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Court-ordered assessments of family resources in family law proceedings: the technical advisor and other non-juridical professionals compared and contrasted

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Abstract
This study provides a reconstruction of the legal framework surrounding family break-up proceedings in order to observe the overlaps in the responsibilities of and relations between the social services and the court-appointed technical advisor and the technical advisor chosen by the parties.
Keywords: family proceedings; interests of the minor; parenting responsibilities.

1. The reform of shared parental responsibility and conciliation tools

From a legal viewpoint, the family, as a complex social phenomenon, shows clear signs of a shift towards the *privatization* of the relevant institutions and of family relations, above all due to the exoneration from the general clauses that, in different ways, sanctioned a sort of inviolable "sacredness" of the institution of the family: the family reveals its meaning as a method of protection, inasmuch as it is a summary and compendium of principles designed to protect its members in the place of the aforementioned general clauses – imbued with the language of advertising – such as "family unity" and "the interests of the family", which have now assumed a different meaning. Family relations, a field in which field the system tends to intervene ever more decisively in order to ensure a significant area of autonomy for them, have taken on a new form of functionalization compared with the theoretical framework of the 1975 reform. The most interesting part of this functionalization is the creation and deliberate promotion of the protection of minors and their right not only to a family, but to a family that generally meets a number of criteria for suitability. From this reflection, which helps to regenerate a judicial culture inspired by and built around the protection of minors, we cannot but note the sharp increase in the numbers of families turning to the professional social services in the hope of obtaining support and advice in highly complex situations, and a greater use of expert consultations (with court-appointed and part-appointed professionals) in court proceedings.

The reform of shared parental responsibility, before introducing regulations whose content is only innovative in some ways, had the idea (and through this the merit) of engraving the prescriptive principle of shared parenting responsibilities on the system, a principle that was already in force in the context of family break-ups: as a manifestation of the right to two parents, it expresses the right of the offspring to receive care, education and upbringing from both parent figures, thereby being set as the main premise of the whole regulatory framework. The principle introduced by the new system, which has given quite significant validation to its contents, also constitutes an operative principle in a number of European contexts and is, in brief, aimed at protecting the rights of underage offspring and searching for the best way to re-arrange the family in the light of the break-up in order to maintain a situation that "resembles" as closely as possible

the one experienced during the normal married life of the couple. In the light of this principle, the newly introduced regulations are designed to protect and promote the minor's real need to maintain a "balanced" and "continuous" relationship with each parent, so that the whole subject of family break-up is informed by the principle of sharing not only nominal parental responsibilities but also active parenting roles, in consequence of the offspring's right to have two parents. This is why the legal reference contained in the *incipit* of the regulations, which sanctions the offspring's right to "preserve significant relationships" with the ascendants and relatives from both of their parents' families, is remarkable. The stipulations of the new regulations, by introducing a principle that is widely accepted in theoretical terms but has often shown itself to be problematical in its application, identify not so much and not only the right of ascendants to exercise visiting rights regarding the offspring, but rather a general principle of protection relating to the upkeep of significant affective and social relations with their ascendants despite the termination of the parents' marriage and the assignment of custody, in order to guarantee "the affective charge the human being cannot do without at the time of his formation". It is also notable that the national legislator opted to apply the rule of shared parental responsibility to the whole area of family break-up, therefore extending it beyond the field of separation and divorce, in particular to natural filiation, whether in a *more uxorio* context or otherwise.

As a consequence, the refreshed regulatory framework highlights a certain reluctance to assign *exclusive* custody; this option must be used only when there are elements that break out of the confines of ordinary difficulties and in the event of this inordinate level of conflict meaning that shared custody would be contrary to the minor's moral and material interests, thus presuming an *a priori* appraisal that perhaps is not the best suited to an issue – that of custody – which more than others requires a prudent evaluation of actual and unique circumstances. Art. 155-*bis* of the Civil Code (CC) stipulates that each of the two parents may request exclusive custody when they believe that this would be in the best interests of the minor, except in the case foreseen by the second paragraph of art. 155-*bis*. The "last remaining" option of exclusive custody, therefore, will find its own field of application, one distinguished its expansion in one direction to include the circumstances described in articles 330 and 333 CC in the event of violation or abuse of parental responsibilities or the unsuitability of the other parent leading to the offspring's wellbeing being prejudiced, and in another direction, again connected to possible damage caused to the offspring but of a different nature: for example the damage caused by one parent moving away to a distance that makes it almost impossible to find a satisfactory solution for sharing custody.

Another innovative aspect of the regulations is found in the stipulations contained in the second paragraph of art. 155-*sexies* CC, according to which "the judge, having given audience to the parties and obtained their consent, whenever (s)he deems appropriate may defer adoption of the measures contained in art. 155 CC in order to allow the spouses, with the aid of experts, to attempt mediation proceedings to reach an agreement, with particular attention to the protection of the moral and material interests of the offspring". In fact, these negotiated agreements are not infrequently the result of the intervention of the social services and other non-juridical professionals who support, monitor and accompany the couple and their offspring through the family break-up. In this sense, the fact that it is explicitly allowed for any judge who prefers not to impose definitive measures (although these can always be revised) to offer the spouses support in their search for a solution constitutes an important change. This option also aids the formation of a mindset that encourages attempts to create constructive dialogue in the interests of the children, in order to arrive at a solution found by the spouses themselves (albeit with some assistance), through support offered from outside the couple and with the goal of prevention. An excessive lapse of time between the issuing of the provisory measures, coupled with the settling of the child or children in the custody of one of their parents, creates an emotional environment in the minor that a

subsequent divergent measure cannot help but disturb. From another point of view, the process to reach agreement on custody arrangements and on the regulation of relations with the children leads to a reduction in conflict situations and in subsequent recourse to legal channels to change conditions that have been established but in reality have not been agreed to by both parties.

The law seems to have given more importance to the role of the social services and other professionals in the sector concerning the institutional investigations necessary to convince the judge, particularly in terms of listening to the minors themselves and family mediation services. The second paragraph of the new art. 155-*sexies* CC in particular formalizes the establishment of mediation in family law as a process leading to the rearrangement of family relations in view of or as a result of separation and/or divorce. The family mediator, having received specific training and been requested by the parties, works towards a point where the couple draw up their own programme for separation that will be satisfactory for both them and their children, all with guaranteed confidentiality and away from the courts. By creating a separate setting, a *neutral* space and time where the spouses can rethink their relationship as a couple or as a couple that is heading towards separation/divorce, mediation allows them to stay united in their role as parents for as long as it takes them to reorganize their lives from an emotional and practical point of view. Looking more closely, we can see that it is a definite entrance (though perhaps a little on tiptoes), as the legislator, despite expressly allowing for mediation, has left the characterization of the procedure to follow unclear and the figure of the mediator inadequately outlined.

In this light, the real novelty is the opportunity to assess the importance of the contribution made by *non*-juridical operators (court- and party-appointed advisors, psychologists/psychiatrists and social workers) and the perception of said importance within the courts.

2. Court-appointed technical advisors: nature and legal contours

In the light of the changes in shared custody settlements, the figure of the technical advisor also has its role confirmed. The collaboration between the court and the external professional constitutes one of the crucial stages of the whole process, an instrument creating cooperation that allows the judge to fill any gaps in the essential scientific or professional knowledge necessary to define the proceedings in a complete and measured manner.

The technical advisor has been established as the principal figure in the category of assistants to the judge, as this person, despite being separate from the judge, provides them with any technical and/or scientific experience and knowledge beyond the specific competencies of the court that are needed to solve the difficulties pertaining to the subject of the proceedings. This technical consultation constitutes the ideal follower to the expert report governed by the original version of the code. Indeed, while the expert report was included in the Penal Code among the forms of evidence available to the parties concerned, the consultation process, despite being governed by the rules for preliminary hearings, finds its principal point of reference in the rules concerning court bodies, together with the other assistants to the judge. In any case, it cannot be denied that common doctrine tends to couple the two institutions both in practical and theoretical terms.

The norm contained in the first paragraph of art. 61 of the Code of Civil Proceedings (CCP) allows that the court authorities, when it is necessary to have the assistance of one or more professionals with a specific technical competency, may appoint an advisor for the whole duration of the proceedings or for the performance of a single act, based on their prudent assessment of the situation and within the limits of their discretionary powers.

The advisor's responsibilities can be described as activities to gather information about the case – when a specialist opinion is necessary – and inference-making activities in which a number of technical rules are applied to the information that has been gathered, on the basis of which certain

conclusions can be drawn. The judge may ask the expert advisor to assess the facts that they (the judge) have already ascertained or presume to exist (*inference-making* activities) and/or to ascertain what the facts effectively are (*information-gathering* activities). In the former case, the consultation is presumably requested after the initial evidence-gathering processes and its purpose is to assess situations where the components have already been adduced; in the latter case, the consultation can in itself constitute an objective source of evidence, although this does not mean that the parties can renege on their obligation to give evidence and leave it to the advisor to determine the validity of their claims. In this scenario, the party must at least state their reasons for asserting their right and the judge must then decide that technical knowledge above and beyond their own is vital or that there are other reasons that make it impossible or inadvisable to proceed directly with the judgment. This investigative means must not be used to free a party from the obligation to provide proof of what they claim and therefore it can be quite legitimately rejected by the judge when the same party reneges on giving evidence, except when certain situations can be determined only through recourse to specific and specialist technical knowledge or when determining them would meet with equally significant practical difficulties.

The advisor has a mandate to acquire all the elements necessary to respond to the judge's queries, including evidence not contained in the documents presented by the parties as long as it refers to facts pertaining to the strictly technical scope of the investigation and does not concern events or situations that, having been directly proposed as the foundation of the claim or protest filed by the parties, must be proven by the parties themselves. This prerogative should be understood as the court-appointed advisor's right to complete their investigations aimed at establishing the facts, provided that their information-gathering activities are strictly connected to and aimed at responding to the judge's queries. Therefore, any information-gathering activities regarding facts that are not pertinent (ergo useless) to the query, though they may in theory be essential for the purpose of deciding on the case, are considered illegitimate.

In family law proceedings, recourse to the court-appointed advisor (in theory for the *sole purpose* of determining family resources and responsibilities) receives further validation; this is not only due to the functions linked to the proceedings in question (which are concisely expressed in the clause on the minor's interests), but also because of the fact that said functionalization is aimed at identifying and assessing the parenting abilities of each party and establishing the best possible arrangement in the measures regarding minors, which, if they are based on erroneous assessments, can lead to seriously prejudicial consequences. Added to this is the fact that the matter in question involves professionals with unique abilities: when these figures, usually from the fields of medicine and psychiatry/psychology, intervene, it means that the expert assessments performed on the parties have strong similarities with health assessments (in their broadest sense). Thanks to the competencies required and the means of completing the tasks, this expert advice carries some of the connotations that can usually be traced to medical diagnoses: the activities are performed by professionals with psychological and psychiatric competencies and, in this context, it is to be hoped that they observe certain precautions and a number of obligations typical of healthcare provider-patient relationships. The judge and pleading attorneys – particularly the latter in the light of the trust placed in them by the parties – have the task of fulfilling their information-providing obligations and acquire a certain level of adhesion to the consultation process (which in some ways can be compared with the *generic* informed consent found in medical reports), in terms of the contents, the means of completion and the results, even when these are contrary to expectations.

It is obvious that this consultation process does not have any therapeutic purpose; however, it can in some ways lead the parties towards a greater awareness of their difficulties. Nor does the process envisage reaching a diagnosis, although of course the assessment of parenting abilities is a necessary preliminary to the issuing of the "best possible measure" for arranging custody.

To sum up, the consultation process, in its quality as a means of supplementing the preliminary hearings in family law proceedings, is designed to help the judge to adopt the most appropriate measures for the good of the parties and, in particular, for ensuring the psychological and physical wellbeing of underage offspring, in a framework that takes into account the need for affective relationships and a good upbringing, and the changing demands of the same. At the same time, the consultation process displays highly complex facets, as, despite being contained in a strictly judicial frame, it is completed using clinical instruments and it intervenes in matters (the inviolable rights of individuals in family relations) whose emotional charge can condition social workers, advisors, lawyers and judges, albeit on a subconscious level. As its theoretical and legal foundations lie in the interests of underage offspring (art. 155 of the Civil Code) and its formal foundations are found in the judge's power to request specific professional skills at their discretion (art. 61 of the Code of Civil Proceedings), it can be defined as an investigation aimed at gathering information about the relations in a given family and the parenting abilities of its members. The court-appointed advisor, as an unbiased expert, will have to evaluate the parties and their relationships in accordance with the query formulated by the judge, and also provide the necessary elements for the adoption of appropriate measures that will introduce the necessary changes to put in place the structures that will best meet the minor's needs, taking into account that these will gradually change. All of this occurs in a context where minors play a leading role in establishing the conditions for their own care.

3. Liaisons between the court-appointed and the party-appointed advisors

The party-appointed technical advisor is the professional appointed by the parties to support the court-appointed advisor. Their task is to contribute to the correct completion of the investigative operations by assisting with them and to ensure that the method used is suitable; in the case of family law proceedings, they verify the results of both the interviews and the psychological tests so that the court-appointed advisor can maintain effective and equal distance from and neutrality regarding the parties.

In this context, and in order to create effective cooperation between the professionals, it is to be hoped that the party-appointed expert would express their opinions during the investigative operations, perhaps suggesting different strategies for completing the tasks or different interpretations of the information gathered and proposing any further operations early enough for them to be implemented. It would also be desirable for them to liaise with the party's lawyer in order to bring them up to date with the salient points of the case report and help them to better understand the details in it from a psychological point of view. In this sense, the party-appointed expert has the obligation to assist the party whenever they display especial difficulties or discomfort during the judicial process. In synergy with the lawyer, (s)he should walk side by side with their shared client and give them emotional support, helping them to free themselves of their conflict mentality and to fully comprehend the results of the interviews and tests, in the hope of creating a certain amount of cooperation with their ex-spouse and finding the best arrangement for shared parenting responsibilities.

As far as liaisons between the advisor appointed by the judge and the party-appointed advisor are concerned, it is clear that it is absolutely vital for them to establish cooperation in their working relationship. To this end, the court-appointed advisor should facilitate the participation of their counterpart in the investigative operations, making contact with them in time for the start of the operations and drawing up an agreed calendar for interviews and tests (within the limits of and respecting the schedule for the legal proceedings). In their turn, the court-appointed expert would have to show flexibility when faced with any requests to move appointments in order to allow the

party-appointed advisor to be present at all stages of the process.

4. Liaisons between the court-appointed technical advisor and the local social services

The judicial authorities turn to the social services in order to adopt the measures that most closely protect the interests of minors, whose needs for uninterrupted affective and educational processes are the main purpose of the court's intervention: social workers are often given a series of tasks, which may be of a *preliminary* nature, with psycho-social assessments of the family unit and of parenting abilities, of an *executive* nature, implementing court orders by organizing protected encounters and providing support activities, or of an *overseeing* kind, monitoring adherence to the agreements between the parents or taking on the minor's case and placing them in the custody of one of the two parents.

Moreover, the courts more often than not request planning activities of the social services, which allow the measures already in place to be modulated and modified over time. From this point of view, the responsibilities of the social services include the field of consultation on the possible modes of separation and on the resources that could be activated in the event of contested separation, giving support to parents who display relational difficulties in their role as mother or father and offering direct and indirect help to the units involved and to their individual components (at the same time ensuring that the visiting rights of the parent without custody are respected) in order to make the parents aware of the suffering caused to the children by the situation of conflict.
These two instruments – the intervention of the social services and the court-appointed advisor's report – work together to provide assessments of the parties and the minors that supplement, anticipate and inform the judge's measures. Their methods of completion and their goals are not always the same, although we can find some elements in common. What is quite different is the juridical nature and the mindset informing the two "institutions": from this point of view, the juridical standing of the intervention of the social services cannot be easily compared with the figure of the expert advisor, the most important of the judge's assistants, because of the different level of participation of these assistants in the courtroom, where they are obliged to bow to the founding principles of court proceedings, first and foremost that of cross-examination. Comparing the investigations of the social services to "notes of an informative nature" is equally unsatisfactory, as the social services perform an important role providing support and cooperation to the courts through actions that are often marked by a certain level of informality and by the need for forward planning that unites them in their quest to protect the minor. The aspect of cooperation with the courts, together with the praxis of teamwork and the overall forward-looking nature of the intervention of the social services, are flanked by a further distinguishing feature: the social services investigation is a service provided by the local authorities, a neutral third party, and is performed from the viewpoint of ensuring the smooth running of public services. It is quite clear that this, even if it does not stop the social services from being involved in the court proceedings as a *sui generis* assistant to the judge, certainly hinders application of all the court rules that apply to the advisor, which mainly pertain to the principle of cross-examination.

Another aspect that distinguishes the two forms of intervention – the advisor's and the social services' – concerns the outcome of the report. As far as the consultation process is concerned, the report is usually a "finished product", although supplementary consultations are not infrequent: the expert report deposited in the files of the proceedings is the result of a precise process delineated by the query formulated by the judge, which generally uses descriptive means and methods of assessment to summarize an existing situation concerning the parties and the minor, even when the expert is able to foresee the probable evolution of the minor's personality and their relationships. The involvement of the social services in the proceedings, even when in the shape of a task limited

to a request for information, provides the judge with a series of possible actions – often of diverse nature – with a *planning* component able to assist the judge in ordering the most appropriate measures and in creating conditions that will allow those already in place to be modified. Wider-reaching actions can be implemented, such as taking on cases or directing them towards other specialist services provided by the healthcare and welfare network, ensuring a 'multi-eye' vision and creating spaces for reflection governed by the principle of cooperating to ensure protection of the children's interests.

Furthermore, while the consultation process is distinguished by its high level of specialization and the fact that the advisor appointed by the judge disappears once the task has been completed, the social services stay in the background if for no other reason than that they are a potential public source of aid that can be re-activated.

The advisor is chosen by the court from a list of professionals enrolled on a special register and is identified by name as a person who enjoys the esteem and trust of the judge as the result of time and experience. Social workers, on the other hand, are appointed according to the municipality where the parents and/or children have their permanent address, with the result that the margin for choice left to the judge is negligible, as the assignation of jurisdiction is pre-ordained and generally unchangeable.

Lastly, the request for an expert consultation (with court-appointed and part-appointed professionals) imposes direct financial burdens on the parties, made up of the advisor's fee and, when required, the appointment of a party-appointed advisor, and of the expenses deriving from the completion of their activities and all the necessary connected operations. The intervention of the social services, although far from being cost-free, does not imply any direct expenditure for the parties; it represents an indirect burden borne by taxpayers as a whole, as it is a cost pertaining to the administrative apparatus of the local authorities.

As far as the specific relations that can be formed between the two figures is concerned, it could happen, for example, that, once the consultation is complete and the conclusions have been received, the judge deems it necessary for the social/public health services to intervene and take up a minor's case for psychological support or psychotherapy, or take up the parents' case – whether individually or as a pair – to provide parenting support or other aid. In this case, the court must forward the expert report to the service concerned. If the appointed service fails to agree with the conclusions or recommendations of the court-appointed advisor, it will inform the judge in writing of its justified observations on the basis of which it proposes to provide different forms of support from those requested. It will, however, be the judge to adopt the appropriate measures, after consulting the parties and, when necessary, the social services and the advisor.

Another possibility, in particular in the event of the consultation being requested for a situation that the social services have already been asked to intervene in by the court, is that the services are immediately informed of this and suspend their activities whenever they are incompatible with the advisor's, informing the judge of this promptly.

5. Technical advisors' handling of personal details

The handling of personal details and, relative to this, the contours of the confidentiality guaranteed by the court-appointed expert and their assistants is a rather fascinating topic.

In conformity with art. 47 of the Privacy Code (Legislative Act no. 196 of 30 June 2003), the "Guidelines for the handling of personal details by technical advisors and experts acting as assistants to the judge and the public attorney" of 26 June 2008 (attachment no.2), the Codes of Ethics of the professional orders in question and the confidentiality laws contained in articles 380, 381 and 622 of the Penal Code, the court-appointed advisor and their assistants are naturally

obliged to handle the parties' personal details in accordance with the principles of lawfulness, rectitude and pertinence.

In particular, the use of the parties' personal details must be relevant and limited to the task expressly assigned by the judge: in this sense, court-appointed advisors and their assistants are expected to adhere to the instructions given and to use suitable information and details to provide and correct and complete representation of the situation being investigated and use this as the basis for their investigative operations and their subjective appraisals. Therefore, court-appointed advisors and their assistants cannot handle information relating to any parties external to the proceedings without just cause.

At the time of making the appointment, the judge invites the advisor to make at least an audio recording of all the encounters between the parties. However, the material relating to the performance of the operations, together with the material gathered during the consultation process and that passed on by the judge, must be attached to the case report; there must be as many copies made of this as there are parties in the case. In the event of the appointment being revoked or the advisor deciding to renege, they and their assistants must return all the documentation acquired in the course of the operations to the judge.

Obviously, communication of the details obtained must be limited to the parties and their advisors; they may be transmitted to third parties only when previous and specific authorization has been obtained from the relevant court authority.

At the end of the consultation process, conservation of the material in question is allowed (in order to fulfill certain legal obligations regarding taxation and accounting) for the details considered effectively necessary. Any other information used for scientific or statistical purposes must be either destroyed or made anonymous.

For party-appointed advisors and their assistants, the rules for the handling of personal details and client confidentiality are slightly different, thanks to the trust placed in them directly be the litigating parties and the purely contractual relationship that binds them. Party-appointed advisors and their assistants are subject to the same principles of lawfulness, rectitude and relevance as court-appointed advisors. However, if party-appointed advisors independently handle the personal details of the parties, they will be obliged only to obtain their express and informed consent in writing, under the terms of art. 23 of the Privacy Code.

6. Professional liability of the advisor

The issue of the professional liability of the advisor, distinct from the responsibilities imposed by the relevant professional orders, can be included in the general and progressive judicial and cultural trend towards making intellectual professionals liable for their alleged negligent activities and imposing on them the cost of the material and immaterial damage caused to citizens and clients, as part of what has been identified as a sort of manipulation of the justice system regarding the assignment of damages in basic subjective situations. This trend, which in the past involved mainly the medical profession, has the potential to spread to other intellectual professionals and, it is reasonable to suppose, to those who, having the relevant competencies, intervene in judicial proceedings.

The number of judicial proceedings brought against these advisors – and also, understandably, against social workers – for civil liability is almost negligible compared with the sanctions for breaches of the codes of discipline imposed by the various professional orders. The regime governing the professional liability of technical advisors makes the intellectual professional liable for breach of the ethical and judicial duties that the relevant order considers as the foundation of that profession. In articles 20 and 21 (dispositions for implementation) of the Code of Civil

Proceedings (CCP), Italian law stipulates that a disciplinary committee – set up by the president of the court, or upon the request of the public attorney's office or a representative of the order the professional belongs to – should charge the advisor and give them the opportunity to defend themselves. The committee may throw out the case or apply the disciplinary measures of warnings, suspensions from the order for a period of no less than one year or striking off the register, depending on the gravity of the disciplinary offence committed.
In strictly judicial terms, according to the second paragraph of art. 19 CCP *dispositions for implementation*, the advisor has the obligation to maintain an exemplary standard of morals; indirectly and following inclusion on the professional register, the advisor also takes on the obligation to maintain the specific competency that was the reason for their inclusion. Still taking literally the stipulations of art. 19 CCP *disp.imp.*, any advisors who fail to diligently fulfill the tasks assigned to them are also culpable: in fact, it is the advisor's duty to fulfill them "well and faithfully" (according to the words of the oath contained in art. 193 CCP), maintaining their impartiality and diligence and conforming to all the legal dictates. The most frequently occurring cases, ones that involves numerous professionals from many different areas of activity, are: unjustified (and culpable) failure to attend the hearing organized to assign the office and administer the oath; unjustified delays in filing the case report; performance of acts or negligence leading to invalidation of the case report; insufficient or erroneous information in the case report.
Reconstruction of events and determination of responsibility is, in some ways, easier in a court of law, partly because the legislator has provided for a series of different categories of legal paradigms, which can be summed up as: refusal to fulfill compulsory offices (art. 366 of the Penal Code); falsehoods in the report or false interpretation (art. 373 of the Penal Code) ; perjury, when the advisor "artificially alters the state of places or things or persons" (art. 374 of the Penal Code); failure to report offences committed by public officials (art. 361 of the Penal Code) ; material falsehood committed by a public official in official documents (art. 476 of the Penal Code); false information included in official documents by either a public official or private individual (articles 480 and 483 of the Penal Code); lack of faithfulness in the consultation (art. 380 of the Penal Code) or "other forms of faithlessness" (art. 381 of the Penal Code) .

The situation for civil liability, on the other hand, is more "open" and "non-categorized" and is complicated by the tone of the stipulations in art. 64 CCP, which, in the context of civil suits, refer to the paradigm of offences involving expert consultants and, in the second paragraph, apply the penalty of imprisonment or payment of a fine (amounting to 10,329.14 Euro) in the event of the advisor committing a breach of their professional duties with *major fault*. In any case, the advisor is liable for payment of damages. The precise formulation of the law has given rise to a series of exegetic doubts. These relate first of all to the type of civil liability the advisor incurs through negligent or unfaithful fulfillment of their office. Secondly, the question of the type of fault necessary to increase their liability arises: in other words, whether the professional is guilty not only of malice and major fault but also of *minor* fault, again relating to professional acts requiring elements of specific competence. As for the first aspect, it is not pacific if it regards a case of injurious damages of an extra-contractual kind or linked to contractual responsibilities, or, moreover, liability arising from "social contact" (which can be likened to the strict regime of the medical profession); it is also true that, even if the final sentence of art. 64 p. 2 ("In any case, the payment of compensation for the damage caused to the parties is compulsory") were absent, the advisor would not be able to get away from their civil responsibility as per art. 2043 CC.

By following this path, we can rediscover an earlier orientation – of a jurisprudential and doctrinal stamp – that refers to the determination of the extra-contractual civil liability of the professional for *major* fault, or, in the absence of any kind of contractual obligations between the

parties and the court-appointed advisor, for any level of fault. Another path, while still referring only to the matter of the level of fault necessary for conviction, tends more towards contractual liability: the advisor could avail of the limited responsibility clause, which can be applied only in the event of conduct with *malice* or *major fault*; the accused would be exonerated in the event of minor fault, regardless of the complexity of the office or the specific act committed. The concept of limited responsibility arose from the same art. 64 CCP, which limits the application of penal sanctions to cases of *major fault*.

Those who consider that the responsibility of the advisor cannot be limited as regards the subjective elements (fault and intent), as they have to be held responsible no matter what level of fault is established, do admit that the professional could make use of art. 2236 CC: in the case of particularly difficult offices, their liability would not be increased through only minor fault. This regime of liability is specifically for intellectual professionals and has met with great success in judges' determination of liability in medical care, which, by its very nature, is a relationship free from any contractual obligations and therefore considered as arising from "social contact". This particular perspective would certainly have the merit of likening the patient-doctor relationship to that between the advisor-party, and in fact there are some similarities. There is a relationship of trust with a doctor who, through a *therapeutic relationship*, does their utmost to diligently fulfill their obligations regarding information and "execution" in the patient's best interests; the relationship with the advisor should be marked by the same kind of unspoken trust being placed in the professional by the party: in the court-appointed advisor because of their high level of competency and their strict impartiality, and in the party-appointed advisor because of the very reason for appointing them.

While we can believe that this last route could be the most sustainable one, it is still an onerous task to establish whether the office or a particular act performed under its auspices is of easy or difficult execution; here the office in question is the assessment of family resources. As mentioned above, the most recurrent cases – the same for advisors from all kinds of professions – include that of unjustified (and culpable) failure to attend the hearing organized to assign the office and administer the oath; unjustified delays in filing the case report; performance of acts or negligence leading to invalidation of the case report; insufficient or erroneous information in the case report. However, when it comes to consultations on the matter of family law, which involve the intervention of professionals from the medical, psychiatric and psychological fields (and also occasionally the social services), the same cases and, in particular, the charge of insufficient or erroneous information in the case report, are seen in a different light from the other professional areas (accounting, engineering and legal medicine cases). This happens for two reasons: the first is that the advisor's specialist assessment is made regarding minors and, naturally, the people involved in their lives, including their parents; the same measures, when based on erroneous evaluations, lead to highly prejudicial effects on underage offspring. Besides the list of cases mentioned above and, significantly, with the charge of insufficient or erroneous information in the case report, in theory the erroneous assessment of parenting abilities should also be included; or, although the consultation is not intended for therapeutic purposes (and much less diagnostic), it is possible for a suspicion of a psychiatric condition in the minor, or in one or both of the parents, to emerge, only to be revealed as unfounded. Lastly, we cannot exclude the possibility of the professional being charged with an offence linked to the handling of personal details, when performed in breach of the principles of lawfulness, rectitude and pertinence.

The guilty professional is usually charged with and made liable for: the damages resulting from delays in the approval and scheduling of the proceedings and the forced repetition of the consultation process; the expenses incurred through adoption of urgent measures (*e.g.* shoring up a building that was erroneously declared unsafe); the expenses incurred to demonstrate the

erroneousness of the advice; the damages arising from acceptance of another's petition (but not the damages caused by losing one's chance of emerging victorious from the proceedings). The question is whether, on top of the "classic" types of compensation for damages arising from error or negligence in a professional consultation, other kinds can be identified. From this standpoint, the specific damage relating to family law proceedings could be identified as discomfort and suffering for minors as a result of a measure that turns out to be "wrong", as it was based on erroneous assessments, or in the unfavourable consequences in terms of work, relationships and personal suffering for the victims of an incorrect medical/psychiatric diagnosis.

It can be seen, therefore, that the matter is far from simple, and not only because the consultation in question analyzes situations built of fragility and emotions and complex relationships in continual evolution: these are quite different situations from those analyzed by other professional disciplines, where assessments can be more easily traced and are almost impossible to contest or, more importantly where the same assessments do not trample over the personality of individuals who are often already distressed by the judicial proceedings.

References

Ardesi, S.-Filippini, S. (2008), *Il servizio sociale e le famiglie con minori: prospettive giuridiche e metodologiche*, Roma;

Aterno, S.-Mazzotta, P. (2006), *La perizia e la consulenza tecnica*, Padova;

Balestra, L. (2006), *Brevi notazioni sulla recente legge in tema di affidamento condiviso*, in *Familia*, p. 655;

Barone, C.M. (1988), voce *Consulente tecnico, dir. proc. civ.*, in *Enc. giur.*, Roma, VIII;

Busnelli, F.D. (2002), *La famiglia e l'arcipelago familiare*, in *Riv. dir. civ.*, p. 509;

Campanini, A. (2002), *L'intervento sistemico*, Roma;

Carrassi, C. (1987), *I Servizi sociali e il giudice dei minori*, in *Dir. fam. pers.*, p. 668;

Conte, M. (2004), *La consulenza tecnica*, Milano;

Id., (2005), *Le prove civili*, Milano;

Cordiano, A. (2008), *Attualità dell'art. 148 c.c. e affidamento condiviso della prole*, in *Studi in onore di Davide Messinetti,* a cura di F. Ruscello, Napoli, p. 315;

Dal Pra Ponticelli, M. (2005,) voce *Metodologia del Servizio Sociale*, in *Dizionario di Servizio Sociale*, diretto da M. Dal Pra Ponticelli, Roma, p. 348;

Di Nicola, P. (1998), *La rete: metafora dell'appartenenza. Analisi strutturale e paradigma di rete*, Milano,;

Dellavalle, M.-Long, J. (2009), *La cooperazione fra servizio sociale e giudici in un processo giusto*, in *Min. giust.*, 2, p. 177;

Dogliotti, M. (1988), *Separazione e divorzio*, Torino;

Donati, P. (2002), *Gli spostamenti di confine fra pubblico e privato nella famiglia*, in P. Donati e P. Di Nicola, *Lineamenti di sociologia della famiglia*, Roma, p. 240;

Ferrando, G. (1989), voce *Filiazione (rapporto di)*, in *Enc. giur.*, XIV, Roma;

Finocchiaro, M. (2006), *Affidamento condiviso*, in *Guida dir.*, 11, p. 25;

Montobbio, A.-Verde, A. (1996), *Un approccio psicodinamico alla consulenza tecnica d'ufficio in materia psicologica sui minori*, in *Min. giust.*, 2, p. 104;

Neve, E. (2008), *Il servizio sociale. Fondamenti e cultura di una professione*, Roma;

Plentada, R. (2007), *La responsabilità civile del consulente tecnico d'ufficio*, in Resp. civ., p. 366.

Potetti, D. (2010), *Novità e vecchie questioni in tema di consulenza tecnica d'ufficio nel processo civile*, in *Giur. mer.*, p. 38;

Protettì, E.- Protettì, M.T. (1994), *La consulenza tecnica nel processo civile*, Milano;

Quadrelli, M. (2009), Il *ruolo dell'assistente sociale nel procedimento dinanzi al tribunale dei minori*, *La Rivista di Servizio Sociale*, 4, p. 6;

Rossetti, M. (2003), *La figura e l'attività del C.T.U. nel processo civile*, Milano;

Id., (2006), *Il C.T.U.*, Milano;

Rossi Carleo, L. (1999), *La separazione e il divorzio*, in *Tratt. dir. priv.* Bessone, IV, *Il diritto di famiglia*, I, Torino, p. 238;

Ruscello, F. (2005), *Autonomia coniugale e crisi della famiglia. Rilievi introduttivi*, in *Vita not.*, p. 76;

Id., (2006), *La potestà dei genitori. Rapporti personali*, Milano, 2006, seconda ed.;

Id., (2007), *La dinamica coniugale nel farsi e disfarsi del legame. Separazione personale e affidamento condiviso della prole*, in *Vita not.*, p. 57;
Sacchetti, L. (2007), *Sulle responsabilità giuridiche degli assistenti sociali*, in *Min. giust.*, 2, p. 241;
Samory, E. (2005), voce *Responsabilità - Dizionario della scienza di servizio sociale*, in *La professione sociale*, 2, p. 65;
Santoro Passarelli, F. (1961), *L'autonomia privata nel diritto di famiglia*, *Saggi di diritto civile*, Napoli;
Stanzione, P. (1975), *Capacità e minore età nella problematica della persona umana*, Camerino-Napoli;
Id., (1980), *Diritti fondamentali dei minori e potestà dei genitori*, in *Rass. dir. civ.*, p. 455;
Trabucchi, A. (1988), *Il "vero interesse" del minore e i diritti di chi ha l'obbligo di educare*, in *Riv. dir. civ.*, I, p. 741;
Trerotola, E. (1999), *Problemi di qualificazione e disciplina giuridica dell'inchiesta sociale*, in *Giur. mer.*, I, p. 52;
Umani Ronchi, G. (2008), *La consulenza tecnica in medicina legale: metodologie operative*, Milano;
Vercellone, P. (1982), *Libertà dei minorenni e potestà dei genitori*, in *Riv. dir. civ.*, I, p. 530;
Vitrano, F. (2009), *Il ruolo del consulente tecnico tra la centralità del bambino e le esigenze del percorso giudiziario*, in *Min. giust.*, 3, p. 341;
Zatti, P. (2002), Familia, familiae - *Declinazione di un'idea*, in *Familia*, p. 9;
Verardo Romano, M.R. (2006), *Affido condiviso: regole sulla mediazione per far funzionare la nuova normativa*, in *Guida dir.*, 2006, 14, p. 11;