplewska-Żakowicz, 2016; standard 1.3, Standardy diagnozy psychologicznej, 2018 [Eng. Standards of psychological assessment – translator’s note]).

In psychological assessment for legal purposes, the goal and scope of the diagnosis are determined by the court in the form of questions contained in the provision admitting the evidence from the opinion of an expert psychologist. The questions are then operationalised by an expert (formulated in a psychological language) and are most often related to the impact of the divorce on the child’s mental health, possible reasons to refuse granting a divorce on the ground of the child’s best interests, an indication of the guardian providing better guarantees of proper child-rearing conditions, as the so-called “primary caregiver”, with whom the child has a permanent residence, the assessment of the parental competence of the applicants to provide child care, the characteristics of the child’s relationship with each parent and with siblings (Woszczek, Woszczek, 2011; Toeplitz-Winiewska, 2014a; Czerederecka, 2016<sup>4</sup>). The psychologist decides on the choice of diagnostic tools, the course of the investigation and the form and content of the psychological opinion, which is the result of the diagnosis process (the framework is provided by the response to court questions).

## 1. Knowledge

The assessment process for family matters should be based on empirical evidence (EBA, Evidence-Based Assessment; Hunsley, Mash, 2007). Consequently, psychology expert witness providing opinions in divorce matters should be aware of the latest scientific developments in the area of diagnosis, among

others, the methods of child and family assessment, the specificity of dyadic assessment (Pietrzyk, 1987) and family assessment. They should also have the knowledge of family psychology, child developmental and clinical psychology, child-rearing psychology, the specific nature of individual functioning in conflict and crisis, and the psychological consequences of changes in family structure (Simon, Stahl, 2014). Furthermore, they should have knowledge of the current legal provisions (substantive and procedural law) concerning divorce and legal separation as well as the procedural rules relating to the institution of a judicial expert, demonstrating the knowledge of their powers and responsibilities in the context of legal proceedings. Case law can be used to interpret some of the provisions. In recent years, additional regulations, such as, for example, Standardy diagnozy psychologicznej (2018), Standardy opiniowania sądowego w sprawach rodzinnych i opiekuńczych (2016), Standardy metodologii opiniowania w opiniodawczych zespołach sądowych specjalistów [Eng. Standards of opinion-preparation methodology in consultative teams of court experts- translator’s note] (Annex to the Ordinance of the Minister of Justice of 1 February 2016 on determining standards of the opinion-preparation methodology in consultative teams of court experts), have been developed to support the diagnostic process in legal psychology, which are not legal sources, but which refer to the principles of a psychologist’s conduct in psychological and judicial opinion making process. The knowledge of a psychology expert witness in this regard increases the likelihood of accurate and reliable psychological diagnosis, making the psychological assessment for legal purposes more useful to the courts (Simon, Stahl, 2014).

Specific topics and theoretical concepts related to the peculiar nature of divorce matters include, among others, the impact of divorce and change of family structure on children, the development phases and the needs of children related to them, the

3 The diagnostic competence is “the ability to use appropriate methods (e.g. interview, test, observation) to determine, depending on the service provided, the relevant characteristics of the subject, group, organization or situation” (Stemplewski-Żakowicz, 2016, p. 21).

4 In the publication, the author indicated a comprehensive catalogue of court expectations of an expert psychologist in family and care matters.

functioning of partners in conflict, forms of domestic violence and their importance for the psychological functioning of the child, separation of the child from the other parent, the phenomenon of parentification, the concept of resilience, together with risk and protective factors in child adaptation, the importance of changing the child's place of residence, alternating care and time spent with each parent, the functioning of the divorcing partners in divorce crisis and conflict, the adaptation and coping of adults, including adult primary caregivers (Simon, Stahl, 2014).

Most analyses confirm the adverse impact of divorce on child psychological adaptation (including depression, anxiety, stress, suicide attempts and suicides, disorders associated with the use of alcohol and other substances, behavioural addictions) and recommend the implementation of preventive and supportive programs to prevent negative consequences in the future or not to allow individual symptoms to develop into full disorders (Sands, Thompson, Gaysina, 2017<sup>5</sup>; Auersperg, Vlasak, Ponocny, Barth, 2019). The researchers describe the mechanisms that are intermediate in the occurrence of subsequent mental health disorders in children and indicate the child's insecure attachment style as a traumatic implication of family-breakdown situation for children (Andrews, Hicks, 2017; Gidhagen, Holmqvist, Philips, 2018) or activation of the HPA axis and increased central nervous system response due to the stress experienced by the child involved in parents' divorce (Bloch, Pleg, Koren, Aner, Klein, 2007; Stephens, Wand, 2012; Lau, Bigio, Zelli, McEwen, Nasca, 2017).

Researchers are divided as to the phenomenon of parental alienation – some authors point to empirical evidence justifying the inclusion of this construct in the classification of diseases (Namysłowska, Heitzman, Siewierska, 2009; Czerederecka, 2010a; Bernet, 2020)<sup>6</sup>, while others are sceptical, pointing to methodological objections to the studies presented and thereby rebutting the concept of parental alienation

(Clemente, Padilla-Racero, 2015; Milchman, Gaffner, Meier, 2020). There are two terms in the literature of the subject related to the isolation of a child from the other parent. Parental alienation refers to a kind of alliance between a child and one parent and to the rejection of a relationship with another parent without a substantial basis. Parental alienation syndrome or alienation from the secondary parent syndrome consists of a group of behaviours that occur in a child who has been subjected to parental alienation (Bernet, von Boch-Galhau, Baker, Morrison, 2010). Concerns about the concept of parental alienation led researchers to initiate numerous analyses that have resulted in a modification of the concept. Today's models are based on four (Baker, 2020) or five factors (Bernet, Greenhill, 2021) as compared to Gardner's original 8-factor model (Gardner, 1985). Self-descriptive tools (for children and adults who have experienced signs of indicated behaviours in the past) have been developed to measure the described construct of parental alienation, which are used in clinical practice and in scientific research. They include: The Baker Strategy Questionnaire (BSQ) addressed to adults for retrospective evaluation of parental alienation manifestations, consisting of 20 statements that describe 19 specific and one general behaviour of parents (separately for mother and father) (Baker, Chambers, 2011; Bernet, Baker, Verrocchio, 2015), the Baker Alienation Questionnaire (BAQ) for children currently experiencing manifestations of parental alienation (Baker, Burkhard, Albertson-Kelly, 2012), Parental Alienation Behavior Scale (PABS) (Hands, Warshak, 2011) and the Rowlands Parental Alienation Scale (RPABS) that refers to Gardner's 8-factor model of parental alienation (Rowlands, 2019, 2020).

Some researchers qualify parental alienation as a form of violence (Verrocchio, Baker, Bernet, 2016; Verrocchio, Baker, Marchetti, 2017). As a complex form of violence, it consists in a parent using a long-term conduct detrimental to the child's

5 The meta-analysis showed the relationship between parents' divorce and the symptoms of depression in the child, and did not confirm the direct correlation between divorce and the symptoms of fear in the child.

6 On 7 September 2016, an expertise was published, commissioned by the Office of the Ombudsman for Children, on Gardner's Syndrome as a disease unit and its relevance in the case law of family courts, prepared by I. Namysłowska, J. Heitzmann and A. Siewierska (<https://petycja.eu/tag/prof-dr-hab-irena-namyslowska/>, Access: 9 January 2022).

relations with the other parent, which is intended to cause harm to the other parent due to their close relationship with the child, which also causes other damages to the family members (Harman, Kruk, Hines, 2018). Research shows that the phenomenon described is related to negative consequences for the child, but also, in the situation of loss of contact with the child, the parent experiences stress and suffering that result in emotional, behavioural, cognitive, professional-financial, physical and social difficulties (Lee-Maturana, Matthewson, Dwann, 2020). The first studies are being developed of the so-called good family practice, in case of families where symptoms of parental alienation are identified, which consists in the implementation of assistance programs addressed to family members (Temler, Matthewson, Haines, Cox, 2017).

Even if we accept that parental alienation is not a form of violence (Milchman, Gaffner, Meier, 2020), in the parents' divorce process a child may experience other behaviours referred to as violence by caregivers. The mere exposure of a child to conflict between parents meets the criteria of violence and adversely affects the child's adaptation to the situation of change in the family structure (Dijk, Valk, Deković, Branje, 2020). In addition, it is associated with a significantly higher risk of experiencing emotional and behavioural difficulties during and many years after the parents' divorce (O'Hara, Sandler, Wolchik, Tein, 2019<sup>7</sup>; Davies, Thompson, Martin, Cummings, 2021<sup>8</sup>), and in difficulties in relationships as well as in school performance (Kelly, Emery, 2003; Harold, Sellers, 2018). Conflict between parents has a negative impact, regardless of whether the parents live together and whether the children are biologically related to the parents (Harold, Sellers, 2018). The child's exposure to the conflict of divorcing partners increases the risk of the diffusion of parental roles expressed by child parentification or triangulation by including the child in the conflict (Dijk et al., 2020). Parentification involves changing the roles within the family when a child is encouraged by their caregivers

to take on the role of partner, mediator, guardian or therapist. These roles enable the instrumental and emotional needs of the parent to be met to the detriment of the child (instrumental and emotional parentification, Grzegorzewska, 2016; Schier, 2018). In Poland, tools are being developed to measure the phenomenon of parentification within the population of children and young people such as *Kwestionariusz Parentyfikacji dla Młodzieży* [Eng. the Parentification Questionnaire for Youth – translator's note] (Borcher, Lewandowska-Walter, Połomski, Peplińska, 2020). Grzegorzewska (2016, pp. 30-31) points out, after Minuchin, five criteria of parentification: "the responsibilities of a parent are transferred onto one child in the family, they are excessive and not adequate to the age and level of development of the child, they preclude or limit the satisfaction of the needs and development tasks of the child, and the taking on of duties is necessary to ensure that the child receives the attention and love of the parent, the structure of family power is unclear, and the boundaries between the parent-child subsystem are so blurred that the child becomes a parent/partner of their own parent." Studies show that parentification processes in families of divorced parents can continue until late adolescence and early adulthood (Jurkovic, Thirakiield, Morrell, 2001; Peris, Emery, 2005).

Not every child will develop in the future unadaptive behaviour patterns and emotional responses when being exposed to the risk factor in the form of parent divorce (and other risk factors related to the divorce process such as violence, a conflict between divorcing partners, changes in family structure caused by divorce or parents re-entering into relationships, smaller involvement of parents in care and upbringing, loss of relations with important people – parent with whom the child has no established place of residence and other family members, deterioration of the material and living situation; Kelly, Emma, 2003). Positive adaptation of the child, despite unfavourable conditions, depends on the process of interaction between risk and protective factors. The measure of

7 The authors explain that the consequences experienced by the child depend on the specific nature of the particular conflict situation (the studies explore various conflict variants), as well as on the child's emotional and behavioural coping strategies.

8 The authors point to an increased negative emotional reaction of children in response to the stressor, which, over time, may cause difficulties in different areas of the child's functioning.

good adaptation is, for example, mental health, low level of perceived stress, and wellbeing (internal factors, Masten, 2001). Adoption of rigid indicators of good adaptation is not possible and the assessment of positive adaptation will depend on the development tasks and the age of the child. Good adaptation may also be indicated by the absence of symptoms of disorders, the higher frequency of which is observed in children whose parents are divorcing (e.g. depression, addiction, as mentioned above), or good functioning in key areas for children in this group (e.g. close relations with parents, good contact with peers, ability to build relationships – external factors, Masten, 2001). Resilience, therefore, means “a dynamic process which reflects a relatively good adaptation of an individual despite the risks or traumatic experiences experienced by them” (Borucka, Ostaszewski, 2008, p. 2). This process involves the interaction of risk factors and protective factors that ensure positive adaptation with the supporting influence of risk modification mechanisms (Rutter, 2006).

Lack of or low level of partner conflict, close relationship with the parent, with whom the child has no permanent residence and care from both divorced parents, caring parents, whose parental competencies are characterised by attention to the needs of the child, provision of emotional support to the child, authoritative discipline and satisfaction of the child’s needs appropriate to the age and development possibilities are among the protective factors pointed out by the researchers that balance the risk of exposure of children to divorce (Kelly, Emery, 2003).

Based on the research studies, a model integrating knowledge of the protective factors has been developed that is used in cases where child matters are resolved based on the best interests of the child model (BIC model). The best interests of the child are the general principle of family law and a general clause, which means that it becomes specific according to the individual circumstances of the particular case. It determines the direction in which the court will rule in all decisions relating to the child. The protective factors of the BIC model, grouped in two categories, are as follows: a) physical security: availability of adequate physical care, safe physical

environment; b) care and child-rearing: an atmosphere of affection, supporting, flexible upbringing model, a positive example given by parents to the child, interest, a safe further physical environment, respect, social network, education, contact with peers, positive examples in society, the continuity of child-rearing conditions and prospects for the future, the stability of life (Kalverboer et al., 2012; also Brummamelaar, Kalverboer, Harder, Post, Zijlstra, Knorth, 2014; Op de Beeck et al., 2017).

Psychological diagnosis in divorce cases where the parties have minor children in common involves an analysis of the family environment taking into account the care and child-rearing situation (Annex to the Ordinance of the Minister of Justice of 1 February 2016 on determining standards of the opinion-preparation methodology in consultative teams of court experts; *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych*, 2016). Recent studies recommend that the concepts used so far, such as the style of child-rearing, the parental attitude, should be replaced by the construct of parental competence (Jackiewicz, Białecka-Pikul, 2019). Parental competence is a set of acquired skills to adequately perform the duties and tasks associated with the role of a parent (Johnson, Berdahl, Horne, Richter, Walters, 2014; Matczak, Jaworowska, 2017), including knowledge of child-rearing methods and a sense of parental effectiveness (feeling that this knowledge can be applied effectively in practice). The advantage of the proposed construct is its emphasis on the mutual and dynamic parent-child interactions in the diagnosis process (so-called child effect) and inclusion of the parental competence in a continuum instead of the “0-1” valuation, which implies the possibility of modifying and developing the child-rearing skills (Jackiewicz, Białecka-Pikul, 2019). Legal psychology assumes that the competences of parents who are divorcing include, among others, the ability to provide a stable upbringing environment for the child, to recognize and meet the needs of the child, and to stimulate physical and mental development in a comprehensive way (Czerederecka, 2020).



## 2. Competences

The psychologist issuing an opinion in divorce matters should have knowledge of the diagnostic tools in the area of family psychology that take into account the specific characteristics of the case (standards 1.3, 2.3, 4.6 of Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych, 2016; Paluchowski, 2015; Stemplewska-Żakowicz, 2016; Toeplitz-Winiewska, 2017). In addition to psychological survey and observation, other current methods that meet psychometric requirements and have scientific bases (standards 2.5, 2.9, of Standardy diagnozy psychologicznej, 2018), such as questionnaires and projection techniques, are used to diagnose the family situation in divorce cases<sup>9</sup>. The open catalogue of the methods used includes: a) for characterisation of the family<sup>10</sup> environment — Questionnaire: Family Environment Analysis - Own Family (M. Ryś, 2009), Family Relationship Questionnaire (KRR, M. Plopa), Family Evaluation Scale (SOR, D., Olson in adaptation by A. Margasiński), Family Relations Test (TSR, E. Bene, in adaptation by A. Frydrychowicz), Family Relationships Test (TRR, A. Lewandowska-Walter, M. Błażek), Diagnosis of family ties of children and adolescents (A. Lewandowska-Walter, M. Błażek, W. Bruski), Questionnaire of relations with siblings during the period of adolescence (KRR, A. Lewandowska-Walter, P. Połomski, A. Peplińska); b) for characterisation of the care and child-rearing situation, including the diagnosis of parental competences: Questionnaire: Analysis of child-rearing styles in a family - own family (M. Ryś, 2009), Questionnaire for parents to study parental attitudes (M. Ziemska), Parent-Child Task-Related Communication Test (TKZ-RD, A. Frydrychowicz), Parenting Attitudes Scale (SPR-2, M. Plopa, 2008), Parental Competence

Test (TKR, A. Matczak, A. Jaworowska), Questionnaire for evaluation candidates for adoptive parents, caregivers, legal guardians and Mediators (CUIDA, F.A. Bermejo, I. Estevez, M.I. Garcia, E. Garcia-Rubio, L. Lapastora, P. Letamendia, J.C. Parra, A. Polo, M.J. Sueiro, F. Velazquez de Castro, in adaptation by A. Jaworowska); c) for psychological characterisation of the subjects: Neo-FFI Personality Inventory (P.T. Costa, R.R. McCrae, in adaptation by B. Zawadzki, J. Strelau, P. Szczepaniak, M. Śliwińska, 1998), Eysenck Personality questionnaire (EPQ-R, EPQ-R(S) – in abbreviated form, H. Eysenck and S.B.G. Eysenck, 2006, in adaptation by A. Jaworowska), NEO-PI-R personality inventory (P. T. Costa Jr., R.R. McCrae, 2006, in adaptation by J. Siuta). Among the projection techniques one should mention: Thematic Apperception Test (TAT, H. Murray, 1987; CAT-A, CAT-H, CAT-S – versions for children, L. Bellak, S.S. Bellak, 2008), Family Drawing Test if its interpretation is comprehensive (Paluchowski, Stemplewska-Żakowicz, 2013a, 2013b), The Rotter Incomplete Sentences Blank test (RISB, J.B. Rotter, M.I. Lah, J.E. Rafferty, in adaptation by A. Jaworowska, A. Matczak, 2008), Rorschach Test (ROR, H. Rorschach).

Some methods referred to as projection methods are questionable as they do not meet the reliability criterion and are not based on projection. They include Szondi test, Karl Koch's tree test, Lüscher color test, and graphological analysis of handwriting. There are also some doubts regarding the Color Pyramid test. Also, other techniques facilitating drawing, in which the interpretation is based on the marking system are not projective methods (Stemplewska-Żakowicz, Paluchowski, 2013a, 2013b). Stemplewska-Żakowicz and Paluchowski indicate that in order to decide on implementing the particular method in psychologi-

9 Stemplewska-Żakowicz and Paluchowski (2013a, p. 433) indicate that the projection technique is “a diagnostic technique based on cognitive projection or apperception. The essence of the projection diagnosis is, to apply the language of contemporary psychology, the use by the subject of his or her personal cognitive and affective structures (cognitive schemas) to give individual meanings to an ambiguous material. The projective behaviour is, therefore, the interpretation by the diagnosed person of a projection stimulus with a specific structure presented during the diagnostic test, and not the expression (speaking, writing, drawing).”

10 The division takes into account the regulations contained in the Ordinance of the Minister of Justice of 1 February 2016 on determining standards of the opinion-preparation methodology in consultative teams of court experts (template of an opinion on family and care matters) and it includes: characterisation of the family environment, including care and child-rearing conditions, psychological characterisation of the subjects and the results of medical consultations. These methods do not cover the entire range of available diagnostic tools.

cal opinion-issuing practice, it is important to have a theoretical basis and evidence-based confirmation of the psychometric properties of the given tool. The formal division into objective diagnostic techniques (based on objective criteria – a key or a system) and projection techniques becomes of secondary importance (Stemplewska-Żakowicz, Paluchowski, 2013a).

When choosing methods for family diagnosis, the psychologist takes into account the psychometric properties of the tool and the individual characteristics of the subjects (standard 2.7 of Standardy diagnozy psychologicznej, 2018; Toeplitz-Winiowska, 2014a, Ordinance of the Minister of Justice of 1 February 2016 on determining standards of the opinion-preparation methodology in consultative teams of court experts, Annex, point 9), such as age, level of development, possible disability or linguistic limitations. In specific situations, the available methods should be adapted or modified in accordance with copyright law and their essential elements<sup>11</sup>. Diagnostic tools vary in form, duration of the assessment, competences required from the evaluator to use the particular tool, the purpose, age and group of subjects, psychometric characteristics, theoretical grounds, the way the results are described, the area of family functioning, to which the tool refers. At the same time, the above classification determines the elements of the expert's opinion. Analysis of judicial files is an important method of collecting family data (Annex to the Ordinance of the Minister of Justice of 1 February 2016 on determining standards of the opinion-preparation methodology in consultative teams of court experts).

The law states that psychological assessment for legal purposes in divorce cases where the parties have common minor children should include a justification (Article 285 (1) CCP). In addition, the opinion should include an introduction, a descriptive section (description of the factual state, the assessment methods used, together with the rationale, a description of the assessment, the strengths and weaknesses of the hypotheses under consideration) as well as final conclusions (Strózik, 2016). The process of obtaining answers to court questions through a comprehensive analysis of many data from different sources, including those that support the preferred conclusions of the opinion is just as important as the conclusions of the study themselves. The psychologist should explain how they have reached the conclusions presented in the opinion by describing the data they used and how this data was used to draw conclusions (Simon, Stahl, 2014).

The transparency of the diagnosis process allows other persons involved in the divorce case (e.g. the court, parties and their representatives, another expert psychologist) to follow the psychologist's reasoning (intersubjective communicability, Słysz, 2014). In the diagnosis process, psychologists use heuristics, that is decision-making rules that shorten the inference process, but can cause cognitive distortions. Also, other cognitive errors cannot be ruled out (Słysz, 2014; Simon, Stahl, 2014). Thanks to the transparency of the diagnosis there is a kind of non-substantive verification of the strengths and weaknesses of the hypotheses made by the evaluator, the manifestations of neutrality and lack of psychologist's bias and prejudices (Słysz, 2014; Simon, Stahl, 2014)<sup>12</sup>, as well as additional criteria for psychological assessment for legal purposes as defined in the literature and case-

11 For more information on the procedure for adapting or modifying see the guidelines to the standards for psychological diagnosis relating to the general diagnosis of persons with disabilities, other than the diagnosis of disability (2018).

12 Impartial attitude is one of the key principles of the work of a psychology expert witness. The Code of Civil Procedure enumerates the grounds for the exclusion of an expert in situations which call into question their impartiality. The rules also allow a psychologist to exclude themselves from the case if there is a justified basis for violation of the principle of impartiality (Articles 47, 49 CCP).



law<sup>13</sup>,<sup>14</sup>. In accordance with the order of the Supreme Court of 7 November 2000, I CKN 1170/98, “the expert’s opinion shall be assessed, pursuant to Article 233(1) CCP, on the basis of the criteria of compliance with the principles of logic and general knowledge, the level of the expert’s knowledge, the theoretical basis of the opinion, as well as the manner of justification and level of assertiveness of the conclusions expressed in the opinion.”

It is up to the court to make a decision and to give a judgement containing provisions regarding the admissibility of divorce, the scope of parental authority, the place of permanent residence of the child, the extent of contacts with the secondary caregiver, spousal maintenance, the distribution of the assets of the spouses after the divorce (Articles 56, 58 of the Act of 25 February 1964, The Family and Guardianship Code, hereinafter called FGC). The task of the evaluator issuing opinions in divorce matters is to consider various solutions included in diagnostic hypotheses – their strengths and limitations and to predict short- and long-term consequences, of, among others, granting of a divorce and the dismissal of divorce proceedings from the perspective of the child’s emotional, cognitive and social functioning, the long-term consequences of establishing the child’s place of residence on the mother or father, the likely changes in the child’s relationship with each parent, the dynamic of the partner’s conflict and the varying impact of the conflict on the child, the interaction of risk and protection factors, the consequences of leaving both parents the full parental authority (article 58 (1) FGC), the possibilities for the development of parental responsibility of each parent during and after divorce (Simon, Stahl, 2014). The purpose of this diagnostic procedure is to improve the decision-making

process by the court without any responsibility for the shape of the decisions being recognized by the psychologist.

### 3. Ethical Attitude

Sources of knowledge of the desired values and attitudes of the evaluator issuing opinion in divorce matters are the provisions of law<sup>15</sup>, codes of ethics (Kodeks Etyczny Psychologa PTP [Eng. Code of Ethics of the PTP Psychologist – translator’s note], 2018), standards of opinion, guidelines and examples of good practice (American Psychological Association, 2010, 2013a, 2013b; Standardy opinowania psychologicznego w sprawach rodzinnych i opiekuńczych, 2016; Standardy diagnozy psychologicznej, 2018).

The status of a psychology expert witness is different from that of a clinical psychologist or psychotherapist. In particular, confidentiality is limited, since the data from diagnosis are transmitted to the court and are included in the case file, to which, for instance, the divorcing partners and their attorneys have access (Article 9 CCP, the principle of procedural transparency). The hypotheses made by the psychology expert witness should take into account the questions set out by the court in the appointment order and should not result from the relationship with a client, who in court cases is described as: an evaluated person, a party, a participant in the court case (Toeplitz-Winiewska, 2014b). The result of the psychologist’s activity is an opinion that can be taken into account by the court when issuing a judgement in a case (Article 233 CCP, the principle of free assessment of evidence; the non-conclusive nature of the opinion). In this case, combining profession-

13 Cf. A. Czerederecka (2013, 2015), which describes a model for assessing psychological and judicial psychological opinions which includes taking into account ten criteria: uniformity and transparency of the investigation procedure, compliance with basic criteria for psychometry – reliability and relevance, intersubjective verification (objectivity), taking into account the current level of knowledge, the relevance and usefulness of the methods and content of the opinion used to resolve the problem formulated by the trial authority, the adequate preparation of the psychologist to use the technique chosen by them, the distinction between hypotheses and conclusions, but also the absence of excessive interpretation precautions, intersubjective communicability, a recommendation to change the method or to re-examine in case of doubt (pp. 345-349).

14 Article 201 of the Act of 6 June 1997, The Code of Criminal Procedure indicates the requirement of completeness, clarity and absence of internal conflict in the opinion itself or between different opinions on the same matter, but this provision does not apply to divorce cases.

15 For example, the provisions of law concerning the impartiality of the expert in relation to the subject matter of the case and excluding any conflict of interest with the parties to the proceedings (Article 281(1) in connection with Article 48 CCP).

al roles, such as an expert and psychotherapist or a mediator for the evaluated members of the family is precluded (American Psychological Association, 2013a). The expert acts on the order of the court (Toeplitz-Winiewska, 2017) – the diagnosed person does not report themselves to the evaluator but is obliged by the court to take part in the case and to undergo a psychological examination (as a general rule, in divorce cases there is no obligation to attend the diagnostic examination, however, failure to participate may result in possible negative decisions for that participant). Therefore, the informed consent of the evaluated in connection to court cases is of peculiar nature (standard 3.2 of Standardy opinio-wania psychologicznego w sprawach rodzinnych i opiekuńczych; standards 1.11 and 1.12 of Standardy diagnozy psychologicznej). The psychologist's work does not aim directly at improving the wellbeing of the evaluated person, although the best interest of the examinee is the paramount value in the diagnosis associated with divorce matters (Article 5 of the Code of Ethics of the PTP Psychologist, 2018).

Ethical challenges in the diagnostic practice of a psychologist relate to the nature of the opinions on divorce matters where the diagnosis is multi-person, which means it is time-consuming, implicates multiple relationships within the family system, and demands to take into account the perspectives of many people. The partners under the diagnosis are in conflict and their objectives or interests may conflict (Czerederecka, 2010b). The results of court proceedings generally include important consequences for family members, relating to the change in family structure, the frequency of contacts between the parent and the child, or the form of such contacts. Evaluation in divorce matters in the circumstances described above results in the potential pursuit of the best possible outcome by the examinee. The diagnosis process is particularly at risk of producing distorted data (and incomplete data, also due to time-limited contact with the evaluation subjects or their reluctance to participate in the diagnosis) (Toeplitz-Winiewska, 2017). In order

to minimize the risk of relying on questionable data during the inference process, the evaluator should take into account the limitations of self-descriptive tools and choose diverse diagnostic methods as well as integrate data from different sources. In a divorce judgement, the court decides about, for instance, the place of residence of the child with one of the parents, hence there are questions directed at the psychologist intended to determine the parental responsibility of the parents. In these circumstances, the evaluator may face the challenge of comparing parents with similar levels of parental competence<sup>16</sup>. Due to the complexity of family diagnosis in divorce cases, it is preferable in judicial practice to establish evidence from the opinion issued by a CTCE and co-operation of specialists in various fields (Article 2901 CCP). With the popularisation of video and sound recording devices, there is a risk of recording a meeting and revealing the content that from a psychologist's perspective are subject to professional secrecy. Models of psychological diagnosis assume that one of its elements is to intervene against the study subject (GAP model, Paluchowski model, Stemplewska-Żakowicz, 2016). Considering the fact that a court is the ordering party and the recipient of the opinion, the psychological diagnosis in judicial opinion-making is limited to the examination, analysis and reporting of the results. Family members are not subject to any intervention or recommendations (except special situations where the court included in the decision to appoint an expert the question about recommendations towards family members, e.g. participation in therapy). These issues do not cover all the possible ethical dilemmas involved in the work of the psychologist issuing opinions in divorce matters.

Paluchowski proposes a universal model for making ethical decisions. The first step is to define and describe a specific ethical problem, including any precedents. In the second step, the psychologist decides whether they are dealing with a problem (application of the code of ethics is sufficient) or with a dilemma. If the situation is an ethical dilem-

16 The court in divorce judgement determines the place of permanent residence of the child and the person of the so-called primary caregiver, and hence the question to experts may take the following form "Which parent offers better child-rearing guarantees?" It is the task of the court to decide on this matter and it cannot delegate this duty to a psychologist.

ma, the psychologist identifies areas of conflict (e.g. conflict with the provisions of law or other standards). The next step is related to the determination of possible professional actions. The final element of the proposed model is the continuous monitoring of the effects of the actions taken (Paluchowski, 2021).

## Conclusions

The purpose of this paper was to present selected diagnostic competences expected from psychologists issuing opinions in divorce matters where partners have common minor children. The presented scheme of diagnostic competences, grouped in three categories: knowledge, skills, and ethical attitude, organizes the knowledge within this area but does not cover comprehensively its full complexity.

In view of the challenges described in this paper and faced by psychologists working for the court in family matters, it is worth considering whether it would not be advisable to disseminate additional organizational and legal tools that support the work of experts. Among these tools, it seems appropriate to introduce different modalities of further training for experts, which would allow for the enhancement of the diagnostic workshop in particular categories of cases and with different groups of examinees, and for the exchange of experiences among psycholo-

gists, for example of a supervision nature that takes into account the context of issuing opinion for the court use. They would also increase the knowledge of legal issues in this professional group. Regarding research methodology, the suggestions proposed in the standards of opinion-making on family and care matters, are noteworthy. For example, they encourage teamwork in drafting opinions, including consultation with experts in various fields (not only within the framework of the CTCE), and suggest increasing the number of diagnostic meetings with the evaluated people and the development of further diagnostic tools dedicated to psychology expert witness, as well as standards to objectify diagnosis depending on the type of court case. Further systemic solutions are also expected regarding the status of a psychologist, also psychologist as an expert<sup>17</sup> (including, for instance, competences and responsibilities), as well as detailed rules for the co-operation of psychologist and court.

Continuous progress in the research on child and family functioning during a divorce crisis reveals new phenomena, allows the development of valuable diagnostic methods, and assists the diagnosis process to make it more relevant and useful to the court. With changing social and cultural conditions, further challenges and ethical dilemmas for psychologists issuing judicial and psychological opinions can be expected to arise.

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17 The Polish legal system developed regulations concerning the work of psychologists in CTCE.

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