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THE POSSIBILITY OF USING CYBERSEX EVIDENCE IN DIVORCE PROCEEDINGS IN THE CONTEXT OF PROVING FAULT FOR MARRIAGE BREAKDOWN FROM A COMPARATIVE LEGAL PERSPECTIVE

ABSTRACT

The authors analyze the potential use of cybersex evidence in divorce proceedings, with a focus on determining marital fault from a comparative legal perspective. The purpose of the study is to comprehensively examine the interpretation of cybersex in the context of marital guilt, while assessing the implications and challenges of bringing such evidence to court in the Polish legal framework. The authors examine the implications of these social changes in the Polish legal framework, focusing on the potential use of cybersex evidence in divorce proceedings to establish marital fault. The analysis considers different legal jurisdictions, their interpretation of cybersex in the context of marital infidelity, and the procedural challenges of presenting such evidence in court.

KEYWORDS: *cybersex evidence, digital evidence, divorce, fruit of the poisonous tree, the collection and admission of digital evidence*

INTRODUCTION

Nowadays, almost every sphere of current functioning is undergoing dynamic changes. In recent years, the trend has been to popularize the use of modern technological solutions in the ongoing activities of daily life. Some of the first areas associated with the computerization of services were those related to the use of computers for the automation of various processes, calculations (e.g. scientific), or control of various industrial processes. In addition to areas such as science, industry and finance, computerization played an important role in public administration, which involved the automation of administrative processes, including for population data processing, budget management, as well as the creation of information systems, records and databases, and, in the longer term, also in the judiciary and labor market. Although the successive solutions implemented in the judiciary to streamline and speed up certain processes have had their supporters, unfortunately they have also been met with numerous opponents. An example is the implementation in Poland of electronic protocol in courts, providing a faithful reflection of the course of the hearing, which is of considerable importance for the evaluation of the evidence gathered. There is no doubt that the pandemic caused by COVID-19 has had a positive impact on the popularization and, most importantly, acceptance of

the use of technological solutions that support, but also increase the efficiency and speed of actions taken in specific areas (Klich, 2021, p. 686). Currently, it is possible to assume that informatization covers virtually all spheres of life and activity, significantly affecting the way society and the economy function. Computerization has played a key role in breaking down geographic barriers. This is due to the possibility of rapid transmission of information, long-distance communication, as well as cooperation of individual units and organizations, regardless of their current geographical location.

The primary research objective is to determine whether practicing cybersex can be a cause of divorce or the breakdown of the parties' marital relationship, and further to answer the question of what are the practical aspects (and, above all, the difficulties) of conducting evidentiary proceedings using cybersex evidence. This research paper delves into the possibility of using cybersex evidence in divorce proceedings in Polish Civil Procedure, under the lens of the fruit of the forbidden tree, also called the fruit of the poisonous tree doctrine. It provides an in-depth analysis of the legal, ethical, and procedural implications, evaluating the admissibility and relevance of such evidence in the context of marital fault (Bransdorfer, 1987, p. 1061).

DEFINITION OF CYBERSEX AND ITS RELEVANCE TO DIVORCE PROCEEDINGS

In making an introduction to the issue of the problems of divorce proceedings, including cybersex evidence, it is necessary to define and introduce the concept. Computer sex is a virtual sexual activity in which two or more people connect with each other through a computer network, sending messages to each other describing sexual experiences or causing sensations of a sexual nature. It is therefore a term that refers directly to sexual or erotic interactions that take place via electronic communication, the Internet or digital technologies. This can include various forms of communication and interaction, such as exchanging intimate messages, sharing pornography, erotic video calls, as well as advanced techniques such as virtual reality or even so-called *sex robots*. Cybersex can be said to involve role-playing and pretend sexual

intercourse and sending messages in such a way as to stimulate the fantasy of other participants. It can also be enhanced through the use of a webcam. Cybersex, or virtual sexual activity has emerged as a new form of non-physical extramarital relationships, prompting a re-evaluation of the traditional concepts of adultery and marital fault. Consequently, cybersex activity refers to all that includes sexual content for recreation, entertainment, exploration, education, commerce and the search for sexual or romantic partners (Daneback et al, 2006, p. 61; Griffiths, 2001, pp. 333-342). It seems impossible to adopt a uniform definition, which provokes the notion that the definition of cybersex may vary depending on context, culture and social norms.

What is not in doubt is that cybersex takes place in a virtual environment, and those involved do not need to be physically present in the same place for sexual interaction. This, in turn, has the effect of increasing the possibility of its implementation with people who are not everyday partners, spouses. Moreover, this type of activity can be both one-sided (e.g., viewing pornography, using erotic services in massage parlors) and two-sided (e.g., exchanging intimate messages)(Schneider, 2003, p. 335). Not only addiction to cybersex, but also its occasional realization in practice can be associated with socio-interpersonal, psychological and criminal consequences. There is no doubt that it can have a significant socio-interpersonal impact. As a result, we may have to deal not only with the deterioration of relationships and sexual dissatisfaction, but also with problems in marriage, often leading to the breakdown of marital relations. It is noticeable that cybersex addiction has an impact on the social relationships of addicts, as well as being a major cause of divorce and separation of spouses (Agastya et al, 2020, p. 236; Daneback, 2005, pp. 321-328). Cybersex leads not only to broken relationships, but also to emotional alienation (Schneider, 2000, p. 31 et seq.). It is also worth noting that the negative impact of cybersex affects not only spouses (partners), but also their children and family, who are indirectly affected by the negative phenomenon socially and psychologically.

People who find out about their partner's cybersex practice feel hurt, betrayed, rejected, abandoned, devastated, and have feelings of isolation, embarrassment and, above all, lose trust in their partners. This, in turn, affects the realization of the basic functions of marriage involving the need for mutual

emotional, physical and economic closeness. In this type of situation, the breakdown (permanent and complete, but also temporary) of marital life is often inevitable. Certainly, obtaining knowledge of a partner's cybersex practice has a limiting effect on the trust held. However, it is worth pointing out that it is not possible to define a standardized opinion on whether cybersex unequivocally affects the breakdown of marital life or not. The issue is highly evaluative and subject to subjectivity. Many times spouses suppress the signals flowing to them that may indicate their partner's infidelity. On the other hand, having this knowledge, they may categorize their spouse's actions as not indicative of infidelity in the absence of unambiguously physical contact.

Speaking of the impact of cybersex on divorce proceedings, it is possible to say that evidence of cybersex can be a primary reason for filing for separation or divorce. They can also be secondary, which is related to the use of evidence of cybersex to support arguments about the desirability of obtaining a divorce decree with a judgment of guilt of the spouse, while there are other reasons for initiating divorce proceedings.

CYBERSEX EVIDENCE AS A PREMISE FOR A DEVELOPMENT OR SEPARATION JUDGMENT VS. THE *FRUIT OF THE POISONED TREE* DOCTRINE – POLISH, US AND CANADIAN EXPERIENCE

In the digital age, the nature of human interactions and relationships has transformed significantly, with the concept of infidelity undergoing considerable changes. This paper explores the viability of using cybersex as evidence of adultery, leading to the breakdown of a marriage, comparing the legal perspectives of various jurisdictions. Cybersex, or virtual sexual activity, has emerged as a new form of non-physical extramarital relationships, prompting a re-evaluation of the traditional concepts of adultery and marital fault. The recognition and acceptance of cybersex as a form of adultery differ greatly across various jurisdictions, due to diverse cultural, moral, and legal standards. For instance, some US states practicing fault-based divorce laws have begun to acknowledge cybersex as a form of marital misconduct. However, in other jurisdictions, such

as most parts of Europe, the no-fault divorce system prevalent there precludes the use of such evidence (Bialecki, 2015, Doktryna, p. 160 et seq.).

The popularization of the process of computerization and digitization has resulted in profound changes in social interactions, which has contributed to redefining traditional concepts such as fidelity and marital misconduct. The advent of the digital era has brought profound changes to our social interactions, redefining traditional concepts such as fidelity and marital misconduct. Cybersex, defined as online sexual activity between individuals who are not marital partners, presents a complex legal challenge in the context of divorce proceedings. This article aims to navigate the interpretation and legal recognition of cybersex as grounds for divorce within Polish Civil Procedure. In Poland, a divorce can be granted on the grounds of the irretrievable and complete breakdown of the marital relationship, regardless of fault (Article 56 §1 of the Polish Family and Guardianship Code (Act of 25.02.1964, uniform text: Journal of Laws of 2020, item 1359). However, the court may determine the guilt of one or both spouses in causing the breakdown (Article 57 FGC). As it stands, Polish legislation does not explicitly recognize cybersex as a form of adultery. Therefore, whether cybersex can contribute to determining fault lies largely in the court's interpretation of *marital misconduct*.

Introducing cybersex evidence in divorce proceedings poses several challenges, including the verification of digital data and addressing privacy concerns. Proving the authenticity of the online interactions often requires comprehensive forensic investigations, while ensuring the balance between the right to privacy and the need for disclosure in legal proceedings is maintained. The comparative study focuses on specific cases from different jurisdictions, where cybersex evidence has been used in divorce proceedings. These examples underline the growing acceptance of cybersex as a form of adultery and the consequential need for modern legal systems to adapt to the digital era. With the increasing digitization of human interactions, it is crucial for legal systems to consider the evolving nature of adultery and marital fault. Future laws might need to accommodate virtual forms of infidelity, like cybersex, in determining marital fault in divorce proceedings. This shift may necessitate global consensus on the definition and recognition of digital adultery, addressing privacy concerns and ensuring the authentication of digital evidence.

The study concludes by underscoring the importance of adapting legal systems to contemporary social and technological changes. While there are various legal and ethical challenges, acknowledging cybersex as a form of adultery in divorce proceedings can prove to be a significant step towards a more holistic and relevant interpretation of marital fault.

The use of cybersex evidence in Polish courts raises complex legal and ethical issues (Białeczki, 2015, Gromadzenie, pp. 53-54). Digital evidence, including cybersex-related content, must be carefully evaluated for authenticity and relevance. Moreover, it necessitates a careful balance between the right to privacy and the need for disclosure, reflecting both the Polish Constitution and European Union legislation on privacy and data protection. Despite the absence of an explicit legal framework, a few instances have appeared before Polish courts where cybersex evidence was considered, providing insights into the ongoing legal discourse on this subject. These cases demonstrate the court's approach and the weight given to cybersex as a form of marital misconduct. The integration of cybersex evidence in divorce proceedings requires further clarity and precision within the Polish Civil Procedure. Although it represents an evolving challenge, it also provides an opportunity for legal growth and modernization to keep pace with societal changes. In the context of the Polish legal system, the recognition and interpretation of cybersex as a ground for marital fault remain open to judicial interpretation. As the digital era continues to redefine traditional social boundaries, Polish Civil Procedure will need to evolve and adapt, carefully addressing issues of privacy, data protection, and the interpretation of marital misconduct in the digital age.

The exploration of the potential use of cybersex evidence in divorce proceedings forms a new frontier in Polish civil procedure. This research seeks to unpack the possibility of using cybersex as proof of marital fault, its interpretation within the Polish legal system, and the challenges of admitting such evidence in court (Białeczki, 2017, pp. 206-222).

Currently, Polish law does not explicitly define cybersex as adultery, hence, its interpretation as marital misconduct is subject to judicial discretion from the perspective of evidence obtained illegally and from the perspective of evidence of the fruit of the poisonous tree (Pitler, 1968, p. 579). The complexity lies within the broader understanding of the breakdown of marriage and what

may be deemed as contributory behaviour. The inclusion of cybersex evidence in court cases involves various legal and ethical dilemmas, such as validation of the evidence, invasion of privacy, and the inherent ambiguities in digital data interpretation (Constitution of the Republic of Poland of 2.04.1997, Journal of Laws No. 78, item 483). There are emerging cases in Polish courts where cybersex evidence has been considered, albeit the legal framework remains undefined. These instances provide insights into the evolving judicial stance on this matter. This research concludes that the consideration of cybersex as evidence of marital fault within Polish civil procedure is complex and requires careful navigation. The legal system must adapt to changing societal norms while preserving privacy rights and ethical standards.

As societal norms evolve with the digital age, the legal definitions of infidelity are also challenged. This research scrutinizes the treatment of cybersex as evidence in divorce proceedings across different legal jurisdictions, focusing on the determination of marital fault. The recognition of cybersex as a form of marital misconduct varies among jurisdictions. In certain U.S. states, cybersex has been considered a form of marital fault, while in others, and in most of Europe, it is not explicitly acknowledged. The inclusion of cybersex evidence in divorce proceedings faces numerous legal and ethical challenges, from authenticating the digital data to balancing privacy rights and disclosure needs. The analysis includes case studies from different jurisdictions where cybersex evidence has been used in divorce proceedings. These cases illustrate the evolving legal landscape in response to the advent of digital infidelity. The use of cybersex evidence to establish marital fault in divorce proceedings requires a nuanced approach that balances evolving societal norms, individual privacy rights, and above all legal traditions. It also demands an international conversation to harmonize diverse legal practices.

From our scientific perspective, which can be read as a controversial position, the characterization of secondary evidence which owes its discovery to evidence initially obtained in violation of a constitutional, statutory, or court-made rule as the *fruit of the poisonous tree* evokes more passion than rational analysis. As it is claimed in the doctrine, before examining the exclusionary rule as applied to secondary evidence gleaned from illegally obtained primary evidence, it is instructive to assess the policies behind the exclusionary rule.

An exclusionary rule may derive from a constitutional, statutory, or judicial source, and it is axiomatic that states are not precluded from enacting laws which provide greater protection than that required by the Constitution. However, a state legislature in passing a law regulating police activity or a state court in interpreting it, may, within constitutional limitations, decide that certain or all violations should not give rise to the exclusion of reliable evidence. It may, of course, be argued that rules regulating police conduct are valuable even without the sanction of the exclusionary rule. States commonly enact laws which are never enforced (Pitler, 1968, pp. 581-582).

The integration of technology in our lives has reshaped personal relationships, compelling legal systems to navigate uncharted territories such as cybersex in divorce proceedings. The *fruit of the forbidden tree* doctrine, rooted in U.S. legal practice, excludes evidence obtained illegally or unconstitutionally from being used in court. Though not explicitly named or codified in Polish law, a similar principle can be inferred from the right to privacy outlined in the Polish Constitution and the European Convention on Human Rights (Case of Gäfgen v. Germany, Application No. 22978/05). Polish law does not specifically define cybersex as marital misconduct. However, given the digital evolution of infidelity, courts are now faced with the question of whether cybersex can contribute to a marital breakdown. The complexity of using cybersex evidence lies in its collection method. If obtained without consent or through illicit means, it may breach privacy rights, thereby potentially falling under the *fruit of the forbidden tree* principle (Białecki, 2015, Praktyka, pp. 159-180). However, the legislator in Article 308 of the CCP does not distinguish between legal and illegal recordings. Nor does it explicitly exclude evidence from recordings of conversations without the consent and knowledge of those who participate in the conversation. Consequently, according to the position of the judiciary, the relevance of such evidence is subject to assessment in the individual case (Order of the Supreme Court of 13.01.2022, II PSK 203/21, Legalis). This discussion illuminates the need for clearer guidelines within the Polish Civil Procedure to handle cybersex evidence in divorce cases, bearing in mind respect for privacy rights and data protection regulations. The research concludes that the potential use of cybersex evidence in Polish divorce proceedings is a complex matter that requires careful consideration of privacy rights and

procedural justice. As the legal system adapts to the digital era, a balance must be struck between technological realities, legal principles, and fundamental human rights (Karolczyk, 2012, pp. 88-106; Krakowiak, 2005, pp. 1250-1253; Laskowska, 2003, p. 96; Wengerek, 1977, p. 40). It should be noted that the available literature cited in the text does not specifically address the issue under study of the admissibility of cybersex evidence, but only the admissibility of evidence obtained without the consent and knowledge of the other party.

The digital era has fundamentally changed human interactions, which has led to novel legal challenges, such as the use of cybersex as evidence in divorce cases. This research only theoretically evaluates the admissibility and relevance of cybersex evidence within Polish Civil Procedure, focusing on the interplay with cybersecurity issues. Polish law does not expressly categorize cybersex as marital misconduct; the interpretation is left to the discretion of the courts. As online infidelity gains recognition, the necessity of addressing cybersecurity issues pertaining to the collection and admission of such digital evidence becomes crucial. Cybersecurity, which refers to the protection of internet-connected systems, plays a vital role in the authentication and handling of cybersex evidence.

In the literature and case law there is an opinion that in a divorce (respectively, separation) trial in terms of proving fault in the breakdown of marital relations, digital recordings of conversations between the parties may also serve as evidence, even if these recordings were made without the knowledge of one of the parties and during the actual separation of the spouses (Ignaczewski, 2010, p. 195). This therefore means that, in principle, there is no obstacle to cybersex evidence being presented before the court, which is also an example of electronic evidence. The Polish Supreme Court, in its April 25, 2003 judgment, addressed the issue of the admissibility of a party's presentation of evidence obtained by unlawful means. According to the position of the Supreme Court, in a trial for dissolution of marriage by divorce, in terms of proving the fault of the breakdown of marital relations, a tape recording of conversations held by the parties may also serve as evidence, even if these recordings were made without the knowledge of one of them. In the opinion of the Supreme Court, against the background of the facts under consideration, there are no fundamental reasons to completely disqualify the evidence of the defendant's

disputed recordings of telephone conversations, even if these recordings were made without the knowledge of one of the of the callers. Since the defendant did not successfully challenge the authenticity of the material in question in the course of the proceedings, it could serve as the basis for assessing the conduct of the parties with respect to each other. According to the appellant, the decisions of the courts of first and second instance violated the rules of evidence procedure, as they granted the value of credibility and evidentiary force to evidence obtained illegally. The appellant was concerned with the inclusion in the evidence of the case of cassette recordings of the defendant's statements of telephone conversations held between the spouses and recorded by the plaintiff. The applicant argued that the use of this evidence in the present proceedings was inadmissible, as it was obtained unlawfully (without the knowledge and expressed consent of the person recorded on the tape). The cited decision of the Supreme Court – although subjected to harsh criticism – deserves attention, as it creates certain rules of evidence in the context of the admission of evidence obtained illegally. In our opinion, the use of such evidence is possible insofar as the court also has other evidence at its disposal, and in this context, evidence in the form of a recording should be treated as another means of evidence, not covered by the evidentiary prohibition, being in fact evidence of subsidiary importance (Judgment of the Supreme Court of April 25, 2003, IV CKN 94/01, *Legalis* No. 62099). The judgment was rendered in a divorce case, and, as the justification shows, the recordings of telephone conversations were not the only evidence in the case on the basis of which a party was attributed contribution to the breakdown of marital relations. There is no doubt that the referenced ruling applies to evidence of recordings, but *per analogiam*, the facts under analysis can be applied to evidence of cybersex.

Given that the issue of the admissibility of cybersex evidence is one of the controversial ones, it seems that due to the specifics of separation and divorce cases, the court should approach this type of evidence on a case-by-case basis. In our opinion, when adjudicating these types of cases, one should prevent situations in which evidence obtained deceitfully or secretly would constitute the essential evidence on which the court makes its factual findings. Often the presentation of such evidence in a separation or divorce case disproves a false

version presented by a party or witness, and the evaluation of evidence in each case is a matter for the court under the principle of free evaluation of evidence.

In Canadian divorce law, the admission of evidence from electronic computer media is standard. Such information (electronic documents) is called *metadata* and is commonly used in divorce cases, among others. This is primarily files stored on computer hard drives and web servers, email records, data from cell phones, voice recorders, back-up systems. Many times such evidence allows the court to reveal details such as the date of the document and its author, modifications made, the date the contents of the document were read. In the current state of the law, Canadian courts allow, among other things, evidence from voice and video recordings, evidence from computer media, so-called screenshots of websites, computer files, hard disks, e-mail, microfilm of documents (Niman, 2011, pp. 2-44).

When deciding whether to admit illegal evidence, the court deciding the case should bear in mind that there will often be a conflict in the case between constitutionally protected values, that is, most often the right to a fair, i.e. also truthful, hearing by the court (Article 45 of the Polish Constitution), and the right to freedom and protection of communication (Article 49 of the Polish Constitution). It is difficult to articulate a general directive on the issue at hand that will apply in all cases, and probably not at all. The procedural decision to admit evidence obtained contrary to the law should take into account the particular circumstances of a particular case, which in one case may justify giving priority to the pursuit of material truth, and in another case giving priority to the right to protect the secrecy of communications. It goes without saying that an absolute ban on evidence should cover, for example, illegal wiretapping of third-party conversations, illegal interception of someone else's correspondence, or hacking into an email inbox (Judgment of the Court of Appeals in Warsaw of July 6, 1999, I ACa 380/99, Lex no. 46757).

PRACTICAL ASPECTS OF CARRYING OUT CYBERSEX EVIDENCE

Proving a partner's involvement in digital infidelity in the course of legal proceedings in the courtroom may involve certain problems, both technical and legal. Issues concerning not only the standard of proof, but also its admissibility, are actualized here. Therefore, in the first place, continuing to consider the doctrine of the fruit of the poisoned tree, it is necessary for the court to assess whether the evidence submitted by a party in the form of, for example, a recording on which activity indicative of marital infidelity was recorded can be carried out. The above-mentioned legal obstacles already signaled, expressed, for example, in the inadmissibility of evidence obtained illegally, can lead to a real loss of the possibility of proving the infidelity of the partner. This applies primarily to those situations in which the law does not legalize the admissibility of the so-called *contrary evidence*. On the other hand, however, the recognition by the trial authority of such evidence as valuable and relevant to the resolution of the case implies the necessity of conducting this evidence, taking into account the existing difficulties.

Another issue of importance in terms of the practical aspects of conducting this type of evidence is whether this evidence will be treated as documentary evidence or other means of proof. As indicated, IT tools are playing an increasingly important role in court proceedings, which is related to the expansion of the catalog of admissible means of evidence. But from the perspective of court proceedings, it is not only the so-called electronic means of evidence that matter. Increasingly, activities undertaken *online* are becoming the subject of proof. It is no longer surprising that the subject of evidence is screenshots of conversations conducted using instant messaging (e.g. Messenger, WhatsApp, Viber, etc.), or screenshots confirming the use of dating sites (e.g. Tinder). However, it is worth noting that communication using modern technological solutions does not always guarantee certainty in terms of maintaining privacy and eliminating the possibility of recording online interactions by the interlocutor or a third party. Therefore, it is necessary to establish the correct regime under which such evidence will be carried out.

According to Article 77³ of the Polish Civil Code (Act of 23.04.1964. – Civil Code (uniform text: Journal of Laws 2023, item 1610), a document is a carrier of information that makes it possible to read its contents. Thus, the legislator introduced a broad conception of the understanding of a document, taking into account the modern use of the development of modern technologies, also reflected in the legal regulations. The legislator's aspiration is to distinguish proof of a document containing text from documents in other forms – such as audio and video recording (Klich, 2016, pp. 202-203). Thus, the legislator introduces two types of documents, textual (information carriers in either written or electronic forms containing text drawn up using alphabetical characters and linguistic rules, making it possible to identify their issuer, who, as to these documents, applied the documentary form) (Feliga, 2023, p. 1414) and non-text (information carriers in written or electronic forms that do not contain text or contain text, but it is not possible to identify their issuer, and in particular include image, sound or image and sound recording) (Zedler, p. 562 et seq.). An electronic document is undoubtedly a means of evidence, which is characterized by differences that clearly distinguish it from the traditionally perceived document on the grounds of civil proceedings (Pilich, 2019, p. 61). The legislator's definition of a document in the cited manner prejudices the technology-neutral understanding of the concept in question. Consequently, it is possible to state that the content of the document can be disclosed in any way and by any means. The limit of the possibility of arbitrary creation of the content of the document, using any medium that makes it possible to get acquainted with it, is the evidentiary function to be performed by the document in civil procedural law, guaranteeing the possibility of preserving and reproducing the recorded information (Klich, 2016, pp. 202-203). However, it should be emphasized that the legislator does not specify what an information carrier is. It can be any tool that will fulfill the purpose of recording information, so it is technologically neutral. What is important is that there is a possibility of reading the content of the information. Thus, traditional media (e.g., a computer printout in the form of credit card statements confirming payments from a joint account of spouses to cover access to widely offered pornographic services, hard drive, flash drive), as well as those that are just gaining popularity (cloud computing) are acceptable. It is irrelevant whether

the content was fixed on paper, in electronic form, recorded in audio, visual or audio-visual form (Załucki, 2023, Legalis). The key evidentiary issue is that it must be possible to determine the issuer of the document. This is because the legislator explicitly in Article 245¹ of the CCP (Act of 17.11.2964. – Code of Civil Procedure, uniform text, Journal of Laws 2023, item 1550), hereinafter: CCP.) determines that the provisions of the chapter on evidence from apply to documents containing text, making it possible to determine their issuers.

Practical doubts arise as to whether, for example, printouts from instant messengers can be treated as document evidence in civil proceedings. Given the condition set by the legislator, according to which it is necessary to ensure that the issuer of the document can be identified, the answer to the question posed in this way is negative. However, this does not mean that this type of information cannot be the subject of evidence. Indeed, according to Article 308 of the CCP, evidence of documents other than those listed in Article 245¹, in particular those containing a recording of an image, sound or video, shall be carried out by the court, applying the provisions on visual evidence and evidence of documents, respectively. Significantly, according to the position expressed in the judicature, the documents referred to in Article 245¹ of the CCP constitute evidence in the case regardless of whether they are certified by an attorney for conformity (Judgment of the Court of Appeals in Poznań of 28.07.2021, I ACa 514/20, Legalis). Thus, it is necessary to approve the position expressed in the jurisprudence, according to which Article 308 of the CCP allows to give evidentiary force to printouts of screenshots, while at the same time it is not necessary to certify their contents for conformity with the original. The provision distinguishes a category of evidence from devices that record or transmit images or sounds (Judgment of the Court of Appeals in Lodz of 13.11.2014, I ACa 984/14, Legalis). It is also worth noting the position of the case law, according to which the screenshot and the saved website are evidence in a civil trial under Article 308 of the CCP as image evidence (Judgment of the Court of Appeals in Katowice, 16.11.2021, V AGa 411/20, Legalis). This is because it is not possible to assume that the content of a conversation contained in a computer printout (e.g., from instant messaging correspondence) is consistent with the actual state of affairs. However, it should be assumed that this means of evidence proves the existence of a computer

record of a certain content at the time the printout was made (Judgment of the Court of Appeals in Warsaw of 22.03.2022, V ACa 756/21, Legalis; Judgment of the Court of Appeals in Krakow dated February 8, 2013. – I ACa 1399/12; Order of the Court of Appeals in Wrocław dated October 12, 2012, I ACz 1810/12, Legalis). The fact that such evidence can be easily modified and prepared does not deprive it of its evidentiary power.

Assessing the reliability of cybersex evidence is also a fundamental practical problem. This is due to the lack of physical contact between the persons involved in the interactions, because in the case of digital infidelity, they take place in virtual space, which can make it difficult to collect concrete physical evidence or testimony of direct actions. These difficulties are further compounded when the unfaithful partner used private or fictitious accounts or security features. Many times it is impossible to prove the fact of infidelity leading to the complete and permanent breakdown of marital relations. Of course, in cases where it is possible to gather reliable messages, photos, videos or other recorded forms of communication clearly prejudging the infidelity of the spouse, it may be easier to prove the infidelity of the spouse. On the other hand, however, if the partner is cautious, as manifested, for example, in removing traces of his activity, finding evidence may prove more difficult.

In addition, this evidence is most often in digital form (e.g. text messages, photos, video recordings, etc.). This creates the risk of their alteration and falsification, which in turn makes it difficult to assess their authenticity and reliability. In this case, the need for expert IT evidence updates. In Article 254 of the CCP, the legislator has abandoned the requirement to test the veracity of handwriting only, expanding the scope of scribal expertise to include issues related to the preparation of a document in electronic form. This means direct consideration not only of the traditionally known forms, i.e. oral and written, but also of the electronic form and the documentary form. The latter is important insofar as it acts as an intermediate form between the written and electronic forms and the oral form. The basis for the examination of the veracity of a document, therefore, are the circumstances that cast doubt on the veracity of the information contained therein, as well as the signature with which it was affixed. Allegations of the falsity of both the signature and the content of the document itself will in most cases require evidence from an expert in handwriting examination,

as well as the veracity and integrity of electronically recorded data. In the event that forged documents appear in court proceedings, the parties are entitled to raise objections in this regard (Klich, 2016, pp. 204-205).

Thus, the subject of the forensic opinion will be to determine first of all whether the material presented in court has not been tampered with, falsified, as well as whether it bears the characteristics of originality. One must agree with the thesis that the assessment of the evidentiary value of an electronic document will be affected primarily by its authentication, the primary task of which is to verify the reliability of the evidence. It includes: a) determining whether the content of the records has changed since its creation; b) determining the source of the data contained in the document; c) testing the veracity of the data associated with the record (Lach, 2004, p. 165 et seq.). Indeed, the role of the IT expert in these cases is to enable the court to assess whether, for example, the record of the recording is authentic, whether it has not been tampered with in any way, or whether it has been properly edited in a way intended to achieve a predetermined effect by the betrayed partner. The catalog of sources constituting the basis for examining the veracity of a document has been significantly expanded, by including, among others, data carriers (digital cameras, hard drives, handheld USB flash drives, or CD/DVD/BD, etc.), computers, or network traffic (Klich, 2016, pp. 205-206). An expert computer scientist has specialized knowledge not only of computerization and the classic use of modern technological solutions, but also of the specifics of creating and using computer programs and processing information in computer systems. Therefore, he should be required by the court to perform a technical analysis of digital evidence in a way that makes it possible to determine its authenticity, source, or date of preparation. It should be emphasized that the analysis of digital records is not based on uniform technical standards or the selection of analysis methods. This, in turn, can lead to the formulation of a subjective opinion, lowering the so-called standard of proof. Of course, the expert is obliged to give a guarantee of due performance of his duties. But in this type of case, giving an opinion is fraught with a rather high risk of formulating an unobjectified opinion. The most common mistake made by the procdes authority is to formulate the questions to the expert in a way that leads the expert to formulate a legal assessment. An example is the question of whether the materials contain pornographic content. It should be stressed

emphatically that the role of an IT expert is not to provide a legal opinion, but to provide an opinion based on his expertise. This is because he performs an auxiliary role to the trial authority. Therefore, he should answer the question of what is in the submitted material, not what is the nature of it. The IT expert faces the challenge of assessing the authenticity and integrity of the digital material submitted for an opinion. This is a fundamentally complex process, although the use of appropriate methods and tools certainly facilitates it. What is important, however, is that the party requesting proof of cybersquatting correctly delineates the thesis of the evidence. According to Article 235¹ of the Polish CCP, in a request for evidence, a party is obliged to designate the evidence in a way that makes it possible to carry it out and to specify the facts to be proved by this evidence. The procedural authority in the order to admit evidence is obliged to designate the means of evidence and the facts to be proved by it. If necessary and possible, the court should also specify the date and place where the evidence is to be taken (Article 236 § 1 of the CCP). In turn, the importance of the content of the request for evidence is directly determined by Article 236 § 2 of the CCP, according to which it is sufficient that the court refers in the order to the content of the party's request. This applies when the issuance of a decision on the admission of evidence was requested by a party. An important instrument that can minimize the attempt to submit to the court documents that raise doubts, for example, about their authenticity. This is because the court may, if necessary, summon the issuer of a document drawn up in electronic form to provide access to the computer data carrier on which the document was recorded. This disposition is expressed by the legislator in Article 254 § 2¹ of the CCP. Providing access to the computer data carrier should be equated with its transfer to the procedural authority together with the information recorded on them, which is the basis for verifying the veracity of the document. In the event that it will be possible to provide access to an IT data carrier not only by physically submitting it to the procedural authority, but also by making an electronic transmission of the contents recorded on it, it seems reasonable *de lege ferenda* to include such a possibility in the provisions of the procedural law, while ensuring a high level of security.

In addition, a significant impediment from an evidentiary perspective when conducting cybersex evidence is the pursuit of privacy. After all, seeking

to prove a partner's participation in cybersex may violate his privacy and security, as well as that of a third party to the interaction. This is particularly possible in situations where the evidence captures intimate content. A guarantee for ensuring privacy is that the legislature provides for the case to be heard in camera. The general rule is expressed in Article 153 § 1 of the CCP, according to which the court *ex officio* orders that all or part of the hearing be held in camera if the public hearing of the case threatens public order or morals. *Lex specialis* to this post-rule is Article 427 of the CCP, according to which hearings in cases heard in separate proceedings in matrimonial cases shall be held in camera, unless both parties request that the case be heard in public, and the court finds that openness does not threaten morals. Consequently, it should be considered that the principle of openness suffers a limitation in the case of matrimonial cases.

To conclude the considerations made, it is worth pointing out that in the case of proceedings in which a party requests evidence of cybersex, it is crucial to comply with legal regulations (in particular, regarding the possibility of using so-called evidence obtained in an illegal manner), as well as to cooperate with experts specializing in cyberlaw, as well as expert computer scientists, while respecting ethical principles. It is worth noting that evidence of cybersex can also have a significant impact on pending matrimonial proceedings and can be a significant reason for limiting the right to exercise parental authority, or even – for its termination. The reason for this is that children in a family in which one spouse pursues cybersex may be exposed to a significantly higher degree of accessibility to pornographic content. This, in turn, can contribute to minors experiencing trauma, abuse, or be the cause of addiction. At the same time, the use of pornography on the Internet and its association with sex can harm sexual and social development (Weinstein et al, 2015, p. 2). Consequently, this may result in difficulties in establishing relationships in the future.

CONCLUSION REMARKS

The paper discusses cybersecurity standards and their implications for the acquisition, admissibility, and reliability of cybersex evidence. Incorporating cybersex evidence in divorce proceedings brings a set of challenges, especially related to the violation of privacy rights, data protection, and the potential for cybercrime. These challenges necessitate a careful balance between legal requirements, cybersecurity, and ethical considerations. The research underlines the need for a defined legal framework within the Polish Civil Procedure to deal with cybersex evidence, highlighting the importance of cybersecurity in shaping these guidelines. In conclusion, the potential use of cybersex evidence in divorce proceedings in Polish Civil Procedure, while complex, provides an opportunity for legal growth. However, the introduction of such evidence needs to be handled with care, respecting privacy rights, data protection regulations, and cybersecurity principles.

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