

## Ethical Issues of Psychological Expert Testimony in Child Custody Cases: A Comparison of Ethical Approaches

Bohumila Baštecká, Hedvika Boukalová\*

*Charles University, Czech Republic*

\*Corresponding author. E-mail: [hedvika.boukalova@ff.cuni.cz](mailto:hedvika.boukalova@ff.cuni.cz)

**Background.** Both authors are working on the Board of Ethics of the Czech-Moravian Psychological Society. They face a recurring pattern of complaints, where one parent in the multilateral contractual field of the child custody domain complains about the psychological report in their case, including the psychologist's procedure, conduct, partiality, etc. The child custody domain is under Civil Law jurisdiction, where psychologists serving as expert witnesses report their evaluations at the request of the court.

**Objective.** To point out some of societal and professional challenges confronting psychologists as expert witnesses in child custody cases. To improve ethical awareness in this area of psychological expert witness practice.

**Design.** We compiled an overview of the complaints obtained by the Board of Ethics of the Czech-Moravian Psychological Society from 2013 to 2019, against psychologists who served as expert witnesses in child custody cases in the Czech Republic. We then compared these complaints with the ethical norms established by the Czech Code of Ethics of the Psychological Profession; the recommendations of the European Federation of Psychologists' Associations (EFPA) (*c.f.*, The European psychologist in forensic work and as expert witness); and the guidelines of the American Psychological Association (APA) (*c.f.*, Guidelines for Child Custody Evaluations in Family Law Proceedings).

**Results and Conclusions.** Testimony by psychological experts in child custody cases is occurring in the context of societal changes and political decisions concerning child custody arrangements, and the best interests of the child in the context of gender neutral laws. Several ethical concerns seem to be of special importance: 1) the "psychological best interest of the child" in the multilateral contractual field; 2) the purpose and contribution of psychological expert testimony in child custody cases; 3) the role, task, and responsibility of the expert witness, including establishing working alliances and parallel processes; 4) the appropriate allocation of responsibilities in the multilateral contractual field; and 5) the ethics of reflexivity, responsibility, and courage.

The "complaint bias" is discussed.

**Key words:** psychologist as an expert witness; child custody cases; psychological best interest of the child; ethics of virtues; psychological and personal ethics of reflexivity, responsibility, and courage

## **Introduction**

During our work on the Board of Ethics of the Czech-Moravian Psychological Society, we noticed a pattern of complaints in the child custody domain. Usually one parent complained about the psychologist's report, including the psychologist's procedure, conduct, partiality, etc. Some of these reports were done by psychologists in their roles as expert witnesses. One of the authors (HB) is engaged in expert witness practice. We took these complaints about expert witnessing in the child custody domain as teaching material, in order to point out some of the societal and professional challenges psychologists confront as expert witnesses in child custody cases. We would like to improve ethical awareness in this part of psychological expert witness practice, *i.e.*, in the child custody domain under Civil Law jurisdiction, where psychologists as expert witnesses report their evaluations at the request of the court.

We compiled an overview of the complaints against the psychologists who served as expert witnesses in the child custody domain in the Czech Republic. Then we compared the recurring patterns with the ethical norms established by the Czech Code of Ethics of the Psychological Profession; the recommendations of the EFPA (*c.f.*, The European psychologist in forensic work and as expert witness); and the APA guidelines (*c.f.*, Guidelines for Child Custody Evaluations in Family Law Proceedings).

## **Method: Analysis of the Complaints and Final Statements of the Board of Ethics**

The overall number of final reports issued by the Board of Ethics over the years 2013-2019 is 40.

We divided the complaints and statements into three groups. The first group (13 reports) was comprised of complaints against psychologists operating outside the custody situation. They were mainly complaints about the psychologists' approach in therapy and diagnostics in various areas, ranging from clinical diagnostics to work diagnostics. Among these complaints we also found complaints about expert witness testimony outside the custody field, specifically with adults in criminal cases.

The second group included 19 complaints dealing with custody cases where psychologists did not play the role of court expert.

The third group (8) of complaints was comprised of cases of child custody expert testimonies.

## **Results**

### ***Complaints Against the Psychologist in Child Custody Domain in a Role other than Expert Witness***

In child custody cases where the psychologist is not in a role of a court expert witness, we frequently see the psychologist sending a report to the Department of Social and Legal Protection of Children, which sends it to the court that is deciding about the proportion and form of parental care by each parent. Alternatively, the psychologist provides a certain report (on anything from diagnostics to recommended therapy for the child) to one of the parents, and this parent uses the report in the custody court proceeding.

The recurring patterns in the complaints within this group were:

- One of the parents was not informed about the therapy or diagnostics of the child.
- Only one of the parents was given the report diagnosing the child; it is usually the one who contacted the psychologist. The psychologist refused to give his/her report assessing the child to the other parent.
- One of the parents was in a previous therapeutic relationship with the psychologist, but the psychologist later evaluated both parents and their relationship with their children. In a similar case, the report about the family situation and the father was created on the basis of the psychologist's therapeutic contact solely with the mother or child.
- The psychologist issued a report about sexual abuse of the child by the father to the Department of Social and Legal Protection of Children, or directly issued a criminal accusation against the father to the police. These reports were based on information from the therapy with the mother and child.
- One of the parents was not involved in an assessment of a child and his/her relationships with the parents. The relationships with the missing parent, and sometimes also his/her personality traits, mental health problems, and violent behavior are mentioned in the psychologist's report based only on information from the second parent and/or the child.
- The psychologist expressed an opinion about the mother based on information from the father and an expert witness psychological assessment report created by another psychologist, which focused on the whole family.
- The child's father complained about the methods used by the psychologist in assessing the child; the place where the evaluation was done; and the recommendations that were the result of using those methods.

The fields of ethical interest evaluated in these cases were:

- The psychologist is consistently doing his/her psychological work within a complex field (or "multilateral contractual field") with several different parties involved. These are the parents, the child, the court, the Department of Social and Legal Protection of Child, and sometimes also the organization which employs the psychologist. It is important to be aware of this and to carefully and transparently communicate those relationships.
- In cases where suspicion about abuse by one parent is communicated to the psychologist by the other parent, the psychologist is recommended not to substitute him or herself but rather, for example, empower the parent to file a criminal complaint.
- When reported facts affect parental rights, it is appropriate for the psychologist to maintain impartiality and distance from all parties involved. The short-term and long-term consequences of the actual procedure must be considered.
- The psychologist should not comment, even anonymously, on the psychological state of any person without relevant evidence, which comes from a proper psychological examination of that person, including providing the subject with the clearly stated purpose of the examination.

- It is inadmissible to assess someone without direct contact with the person. Expressing a professional opinion under such conditions may not only harm the assessed person, but also violates the principles of professional responsibility.
- The psychologist is allowed to use methods based on his /her choice, but should be able to explain the use, specify the results, and infer the outcomes correctly. Methods used should be relevant and based on current scientific knowledge or supported by good practice.
- The psychologist should act within his/her field of particular specialization and qualification.
- The psychologist should be aware of his/her own role and the power connected with this role.
- The psychologist should make clear his or her involvement with one of the parents and the role of his/her professional commitment with the particular person.

### ***Complaints Against Psychologists in the Role of Expert Witness in the Child Custody Domain***

In child custody cases, when the psychologist is in the role of court expert witness, we see a recurring pattern of complaints focused on:

- Methods used by the psychologist expert: are they relevant, scientific, and sufficient for the conclusion drawn?
- The field of expertise: is the psychologist operating within the area of his/her own expertise, or is the psychologist expressing his or her opinion within a specialization certified by the court?
- According to the complainant, the psychologist seems to be biased against him/her.
- Formal mistakes in the report.

The fields of ethical interest (except for the fields mentioned above) evaluated in these cases were:

- The psychologist should behave with respect and ethically toward his/her colleagues. She or he should not accept the task of evaluating a colleague's work without contacting him/her first with the feedback toward his/her work.
- The results and findings should be consistent and supported by the current state of the art and concise psychological theory.

### ***Examples of Complaints***

Below are some examples of the complaints in the child custody domain, followed by an identification of the ethical principles applicable in these situations:

- A parent complains about the opinion given by an expert from the field (specialization) of education and culture. The expert opinion also contained an evaluation of the origin of the child's celiac disease and atopic eczema.
  - ▶ The expert psychologist should perceive the limitations of his/her own expertise and involve a consultant from a different field, if necessary.

- A complaint about the methods used by the expert. The psychologist used methods of observation and projective methods (drawing) to evaluate the mental development of a child in a custody case.
  - ▶ The psychologist decides on the methods to be used, but these must be relevant to the evaluation of particular area. There are standardized methods to assess a child's mental development that represent the current state of the art in psychology.
- The psychologist failed to mention the specific methods used during the custody evaluation, as well as the particular results, in his/her report.
  - ▶ Specific methods, their names, and optimally, in some form, also the results, should be included and should correspond to the purpose of the examination. They assure the verifiability of the results and represent part of expert opinion making. It should also be clear what role the results played in the expert's opinion.
- During the evaluation, the psychologist visited one of the parents at home, and the observation part of the assessment was made under these conditions. The other parent agreed with the visit, but this parent subsequently had withdrawn his/her agreement.
  - ▶ In cases of special procedures it is best to have written consent.
- The psychologist wrote a report to support the child's mother's request to accompany the child during a longer medical stay at a rehabilitation center. In this report the psychologist highlighted the importance of the close relationship and contact of the child with a mother. On the basis of this report, the mother was allowed to stay with a child, paid for by medical insurance. After that, the mother used the report in a custody proceeding.
  - ▶ Misuse of the psychologist's report in custody proceedings occurred, because the purpose of the report, which would clearly identify to the court the circumstances of its origin and its objective, was omitted.
- The complainant feels his rights were harmed because he was not informed about, and invited to, his daughter's psychological examination. He was only informed about the conclusions of the examination and recommendations at a later meeting with the mother in a case conference at the Department of Social and Legal Protection of Children. Part of the psychologist's conclusion was a recommendation to immediately end joint care. This recommendation was then referred to a judge of the District Court in her Resolution on the regulation of daughter-to-father contact. The psychologist confirmed that she did not allow the child's father to participate in the daughter's psychological examination, because the mother did not wish it. At the same time, she confirmed that her task was not to analyze and recommend contact between father and daughter.
  - ▶ The psychologist should pay attention to the rights of both parents in child custody evaluations.

***Specific Ethical Problems According to the Code of Ethics of the Psychological Profession of the Czech-Moravian Psychological Society***

The above-mentioned ethical principles and breaches are reflected in following paragraphs of Code of Ethics of the Psychological Profession (2017):

§ I. 4. Relationship with clients, other parties, colleagues and other stakeholders (the public)

... Psychologists recognize a multilateral contractual field and make it understandable by using written contracts and informed consents, while primarily keeping in mind and clearly identifying the client's interest or several interests (in research, for instance).

§ II. 1. Diversity competence

A psychologist ...

- c) does not see own opinions as universally shared beliefs and makes them understandable to others;
- d) understands and actively considers his/her possible bias in a multilateral contractual field; strives for impartiality or, as the case may be (in circumstances when the promoted values and principles are at risk), for clear and reasoned explanation of partiality ...

§ II. 2. Professional competence

A psychologist ...

- f) follows the principles of evidence-based practice and practice-based evidence and understands the benefits and limitations of both procedures by relying on methodological knowledge and critical thinking; ...
- h) is aware of own abilities and limitations, actively seeks feedback from clients, colleagues, supervisors and subordinates, and when professionally in doubt requests support through methodological guidance or consultations with colleagues within a professional association.

§ III. 1. Field of interests

A psychologist

- a) knows whose interest guides the undertaken action and clearly identifies this interest; protects the rights and legitimate interests of a client;
- b) is aware of the various interests involved and knows when it is appropriate to negotiate a multilateral written contract;
- c) clearly identifies a situation when his/her position or engagement within a multilateral contractual field changes and negotiates contract modification, *i.e.*, even possible termination of cooperation ...

§ III. 2. Responsibility for using power

A psychologist

- a) actively reflects the various forms of his/her power and influence in his/her relationship with clients, other parties, colleagues, and the public;
- c) recognizes the nature of the relationship with the client and its level of asymmetry and establishes an adequate distribution of responsibility. This

also applies to the risks inherent to the psychologist's or the client's conduct or situation; ...

- f) does not make any statements about an individual that he/she did not have the possibility to observe or assess, even if under pressure to do so;
- g) protects clients from inappropriate or wrong usage of psychological methods and from the consequences of such usage.

#### § IV. 1. Contracts and informed consent

A psychologist ...

- c) establishes the purpose of the cooperation within the boundaries set by the values promoted by this Code of Ethics, with primary focus on the client's interest. In case of a multilateral contract, considers also other interests, implied or agreed; ...
- d) negotiates the terms and conditions of cooperation and puts them in writing, especially in the case of a multilateral contractual field. Informed consent consisting of an information sheet and a consenting declaration is an example of such a contract. A consenting declaration without an information sheet is invalid...

#### § IV. 2. Formulating the objectives of cooperation and the corresponding use of psychological methods

A psychologist ...

- b) is fully responsible for using verified and quality psychological (research, teaching, diagnostic, intervention) methods, and for respecting the applicable standards and recommended procedures in research, teaching, assessment, and intervention ...

### **Analysis of the Findings and Discussion Concerning the Ethics of Psychological Expert Testimony in Child Custody Cases**

We adopt a global perspective concerning both societal contexts and ethical norms in psychology.

We discuss the Czech legal and ethical context in relation to foreign perspectives, including child custody arrangements, the concept of the best interest of the child, and the role, task, and responsibility of the psychologist as an expert witness in child custody matters.

#### ***Societal Changes and Political Decisions Concerning Child Custody Arrangements and the Best Interest of the Child in the Context of Gender-Neutral Laws***

The child custody domain in the context of Family (Civil) Laws usually means that two persons are divorced/separated while remaining as parents. They would like to arrange their caretaking in the child or children's best interest.

We see three periods and concepts of child custody arrangements in western societies: 1) paternal preference under the patriarchal legal system (dating from Roman law); 2) maternal preference from approximately 1920 on (for the U.S. situation, see Kelly, 1994); and 3) the contemporary gender-neutral laws.

It is worth noticing how influential psychological theories can be, even though they change into totally opposite ideas after a few years of societal development. Psychological assertions seem to serve societal moods by conserving and “blessing” societal changes. The considerable body of theory and research on the development of infant attachment to the mother, for example, has been replaced by equally influential research results indicating attachments to both parents or other “primary caregivers”.

People, including psychologists and children, actually seem to accommodate to more “hardwired” societal changes: “The maternal presumption for custody remained firm for many decades, challenged only after the divorce rate began its dramatic rise in the 1960s. ...the entry of large numbers of women into the work force ... weakened the concept of a primary maternal caretaker” (Kelly, 1994, p. 122).

“Gender-neutral laws” appear in the U.S. context by the mid-1970s (Kelly, 1994, p. 122). The development in the Czech Republic (back then the Czechoslovak Socialist Republic) was different, as it addressed the communist ideals of equality: The propaganda image of a socialist woman of the 1950s as a person employed full time, who uses institutional child care services, is politically active, and still manages the household (Koldinska, 2015, p. 8), was in fact real. The Act on the Family Law, in force from 1950 on, emphasized that “Man and woman in marriage have the same rights and duties,” and “Custody and property arrangements are an obligatory part of the legal decision concerning divorce” (Zakon o pravu rodnem – Act on the Family Law, 1949, § 15, § 32).

Twenty years later, family politics changed. Men and women were still equal, but mothers were superior to fathers. By the seventies, women were entitled to maternity allowances and child subsidies, and their job was guaranteed for up to three years after their child was born (Koldinska, 2015, p. 8-9). Up until 1989, divorces resulted in entrusting care of the child to the mother 97 % of the time.

There are many similarities between the Czech Republic and western countries in the developments over the last 20 years. Gender-neutral court practice brought both the concept of joint custody and the growth of painful child custody disputes. The concept of children’s rights, including the notion of the “best interest of the child,” is decisive in these matters, but it itself also evolves.

The “best interest of the child” appears in several articles of The United Nation Convention on the Rights of the Child (see <https://www.unicef.org/child-rights-convention>) which came into force in 1990. The concept is not new (Silva, 2014). The “interest of the child” is also traditionally strong in Czech family law. The Act on the Family Law (in force from 1950 to 1964) stated: “If a married couple has minors, their marriage cannot be divorced if it would be in conflict with the interest of their children” (Zakon o pravu rodnem - Act on the Family Law, 1949, § 30[3]). Article 3 of the UNCRC states that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.” That means, among other things, that the child will not be separated from parents. If he or she will be separated, then he or she has right to maintain relations and direct contact with both parents, “except if it is contrary to the child’s best interest” (Article 9, section 3). Both parents have common responsibility for the child’s upbringing.



We observe emerging criticism against the concept of the child's best interest from the perspective of child autonomy (Porter, 2018; Hofschneiderova, 2017). This is not surprising since we saw the concurrent development in the field of rights of persons with (mental) disabilities (Convention on the Rights of Persons with Disabilities, Article 12), emphasizing their "rights, will, and preferences". The participatory right of minors in court proceedings – the right to be heard by the court – is now widely discussed, sometimes with tension between it and the "best interest" point of view (Hoblikova & Kropackova, 2019, p. 951).

### ***Ethics of Psychological Expert Testimony in Child Custody Cases***

Our method is the analysis of complaints about psychologists' (especially expert witnesses') reports concerning child custody matters. We assess the complaints according to the Czech Code of Ethics of the Psychological Profession that came into force in 2017 after the reference from wide psychological auditorium. Previous complaints were assessed according to the Code that was in force from 1995 till 2017. At the same time we are looking for inspiration from three international ethical Codes and their principles: the EFPA Meta-Code of Ethics<sup>1</sup>, the APA Ethical Principles of Psychologists and Code of Conduct,<sup>2</sup> and the Universal Declaration of Ethical Principles for Psychologists<sup>3</sup>.

In this article we are following the ethical recommendations and guidelines concerning expert testimony as defined by European psychologist in forensic work and as expert witness (EFPA – see <http://ethics.efpa.eu/guidelines/>) and the Guidelines for Child Custody Evaluations in Family Law Proceedings (APA, 2010).

For our purposes it is important to mention that three years later, the APA produced Guidelines for Psychological Evaluations in Child Protection Matters (2013). We consider the difference between the contexts of child custody and child protection matters to be of utmost importance, although there is no strict interface.

While discerning the different contexts of ethical resources (Czech, European, American, global – codes, guidelines, recommendations), we could follow the ethical moments important for our "child custody complaints patterns."

### ***The "Psychological Best Interest of the Child" in the Context of Multilateral Contractual Field***

"The systems that psychologists serve in forensic work attempt to balance the interests of the individual against collective interests or against the interest of other individuals." (The European psychologist in forensic work and as expert witness, p. 1.)

"Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the 'psychological best interests' of the

<sup>1</sup> Meta-Code of Ethics (2005). Principles: Respect for person's rights and dignity, Competence, Responsibility, Integrity.

<sup>2</sup> Ethical Principles of Psychologists and Code of Conduct (2017). Principles: Beneficence and Nonmaleficence, Fidelity and Responsibility, Integrity, Respect for People's Rights and Dignity.

<sup>3</sup> Universal declaration of ethical principles for psychologists (2008). Principles: Respect for the Dignity of Persons and Peoples, Competent Caring for the Well-Being of Persons and Peoples, Integrity, Professional and Scientific Responsibilities to Society.

child.” (Guidelines for Child Custody Evaluations in Family Law Proceedings, 2010, p. 863)

The notion of “the child’s best interests” is the main reason for psychologists’ (and other professionals’) forensic engagement in the child custody domain.

We offer several points worthy of notice:

- The child and his/her interest is the central focus of child custody matters, but the achievement of his/her best interest is imposed by the state – in the Czech legal and ethical environment, by applying the Act on Social and Legal Protection of Children (Zakon o socialne-pravni ochrane deti, c. 359/1999 Sb.). The judges are the flesh-and-blood vehicles of the state’s political decision, which prefers joint custody as the manifestation of the gender-neutral laws that arrange responsibilities and rights of both parents.
- There are many responsibilities (and corresponding sources of power) in forensic child custody matters: the responsibility of both parents; the responsibility of the judge and the Agency of Legal and Social Protection of Children; the responsibility of the psychologist as an expert witness; and the responsibility of the child/children themselves. No wonder there are also conflicting interests and correspondingly conflicting emotions.
- The standard of the “child’s best interest” is “simple to state and difficult to apply” (Kelly, 1994, p. 128). “Best interest” itself can be used as an argument by all parties in the context of a child custody court proceeding to justify the opposing solutions proposed by both parents and the child protection body (Code of Ethics of the Psychological Profession, 2017, p. 8).

We<sup>4</sup> are convinced that prior thinking about the best interest which the psychologist is supposed to serve, is that the client<sup>5</sup> is in fact the child or the family, not the court or any other bodies.

In such a situation the psychologist must clarify and define individual responsibilities, and what is expected from the psychological intervention, without assuming that everybody wants the same thing.

Then we can ask: what do we, as expert witness psychologists, know or think about the best interest of the child?

The APA guidelines coined Miller’s concept of *psychological best interest*. “Most authorities agree that best interest is satisfied by an adult who wants the child, who has had a continuous and affectionate relationship with her, and who is capable of raising her. That is, the best interest is focused on the *emotional well-being* of the child” (Miller, 2002, pp. 196–197, emphasis by the authors). Miller equates “psychological” and “emotional” and points out that “what is best

<sup>4</sup> “We” here means the consensus arrived at by the Board of Ethics of the Czech-Moravian Psychological Society.

<sup>5</sup> In full awareness of the usage diversity of the term “client”, the Czech Code of Ethics uses this word “as a generic term for the set of situations of direct cooperation of a psychologist and his/her counterpart. This cooperation may be requested by a third party (a court, the police, etc.) while other parties (the client’s parents, for instance) may intervene” (Code of Ethics of the Psychological Profession, 2017, p. 3).

psychologically for the child is not necessarily the best morally” (Miller, 2002, p. 197). (For discussion concerning morality, hypocrisy and best interest standard, see Ritenhouse, 2011.)

If we follow the definition of parental responsibility in the Czech legal context, we cannot agree. Parental responsibility means (among other things) to care for the child’s health, and “his physical, emotional, intellectual and moral development” (The Civil Code, 2012, section 858). “Psychological best interest” may differ from “moral best interest,” but probably it is not possible for the psychologist to separate them and to judge which is more important. Eight years later, the APA guidelines (2010) still quote the Miller’s term “psychological best interest,” but move from a more feelings-based definition of “emotional well-being” of the child, to a more facts-based “welfare”, encouraging psychologists “to weigh and incorporate” the “child’s educational, physical, and psychological needs” (Guidelines for Child Custody Evaluations in Family Law Proceedings, 2010, p. 864).

Still, there is a “multilateral contractual field,” and psychologists enter the field with their notions of best interest of the child, their responsibility, their power, and their emotions. They comprise just one voice among many in the field of human rights. Children’s “best interest” and “autonomy” are principally children’s rights, not states of mind. Therefore, we can ask whether expert witness psychologists are part of the children’s problem with injustice, or part of its solution. “Provided that the Czech environment really strives to respect a child’s rights approach, then it has to deal with one of the most difficult tasks: to get rid of its doting love for children” (Hofschneiderova, 2017).

### ***The Purpose and Contribution of Psychological Expert Testimony in the Child Custody Domain***

“The questions asked by the legal system will often confront the limits of psychological knowledge and predictive possibility. The use of force and control, e.g. imprisonment, and deciding on the limits of interest, e.g. child custody, come close to violating basic human rights.” (The European psychologist in forensic work and as expert witness, p. 2)

“From the court’s perspective, the most valuable contributions of psychologists are those that reflect a clinically astute and scientifically sound approach to legally relevant issues. Issues that are central to the court’s ultimate decision-making obligations include parenting attributes, the child’s psychological needs, and the resulting fit.” (Guidelines for Child Custody Evaluations in Family Law Proceedings, 2010, p. 864)

Psychological expertise is one concern, and the court’s questions are the other. The purpose of expert testimony (“to assist in determining the psychological best interest of the child” according to the APA guidelines, p. 864) need not be the same as the contribution it makes.

Again, there are further points to consider:

- We can agree that the purpose of the psychologist’s expert testimony in the child custody domain is “to assist in determining the psychological best

interests of the child” (Guidelines for Child Custody Evaluations in Family Law Proceedings, 2010, p. 864), although there is no Czech agreement on what that means. Some Czech authors (e.g., Pavlat & Matousek, 2016) turn to the APA’s guidelines, stating that the main contribution of psychological expert testimony is to assess “parenting attributes, the psychological needs, and the resulting fit”. But what can an expert witness tell, for example, about the parents’ attributes and what does he or she need in order to be able to tell make a real contribution to the court?

- The court’s set of questions in a custody litigation context is rather “standardized” in the Czech situation (Horinova, 2009): “Which family environment is better for the child?”, “What is the relationship of the child towards his/her mother/father?”, etc. Do these questions address the psychological best interest of the child as mentioned above? If yes, how? The court practice varies from one judge to another. Sometimes the court assigns a rather broad task to the expert witness, e.g., “examine the personalities of parents and the child”, although there is no consensus as to what type of parental personality best suits caretaking (Pavlat & Matousek, 2016, p. 86), while at the same time “comparatively little weight is afforded to evaluations that offer a general personality assessment without attempting to place results in the appropriate context” (Guidelines for Child Custody Evaluations in Family Law Proceedings, 2010, p. 864).

The psychologist expert witness is supposed to answer the court’s questions. Sometimes these questions may not fit the *lege artis* beliefs of the psychologist. He or she may realize the ethics of diversity issues: “Given the increasingly larger diversity of family styles, values, and traditions” (Kelly, 1994, p. 136), the assessment of the family may call for psychologist’s reflexivity – ability to reflect his or her stereotypes and their contexts. The psychologist’s judgment may also reflect the fact that workroom testing cannot tell a lot about the family environment. She or he may also know that the APA guidelines urge not testing personality without placing it in context, e.g., within the family’s structure, resources, and processes. But this psychologist was trained in psychopathology and in individualized concepts of personality. He or she also knows that the court, along with advocates of one or the other parent, will ask: Why do you think what you think? Where did you get your evidence? Have you any test results?

And the psychologist decides to follow the expectations of the court and lay public as the easier way, if she or he is afraid of losing losing his or her good reputation as an expert witness.

Still, we believe that a psychologist may refuse such a requirement. Refusal sometimes seems to be the most valuable contribution the expert witness can make. It requires courage. The Czech Code of Ethics expects that psychologists will refuse questions from a third party if by answering, psychologist would challenge “his/her ethical or professional standard or the reputation of psychology” (Code of Ethics of the Psychological Profession, 2017, p. 13). Then, we hope, there will be no more expert witness reporting, as the core of the custody arrangements investigation, that “daddy doesn’t spank me, and also mummy doesn’t spank me”.

***The Role, Task, and Responsibility of the Expert Witness  
in Child Custody Cases: Working Alliances and Parallel Processes***

“As part of power systems the psychologist must accept and expect to be scrutinized both on ethical and other professional dimensions. ... The more openly honest and straight forward the work of the psychologists has been done, the easier it will be to handle both impartial and partial criticisms, without attacking or offending persons, when handling and responding to critics.” (The European psychologist in forensic work and as expert witness, pp. 2–3)

“The most useful and influential evaluations focus upon skills, deficits, values, and tendencies relevant to parenting attributes and a child’s psychological needs.” (Guidelines for Child Custody Evaluations in Family Law Proceedings, 2010, p. 864)

The role, task, and responsibility of the psychologist-expert witness in the child custody domain seem to be closely connected to the characteristics of the process and resulting working alliance. The “impartiality” of the psychologist in the child custody context is understandably a formula often repeated, because the psychologist enters a multilateral contractual field containing strong power dynamics of the conflicting interests of the parties involved.

We consider this context to be fertile ground for *parallel processes* that flourish within just such a mixture of vulnerability, power, and powerful emotions. “Every expert was once a child; many are married and parents; some are divorced. The expert is likely to have many feelings in common with participants in a custody battle.” (Miller, 2002, p. 199)

We can see parallels not only between persons and their fates, but primarily between processes – the court’s procedure, the psychologist’s procedure, and the ethical committee’s procedure. All parties are involved in the multilateral contractual field. All can decide the form of their engagement: either they have their role in the power games of collecting evidence and proofs, giving judgments and reprimands, or they may search for a way to reflect the process, to see its risks and opportunities, and to strengthen the appropriate responsibilities of the parties involved.

No matter what the reason for the parallels – isomorphism from the systemic point of view, or countertransference and projective identification from psychoanalytic perspective – the result is still the same: the impartiality of all parties, including the psychologist, is threatened. We can see it in the complaints: Sometimes the psychologist is fully engaged in the divorce battle between parents, trying to “save the child” against one of them. What does that mean? Does the psychologist feel alone, with exclusive responsibility?

Let us imagine that the role of psychologist-expert witness is to be partial and consider family relationships (not the family as a structure) to be her/his client. That means also to be fond of the family relationships, looking for their future prosperity and resilience in spite of the parents’ separation.

The psychologist’s task then is to describe the patterns and values of the family relationships, the strengths and deficits of the family processes, and then to recommend the corresponding type of support.

The psychologist’s responsibility then lies in understanding the processes and in clearly communicating them to all parties of the *ad hoc* transdisciplinary group, which could be called “child custody in accordance with the child’s best interest”.

Instead of this dreamy kind of working alliance based on trust, cooperation, and mutual learning, we know and describe the reality, which is full of exhausting power games and temptations for the expert witness to take other than psychological roles – those of advocate, judge, educator, social worker, etc. The psychologists as expert witnesses “may be tempted to opine about matters outside his field of expertise” (Miller, 2002, p. 196); at the same time the debate concerning “the specific nature of psychologists’ involvement and the potential for misuse of their influence” continues (Guidelines for Child Custody Evaluations in Family Law Proceedings, 2010, p. 863).

### ***The Ethics of the Psychologist-Expert Witness in Child Custody Cases: Reflexivity and Courage***

The fact is that parents in the family/civil law context did not violate societal norms; they are not criminals. They divorced/separated. They may not like each other, and they do like their child. That is all. Let us take that as the starting point of our – psychologists’ – expert evaluation.

Let us hope that “the idea that relationships do not end but must be renegotiated” (Emery, Rowen & Dinescu, 2014, p. 502) will change legal procedures, and there will be no need for psychologists-expert witnesses in child custody cases in the future. However, the role of expert evidence is still overestimated in the Czech judiciary and can “strongly influence the result of a case” (Horinova, 2009).

One of us asked a lawyer why they needed us – psychologists – as expert witnesses in child custody matters. “Because people tell lies,” the lawyer answered, “and I need you to distinguish it.” But the psychologist’s “integrity is based on honesty, and on truthful, open and accurate communications” (Universal declaration of ethical principles for psychologists, 2008, p. 3), and if the psychologist is trained with a systemic perspective, he or she does not presume that people are lying; she or he takes into account their “versions”. No wonder that family therapists point out the risk of adversary practice undermining the “needed parental cooperation in custody disputes by increasing parent conflict” (Emery, Rowen & Dinescu, 2014, p. 502).

Nowadays we can see, not only in the Czech Republic, the trend toward returning parental responsibility back to the parents. The Cochem practice (looking for amicable agreement) is one of possible strategies for doing it. There are other promising dispute resolution procedures, e.g., parenting coordination that follows a mediation–arbitration model (Emery, Rowen & Dinescu, 2014, p. 505; see Kelly, 1994 for another review). The role of psychologists in these models differs from that of the expert witness looking for the “better parent”.

We have hope for the future. If we take the complaints perspective and stay in the present mode, we can see several areas of ethical awareness that need improvement in psychologists’ ethical expert witness practice:

- To reflect societal changes and corresponding political decisions (Code of Ethics of the Psychological Profession, 2017, p. 1) and to realize that, due to societal changes, our “evidence-based” formula does not work, and our predictive power is really diminished. To take diversity issues seriously.

- To stabilize ourselves by formulating our appropriate role, task, and responsibility in establishing a working alliance with our client, *i.e.*, the family relationship.
- To cooperate and collaborate with the *ad hoc* teams (transdisciplinary approach, family-centered approach).
- To preserve our integrity, *e.g.*, to refuse procedures that compromise it.

In the U.S. context, it is estimated that only a small group of divorcing parents (less than 15%) remain in high conflict after a divorce (Kelly, 1994, p. 135). If we take an example of one District Court in the Czech Republic (town Hodonín, year 2018), we have comparable data: this Court has 600 child custody cases per year. 135 cases of the total number of 600 were handled by Cochem practice procedures, 5% unsuccessfully (Horakova, 2019).

This ratio also reminds us that there is a limited number of psychological expert witnesses reporting in the child custody domain, and a much more limited number of complaints addressing psychological expert witness reports. We realize that the “complaint bias” influences our perspective. Still, the story of psychological expert testimony in the child custody domain is a great source of learning for us.

## Conclusion

Testimony by psychological experts in child custody cases occurs in the context of societal changes and political decisions concerning child custody arrangements, and the best interest of the child in the context of gender neutral family laws. Several ethical concerns seem to be of special importance: 1) the “psychological best interest of the child” in the multilateral contractual field; 2) the purpose and contribution of psychological expert testimony in child custody cases; 3) the role, task, and responsibility of the expert witness, including establishing working alliances and resulting parallel processes in three interconnected systems (parent – parent; parents – expert witness; expert witness – judge); 4) the appropriate allocation of responsibilities in the multilateral contractual field; and 5) the ethics of reflexivity, responsibility, and courage in the work of psychologist as an expert witness.

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