

DIVORCE VERSUS THE BEST INTEREST OF THE CHILD AS A SUBJECT OF EXAMINATION CONDUCTED IN OZSS: A LEGAL AND PSYCHOLOGICAL PERSPECTIVE

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DOI 10.2478/in-2023-0007

ABSTRACT

The article is a review of the issues concerning the concept of “the best interest of the child” as a negative condition for granting a divorce in the light of a diagnosis made in the Opiniodawcze Zespoły Specjalistów Sądowych (OZSS) on family courts’ request. It presents legal and psychological views on the best interest of the child in the context of a divorce treated as a crisis in the family. Comments are also presented on the scope of examination conducted by the OZSS experts on the impact of a divorce on the best interest of the child and selected problems related to their specificity. Based on the selected literature on the subject matter, case law and the work practice of the OZSS experts in the field of psychology, subjective views on the methodology of examining the impact of a divorce on the best interests of children are also presented. The main thesis of the article is the opinion that commissioning the OZSS experts by family courts to examine negative conditions for granting a divorce is controversial.

Keywords: divorce vs. the best interest of the child, examination carried out by Opiniodawcze Zespoły Specjalistów Sądowych, positive and negative legal conditions for granting a divorce, psychological effects of a divorce on children

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LEGAL VIEW ON THE EFFECT OF A DIVORCE ON THE BEST INTERESTS OF THE CHILD

It is not possible to define the concept of 'the best interest of the child', as it happens in case of every term that is axiological in nature, in psychology and the study of law. In practice, many legal regulations concerning the broad meaning of the best interests of children contain direct references to psychological knowledge of children's needs and development. In the Preamble to the Convention on the Rights of the Child,¹ a universal principle is laid down, specifying that to ensure full and harmonious development of their personality, a child should grow up in family environment, in an atmosphere of happiness, love and understanding; the child should be fully prepared to live an individual life in society. In general, the Convention introduces a series of children's rights that correlate with human rights, and States Parties (including Poland) pledged to respect and ensure them. Protection of the best interest of the child in Poland is constitutional in nature; it is laid down in Article 72 Constitution of the Republic of Poland.² In essence, it consists in an obligation to defend children against violence, cruelty, exploitation, and moral corruption.

Thus, in the axiological dimension, the best interest of the child is a core value protected by law. As it is the case with every man, a child first of all has the right to dignity, life and health. These three values (dignity, life and health) are thoroughly referred to in numerous legal norms, which also cover the best interest of the child within its broad meaning. In the Polish legal system, it is in particular protected by: (1) Act of 25 February 1964: Family and Guardianship Code³; (2) Act of 9 June 2011 on supporting a family and the system of foster care,⁴ (3) Act of 29 July 2005 on preventing violence in a family⁵; and (4) Act of 17 November 1964: Civil Procedure Code.⁶ From the point of view of the present paper, the provisions of FGC are of crucial importance.

There is no definition of the best interest of the child in the Family and Guardianship Code. There were numerous attempts to develop one in the doctrine. Even though a presentation of those attempts would go beyond the scope of this article, the readers should be referred to relevant literature.⁷ Based on FGC, the best interest of the child is described as a series of child's interests protected in case of a family crisis. The Code introduces the concept of "the child's best interest"

¹ Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, Journal of Laws of 1991, No. 120, item 526.

² Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483.

³ Consolidated text, Journal of Laws of 2020, item 1359, hereinafter referred to as "FGC".

⁴ Consolidated text, Journal of Laws of 2022, item 447.

⁵ Consolidated text, Journal of Laws of 2021, item 1249.

⁶ Consolidated text, Journal of Laws of 2021, item 1805, hereinafter referred to as "CPC".

⁷ See e.g. Kołodziejski, S., 'Dobro wspólnych nieletnich dzieci – jako przesłanka odmowy orzeczenia rozwodu', *Palestra*, 1965, No. 9, p. 30; Marciniak, J., *Treść i sprawowanie opieki nad małoletnim*, Warszawa, 1975, p. 19; Stojanowska, W., *Rozwód a dobro dziecka*, Warszawa, 1979, p. 27; Radwański, Z., 'Pojęcie i funkcja »dobra dziecka« w polskim prawie rodzinnym i opiekuńczym', *Studia Cywilistyczne*, Vol. XXI, 1981, p. 18.

as a protective category for which it is necessary to determine, on a case-by-case basis, whether a given solution will at least not make the child's legal situation worse. The "the best interest of the child" encompasses at the same time protection of their fundamental rights, inter alia, by interference into the guardians' parental authority,⁸ the possibility of changing place of residence, upbringing,⁹ determination or deprivation of the right to maintain contact with relatives¹⁰ or interference into parents' right to divorce. In all the above-mentioned circumstances, a court must assess to what extent a particular solution is in conformity with the best interests of the child.

Pursuant to FGC, before granting a divorce, a court must first of all recognise the occurrence of one positive condition, i.e. an irretrievable breakdown of marriage, and next, exclude the occurrence of three negative conditions, i.e. first of all, a conflict between the divorce and the best interest of the child and determination whether there is no recrimination under Article 56 § 3 FGC¹¹ or whether a divorce will be in conflict with the principles of community life. In accordance with Article 56 § 2 FGC, regardless of an irretrievable breakdown of marriage, a divorce is inadmissible if it can result in detriment to the spouses' juvenile children's best interest or if, for other reasons, a divorce would be in conflict with the principles of community life. The regulation is applicable only to situations in which, in spite of the lack of any bond between the parents (i.e. an irretrievable breakdown of their marriage), formal maintenance of their marriage will be a more favourable solution for the interests of the child than a divorce. On the other hand, in accordance with Article 440 CPC, if a court is convinced that there is a chance of maintaining a marriage, it shall suspend a divorce proceeding. However, such suspension can take place only once during a divorce proceeding.

In practice, it is only rarely that the application of the negative condition for a divorce under Article 56 § 2 FGC takes place. According to research findings, the above-mentioned condition is applied in ca. 4% of cases, in which a petition for divorce has been dismissed.¹² M. Domański analysed cases in which a petition for divorce was dismissed based on the negative condition under Article 56 § 2 FGC. He points out that recognising such a condition is always individual in nature, and depends on particular circumstances and a court evaluation. In practice, it is not possible to determine objective criteria for the circumstances justifying application of Article 56 § 2 FGC. Even if they occur, these circumstances can be often linked to a situation in which a court recognises lack of an irretrievable breakdown of marriage. Thus, it is difficult to assume an intrinsic conflict between a divorce and the best interest of the child in such situations, even if there is a positive condition

⁸ E.g. by means of parental custody limitation or the issue of care orders: Article 107 FGC; Article 109 FGC.

⁹ Article 112³ FGC concerns foster care.

¹⁰ Thus, Article 113² FGC.

¹¹ Granting divorce is inadmissible if a spouse who files a divorce petition is the only guilty of the marriage breakdown. It is the so-called principle of recrimination.

¹² Thus: Domański, M., 'Oddalenie powództwa o rozwód w sprawach, w których małżonkowie mieli wspólne małoletnie dzieci, w świetle orzecznictwa sądów powszechnych', *Prawo w Działaniu. Sprawy Cywilne*, 2013, No. 14, p. 196.

for a divorce under Article 56 § 1 FGC. This fact has a considerable impact on the scope of examination conducted in Opiniodawcze Zespoły Specjalistów Sądowych (Consultative Teams of Court Experts, hereinafter referred to as "OZSS"). More on this issue can be found in the later part of this article.

What is important, based on M. Domański's research findings we can conclude that, in analysed cases, the court decides that a divorce will be against the child's best interest mainly on the basis of the suggestions it receives from the examinations in OZSS.¹³ On the other hand, courts' assessments were always strongly connected with the opinions of OZSS and were of moral nature. Assessment that a divorce is against the child's best interest regardless of an irretrievable breakdown of marriage most often results from a negative ethical opinion on spouses' attitudes, e.g. (1) former suppression of a breakdown of marriage in order to formalise adoption; (2) no preparation of a child to parents' divorce or child's lack of knowledge about its consequences; (3) highly negative influence of post-divorce circumstances on the best interest of the child (issues concerning intensification of conflicts after a divorce is granted, disturbance to the family *status quo*). The circumstance referred to in § 2 raises most controversies, which will be discussed below.

A divorce by itself already endangers the best interest of the child. That is why, at the first stage of minimising the risk to this interest, the court must determine whether the guardians' marriage really ended and whether this circumstance is irretrievable. Thus, a breakdown of marriage is analysed with regard to its quality (assessment of non-retrieval) and quantity (time) from the perspective of predicting the crisis irretrievability. When the positive condition is met (a breakdown is irretrievable), the court takes into account negative conditions. When it is recognised that, in spite of a complete breakdown of marriage, a divorce in such circumstances is going to worsen child's situation, granting a divorce shall be inadmissible.¹⁴ However, the assessment is in the nature of a forecast and must be supported by reliable evidence and arguments.

D. Wybrańczyk, in her monograph concerning child's legal situation during a divorce,¹⁵ points out that the condition under Article 56 § 2 FGC is absolute in nature; there are no exceptions to it. This means that statute awards the best interest of the child a supreme rank. Based on the prevalent opinion in the doctrine, the author points out that in conformity with this condition, one can never compare the so-called ideal situation of a child living in a successful marriage to a situation of a child after a potential divorce, but an actual situation of a child before a divorce to the potential change after a divorce is granted. Extending the opinion, it is worth adding that it is necessary to compare the situation of a child in the course of divorce proceedings to the situation when it potentially ends with a formal ruling. Obviously, we are simply determining a certain degree of probability. A divorce should also be granted when the situation of a child does not worsen nor improve afterwards. It is worth mentioning

¹³ The author refers to RODK because this abbreviation was used due to the former status of OZSS at the time of the research conducted.

¹⁴ See Stojanowska, W., *Rozwód a dobro dziecka...*, op. cit., p. 112.

¹⁵ Wybrańczyk, D., *Sytuacja prawna małoletniego dziecka rozwodzących się rodziców*, Warszawa, 2022, p. 87.

one of the principles of Commission on European Family Law that assumes that granting a divorce does not infringe a child's interests more than forcing spouses to maintain their marriage.¹⁶ By the way, there was a widely criticised opinion in the doctrine that a divorce cannot be granted due to the age of the parties' juvenile children. According to that opinion, a divorce should be admissible only if a child was (1) under 4.5 years old or (2) 13+ or at the age of a secondary school student.¹⁷

After the amendments to the Code after 1965, the Supreme Court issued relevant directives concerning the interpretation of Article 56 § 2 FGC.¹⁸ They highlighted a few circumstances in which negative conditions for granting a divorce would occur due to the best interest of the child. These might occur:

- (1) if, as a result of a divorce, the bonds between a child and a parent who would not be with him/her were considerably weakened, to a degree that might have a negative impact on the fulfilment of this parent's parental duties;
- (2) when the facts do not allow the court to decide on child's situation in a way that would ensure that their material and moral needs are met at least to the same extent they were fulfilled by spouses. It should concern in particular situations when joint custody of parents is necessary and to some extent performed, and the relationship between spouses does not hold promise for maintaining this custody after a divorce is granted;
- (3) if spouses' tough attitudes to the exercise of their parental authority were recognised, in particular when one of them demands to have exclusive parental authority and wants to deprive the other of any possibility of participating in their child's upbringing. Especially in a situation when the existing *status quo* might be more favourable for children than a divorce. However, this should not concern situations in which a conflict between parents was destabilising the best interests of children more strongly than the below-mentioned risk of a conflict over parental authority;
- (4) a child's age, health and sensitivity or their relationship with parents may also be important. In case of such circumstances, the Supreme Court recommends basing an assessment on a psychological opinion on children.

Unfortunately, the Supreme Court recommendations of 1968 do not mention that the circumstances against which the negative condition under Article 56 § 2 FGC should protect do not protect a child against informal and permanent separation of parents. It is important due to the scope of examination conducted by OZSS. For example, the fact that parents are not divorced does not mean that there is no conflict between parents over parental authority, limitation of contacts or intentional negative influence of one parent on a child's bond with the other parent. The further part of this article presents opinions on whether it is possible for OZSS to implement the above-mentioned directives in its examination, and for the court to formulate an appropriate request concerning relation between the best interest of the child and a potential divorce of their parents.

¹⁶ Wybrańczyk, D., *Sytuacja prawna...*, op. cit., p. 87.

¹⁷ Thus: Wiślocki, J., 'Dziecko a rozwód', *Palestra*, 1957, No. 2, pp. 43–50.

¹⁸ 'Announcement of the First President of the Supreme Court of 27 March 1968', *Monitor Polski*, 1968, No. 14, item 95.

Attention is drawn in case law to the fact that an actual breakdown of marriage and a formal divorce granting are not identical occurrences. For example, the Appellate Court in Rzeszów, in its judgment of 8 April 2010, case No. I ACa 83/10,¹⁹ stated that:

“The condition under Article 56 § 2 FGC aims to protect a child against negative consequences of their parents’ divorce, but is not able to protect them against a breakdown of their marriage. In order to recognise this condition in the course of a court proceeding, it is necessary to examine the influence of a breakdown of marriage on a child, determine conditions in which granting a divorce may result in more negative consequences for a child than those resulting from an irretrievable breakdown of marriage of the child’s parents (...).”

Thus, court judgment take into account contemporary knowledge on the influence of a divorce on the child’s psyche. As a rule, it is assumed that children remaining in their parents’ dysfunctional relation resulting from an irretrievable breakdown of their marriage is an even more negative circumstance than a formal divorce. Referring to the further part of the above-mentioned judgment the content of which corresponds to the present scientific knowledge, it is necessary to add that: “(...) it is in the best interest of the child to be raised in a family in which the father and mother roles are performed properly, and not to be separated from any of the parents; thus, it concerns a truly functioning family, and not only maintained formally by the law”.

In practice, the concept of “the best interest of the child” consists in the category of interest and its legal protection.²⁰ The law protects the interests of a child in many dimensions, depending on the context and subject matter of a regulation. Decoding the content of the best interest of the child is usually objective in nature and cultural norms shape it in a given social and legal system. The objectivism of defining various “interests” of the child also bears consequences for their legal situation, i.e. the lack of or partial legal capacity depending on their age. In practice, these are adults who, based on culture and legal norms representing it, collectively determine what is in the interest of the child and what constitutes their best interest. Subjective understanding of “the best interest of the child” is, as a rule, ignored in legal solutions. And it does not concern ignoring the context or specificity of individual situations with regard to the protection of the best interest of the child but certain universal values. It has consequences for the issue of a divorce versus the best interest of the child. Firstly, the best interest of the child, perceived subjectively by a parent, a guardian or a child, will be subject to legal protection only if it is not in conflict with its objective understanding laid down in legal norms. Secondly, the law in particular protects children against subjective interpretation of the concept of their best interest by creating frameworks of a universal and objective assessment.

¹⁹ Lex No. 1643024.

²⁰ This is how the best interest of the child is described in Article 3(1) Convention of the Rights of the Child: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Thirdly, the examination carried out by OZSS on a court request in family-related cases is to help determine objective criteria of the protection of the best interest of the child. For this purpose, the principle of independence and professionalism of court experts was laid down in Article 2(2) and Article 11(1)(1) of the Act of 5 August 2015 on Consultative Teams of Court Experts.²¹ In the course of examination, in order to ensure objective insight into the situation of a child and his/her family, experts remain independent of the influence of third parties and are obliged to perform their tasks with due diligence in accordance with up-to-date recommendations of knowledge and science, and following the principles and ethics of the profession, impartially.

PSYCHOLOGICAL AND SOCIOLOGICAL VIEWS ON THE RELATION BETWEEN A DIVORCE AND THE BEST INTEREST OF THE CHILD

A divorce is undoubtedly a crisis situation in a family, destabilising all its members psychologically. It usually results from earlier conflicts, the resolution of which failed for various reasons. Break-up and formal separation of spouses is the only solution that lets the dysfunctional relation end. According to T. Szlendak, marriage is a system of resources exchange, and a divorce takes place when at least one party experiences a sense of injustice within this system.²² Thus, a decision to divorce may be unilateral or bilateral. A divorce alone generates subsequent family crises, especially if one partner is not motivated to divorce. When both parties agree that there are grounds for separation, the risk of intensifying a divorce-related tensions in a family decreases. Children always suffer psychologically when the sense of security and acceptance in a family is destroyed. Parents' separation is in general an undesired event for their juvenile children. There is agreement in literature that a divorce alone is an event that is much less unfavourable for the best interest of the child than upbringing in a family in which there is a bitter conflict.²³

Five stages of a divorce process are distinguished in psychology. According to P. Rydzewski,²⁴ they are: (1) dissatisfaction phase: partners realise the level of their problems in the relationship; (2) conflict phase: they realise that the problems and difficulties in their resolution intensify, conflicts mount and the awareness of an irretrievable breakdown grows; during this phase, juvenile children usually suffer most; (3) decision phase: a divorce becomes the only real possibility; it was found that divorcing parents impose more sanctions and penalties, and their behaviour towards their juvenile children is negative²⁵; (4) post-divorce stress phase: what dominates is stress, sense of loss, depressive disorders affecting family members

²¹ I.e. Journal of Laws of 2018, item 708.

²² Szlendak, T., *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*, Warszawa, 2015, p. 285.

²³ E.g. the authors referred to herein and the literature they refer to.

²⁴ Rydzewski, P., 'Rozwód – zjawisko wielowymiarowe', *Studia Demograficzne*, 1994, No. 3(117), pp. 87–95.

²⁵ Błażek, M., 'Rozwód jako sytuacja kryzysowa w rodzinie', in: Janicka, I., Liberska, H. (eds), *Psychologia rodziny*, Warszawa, 2014, p. 276.

as a result of a family break-up; (5) adaptation and restoration phase: adaptation to changes and a return to psychological well-being. There are no reliable data on how much time it takes to go through the particular stages. Each of them is experienced with different intensity. However, it is assumed that, in general, most family members function emotionally in a desired way after up to two years after the divorce is finalised.²⁶

There is a common opinion that children of divorced parents are poorer students, their behaviour causes more pedagogical problems, they experience a worse psychological mood and poorer social competence. However, numerous research findings show that if this effect occurs, it is very weak and a overall difference between children of divorced and non-divorced parents is vague.²⁷ Over the last years, as the number of divorces has grown and they have become more common, their negative influence on the best interest of children has decreased. It is also known that children have a better standard of living after their parents' divorce in many dimensions of functioning than when there were serious and intense conflicts in their family. The problems with children's behaviour occur for a short period almost always after their parents' divorce, but they disappear rather quickly. When the functioning of children of divorced parents is compared to that of the children raised in families with a high level of conflict intensity, the conduct-related problems are more serious in the latter group.²⁸ What is important, many behaviour or learning problems of children after their parents' divorce depend to a larger extent on economic factors than on the fact of parents' separation alone. For example, in a family in which the child's economic status does not change after a divorce, e.g. when the other parent regularly pays much maintenance, the educational functioning of children does not worsen.²⁹

Negative consequences of a divorce are usually mitigated in a situation when family bonds are properly developed and the intensity of conflicts between adults after a divorce is low. What is obvious, the influence of a divorce on children also depends on their age and individual characteristics. As a rule, the younger the child, the stronger is divorce impact regarding occurrence of emotional disorders; the older the child, the poorer their educational results.³⁰ However, regardless of child's individual features, the intensity of conflicts between parents is usually a better indicator of the potential wellbeing of a minor rather than a formal status of parents' marriage. A child's functioning in the environment of family conflicts is usually worse for their best interest than real separation of their parents.

²⁶ Błażek, M., 'Rozwód jako sytuacja kryzysowa...', op. cit., pp. 268–272.

²⁷ See research review in: Szlendak, T., *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*, Warszawa, 2015, pp. 292–295.

²⁸ Morrison, D., Coiro, M.J., 'Parental Conflict and Martial Disruption: Do children benefit when high-conflict marriages are dissolved?', *Journal of Marriage and Family*, 1999, Vol. 66, No. 3, p. 635.

²⁹ Amato, P., 'The consequences of divorce for adults and children', *Journal of Marriage and Family*, 2000, Vol. 62, No. 4, p. 1280.

³⁰ Błażek, M., 'Rozwód jako sytuacja kryzysowa...', op. cit., p. 274.

It is also comforting to think that adult children whose parents divorced do not build worse or better relationships in their adult life, and their families do not differ from those founded by persons who did not experience their parents' divorce.³¹ What is of key importance here is the parents' attitude: they can aggravate or mitigate negative emotional consequences of their divorce for their juvenile children. There are also simple rules of communication and dialogue with children in the course of and after their parents' divorce.³² Thus, again the wellbeing of children does not depend on the existence of formal bonds between parents (e.g. the maintenance of marriage) but on the quality of the relation and pedagogical conditions that adults are able to provide children with. It turns out that good functioning of reconstructed families is a rule rather than an exception. Most often, when divorced parents form new partnerships and stepchildren are born, the children of divorced parents function in a way that is at least not worse than in case of the children of parents who did not experience a divorce.³³

Summing up, formal separation of parents alone (inter alia, by means of a court ruling granting a divorce), as a rule, is not a great and lasting traumatic experience for juvenile children. There is much evidence that when parents' separation is the only option to resolve a crisis in a family, it is most often a solution favourable for juvenile children. From the point of view of the examination of a family recommended by a court, a divorce-related situation is in particular connected with the best interest of the child. Having that in mind, one can refer to one of the definitions of the best interest of the child, especially useful in the present context. Based on her research, M. Arczewska established how judges of family courts most often define the concept of the best interest of the child.³⁴ For them, the best interest of the child, inter alia, (a) is a synonymous with security; (b) should be treated in a broader way than just satisfying child's needs; (c) a child's contacts with a parent may be an element of the implementation as well as the interference into that interest. Based on the analysis of data obtained in the course of extensive research, this author proposes a definition of the concept of the best interest of the child, which is common for professionals involved in its protection. The best interest of the child does not only mean satisfying their needs, inter alia, financial ones, but also creating conditions of safe and harmonious development in all areas, including psychic and emotional ones taking into account their individual life situation.³⁵

³¹ Amato, P., 'The consequences...', op. cit., p. 1279.

³² For more on the issue see Ilg, F.L., Ames, L.B., Baker, S.M., *Rozwój psychiczny dziecka od 0 do 10 lat. Poradnik dla rodziców, psychologów i lekarzy*, Gdańsk, 2007, p. 273.

³³ Goldenberg, H., Goldenberg, I., *Terapia Rodzin*, Kraków, 2006, p. 47.

³⁴ Arczewska, M., *Dobro dziecka jako przedmiot troski społecznej*, Kraków, 2017, p. 322.

³⁵ Ibidem.

THE BEST INTEREST OF THE CHILD VS. DIVORCE: ISSUES WITH EXAMINATION CONDUCTED BY OZSS

Statistically, the number of divorces in Poland has been at the same level over the last years, however, it showed a rising trend in the first half of 2021. The available 2021 data show that statistically 57% of divorces granted in 2020 concerned married couples with children. In most cases there was one child in a family (58%). The more children were in a family, the smaller percentage of divorces was.³⁶ In case of parents' divorce, a court optionally commissions OZSS to examine the situation in order to determine a most objective way to protect the best interest of the child in the circumstances of a family crisis. For many years, an increasing percentage of family cases have been referred to OZSS in order to obtain answers to specific questions. It is partly due to the positive assessment of OZSS activities and the usefulness of the opinions provided for the justice system. It is often stated in literature that the opinions developed by OZSS experts are more useful than the opinions provided by registered expert witnesses, in particular in family- and juvenile-related cases. One can risk formulating a thesis that it results from family examination conducted by (at least two) groups of specialists rather than by a single witness expert. There is also high (ca. 80%) conformity of recommendations in OZSS opinions with courts' judgment.³⁷

Objective determination of child's situation is within the domain of forensic psychology. In accordance with Act on OZSS, the specialists employed there are obligated to issue opinions based on current scientific knowledge. Literature presents many established standards of conducting examination of children in family-related cases.³⁸ Regulation of the Minister of Justice of 1 February 2016 concerning Standards of Opinion Development Methodology in Consultative Teams of Court Experts is also binding.³⁹ Most often, the examination conducted in family cases consists in the analysis of guardianship and pedagogical situation concerning children, the divorce impact on their development and psychological wellbeing, the child's right to maintain contacts with parents, the place of residence, or a divorce being against the best interest of the child.⁴⁰ The scope of the above-

³⁶ See *Rocznik Demograficzny*. Główny Urząd Statystyczny, Warszawa, 2021, pp. 230–249, accessed on file: // C:/Users/rosha/Downloads/rocznik_demograficzny_2021.pdf.

³⁷ See Włodarczyk-Madejska, J., 'Efektywność opiniodawczych zespołów specjalistów sądowych', *Prawo w Działaniu. Sprawy Cywilne*, 2018, No. 33, pp. 242–292 and the literature and review of research on OZSS effectiveness referred to therein.

³⁸ See Ackerman, M.J., 'Opiniowanie w sprawach o opiekę nad dziećmi', in: Ackerman, M.J. (ed.), *Podstawy psychologii sądowej*, Gdańsk, 2005, p. 39; Marten, Z., *Psychologia zeznań*, Warszawa, 2012, pp. 119–139.

³⁹ Official Journal of 2016, item 76, hereinafter referred to as "the Regulation".

⁴⁰ For more detailed description of the frequency of questions referred to OZSS by courts, see: Włodarczyk-Madejska, J., 'Efektywność opiniodawczych zespołów specjalistów sądowych', *Prawo w Działaniu. Sprawy cywilne*, 2018, No. 33, p. 280; Most often, because in 74.3% of analysed cases courts ask experts about (1) emotional bonds between petitioner/petitioners and a minor; next (2) a suggested resolution of the case (62.3%); (3) whether contacts/contact arrangements are advisable (37.8%). Questions about the conformity of a divorce with the best interest of the child are usually incorporated in the questions about the suggested resolution of the case. Earlier research indicates that questions directly referring to the clause of the best interest of

mentioned examination is most often individualised depending on questions asked by a court. From the OZSS point of view, the last condition may cause most difficulty as regards providing accurate answers. Below, we have analysed some essential issues related to the conflict between divorce and the best interest of the child, and the OZSS examination practice.

1. First of all, in the literature on this subject matter, it has been raised many times that answering a question on whether a divorce is against the best interest of the child is not actually within the domain of OZSS. The practice of referring questions concerning specific solutions in a case instead of commissioning OZSS to obtain the so-called special information has been negatively assessed.⁴¹ Direct criticism concerned the fact of asking OZSS questions whether a breakdown of marriage is irretrievable or if a divorce is against the best interest of the child.⁴² It should be added that OZSS experts often adopt the suggestion made in the court commission and include the content of a judgment, to which courts often eagerly refer. For example, court states in the justification that “granting a divorce is inadmissible due to the best interest of the parties’ juvenile daughter (...), which directly results from a convincing opinion of RODK and the court fully approves of it”.⁴³ According to P. Ostaszewski, courts should not ask in evidence theses whether the best interest of the child is going to suffer as a result of a particular judgment, because only courts are competent to decide what the best interest of the child is.⁴⁴ Attention is also drawn to the problem in the doctrine.⁴⁵ M. Domański directly states that:

“the practice of rewriting statutory conditions of a divorce to the evidence-related decision (...) should be negatively assessed. The conditions are in the nature of legal concepts. (...) The aim of an opinion is to provide the court with special information from the fields. It is not up to experts’ to make statements concerning statutory conditions of a judgment.”⁴⁶

It is definitely better when a court, in order to exclude a negative condition for a divorce under Article 56 § 2 FGC, asks questions that require specialist psychological knowledge, which can help to make an appropriate judgment, e.g. questions about

the child as a negative condition for a divorce occur in 36% of courts’ requests addressed to the former RODK, Ostaszewski, P., ‘Opinie sporządzane przez rodzinne ośrodki diagnostyczno-konsultacyjne w sprawach opiekuńczych i rozwodowych’, *Pravo w Działaniu. Sprawy Cywilne*, 2013, No. 14, p. 12.

⁴¹ Czerederecka, A., ‘Kompetencje biegłego psychologa w odniesieniu do spraw rodzinnych i opiekuńczych’, in: Czerederecka, A. (ed.), *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych*, Kraków, 2016, p. 33; Ostaszewski, P., ‘Opinie sporządzane przez rodzinne ośrodki diagnostyczno-konsultacyjne w sprawach opiekuńczych i rozwodowych’, *Pravo w Działaniu. Sprawy Cywilne*, 2013, No. 14, p. 13.

⁴² Ostaszewski, P., ‘Opinie sporządzane przez rodzinne ośrodki...’, op. cit., p. 13.

⁴³ Ibidem, p. 21.

⁴⁴ Ibidem.

⁴⁵ Cf.: Czech, B., ‘Wybrane prawne i aksjologiczne aspekty opiniowania w sprawach rodzinnych (problem “dobra dziecka”)', *Zeszyty Naukowe Instytutu Badania Prawa Sądowego*, 1981, No. 32, p. 267; Czech, B., ‘Opis a wartościowanie i ocena w opinii biegłego (na przykładzie “dobra dziecka”)', in: Stanik, J.M., Majchrzyk, Z. (eds), *Etyczno-zawodowe problemy biegłego sądowniczo-psychologa i psychiatry w praktyce sądowej*, Katowice, 1995.

⁴⁶ Domański, M., ‘Oddalenie powództwa...’, op. cit., p. 189.

the influence of parents' separation on a child's emotional development, child's awareness of the divorce-related situation, a child's bonds with each of the parents, or the impact of divorce-related circumstances on the emotional functioning of the parties' juvenile child. Within this scope, court experts form decidedly more competent teams. Nevertheless, as it was proved above, in practice this question is often asked in a court request. Perhaps, it should be assumed that in practice a court asks experts for specialist information that goes beyond the literal content of the condition under Article 56 § 2 FGC, which helps to establish whether a rare circumstance stipulated in the provision takes place.

2. A diagnostic issue is defined in the OZSS examination methodology as facts or circumstances requiring determination and indicated in the decision of a body requesting an opinion. In this case, a court's question "whether a divorce is going to be in conflict with the best interest of the child" becomes the same diagnostic issue. On the other hand, a diagnostic process means all activities undertaken by experts aimed at obtaining necessary knowledge to resolve a diagnostic issue. It is also necessary to adopt an appropriate examination technique, i.e. a method of collecting data, *inter alia*, by means of an adequate interview structure.⁴⁷ In accordance with the literature formerly referred to, it is necessary to plan examination activities to be able to determine whether granting a divorce to a juvenile child's parents is going to considerably worsen child's psychological functioning. It does not concern a comparison of child's present situation with the conditions that would exist if the parents were not in conflict but rather a comparison of a thorough assessment of child's functioning in the circumstances of an actual (present or former) conflict in a family with the assessment and a forecast of child's functioning after a real separation of parents. Experts assess past or present events, while forecasts refer to future and potential events. Undoubtedly, assessments are easier than forecasts and, as a rule, are more useful for courts. Experts should focus on such selection of examination techniques that enables them to get to know children's opinions on the former and present relationship between their parents and their feelings in selected periods. The technique should be adjusted to the age of a child involved. What is important, it seems that drawing experts' attention to the assessment of the present functioning of the child is more valuable, when there is a well-documented conflict in the case files and the circumstances of intense involvement of a child in its course are known. Predictions always bear potential errors but they should be based on rational forecasts of child's situation after a divorce. This rationality should refer to the current scientific knowledge of short-term and long-term consequences of a divorce for the functioning of children and adults. As a rule, it is known that in an absolute majority of cases, parents' separation is better for children than the functioning of a family in a strong conflict and the so-called parents' dead relationship. It is a fact that a divorce often does not resolve tensions between parents but at least, as a rule, effectively separates them physically. Thanks to that, minors do not have to continue being directly involved in adults' disputes. Unfortunately,

⁴⁷ See para. 2.10 of the Regulation.

children of divorced parents may still be indirectly involved in adults' conflicts, e.g. in the form of the fight for a child's contacts with a chosen parent or his/her permanent place of residence.

One cannot also assume that a conflict between parties will end as soon as the case is resolved before court. Experts should predict the most probable aspects of a dispute between parents and its influence on a child (e.g. contacts, parental authority), taking into account whether the situation of a minor would be better in case of a refusal to grant a divorce or after a divorce is granted. One should always keep in mind that divorce is a formal act. In practice, judges do not commission OZSS experts to carry out examination in order to determine the influence of a parents' conflict on the best interest of the child – it almost always has a negative effect – but rather the influence of 'granting a divorce' on the best interest of the child. The question may be recognised as an attempt to obtain information whether there are any circumstances in the family situation, to which the above-mentioned directives of the Supreme Court refer. Thus, what matters for a court are: (1) specific bonds between the child and parents; (2) the child's specific needs; (3) parents' dispute concerning future authority and contacts with the child; (4) the child's age and health condition; and whether these elements will not contribute to destroying the existing status quo after a divorce has been formally granted. In case of stylistically different forms of questions a court asks about a conflict between a divorce and the best interest of the child, that the application of an examination technique adjusted to the Supreme Court's recommendations by OZSS experts seems to be one of the most reasonable options.⁴⁸

3. It is well-known that the court should assess a negative condition for a divorce which is against the best interest of the child only after confirming a positive condition, i.e. a complete and irretrievable breakdown of marriage. However, sometimes in their answer to the question about the divorce impact on the best interest of the child, experts make statements concerning the positive condition. This takes place when they justify potentially negative impact of a divorce on the child with lack of an irretrievable breakdown of marriage. In such a case, experts are likely to refer to the concept of mutual bonds and relationships. The practice is criticised in literature not due to the fact that experts go beyond the scope of the request but mainly because of the practice of courts alone. M. Domański states that:

“(...) considering the conformity of a divorce with the best interest of the child in a situation when there is an irretrievable breakdown of marriage is aimless. In many cases experts did not speak about the consequences of a divorce but about the consequences of a breakdown of a family. It is obvious that a breakdown of a family is extremely dangerous for a juvenile child. However, if an irretrievable breakdown did not occur, granting a divorce, i.e. the »sealing« of the breakdown of a family, would be a flagrant infringement of the best interest of the child. In all cases where a breakdown is not irretrievable, a court's questions about the best interest of the child are premature and aimless”.⁴⁹

⁴⁸ In accordance with para. 3.3.2 of the Regulation, experts are obliged to perform a diagnostic process in the area of their specialisation, relevantly to the diagnostic issue.

⁴⁹ Domański, M., 'Oddalenie powództwa...', op. cit., p. 190.

One can argue about the opinion, especially taking into account the OZSS practices. Expressing opinions about an “irretrievable breakdown of marriage”, in particular within the scope of emotional and physical bonds between spouses is within the domain of an assessment and not a forecast, as it is in case of reference to the influence of a divorce on the best interest of the child. Conducting examination of spouses and their juvenile children, experts can notably help the court to determine whether the bonds between parties are broken. Forecasting whether the process is going to be irretrievable is another matter. While one can agree that referring a direct question to OZSS about the positive condition for a divorce would be erroneous, asking questions about e.g. parties’ mutual relationships would be justified. Earnestly chosen examination procedure and technique in OZSS to answer such questions may be valuable for the assessment of and forecasting the influence of a divorce on the best interest of the child. Thorough recognition of spouses’ relationship in the course of an interview in OZSS, in particular determination that emotional or physical bonds have not actually ended will obviously be an indicator of the negative influence of a divorce on the best interest of the child. Thus, regardless of the fact whether a court directly or indirectly asks about the negative condition for a divorce, experts should – during the examination proceeding – thoroughly examine actual bonds between parties and the nature of their present marriage. In addition, examination techniques should take into account and discover the parties’ motivation to divorce, and whether the decision is unilateral or bilateral. It is sufficient to recognise that only one party is consciously motivated to divorce and stops maintaining and building marital bonds.

Examining quality of the relationship between divorcing parents is also viable, provided that it is useful for the purpose of excluding that a positive condition for a divorce is actually fulfilled. If a breakdown of marriage does not take place, it is hard to deny that parents’ separation may really be in conflict with the best interest of the child. OZSS may be the place where a court can obtain specialist information about the situation between parties or a potential change in the motivation to divorce. It is possible that in the course of determining facts by a court a breakdown of marriage seemed to be irretrievable. Then, as a result of various circumstances, parties may, at least partially, restore their marital bonds.⁵⁰ The binding methodology also supports a thesis that it is necessary for OZSS to thoroughly examine the nature of the relationship between the divorcing parties in case of a question about the divorce being against the best interest of the child. Even if a court does not ask about the relationship between parents, in accordance with obligatory parts of the opinion, experts always describe (1) psychological characteristic features of persons examined, i.e. provide a description and explanation of the examined person’s behavioural mechanisms that result from the integration of data obtained in the diagnostic process; (2) characteristic features of the family environment, i.e.

⁵⁰ Speaking from his work experience gained in OZSS, the author can confirm the fact that such changes in the relationship between parties occur in the course of the examination conducted on a court request. Sometimes it turns out that before a court proceeding concerning a divorce starts, some emotional or physical bonds between spouses revive what they, consciously or not, reveal in the course of the OZSS examination.

provides a description and analysis of the functioning of the family system taking into account its strengths and weaknesses. The provision of opinions in family and guardianship related cases must always include a complex diagnosis of the family system.⁵¹ These are examination frameworks in which valuable information concerning the reality of a breakdown of marriage and its influence on the best interest of the child may occur. In addition, when in the course of examination information about the infringement of the best interest of the child is obtained, experts are obliged to take this information into account in the content of their opinion, even if this goes beyond the scope of a court request.⁵² It is hard to deny that the fact that experts get to know about the lack of an irretrievable breakdown of marriage will lend weight to the assumption that the best interest of the child will be infringed in case a divorce is granted.

4. Finally, it is necessary to refer to the issue concerning a divorce being against the best interest of the child in a situation when a minor is not informed about the fact. It happens that within the examination conducted by OZSS, experts obtain information from minors that they do not know what a divorce is, and that it concerns their family. Children are sometimes completely unaware of the circumstances of a divorce and of the fact that their parents have decided to separate. Sometimes, when this is the case, experts indicate that the divorce is against the best interest of the child. In the author's opinion, this practice is not justified by the concept of the best interest of the child and the negative conditions for a divorce laid down in Article 56 § 2 FGC. To tell the truth, one can look for a link between a child's lack of knowledge and a conflict between a divorce and the principles of community life. From the ethical point of view, a child's dignity and his/her right to know what their family situation is, provided their age and emotional maturity allows it, a minor undoubtedly should be informed that the parents are divorcing. Parents on their own or with the assistance of a psychologist should ensure that their juvenile children are appropriately informed about a divorce and its potential influence on the functioning of their family at least before the term of examination by OZSS. However, the basic circumstance is a real breakdown of marriage, and persistent determination to divorce (demonstrated by one or both parents). Unfortunately, the knowledge about a divorce will not change key facts: parents are planning to divorce; it is a decision, which does not depend of a child. Formally, the decision will be assessed by a court, which can make its implementation possible. The fulfilment of the condition laid down in the methodology of OZSS examination would be an absolutely better practice.⁵³ In justified cases it is possible to conduct examination in more than one term. When experts find out that a juvenile child of the parties is not properly informed about the parents' divorce related situation, they should assign a subsequent term of examination so that they can appropriately prepare

⁵¹ See the Regulation, para. 2.16, para. 2.17 and para. 8.8.1.

⁵² Regulation, para. 4.4.2.

⁵³ See the Regulation, para. 8.8.6.

their child. However, they should not suggest in such situations that granting a divorce will infringe the best interest of the child.

It also happens that parents behave responsibly enough and do not involve children in conflicts. Minors may not experience a crisis situation in their family when they live with parents if they are not aware that their parents no longer feel mutual bonds. Learning about their plans to divorce in such circumstances will undoubtedly cause considerable stress. As a result, parents' situation will also totally change; they will live separately and their children will have to learn how to function in the family in which their parents are suddenly separated. In such a situation, it is difficult to justify a divorce by stating that a child will stop functioning in a situation of great tension. From a child's point of view, such a divorce will probably be a stronger interference in his/her best interest than the separation of their parents brought into a strong conflict. In practice, such situations are very rare but they bear additional specific difficulties in the examination conducted by OZSS experts when a court commissions them to refer to the negative condition for a divorce under Article 56 § 2 FGC. As it was mentioned above, in such circumstances parents should in advance inform a child about their plan to divorce and the consequences of that. In spite of periodical crises after the separation of 'mum and dad', having two happy parents living in separation may prove to be more important for the best interest of the child than having two unhappy parents living together and maintaining an empty relationship. Being in contact with such parents, experts should have in mind that those spouses were able to protect their juvenile child against participation in adults' conflicts, so most probably they will be able to take care of the best interest of their child also after they are granted a divorce. It is necessary to remember that a divorce does not always have to mean that a child's functioning in a tense family atmosphere ends. Sometimes, it will be an undesired change, which in the long term may be the best solution for a family.

CONCLUSIONS

The circumstance of a divorce being against the best interest of the child, expressed in Article 56 § 2 FGC, often becomes the subject matter of OZSS examination, although theoretically it is within the domain of law rather than psychology. However, in practice, courts find it difficult to exclude the occurrence of this circumstance without referring a family to specialist examination. In this regard, the role of OZSS may be of key importance. When a diagnostic issue concerns the divorce being against the best interest of the child, experts should first of all assess the functioning of a child at present, forecast changes that will take place after a divorce is formally granted, and whether those changes are going to worsen the functioning of a minor. It is also important for experts not to compare a child's situation with the conditions that might occur if parents were not in conflict but to compare the assessment of the functioning of a child in the situation in which an actual (present or former) conflict in a family exists with the assessment and forecast regarding the functioning of a child after his/her parents really separate. The examination conducted in OZSS

should help collect specialist information for a court concerning: (1) specific bonds between a child and parents; (2) a child's major needs; (3) possible occurrence of a dispute between parents over future parental authority and contacts with a child; (4) whether a child's age and health condition make the formal granting of a divorce disrupt the existing *status quo*. Assessing those four circumstances, experts should express their opinion whether any of them results in more harm to the best interest of the child in case a divorce is formally granted than in the situation when the so-called 'dead' marriage continues to function. In practice, these are very rare and extraordinary situations.

In a situation when a court commissions OZSS to examine the whether the divorce is against the best interest of the child, due to the examination methodology, experts may also provide valuable information about a positive condition for a divorce under Article 56 § 1 FGC. The analysis of the situation in a family environment together with parents' and their juvenile children's characteristics may considerably contribute to recognition whether an irretrievable breakdown of marriage and spouses' physical and emotional bonds has taken place or not. Obtaining information about the lack of an irretrievable breakdown of marriage in conjunction with granting a divorce will constitute the infringement of the child's best interest.

A court's question referred to OZSS with regard to the divorce being against the best interest of the child is always difficult to answer. It concerns fundamental and non-defined issues such as "the best interest of the child", and is connected with the assessment and prediction of the future based on the examination of one of the most stressful circumstances in the life of both a child and an adult, i.e. a divorce. As far as this matter is concerned, it is important for courts to be more precise when asking questions and commissioning OZSS experts to obtain possibly detailed information that will help them decide whether formal separation of parents will be a solution interfering into the best interest of the child to a greater extent than the legal maintenance of marriage in which an irretrievable breakdown has taken place. On the other hand, experts should appropriately adjust their examination procedure bearing in mind the specificity of the regulation under Article 56 § 2 FGC.

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Cite as:

Żukowski L.J. (2023) 'Divorce versus the best interest of the child as a subject of examination conducted in OZSS: a legal and psychological perspective', *Ius Novum* (Vol. 17) 1, 107–124. DOI 10.2478/in-2023-0007