TALLINN UNIVERSITY OF TECHNOLOGY
School of Business and Governance
Department of Law

Katrin Virgebau

PROTECTION OF THE CHILD`S BEST INTERESTS THROUGH IMPROVEMENT OF FAMILY MEDITATION SERVICE AS A STATE SERVICE IN ESTONIA

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Supervisor: Kristi Joamets, PhD

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I hereby declare that I have compiled the thesis independently
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Katrin Virgebau

(Signature, date)

Student code: 215420HAJM

Student e-mail address: kvirgebau88@gmail.com

Supervisor: Kristi Joamets, PhD:

The paper conforms to requirements in force

……

(signature, date)

Chairman of the Defence Committee:

Permitted to the defence

……

(name, signature, date)

TABLE OF CONTENTS

ABSTRACT

The aim of the master's thesis is to take a closer look at an amendment to the law that will come into force in 2022, creating a national family meditation service in Estonia. Although a lot of work has been done to protect children's rights year after year, and things are getting better every year, according to the Estonian Ministry of Social Affairs, there are still too many disputes that burden the courts, child protection specialists and other relevant authorities[1].

The main objective is to examine whether the exclusion of qualification requirements for family carers from the legislation has a negative impact on the protection of children's rights, and to broaden the discussion to other complementary aspects and other shortcomings in the legislation.

This is a qualitative study using different methods of interpretation of the law, including grammatical and teleological interpretation. The author analyses the current Conciliation Act and the Estonian Civil Code, which have been substitutes for the new Family Conciliation Act in the current legislation, and identifies possible problem areas.

The main outcome is that legal framework for the new amendment is definitely necessary but it still does not solve issues from the past attempts if not presented properly.

Keywords: Family meditation, child`s best interests, family law, meditator`s qualification

[1] https://sotsiaalkindlustusamet.ee/et/uudised/valitsus-kiitis-heaks-riikliku-perelepitussusteemi-loomise

INTRODUCTION

The obligation to care for and bring up a child and the protection of the child and the parent derives from the Constitution of the Republic of Estonia § 27[2] and also Article 27 of the Convention on the Rights of the Child which is in force at international level and obliges the person responsible for the development of the child, who is generally the parent, to ensure the necessary conditions for the development of the child. In international private law, the applicable legislation must be taken into account, namely national legislation, EU regulations and international treaties.

Under Article 3 of the Convention on the Rights of the Child, the executive or legislative body, the courts, the State, private social welfare institutions have a duty to give primary consideration to the best interests of the child in all matters relating to the child. Within the State, the protection of the best interests of the child is enshrined in the Child Protection Act § 5(1)(3)[3].

A great deal of work has been done to protect children's rights in recent decades, but the world is constantly changing and so are the issues at stake. While at one time a marriage certificate was enough to resolve the differences that arise in divorce or other disputes, today there are many more variables to consider. For example, open borders, cultural mixing, and different forms of cohabitation other than marriage, and the regulation of these forms of cohabitation at both local and international level[4]. In the context of cultural mixing, in addition to the differences caused by cultural differences due to globalisation, we also have to take into account the population of our own country, a third of whom, according to the Estonian Statistical Office, do not speak Estonian and are therefore unlikely to share the same customs and culture. In addition to the different forms of cohabitation, there are also factors relating to reproductive rights and the rights and obligations that go with them.

[2] The Constitution of the Republic of Estonia. RT I, 15.05.2015, 2, 27.
[3] Child Protection Act. RT I, 12.12.2018, 49, § 5 (1) 3
[4] Crespi, I, Meda, S. G, Merla L. (2018). Making multicultural families in Europe. Switzerland: Palgarve Macmillan.

As alternative dispute resolution has become more widespread across the EU, including in family law, so too has the increasing voluntary nature of these methods. However, in conceptual terms, forced mediation runs counter to the nature of mediation and the basic principles of conciliation[5]. In Estonia, family disputes are settled in the framework of civil proceedings and there are special rules for the use of mediation in family disputes[6].

Conciliation should be based on the parties voluntarily resolving the dispute. However, it is understood that conciliation can only be coercive to the extent that the parties are obliged to attend an informative event explaining the purpose and nature of conciliation. And, on that basis, it is not as if conciliation would be inconsistent with the parties' voluntary participation in or initiation of the conciliation process. Similarly, reducing the voluntary nature of conciliation calls into question the quality of justice.

A key condition for the success of mediation is that people have confidence in the legitimacy of the outcome of the process, in the process itself and in the quality of the process. The content of family mediation must be about reaching agreements that are beneficial to the parties and that both parties are happy with. Ultimately, the positive or negative outcome of any dispute resolution method will depend on the willingness of the parties themselves to use it, but it is certain that less confrontational procedures will achieve a positive outcome sooner, and that less confrontational methods will not damage relationships as much. It is possible that the parties' motives for using alternative dispute resolution methods to court proceedings may be more about time and money rather than an understanding of the more substantive considerations or the longer term. The Estonian public in general also does not seem to be well informed and aware of the ins and outs of family mediation as family disputes are dominated by formalities. An average person is usually not in a position to even go to court on their own because of the lack of knowledge and understanding, and it is necessary to hire someone with the appropriate education and knowledge.

The use of family mediation as an alternative dispute resolution is also hampered by confusion over terminology on the one hand, and by society's lack of awareness and understanding of the meaning of the different methods on the other. It should be borne in mind that the terminology of

[5] Quec. D. (2010). Mandatory Mediation: an Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program.― *Cardozo Journal of Conflict Resolution* 11, 481.
[6] Code of Civil Procedure RT I, 28.12.2016, 22.

ADR is specific to the field and that a person who is not familiar with a particular subject is not aware that there are different ADR methods and that their techniques and outcomes vary.
The subject is topical as the Resettlement of Families Act comes into force in 2022. Efforts so far, also through various collaborative projects between the Child Protection Association and the Bar Association, advising families free of charge on family law issues, have not significantly moved closer to achieving the goal and continue to show the need for a national family support system. The author discusses the legislation currently in place and also the amendments that are being drafted. In addition, the author also gives an overview of the European Union Green Paper on which the new law is based, which sets the general framework and conditions for the new legislation. The author agrees that the need for a Family Settlement Act is appropriate but that a thorough analysis of the impact of the amendments is needed to avoid over-regulation of the legislation and to make sure that the new law is accompanied in practice by the principles of the Convention on the Rights of the Child on the welfare and rights of the child.

For the analysis of child welfare and best interests, the author uses the views of various authors in scientific articles both abroad and in Estonia, as well as national legislation, EU regulations and international conventions. The work also uses statistical data to analyze the results of the research question and to open up the theoretical approach. The source of the statistical data is official statistics issued by the relevant authorities. Since the aim of the legislation to be drafted is to ensure the best interests of the child and to reduce the burden on the courts and other bodies, it is necessary to determine whether and to what extent the changes would achieve this aim.

A balance needs to be struck between regulation and over-regulation. Over-regulation is counterproductive. For example, Black[7] has pointed out that over-regulation hampers both economic growth and overall welfare and is one of the problems of a post-industrial society. Other authors[8] add that over-regulation produces a restriction of individual freedoms through state programs, and that if excessive regulation does not take account of the self-regulatory mechanisms at work in society, the result cannot be positive[9]. In his work, Sõlg has pointed out that regulation must be based first and foremost on the needs of society and not solely on the vision of the drafter

[7] Black, D. (1989). *Sociological Justice*. Oxford University Press.
[8] Carlsson, A. E. (2001). Recycling norms. California Law Review, 89, 5.
[9] Triipan, M. (2006). Proportsionaalsuse põhimõte Euroopa Liidu õiguses. Juridica, 3, 151- 158.

Sõlg[10]. Over-regulation leads to a blurring of the clarity and transparency of the legal order, with indirect and direct economic costs.

The topicality of the choice of subject in society is confirmed by the statistics collected on the contacts between the various authorities and the media coverage. The aim of this work is to find out whether the new law on family reunification is in the best interests of the child. In order to do this, it is necessary to answer the research question whether the qualification requirements for mediators written into the planned law ensure the best protection of the rights of the child on the basis of the principle of the best interests of the child. This is a qualitative study using different methods of interpretation of the law, including grammatical and teleological interpretation. The author analyses the current Estonian Conciliation Act and the Civil Code, which have been substitutes for the new Family Conciliation Act in the current legislation, and identifies possible problem areas.

In the first chapter of the thesis, the author analyses the developments that have taken place over the last decade in the field of the best interests and welfare of the child, both at national and international level. As well as the current legislation in the field of mediation. In the second chapter of the thesis, the author focuses on the impact of the new legislation and the extent to which it meets the objectives set out in the draft legislation, and whether or to what extent the changes introduced will better protect children's best interests in the light of the principle of the best interests of the child.

[10] Sõlg, R. 1999. "Õigusakti eelnõu ettevalmistamise organisatsioonilised küsimused." Kogumikus: *Õigusriigi printsiip ja normitehnika*. Tartu: Sihtasutus Eesti Õiguskeskus.

1. SUBJECTS AND REASONING

1.1. Interpretation of child`s best interests

In the European Union, the best interests of the child are defined as." "what is in the best interests of the child's mental, moral, physical and material well-being[11]". "From this perspective, children have an important place in both the political and the legal landscape, and it is the duty of the State to ensure, in all circumstances and using all means at its disposal, the permanent protection of children. Despite this, in practice, however, not everything is as good as it could be because there is too much room for interpretation and an inadequate legal framework. On the practical side, there is still a large number of children who do not have a full life. Who are not guaranteed a secure living environment, stability and mental well-being. In addition, in practice there is room for interpretation in the Convention on the Rights of the Child[12] and the Convention lacks enforcement mechanisms. Also, people's own awareness seems to be lacking, both of the primacy of the rights of the child and of the possibilities that currently exist both to resolve disputes and to protect the child's welfare.

Children and their well-being and needs are very different due to differences in families, origins and other factors. In order to assess a child's needs and wellbeing properly, it is necessary to look at each child individually without making generalisations.

The Convention on the Rights of the Child makes it clear that the rights and best interests of the child must be effectively and fully safeguarded, taking into account that the articles of the Convention are equal in nature. In order for these rights and interests to be safeguarded, the principles must be respected in practice. Where different interpretations of the law are possible, preference must be given to the interpretation which is more protective of the best interests of the child. It is therefore the duty of the State to assess the real best interests of the child and to carry

[11] Atangcho, N. A. (2010). Excursion into the Best Interests of the Child Principle in Family Law and Child-Related Laws and Policies in Cameroon. International Survey of Family Law, 63, 65.
[12] Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

out a possible impact analysis to assess the possible consequences[13]. Nor can a state's claim that the best interests of the child have been taken into account be taken into account if the responsible authorities and officials do not have sufficiently updated competences. If there is no such impact analysis, the State's claim that the best interests of the child are taken into account is not valid.

The Convention covers all services, procedures, legislation, proposals, decisions and inaction[14]. The Convention has been widely criticised for being too broad and ambiguous, and a recommendation has been made that it should be interpreted as a set of rules. It is possible to conclude that where there are deficiencies in the guarantee of the rights set out in the Convention, the best interests of the child have been compromised and insufficient account has been taken of the best interests of the child. Article 8 of the Convention on the Rights of the Child provides for the regulation of family relations and gives the child the right to be cared for by his or her parents[15]. Caring for means providing for both material and emotional well-being, as well as a safe and stable environment.

In order to protect the rights of the child as well as possible, state support is needed to create the right environment for children and parents to secure their rights. The need for the development of appropriate processes and legal frameworks has been highlighted in a number of studies and by the authorities and responsible officials. Legislation developed must be objective and transparent, and the impact of such legislation must be assessed and anticipated, both now and in the future[16]. While the primary responsibility is that of the parent to be responsible for and care for the child, it is the role of the state to facilitate and ensure that parental responsibilities are met[17]. Although children are vulnerable for their age, they have the same values and rights as adults and should be treated as full members of society on an equal footing with adults[1819].

As the interests and rights of the child are paramount, courts must be able to demonstrate that the principle of the primacy of their interests has been effectively applied when making their decisions. It cannot be sufficient to claim that the child's best interests have been taken into account, but this

[13] Aru, A. Paron, K. (2015). Lapse parimad huvid. - Juridica VI, 375 – 386.
[14]Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.
[15] *Ibid*.
[16] Avi, A., Kivisild, T., Varul, P. (2004). Restrictions on Active Legal Capacity. Juridica International, 9, 99-107.
[17] Boele-Woelki, K., Braat, B., Sumner, I. (2005). *European Family Law in Action. Volume III: Parental responsibilities.* Oxford : Intersentia.
[18] Peens, B. J. Louw, D. A. (2000). Children's Rights: A Review. - Medicine and Law, 19, 1, 31.
[19] Tobin, J. (2013). Justifying Children's Rights. - International Journal of Children's Rights, 21, Issue 3, 395-441.

must be confirmed by an analysis of the decisions. The primacy of the interests of the child over the rights of the child's parent has also been confirmed by the judgments of the European Court of Human Rights[20]. In the case of substantive discretionary decisions, the facts relating to the judgments must have been gathered by the relevant professionals in order to ensure that the views and outcome are as accurate as possible. Article 6(2) of the Convention states that "States Parties shall ensure the survival and development of the child to the maximum extent possible"[21] but the word maximum in this provision again leaves room for interpretation and is not quantifiable. Proportionality must be the guiding principle. It can also be argued that, in the best interests of the child, it is important for the child to have both parents and for the parents to be able to get along with each other, which also ensures the child's mental well-being. The Convention on the Rights of the Child has explained that in order to better implement the principle of the best interests of the child, a three-tier approach should be used, starting with an assessment of the substantive legal situation and, where there is more than one interpretation of the fundamental value, proceeding on the basis that the principle of the Convention is best guaranteed[22].

In addition, the Convention on the Rights of the Child also clarifies the way in which the principle is assessed and implemented, in order to ensure that the best interests of the child are taken into account, irrespective of the field, and that these interests are always paramount. While the Convention sets out a broad set of minimum obligations for States Parties, Article 3 is increasingly being used as an international source in its own right. For example, when it comes to asylum and refugee issues, returning a child to his or her country of origin, depending on the general situation in the country of origin, may be contrary to the best interests of the Convention and therefore of the child. In Estonia, the best interests of the child are given priority under § 21 of the Child Protection Act, which states that "in taking all decisions affecting a child, in not taking decisions and in considering the options available to the child, the best interests of the child must be ascertained and must be a primary consideration in making the decision[23]". The Child Protection Act § 4 and § 5 clarify the principles for safeguarding the best interests and rights of the child, but in the absence of a general formula and a quantifiable way of assessing the best interests of the child, these provisions must be followed on a case-by-case basis. The principle is that the care and love of both parents is essential for the child, but often the bond between the parent living with the

[20] P.F. v. Poland, no. 2210/12, ECHR 2015.
[21] Committee on the Rights of the Children
[22] *Ibid*,*4*.
[23] Estonian Child Protection Act. RT I, 12.12.2018, 49

child and the child is valued more highly than contact with both parents and this leaves the possibility of restricting the rights of the separating parent and with that detriment the interests of the other parent[24].

Links have also been found between the impact of listening to a child and the child's mental health well-being[25]. In particular, the ability of parents to reach an agreement has the greatest impact on the child. Future life arrangements, hobbies, education, residence and so on are at stake, and not asking for the child's opinion creates feelings of abandonment and exclusion[26]. There has also been a growing political focus on children's legal rights as this is an important societal issue and on children's participation in legal proceedings. In particular, when it comes to the participation of children or adolescents in decisions concerning placement, reproductive rights and health, including mental health and well-being. Article 12 of the Convention on the Rights of the Child also states that children must have the right to participate in legal proceedings. Empirical research confirms that when a child's voice is not heard, there are unacceptable negative consequences.

In short, the best interests of the child have been articulated at both international and national level, but due to the lack of enforcement mechanisms, the lack of measurability at national level due to the wording of the law, and the lack of a legal framework, the best interests of the child cannot be protected to the extent that the best interests of the child are effectively safeguarded.

1.2. Current situation in Estonia

The Estonian Ministry of Social Affairs has been dealing with the issues of child rights and court overload for a long time and various stakeholders such as the Estonian Bar Association, the Estonian Child Protection Association and the Estonian Mediators' Association have been involved in finding the best solutions. Various stakeholders have expressed the opinion that the efforts made so far to protect children's rights have not reduced the burden on the courts or other professionals involved, and that lengthy litigation has not been the most effective in protecting children's rights. Consequently, the government has approved a draft law establishing a national family support

[24] Olm, A. (2013). Non-married Cohabiting Couples and Their Constitutional Right to Family Life. Juridica International, 20, 104-111.
[25] Moore, C. (1986). The Mediation Process: Practical Strategies for Resolving Conflict. San Francisco: Jossey-Bass Publishers.
[26]Melton,G.B.(1999). Parents and children: Legal reform to faciliate children`s participation, in American psychologist. 935,939.

system, with a planned entry into force in September 2022. The creation of a national family mediation system is expected to refer disputing parties to a family mediator, who will help resolve disagreements without a lengthy court process and ensure that disputes are resolved more quickly through intervention and prevent disputes from escalating to a critical point. Third-party consultation would increase the likelihood of reaching an agreement[27].

Over time, a number of studies have been conducted to find links between parental interaction and its impact on children's mental health and ability. How children process and experience emotions has been studied, as well as the extent to which parental miscommunication can affect the brain structure of a child. In one experiment, children's brain responses were measured using electroencephalography while they were shown pictures of pairs with different emotions. Children of quarreling parents were found to be more vigilant, more likely to suffer from stress and anxiety, and more prone to sudden changes. Children of parents who do not get along were also found to have significantly lower academic achievement and were more likely to suffer from anxiety disorders and depression. Such children have problems with self-confidence and have a more negative outlook on the world compared to children whose parents can communicate normally. Children of such parents are also more likely to fall into the clutches of addiction in the future, and their own relationships will be affected in the future because their ability to trust people is impaired and their capacity to solve problems and resolve conflicts is significantly reduced[28].

For the purposes of the present Act, a conciliator is:

1) a natural person to whom the parties have entrusted the activities described in subsection 1(2) of this Act. The conciliator may act through a legal person, being in an employment or other contractual relationship with that legal person;

(1) An attorney-at-law may act as a conciliator within the meaning of this Act if he has submitted an application to that effect to the Board of the Estonian Bar Association. The information on the advocates wishing to act as conciliators shall be forwarded to the Minister responsible for the field.) In addition to the provisions of this Act, the relevant provisions of the legislation regulating the professional activities of lawyers shall apply to the activity of an advocate as a conciliator, including the financial liability arising from such activity.

[27] Kolbusz, J. Alternative Dispute Resolution. *Journal of the American Academy of Matrimonial Lawyers*, 2010, 23 (2), 404.

[28]Foley,M. (2021). Retrieved from: Is It OK to Argue in Front Of Your Kids? Parents Last accessed 15.03.2022

3) a notary in the case referred to in § 16 of this Act; on the basis of an application by the notary, the Chamber of Notaries shall register the notary as a conciliator. The provisions of the legislation regulating the professional activities of notaries shall apply in addition to this Act to the conduct of conciliation activities by notaries, including the property liability arising from such activities.

(4) A notary may refuse to conduct conciliation. Once a notary has commenced a conciliation, he may only discontinue its conduct in the cases provided for by law, including the cases referred to in § 11(4) and (5) of this Act.

(4) A notary may refuse to conduct a conciliation. If the notary has undertaken to conduct the conciliation, he may only discontinue the conciliation in the cases provided for by law, including the cases referred to in § 11(4) and (5) of this Act.

4) in the case provided for by law, a state or local authority conciliation body[29].

Paragraph 2(1) of the present Conciliation Act is simply another good example of leaving too much room for interpretation, and although the Explanatory Memorandum to the Conciliation Act slightly reduces this room for interpretation, the powers and competences of the conciliator are not defined. The question arises as to why the competence of a family mediator is considered less important than that of, for example, a doctor or a lawyer, whose qualifications are very clearly defined.

The obligation to care for and bring up a child and the protection of the child and the parent derive from the Constitution of the Republic of Estonia, § 27[30], and Article 27 of the Convention on the Rights of the Child, which is in force at international level and which obliges the person responsible for the child, generally the parent, to ensure the conditions necessary for the child's development. In international private law, the applicable legislation must be taken into account, namely national legislation, EU regulations and international treaties.

The emergence of cross-border relations has also been boosted by the covid-19 pandemic which has spread over the last two years. Prior to this, there were few workplaces where it was possible to work in one country rather than another, but during the pandemic many companies were forced to adapt their processes to continue doing business. As a result, there was an explosion in the number of jobs that could be done remotely online. This is an important nuance since the Code of

[29] Conciliation Act. RT I, 2009, 59, 385.
[30] The Constitution of the Republic of Estonia. RT I, 15.05.2015, 2 § 27.

Civil Procedure (CCP), under section 70 [31], determines international jurisdiction. For example, where a Member State is involved, Section 70(4)(3) of the CCP applies and Regulation No 4/2009 of the Council of Europe applies.

The Council of Europe has created Regulation 4/200942[32] to prevent "chasing" by a Member State with a better legal system, Article 7 of which allows national courts to hear a dispute in exceptional cases where no national court has jurisdiction under Articles 3, 4, 5 and 6[33]. Although, in general, the presumption should be that the dispute relates to the specific Member State of the Member State seized if proceedings cannot reasonably be conducted and brought in the third country concerned[34]. The provision is also relevant under Article 4 where, for example, there is an agreement conferring jurisdiction on the parties or jurisdiction based on the defendant's appearance in court under Article 5 [35]. That is to say, the Regulation is primarily intended to create a situation in which the dispute is settled in a country with which the parties have a real connection. From the point of view of private international law, a foreign court must include those institutions which the foreign country itself considers to be a court and, in some cases, those institutions which, although not traditionally considered to be a foreign court, are nevertheless considered to be such under private international law. For example, according to the meaning of Article 2(1) of Regulation No 4/2009 on maintenance obligations, the term "court or tribunal" means an administrative authority of the Member States which has jurisdiction in matters relating to maintenance obligations and therefore the right of the parties to be heard is guaranteed, as is the impartiality of the authority.

The war in Ukraine and the massive influx of refugees certainly raises the profile of this issue as refugees come with their families, including children. Ukraine is a party to the Lugano Convention of 2007 and has a cooperation agreement with Estonia in criminal and civil matters[36].

A wide range of factors such as pandemics, general global economic changes and the political situation contribute to parental disagreements and separation. All of these factors create tensions,

[31] Code of Civil Procedure RT I, 28.12.2016, 22.
[32] Nõukogu Määrus (EÜ) nr 4/2009, 18.12.1998, kohtualluvuse, kohaldatava õiguse, kohtuotsuste tunnustamise ja täitmise ja koostöö kohta ülalpidamiskohustuste küsimustes. - ELT L 7, 10.01.2009.
[33] *Ibid*, art. 7.
[34] Lepik, G., Torga, M. (2013). Hagi tagamine ja esialgne õiguskaitse tsiviilasjades: rahvusvaheline mõõde. – Juridica X, 742-751.
[35] *Ibid*, art. 4, art. 5.
[36] Agreement between the Republic of Estonia and Ukraine on legal assistance and legal relations in civil, family and criminal matters. RT II 1995, 13, 63

and people's emotional situations are in a constant state of tension because of what is going on around them, and it doesn't take much more for conflicts to arise[37]. For example, the pandemic deprived people of the possibility of privacy in couple relationships.

The proportion of live births outside marriage in the EU stood at 42% in 2018. This is 17 percentage points above the value in 2000. It signals new patterns of family formation alongside the more traditional model where children were born within a marriage. Extramarital births occur in non-marital relationships, among cohabiting couples and to lone parents[38].

A number of studies, including a study commissioned by the State Chancellery and carried out by the Centre for Social Science Research at the University of Tartu, have drawn attention to the qualifications of officials, lawyers and many other professionals involved in family law disputes. For example, there have been situations where the lawyer representing the child and the judge do not correctly understand the content of the right of guardianship and equate it with consent to a transaction. There is also a lack of knowledge to recognise other forms of violence apart from physical violence, and a lack of knowledge to distinguish between staged violence and real violence. For example, manipulation or other mental violence where there are no physical signs of violence but the violence must be identified through signs. There have also been cases where the lawyer representing the child and the child protection worker do not understand the concept of custody correctly, confusing the suspension of custody (Article 140 of the CCP) and the limitation of custody (Article 134 of the CCP) with Article 119 of the CCP (transfer of decision-making rights to one parent) and Article 137 of the CCP (partial transfer of joint custody)[39].

In Estonia, the provisions of the Family Law Act regulate the relationship between parents and children. According to § 113 of the Family Law Act 2 (FLA), parents and children are obliged to support and respect each other and to take into account each other's interests and rights[40]. The problem is that, in the event of separation, the parents either intentionally or unintentionally forget their obligations towards the child and any peaceful communication between the two parties has often become very acrimonious, if not impossible. As a result, a large number of such separations

[37] Estin A. L. (2017). Marriage and Divorce Conflicts in International Perspective, Duke *Journal of Comparative & International Law*, 27, 485-518.

[38] OECD (2020). 42% of births in EU are outside marriage. Retrieved from: https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20200717-1 Last accessed 06.01.2022

[39] Beilmann, M., Linno, M., Vahaste, S., Göttig, T. and Uusen-Nacke, T., Uuringu tellis Riigikantselei. Uuring on valminud Euroopa Sotsiaalfondi kaasrahastamisel. Uuringu koostas Tartu Ülikooli sotsiaalteaduslike rakendusuuringute keskus RAKE. Uuringu autorid: Kerly Espenberg (uuringu metoodika, intervjuude analüüs) Kadri Soo (fookusgrupiintervjuude analüüs).

[40] Family Law Act RT I, 27.10.2020, § 113.

end up in court, placing a burden on the judicial system as well as on child protection professionals and other authorities involved. According to figures from the Social Security Office, 4,000 people come to court each year with child-related issues. Consequently, the State has adopted various measures to keep pace with the changing world and changing circumstances and to enhance the protection of children's rights.

The courts are guiding the parties to family disputes towards alternative methods, but only in the framework of a compromise. People are not yet aware that resolving family disputes within the rigid framework of court proceedings will not achieve the best outcome.
The important role of mediation in family matters has been underlined by several international instruments since 1996, when the Hague Convention on the Protection of Children was established. This has been complemented by EU regulations and the Council of Europe's Ministerial Recommendation on jurisdiction, recognition and enforcement of children's rights in family matters. Family mediation has been a priority in EU policy in recent years as traditional methods no longer work in a changed society, for example when it comes to cross-border family disputes or child abduction.

Models and practices of family mediation exist around the world, and mediation standards have been set internationally by the Society of Dispute Resolution Professionals (SPIDR), the American Arbitration Association and the American Bar Association[41]. They are also similar to codes of conduct that generally exist in the world, such as the European Code of Conduct for Mediators. An expert analysis of the organization of family mediation services in six European countries, carried out by the sea, also mentions the pros and cons of mediation in various countries and recommends that they be integrated into Estonian legislation[42]. It would also be sensible to integrate the standards of the European Code of Conduct for Mediation into the qualification requirements for Estonian mediation service providers, while ensuring that mediators are competent in the various areas of expertise.

[41] Joamets, K., Vásquez,M.C.S (2019). Current challenges of family mediation in Estonia, *Journal of Contemporary European Studies*, 27:1, 109-120.
[42] Rea Uudeküll, (2020), Ekspertanalüüs perelepitusteenuse korraldusest kuue Euroopa riigi võrdlusel. Sotsiaalkindlustusamet.

The Estonian Mediation Association has played an important role in the development of family mediation in Estonia[43]. The Estonian Association of Mediators defines family mediation as a professional service concerning divorce and also general family disputes, while in practice mediation is mostly offered only in cases concerning custody rights. And the wording of the Recommendation's definition, which is used by local government officials, is also very general, stating that mediation is a tool to assist parents involved in conflicts that threaten the welfare of the child.

The European Commission has also put forward a Green Paper on improving the efficiency of the justice system by encouraging countries to use mediation as an alternative to the traditional dispute resolution through legal proceedings. Directive 2008/52/EC was originally intended to facilitate commercial disputes, but the increased awareness of the usefulness of mediation, following its adoption, has made it possible to apply its principles to other disputes as well. The Directive has served as a basis for several Member States to create a conciliation law. And, from a child protection perspective, several international instruments have stressed the importance of family mediation to ensure that the best interests of the child are better protected. Nor was the Directive intended to harmonize Member States' legislation, but to ensure that a decision resulting from a mediation procedure in an EU jurisdiction is recognized across the EU. And while Member States were free to implement the Directive as they saw fit, the current EU qualification requirements for mediators have led to regulatory harmonization.

The European Code of Conduct for Mediation Services, developed and adopted by experts in 2004, has certainly contributed to further harmonization and, although it is not mandatory, it is widely used in the field of mediation. Estonia was one of the first Member States to adopt legislation in line with the EU directive in 2010, but the expected benefits have not materialized. In fact, according to the Social Insurance Board, 4,000 people still go to court every year with child-related issues, and the Child Protection Specialists and the Bar Association, which offers free legal advice to families through cooperation projects, are also under pressure.

Along the same lines, various studies in other Member States have shown that, despite efforts, mediation has not become significantly more popular as a result of the Directive and mediation

[43] Rea Uudeküll, (2020), Ekspertanalüüs perelepitusteenuse korraldusest kuue Euroopa riigi võrdlusel. Sotsiaalkindlustusamet.

has not become more widespread. The main reason cited in studies of implementation processes is the weak role of the state in promoting the use of mediation[44].

Mediation is the oldest known method of resolving disputes and conflicts and can be used in any field as long as it concerns human relations. In Estonia, family mediation services were first offered by the Estonian Mediation Association, which received its training from the British National Family Mediation, a family mediation organization in the UK[45]. The Estonian Mediators' Association was the only one to offer family mediation services, and the service was funded by the Estonian Ministry of Social Affairs, and after 2001 family mediation services started to be offered by private practitioners[46]. Between 2008 and 2010, a draft amendment to the Social Welfare Act was drafted with the aim, among other things, of regulating family support services, but due to a lack of resources, the amendment was put on hold. In 2010, the Estonian Mediators' Association and the Estonian Chamber of Trade Unions started to develop a professional standard for family mediators, and the entry into force of the Mediation Act in the same year created the necessary legal framework for the use of mediation[47]. In 2012, the Estonian Chamber of Skills and Crafts professional council approved the professional qualification of family mediators at levels 6 and 7, which are the only two levels that establish the qualification requirements for family mediators. The Estonian Mediators Association was also the body entitled to award the title of family mediator until 2022[48].

In Estonia, family disputes are settled as civil cases and there are special rules on the use of mediation in family disputes[49]. The Estonian Code of Civil Procedure also contains several sections which have similar features to conciliation and which allow the judge to assist the parties to a dispute to negotiate in court proceedings. For example, Section 4(4) of the Code of Civil Procedure which provides that "the court must, throughout the proceedings, use its best endeavors to ensure that the case or part of it is settled by compromise or other means by agreement between the parties, if the court considers this reasonable. To this end, the court may, inter alia, submit a draft compromise agreement to the parties or summon the parties personally to appear before the court, as well as propose that they settle the dispute out of court or refer it to a conciliator. If the

[44] D'Urso, L. 2018. "A New European Parliament Mediation Resolution Calls on Member States and the EC to Promote More Use." Alternatives to the High Cost of Litigation 36 (2): 19–20. doi:10.1002/alt.21721.
[45] Uudeküll, R. (2020). *Supra nota* 30.
[46] *Ibid.*
[47] Lepitusseadus, (2010). *Supra nota.*
[48] Uudeküll, R. (2020). *Supra nota* 30.
[49] Code of Civil Procedure RT I, 28.12.2016, 22.

court considers that, in the light of the circumstances of the case and the course of the proceedings so far, it is in the interests of the settlement of the case, it may order the parties to participate in the conciliation procedure provided for in the Conciliation Act[50].

For its part, the Institute of Reconciliation has also launched an alternative training course in family preservation, as well as a full training course in cooperation with the AL-Institute in Germany. At the end of 2019, the Institute of Reconciliation conducted its first alternative training, which was not so much about decision-based agreement but about deeper reconciliation.

The Estonian Mediators Association has put together a basic training for family mediators consisting of ten modules and 160 hours of academic training. Once the family worker has completed the first 80 academic hours, he or she can start the practice of client work by carrying out the family mediation process as a student. In addition to theoretical knowledge, the future family worker can also acquire practical skills through group work, role-playing and discussions[51].

The strengths of family mediation so far are that there are service providers, training program and municipalities that refer families to mediation and also reimburse the costs of mediation services on a need's basis. Another important strength is that society's view of the role of the father is changing and parental equality is expected. Although Devlin emphasised in his earlier work the need for a balance of good and bad in terms of power on the male side, the power position in the male role has long been on the female side[52]. On the downside, access to family mediation services is uneven due to the lack of supervision, the absence of a register of family mediators and the high cost of the service. The nature of the work is also demanding, requiring impartiality and capacity on the part of the family career, and family careers are not able to cope with stress and strain. It should also be possible for the family counsellor to obtain information about the family before the meeting in order to mitigate security risks, and there should also be the possibility of refusing to provide the service if there are certain specific criteria which could put the family counsellor at risk.

[50] *Ibid*.
[51] Uudeküll, R. (2020). *Supra nota* 30.
[52] Devlin, P. (1965). The Enforcement of Morals: Morals and the Criminal Law. New York: *Oxford University Press.*

All the more reason why it should be the first choice in family disputes, as mediation can be conducted with the support of a neutral arbitrator without further damaging the relationship between the parties. Sometimes it does not take much effort to resolve a disagreement but simply requires a third party to reflect back to both parties to get the communication working again.
In this context, it is essential that the arbitrator has the skills and knowledge to promote communication between the parties and remain neutral in the long term. Mediation also provides flexibility compared to litigation and should be less costly and more time-efficient.

The arbitrator's expertise and competence is even more important to recognize signs of violence in the relationship. The seriousness of psychological violence and the fact that it is perpetrated by members of both sexes, even though historically violence in relationships has tended to be assumed to be perpetrated by men, should not be underestimated.

In addition to the issue of violence, it is more difficult for the male partner in a relationship to obtain a decision guaranteeing basic parental rights following a separation, as a large proportion of public officials are women[53]. And this can increase solo inequality.

Article 48 of the Istanbul Convention prohibits mediation in cases of domestic violence and states that "Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention[54]".
Or, for example, § 562(1) of the Code of Civil Procedure, which provides that in proceedings concerning children, the court shall, as early as possible and at every stage of the proceedings, endeavor to direct the parties to reach an amicable settlement. The court must hear the parties as early as possible and draw their attention to the possibility of seeking the assistance of a family counsellor, in particular with a view to reaching a common position on the care and responsibility of the child[55].

Section 562(1) of the Code of Civil Procedure is more specific: If a parent informs the court that the other parent is violating a court order ordering contact with the child or is making it more

[53] Liiberg,A.L. (2020). Sotsiaalkindlustusameti statistika.
[54] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. (2011). Retrieved from: https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e Last accessed 14.03.2022 Last accessed 15.03.2022
[55] Code of Civil Procedure RT I, 28.12.2016, 22.

difficult to enforce, the court may, on the basis of an application by the parent, summon the parents to appear before it to settle the dispute concerning the child by agreement. The court does not have to summon the parents if such mediation or subsequent out-of-court counselling has already failed[56] and even if it suggests mediation, it has not made mediation more popular.

The use of family mediation as an alternative dispute resolution is also hampered by confusion over terminology on the one hand, and by society's lack of awareness and understanding of the meaning of the different methods on the other. Different dispute resolution methods involve different strategies and have different outcomes. The Estonian Mediators' Association has pointed out that there is no room for bureaucracy in family mediation and that the new service could rather have a different name than the one used so far. At the same time, the current name and use of terminology does not seem to be easily understood by the people who are supposed to use the service.

It should be borne in mind that ADR terminology is field-specific and that a person who is not familiar with a particular subject is not aware that there are different ADR methods, techniques and outcomes[57]. For example, in ADR terminology, mediation is a process for resolving disputes by allowing the parties to use a mediator as a facilitator of communication but it is a non-binding process where the parties decide for themselves whether and how to proceed with the mediation process. Perhaps the emphasis in mediation is on the environment. However, in mediation, the third party also provides guidance to reach an agreement that is satisfactory to the parties and, depending on the legal form chosen for the procedure, the outcome can be immediate compliance with the agreement. It should also be borne in mind that there are many different aspects that influence people's choices about the methods of dispute resolution in their relationships. For example, it has been pointed out that ignorance of the law and cultural differences lead people to make different choices, which do not always follow a logical logic[58].

Although a separate Institute of Conciliation emerged alongside to the Estonian Mediation Association in 2017, the lack of a common umbrella organization and national service does not

[56] *Ibid*.
[57] Joamets, K., Kerikmäe, T. (2017). European Dilemmas of the Biological versus Social Father: The Case of Estonia. *Baltic Journal of Law & Politics*. 23-42.
[58] Folberg, J., D. Golann, T. J. Stipanowich, and L. A. Kloppenberg. (2016). Resolving Disputes: Theory, Practice, and Law. *New York: Wolters Kluwer Law & Business*.

allow for complete and consistent statistics[59]. In 2020, the Social Insurance Board conducted a survey to identify 40 actively working family careers across Estonia[60]. Stalford has pointed out that mediators should have a very good understanding of the dynamics of family disputes, in addition to an understanding of methods and practical skills[61]. Judges, and indeed other public officials, do not usually have all the qualifications and personality traits to be equally good in the role of negotiator and psychologist. In most cases, the parties to a family dispute are not aware of their legal rights and obligations, and in such cases the involvement of a legal family mediator would lead to a more constructive outcome. Indeed, clarification of the law may lead some parties to a dispute not to go to court, if only for the simple reason that clarification helps them to understand the consequences of court proceedings.

Family reunification is not defined in current legislation. The Conciliation Act directs to the Civil Code for answers, and the Civil Code again directs back to the Conciliation Act for answers. In other words, there is no adequate legal framework.

Without a proper legal framework, regulatory efforts will not lead to the desired result. The classification of out-of-court dispute settlement as a private or public service is also undefined.

One of the most important features of mediation is its lack of discretion and, in its absence, the parties' trust in the process. Being a mediator is not just about legal and technical knowledge. It is also important to have knowledge of the psychological and social impact on family members and those around them, and an understanding of cultural differences in conflict situations[62]. If we take as a starting point the current situation in the 21st century, where not only the Russian-speaking population differs from the Estonian-speaking population in its culture, customs and habits, then every year more different cultures are added to the total of a country. And given that cultural identity is protected under Article 8 of the United Nations Convention on the Rigths of the Child (UNCRC), where everyone, including children, has the right to cultural identity and the protection and importance of cultural identity is also underlined by the United Nations Educational, Scientific and Cultural Organization (UNESCO). Also it is pointed out by severeal authors how and in what sense the cultural identity is important in person`s development[63]. According to the Estonian

[59] Joamets, K., Kerikmäe, T. (2017). European Dilemmas of the Biological versus Social Father: The Case of Estonia. *Baltic Journal of Law & Politics*. 23-42.
[60] Ann Lind-Liiberg. 2020. Sotsiaalkindlustusameti statistika.
[61] Stalford, H. (2010). Crossing Boundaries: Reconciling Law, Culture and Values in International Family Mediation. *Journal of Social Welfare and Family Law* 32 (2): 155–168.
[62] Valma Murry M., Smith, E. P., & Hill, N. E. (2001). Race, ethnicity, and culture in studies of families in context. *Journal of Marriage and Family*, 63(4), 911-914.
[63] Freeman M. (2011). Culture, Childhood and Rights. *The Family in Law*, 15 (5), 15-33.

Statistical Office, a third of the Estonian population is non-Estonian speaking, this issue cannot be taken lightly.

Involvement of the Russian-speaking population has also been lacking so far and, despite the Family Law having entered into force in 2010, there has been insufficient awareness-raising to promote a wider understanding of the Family Law among the Russian-speaking population.

In short, there are a number of institutions in Estonia that are working to uphold the rights of the child and to develop the field in all its aspects, but problems seem to arise faster than solutions are found. And although the Convention on the Rights of the Child requires that the assessment of the child's well-being should begin with the material well-being of the child, the studies carried out so far show that there is a link between the child's mental health well-being and the child's future life as a full-fledged adult, which places even greater demands on the importance of defining the qualifications of family workers.

2. INFLUENCERS AND CHANGES OF FAMILY MEDITATION

2.1. European Comission`s Green paper

The purpose of this Green Paper is to initiate a broad-based consultation of those involved in a certain number of legal issues which have been raised as regards alternative dispute resolution in civil and commercial law[64].

ADR is the main component of dispute resolution in industrial disputes in the Member States and out-of-court procedures are organized by the social partners themselves. ADR is also the main method used in the Member States in disputes concerning employment relations. In the event of failure to settle the dispute, alternatives offered by the public authorities are available. In the field of industrial relations, out-of-court dispute settlement is a good example of the usefulness of the method in dealing with conflicts between collective and individual interests. It concerns both the interpretation of regulatory provisions and the reconciliation of different interests. Procedures vary slightly from one Member State to another, but the general practice is that parties are free to choose whether or not to participate in alternative dispute resolution structures and whether or not to accept the outcome.

The European Commission raised the need for the creation of voluntary dispute settlement mechanisms as early as 2001. In doing so, it sought to maintain the principle of flexibility, good and efficient administration of justice and the quality and accessibility of the mechanisms. In order to achieve the objective, a number of issues had to be addressed in the approach, as global, sectoral and traditional dimensions had to be taken into account. From there, the question of the need for Community-wide rules had to be resolved, bearing in mind that, if rules are necessary, they must be designed to complement existing Community efforts in various aspects of out-of-court dispute resolution. When deciding in favor of common rules, the scope and content of the legal basis and

[64] Green paper on alternative dispute resolution in civil and commercial law- European Commission. Retrieved from: EUR-Lex - 52002DC0196 - EN - EUR-Lex (europa.eu) Last accessed 20.04.2022

the form that the appropriate legal instrument should take must be defined. The choice of the appropriate legal basis is directly related to the measures envisaged, as the choice is between a Recommendation, a Directive or a Regulation, each of which serves a different purpose. In this context, it is stressed that any measures to be implemented on the basis of the principles set out in the Green Paper must respect the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty[65]. Alternatively, if it is decided not to use different legal regimes, it is possible to simply continue at Community level to promote the cooperation and legal research that has been carried out so far, in particular between judges, legal practitioners and also universities, in order to harmonies practices and national legislation on alternative dispute resolution.

Cooperation between the various parties could provide the basis for codes of conduct or specific guidelines. In the case of e-commerce, such a model is working, and at Community level, consumer associations and organisations themselves are creating different codes of conduct to keep them up to date and in line with the different directives. Regardless of the approach chosen by the Community, the issues of third-party status, minimum quality standards and access to justice need to be resolved. Also, the effectiveness of ADR, the extent of third-party liability and the general confidentiality of ADR and the scope of contractual clauses in the use of ADR. Although some Member States have legislation requiring access to ADR before going to court, it is limited to specific areas and has a limited scope. It is also possible for parties to opt out of out-of-court dispute resolution and the dispute will still proceed in court. The use of ADR, as provided for in contractual clauses, may in turn be contrary to Article 6(1) of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, as it may delay access to justice and may impede access to justice. Article 47(1) of the Charter states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article"[66]. The usefulness of binding contractual clauses in terms of voluntariness has been questioned, as the success and outcome of ADR largely depends on the will of the parties, and freedom of consent is expressed at all stages of the implementation of the ADR method, and a consensual approach is a common feature of the ADR method. If the parties retain freedom as to their rights, then in the event of non-compliance with the ADR agreement, it will be necessary to find solutions for the application of contract law and the interpretation of the parties' intentions. In such a case, a breach

[65] Treaty on European Union Article 5

[66] Article 47(1) of the Charter

of contractual obligation would be applicable and a corresponding penalty could be imposed. Another problem is the imbalance of power between contractual parties, where a large number of Member States have adopted legislation to protect the weaker party. In Estonia, one example of this is in the real estate rental market, where the lessee is in a weaker position vis-à-vis the lessor. This situation has led to a long-standing problem of landlord-tenants because there is a number of tenants who take advantage of the legislation to the detriment of the landlord. The problem is sufficiently serious that the Estonian Landlords' Confederation has proposed to the Ministry of Justice to amend the law of obligations by arguing that the state should not interfere in the contract between the parties if the parties have contractually agreed. Another example is the employer's weaker position vis-à-vis the employee. Employment contract law, or labour law, is the law that protects the employee because, firstly, it prohibits agreeing terms and conditions that are detrimental to the employee or that would put the employee in a worse position than the law. Although the performance and conclusion of contracts are also covered by the law of obligations, labour law is a separate area from contract law and, moreover, the general principles of contract law extend to labour law. Similarly, in situations where there are ambiguities, the provision which is more favourable to the employee applies[67].
It is also important to have a time limit when using the ADR procedure, as the time limit for bringing a case to court is shortened and the action may be extinguished.

To this end, several Member States have legislation in place to suspend the limitation period when the parties have recourse to out-of-court dispute resolution bodies. This implies that one measure to promote ADR would be to amend the rules of civil procedure in the Member States, to the extent that the limitation period is interrupted when an ADR procedure is initiated and resumed if the ADR procedure fails. In Germany, for example, such a system is in place and functioning. The introduction of a similar procedure in the Member States would be appropriate in situations where there is a cross-border dispute, where the courts of one Member State have jurisdiction to hear the dispute but the ADR procedure takes place in another Member State, and where the ADR procedure fails. In this case, the parties would not benefit from the rules on limitation periods in the relevant dispute, since to suspend the limitation period, it would be necessary to prove to the competent court that the ADR procedure took place and when it took place. The proof must also be based on uniform rules as to the evidence to be adduced. The Green Paper also discusses the need for minimum quality standards and the procedural principles in ADR. As ADR procedures

[67] Green paper on alternative dispute resolution in civil and commercial law- European Commission. Retrieved from: EUR-Lex - 52002DC0196 - EN - EUR-Lex (europa.eu) Last accessed 20.04.2022

are flexible, it is difficult to monitor compliance with procedural rules. In the context of ADR judicial procedures, the respect of procedural rules by courts and authorities is regulated. While the Commission is also very supportive of self-regulatory initiatives, third-party verification facilities and the establishment of certification systems and trustmarks should also be encouraged. In matters relating to consumer disputes, the Commission has issued two recommendations on the principles applicable to out-of-court bodies in disputes, whether transnational or domestic, thereby providing minimum quality guarantees for out-of-court dispute resolution parties, such as fairness, transparency, efficiency, impartiality and independence. Ensuring this also gives credibility to the respective bodies which meet these criteria and which respect these principles. In order to establish the necessary principles, the Commission has differentiated between whether the third party formally intervenes in the negotiations and therefore has to comply with certain requirements, or whether the third party's role is less intrusive and it can be more flexible in terms of compliance[68]. In one case, the third party will help to bring the dispute to a settlement and must be guided by the principles of fairness, efficiency, impartiality and transparency while in the other case, the third party must comply with the requirement of independence and be guided by the principles of legality, representativeness, freedom, efficiency, transparency and adversarial conduct[69]. The choice of the third party will be facilitated by the guarantees offered by the third party in the light of the ethical rules to be respected, irrespective of whether the third party has been chosen by the parties to the dispute or has been appointed by the relevant body.

The quality of out-of-court dispute resolution is directly dependent on the competence of the third party to the dispute, which in turn raises issues of accreditation and training of third parties, in addition to the ethical rules to be followed. Alternative dispute resolution involves a variety of techniques, and mastery of them without professional training is unlikely. In addition to the quality and general functioning of ADR, professional training is also important for the protection of the parties to a dispute. In the context of ADR proceedings, third parties must prove to the court that they have the appropriate accreditation, skills or training, and the judge will then assess suitability on a case-by-case basis. However, it has also been stressed that the judges themselves also require specific training in this area. Third parties responsible for the resolution of ordinary out-of-court disputes do not have to fulfil such conditions. Sometimes third parties belong to associations that provide training courses for their members and accreditation and certification of their members,

[68] Green paper on alternative dispute resolution in civil and commercial law- European Commission. Retrieved from: EUR-Lex - 52002DC0196 - EN - EUR-Lex (europa.eu) Last accessed 20.04.2022
[69] *Ibid.*

and these associations develop the necessary codes of conduct and codes of ethics. However, if the third party is not a member of a regulated profession, there is still a need to be able to verify its qualifications, and so a specific ADR expertise may need to be established. In the regulated profession, third parties are subject to general rules on the recognition of qualifications between Member States[70].

The function of providing minimum safeguards through third party competence lies with the public authorities, but it is worth considering whether the state will introduce third party accreditation and thereby support the efforts already made by practitioners, without compromising the simplicity and flexibility of ADR[71]. The Green Paper also discusses the liability of third parties, regardless of whether they are involved in ADR proceedings as a private individual or in a public matter. Even if a Member State does not have specific rules on the liability of third parties, they can still be held liable under the general civil liability law of the Member State if a breach of the rules is established in an ADR procedure. To avoid this, the Commission's discussion has proposed defining the precise role of third parties in the procedure and setting up a liability regime. In countries where there are precise rules governing the qualification requirements, it is possible to dismiss or discharge a third party if he fails in his duties. The aim of the Green Paper was to map the current state of play in the use of ADR methods and to generate a broad debate on the development of practical measures to achieve the result that ADR methods can also be used in family law cases[72]. In order to create the most efficient system possible, the analysis was based on the work already done on ADR. For example, some Member States have implemented vocational training programmes, set up ADR advisory bodies or funded ADR structures. As well as informing the public about ADR. Prior to this Green Paper on ADR, the Commission has focused on consumer disputes and consumer disputes with financial service providers, and in this respect ADR methods have worked well[73].
In addition, in the area of consumer disputes, ODR, which is online dispute resolution and can be used for disputes other than electronic commerce disputes, is also addressed.

[70] Green paper on alternative dispute resolution in civil and commercial law- European Commission. Retrieved from: EUR-Lex - 52002DC0196 - EN - EUR-Lex (europa.eu) Last accessed 20.04.2022
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*

The rules on the professional ethics of third parties vary from one Member State to another as well as requirements on how long a person must have work experience or whether and at what intervals an attestation must be renewed. To encourage the development of ADR in the field of electronic commerce, the Community has done a lot of work by financially supporting online ADR initiatives, university research in this field and funding quality control projects. As the ADR methods for resolving consumer disputes that have arisen in the field of electronic commerce raise a number of legal issues, the Commission's recommendation is that ADR methods should follow the same principles as traditional dispute resolution. The limitations and specificities of the online environment and technical aspects were also taken into account. The Community has put in place the necessary legal framework to ensure the validity of virtual agreements and Member States are obliged to ensure the use of electronic mechanisms in their legal systems for the out-of-court settlement of disputes. It has been pointed out that, in practice, consumers prefer to use simpler and more accessible solutions rather than traditional court action. At the time the Green Paper was drafted, it was not possible to make it compulsory by regulation for consumers to have recourse to ADR in the first place, because the systems for doing so were not in place, the procedural relations between courts and ADR were too complex, and it would also create difficulties at constitutional level in some Member States. Both the Commission and the Council stressed their view that it is in the interest of all parties to a dispute to settle their differences out of court and to seek to resolve their disputes amicably and also stresses the importance of continuing work at European Community level on ADR methods in civil and commercial matters[74]. The Commission and the Council are aware of the useful complementary role of ADR in the civil and commercial field, as well as of the great importance of working with it. Following the Vienna European Council in 1998, an action plan was approved by the Commission and the Council which included a reference to transnational family conflicts and which would examine mediation to resolve family conflicts. Thus, the political landscape is aware of the relevance of ADR mechanisms for cross-border family disputes, whether they concern child custody, maintenance or, for example, the division of property. The usefulness of using ADR in extreme disputes is of course doubtful. For example, in disputes about child abduction or failure to return a child to another parent. In the area of extreme disputes, the Brussels II Regulation[75] is an important tool, and also with this Regulation the Commission has sought to promote the use of ADR by establishing a system of cooperation

[74]Green paper on alternative dispute resolution in civil and commercial law- European Commission. Retrieved from: EUR-Lex - 52002DC0196 - EN - EUR-Lex (europa.eu) Last accessed 20.04.2022

[75] Council Regulation (EC) No 2201/2003, 27.11.2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

between authorities and by establishing a system of jurisdiction rules to help determine jurisdiction[76].

In several European countries, in-service training is compulsory for family careers and ensures that family careers maintain their competence[77]. It is also a requirement that the trainee must have a higher education to participate in the training, and a prerequisite that the education must be in the field of pedagogy, social work or law. Relevant or similar education has been considered as a basic knowledge base for a family worker to be able to cope with his/her work. Further training is considered particularly important in specific cases and when the family is in a high conflict situation.

The European Commission for the Efficiency of Justice (CEPEJ) issued advice in 2019 recommending that the accreditation of mediation training be managed by private or sub-private organizations[78]. And attention is also drawn to ensuring that the body taking responsibility is not itself the training provider. Therefore, the responsibility for accreditation should be given to the Ministry of the Interior, which manages the national family mediation system. The Recommendation also includes a proposal for the International Mediation Institute's Certified Mediator Training Program (CMTP) certificate to be awarded to the training programme as a quality certification. The advice given by the CEPEJ is in the form of a Recommendation but, for example, in terms of time, the training of family mediators in Estonia is well within the scope of the Recommendation. As the CEPEJ recommendation sets a minimum of 40 hours of training, the training provided by the Estonian Mediators' Association and the Estonian Mediation Institute is 160 hours. The purpose of this Green Paper is to initiate a broad-based consultation of those involved in a certain number of legal issues which have been raised as regards alternative dispute resolution in civil and commercial law[79].

In the opinion of the author, the developments made at Union level are in line with the principles and fundamental values of the Union and a sufficient framework has been created to enable the

[76] Green paper on alternative dispute resolution in civil and commercial law- European Commission. Retrieved from: EUR-Lex - 52002DC0196 - EN - EUR-Lex (europa.eu) Last accessed 20.04.2022

[77]Rea Uudeküll, (2020), Ekspertanalüüs perelepitusteenuse korraldusest kuue Euroopa riigi võrdlusel. Sotsiaalkindlustusamet.

[78] Nõukogu Määrus (EÜ) nr 4/2009, 18.12.1998, kohtualluvuse, kohaldatava õiguse, kohtuotsuste tunnustamise ja täitmise ja koostöö kohta ülalpidamiskohustuste küsimustes. - ELT L 7, 10.01.2009.

[79] Green paper on alternative dispute resolution in civil and commercial law- European Commission. Retrieved from: EUR-Lex - 52002DC0196 - EN - EUR-Lex (europa.eu) Last accessed 20.04.2022

necessary steps to be taken at national level to ensure the quality of family care services through the establishment of qualification requirements.

2.2. National family meditation service in Estonia 2022

Section 26 of the Constitution says that "everyone has the right to family and private life.". State authorities, local authorities and their officials may not interfere with the family or private life of any person except in cases and in accordance with the procedure laid down by law, in order to protect health, morals, public order or the rights and freedoms of others, to prevent crime or to apprehend a criminal[80]".

This means that interference in family matters by anyone can only be justified in cases provided for by law. In order to assess the well-being of the child, it is also necessary to analyse the family as a whole, since it is the parents who create the living environment for the child and whose participation in family life is the main and direct factor influencing the child's well-being. Where the behaviour of the parents themselves creates a situation where the child's well-being is at risk, the rights of the parent must be curtailed and the child's well-being must take precedence[8182]. In such a case, it is for the court or tribunal to find an appropriate solution on the basis of its discretion and to assess the extent to which the rights and welfare of the child have been violated. In the analysis of a particular case, it is important to identify the factors necessary for the well-being of the child and to give them a tangible value. In order to do this, it is necessary to have the capacity to collect data, to have specific expertise and to be able to involve professionals in the field. Also, according to the judgment of the Supreme Court RKTK 2-17-3347/129, it is stated that if there is no possibility of an unequivocally correct solution, it is necessary to turn to specialists for an assessment, since the court itself does not have the necessary competences and expertise to resolve the case[83].

The aim of the new law is to create a national mediation service that would ensure the best interests of the child are taken into account. The family mediation service to be set up is very close to the obligations and rights arising from the Family Law Act and family law, but is intended to be

[80] The Constitution of the Republic of Estonia. RT I, 15.05.2015, supra nota 4
[81] Ahas,E. (2015). Kas perest eraldamine on liigne sekkumine perekonnaautonoomiasse või üks lapse huve tagavatest meetmetest? – Juridica, VI, 402.
[82] . Kullerkupp, K. (2001). Family Law in Estonia. – International Survey of Family Law, 95-110
[83] RKTK 2-17-3347/129

situated between the legal protection system and the social system, without being a social service. In the drafting of the Act, consideration was given to the possibility of integrating the regulation of family support services into the existing Conciliation Act, but a decision was taken in favour of a separate Act, as the Conciliation Act is a general law.

Section 11(3) of the draft Act provides that the child protection worker and the family mediator shall cooperate with each other when the need arises. Section 8(1) of the Child Protection Act requires that, in order to safeguard the rights and well-being of the child, the authorities of the State and local authorities and their officials, as well as legal persons governed by public or private law, shall cooperate with each other in the planning, financing and implementation of all measures aimed at children, involving children, parents, careers, interest groups and the general public[84].

The importance of family law for the protection of the best interests of the child has been underlined by a number of international instruments, including the Parental Responsibility and Protection of Children (Hague Convention) and the European Convention on the Exercise of the Rights of the Child. However, cooperation between the family worker and the child protection worker has also been considered important. The new law takes into account the international principles applicable to family mediation, one of the most important being the neutrality and impartiality of the mediator. In order to ensure this, the family mediator will be an external member of the network alongside other professionals working with children, and under the new law the cooperation will consist of the family mediator having information on the child's previous hearing and, if necessary, being able to communicate separately with the child protection worker on this issue[85].

The aim of conciliation meetings is to assist parents to reach an agreement on the child's future living arrangements based on the best interests of the child and to keep the best interests of the child at the center of the conciliation meeting.

Concerns have also been raised about the high proportion of female officers and the limited opportunities for fathers to be treated equally in child-related proceedings. It has been suggested that the recruitment of men as family mediators should be encouraged and that family mediators should be trained in equal numbers of both sexes, and that the number of contracts for family mediation could be equal between men and women. In Norway, for example, it is advisable to use both male and female mediators to ensure gender balance, especially when mediation is a special

[84] Child Protection Act. RT I, 12.12.2018, § 8 (1)

[85] Coordination chart for the draft law. Retrieved from: https://eelnoud.valitsus.ee/main/mount/docList/b2962c6c-492b-410d-bd6d-711b263b4a30#KsTzOHDs Last accessed 10.05.2022

case.The proposed law does not take account of the soloist division and clearly states that a person who meets the requirements laid down in the law and whose suitability has been approved by the Estonian Social Insurance Board can become a family career[86].

According to § 7(1)(3) of the new draft Act, the consent of both parents is required to participate in family mediation, but this may lead to a situation where the other parent does not give consent and the service cannot be provided. Out-of-court family mediation is intended to be voluntary in nature, and in such cases the Estonian Social Insurance Board will issue a certificate confirming the successful completion of the mediation, which can be used as a basis for court proceedings. However, the draft does not exclude the possibility of recourse to the courts, and judges are left free to decide whether or not to refer a family-to-family mediation. The court may also decide not to refer a family for family reunification if one of the parents has been violent towards the other parent or the child, or if there are other good reasons.
The relocating judge is appointed by the Estonian Social Insurance Board as the choice of the parties involved may create further conflict in the relationship and prevent the process from being prolonged by one or both parents.
Another issue has been the powers of the coordinator of the Social Insurance Board under the new law, as the coordinator will have the power to confirm the suitability of the parenting agreement. The powers of such a person should be significantly greater than those of the national family representatives foreseen in the future law. In the event of failure to approve the parenting agreement, the dispute will continue before the county court under section 29 of the Contracts Act.

Models and practices of family mediation exist throughout the world, as well as internationally established mediation standards by the Society of Dispute Resolution Professionals (SPIDR), the American Arbitration Association and the American Bar Association. They are also similar to codes of conduct that generally exist in the world, such as the European Code of Conduct for Mediators. An expert analysis of the organization of family mediation services in six European countries, carried out by the Social Insurance Board, also mentions the pros and cons of mediation in various countries and recommends that they be integrated into Estonian legislation[87]. It would also be sensible to integrate the standards of the European Code of Conduct for Mediation into the

[86] Law on national family support services. RT I 31.03.2022, 15.
[87] Uudeküll, R. (2020). *Supra nota* 30.

qualification requirements for Estonian mediation service providers, while ensuring that mediators are competent in the various areas of expertise.

As Estonian family law is largely based on German family law, it is pertinent to note that in Germany, for example, family mediation organizations have come together and created a web-based system for people to apply for family mediation, and that user-friendliness is ensured by the possibility to choose a mediator according to location, educational background and qualifications. And although the differences between countries are due to the fact that family law is in itself a national law, this does not prevent the integration of best practices from other countries[88]. The EUMC has also suggested following the best practices of mediation in other countries such as Finland, Norway, Lithuania and the UK, where the mediation process is more developed and where there is some general picture of the functioning of the measures implemented[89].

According to Article 11, the hearing of the child in the conciliation procedure must be carried out in all cases unless there are good reasons for not doing so. This wording is very general and does not take into account the age and developmental level of the child and may not be in the best interests of the child. Although according to Article 21(1) of the Children Act, the best interests of the child must be ascertained in all decisions affecting the child and must be a primary consideration in the decision and according to Article 21(2)(2) of the Children Act, the child must be heard in a manner appropriate to his or her age and level of development in order to ascertain the best interests of the child, and the child's opinion must be taken into account as one of the factors in the ascertainment of the best interests of the child in accordance with his or her age and level of development, the wording of the new Act should nevertheless be clarified. Moreover, the obligation and principle arising from Article 21 of the Brussels IIb Regulation that the child must be given the opportunity to be heard in the proceedings against him or her in order to ascertain the child's best interests will apply. However, it should be made clear in the position of the family support service that, in the course of the family support service, the person responsible for the family support service shall hear the child in dispute on matters relating to the organization of his or her life, if the child's level of development so permits. It would also be necessary to set out an indicative and open-ended list of grounds for not hearing the child.

[88] Lüderitz, A. (2005) *Perekonnaõigus*. Tallinn: Juura.
[89] Uudeküll, R. (2020). *Supra nota* 30.

According to the new § 561(1) of the Code of Civil Procedure, parents are generally required to undergo a conciliation procedure in the case of arrangements for communication with the child already before going to court, except in cases of violence or for other good cause (§ 561(2)). The explanatory memorandum to the draft also states that the mediation procedure is compulsory, and other good cause is the situation where the parents and their problems are known to the court from an earlier stage and the court considers that a successful reconciliation of the parents is extremely unlikely and that it is in the best interests of the child that the matter of child contact arrangements be resolved quickly in court proceedings.

The Estonian District Court has expressed the view that the court's discretion should be wider than that provided for in the Bill and that the discretion to send the parties to family mediation should be retained, particularly in matters relating to maintenance. However, there are problems in understanding the basis on which the court will determine that there has been violence in the parents' behaviour[90].

Paragraph 8 also allows the court to refer a maintenance or custody case under section 1371 of the Family Law Act to mediation. Neither the Bill nor the Explanatory Memorandum clarifies whether maintenance claims are to be understood to refer only to maintenance claims of minor children or also to claims of children who, when they reach the age of majority, are pursuing primary, secondary or higher education or are enrolled in vocational training (Section 97(2) of the FLA).

The draft does not provide for the court to refer maintenance cases to parental conciliation but the court may refer maintenance cases to conciliation together with a case concerning rights of access if the court considers that this is necessary for the conclusion of a comprehensive parenting agreement.

The family mediation service will be established primarily for the purpose of mediating communication with the child and the Bill deals only with the mediation of maintenance claims between parents of minor children[91].

[90] Coordination chart for the draft law. Retrieved from: https://eelnoud.valitsus.ee/main/mount/docList/b2962c6c-492b-410d-bd6d-711b263b4a30#KsTzOHDs Last accessed 10.05.2022
[91] Law on national family support services. RT I 31.03.2022, 15.

Only children in respect of whom an application has been made to the court for the establishment of a contact order are taken into account in the regulation. Accordingly, the minor must be a minor. There is no separate investigation to establish violence before the conciliation procedure and if the statement refers to it, the court can follow it. If the petition does not refer to violence, the court will refer the parents to mediation. If a situation arises where, for example, the petition is filed by a violent parent and the petition does not indicate violence, but in fact there is intimate partner violence between the parents, the Social Insurance Board must determine this. In such cases, it is up to the person who suffered the violence to decide whether he or she wishes to participate in the mediation procedure. If the person does not wish to take part in the mediation, the mediation is deemed to have failed and the court proceedings continue.

As regards Section 26 of the CCP, the general principle that the court applies the procedural law in force at the time of the proceedings and conducts the proceedings on the basis of the rules in force at the time of the act should be taken into account (Section 6 of the CCP). The implementing provision in its present form complicates the conduct of court proceedings and is not in line with the foregoing, and it is proposed to amend it. If the aim is to limit the referral to conciliation of cases which have been initiated previously, it should be clearly so provided. The drafters consider that an implementing provision is necessary to implement the provisions of the CCP, which would provide a clear rule of application and avoid confusion[92].
Although the family guardian has the duty to report a child in need of care under § 21 of the Children Act, there could be a possibility in certain cases to separate the child from the family if it is evident that the parents are acting against the child's best interests and are mentally abusive towards each other. These are cases where the relationship between the parents is so hostile that they take advantage of the children in order to achieve their ends, without realizing that they are in fact harming the children's best interests. When this process goes on for years, it is not only the parents who end up needing to improve their mental health, but also the children themselves.

The regulation of the CCP, according to which only court decisions imposing coercive measures are enforceable in cases of arranging contact with the child, will cease to be valid when the draft law enters into force. Thus, the agreements approved by the conciliators referred to in Section 2(2) of the Contracts Act are enforceable pursuant to Section 14 of the Contracts Act, Section 6271 of the Code of Civil Procedure and pursuant to Sections 2(1)(24) and (26) of the Code of Civil

[92] Coordination chart for the draft law. Retrieved from: https://eelnoud.valitsus.ee/main/mount/docList/b2962c6c-492b-410d-bd6d-711b263b4a30#KsTzOHDs Last accessed 10.05.2022

Procedure. It is also not prohibited for a lawyer to be present as a family representative before the Family Court. It has been held that, in the case of an agreement between the parents, it should make no difference whether it is concluded with the assistance of the family settlor or with the assistance of the parents' contractual representatives. However, in the past, similar agreements between parents have been helped by lawyers alone, and the draft creates a situation where agreements concluded in the presence of the family settlor become enforceable once they have been approved by the Social Insurance Board, but agreements concluded through lawyers do not. The content of the agreements will not differ. The Commission asks the Court to consider whether in the future agreements concluded with the assistance of lawyers could also be approved by the Social Insurance Board and thus become enforceable[93].

Paragraph 13(3) of the Family Settlement Act provides that the Social Insurance Board shall not approve a parenting agreement if what has been agreed by the parties to the mediation is not in the best interests of the child or if the parenting agreement or part of it cannot be performed.
This means that in the case of parenting agreements, the content of the agreement does not depend solely on the wishes of the parents, but is also subject to an additional examination of the child's best interests by the Social Security Agency[94].

Special cases within the meaning of the definition of family maintenance are cases where there has been intimate partner violence, child abuse or neglect, or where one or both parents have a mental disorder or mental illness. The internationally recognized principles of family reunification, including the Guidelines of the Committee of Ministers of the European Union to Member States on the conduct of family reunification, allow family reunification if the parties are in an equal position of power. In the case of past or continuing systemic violence by one party against the other, the parties are unequal, and therefore family reunification is not permissible in order to prevent recidivism. Psychological violence is often very difficult to recognize, even by experts with long experience in domestic violence, because of the hidden nature of the violence and the skillfulness of the manipulation. Also, parties are not equal if one of the parties has a mental disorder. To take this into account, the draft has been amended to allow the Social Security Agency to refuse to provide family support services if the case is not inherently suitable for mediation. In addition, before family support is provided, the Social Security Agency will carry out a risk

[93] Coordination chart for the draft law. Retrieved from: https://eelnoud.valitsus.ee/main/mount/docList/b2962c6c-492b-410d-bd6d-711b263b4a30#KsTzOHDs Last accessed 10.05.2022
[94] *Ibid.*

assessment, which, for example in cases of violence, will provide information on the type of violence involved. Depending on the type of violence, the Social Security Agency can decide whether or not family support can be provided to a particular family. For example, family support is excluded in the case of lasting violence[95].

It has been pointed out that the communication of the planned family support system and the social system as a whole should be broader in order to take into account the interests of the children of the Russian-speaking population and to ensure the rights and greater awareness of this target group[96].In addition, it is important to ensure a uniform understanding of the laws concerning everyday life, for example, through extensive information work in Russian. The national family support service described in the draft provides for an online environment in Estonian only. However, it is possible to participate in the family support service with a Russian-speaking mediator and to apply for the assistance of an Social Insurance Board coordinator.

The draft bill also listed indicative areas in which a potential family mediator should have a higher education. At the same time, at the level of the law, it was not considered necessary to include the indicative fields in the draft, leaving the possibility for the Social Insurance Board to assess the suitability of each candidate individually in terms of the candidate's competence. A list of fields at the level of the Act would also give applicants an indication of the basic knowledge expected of a qualified family manager.

In its Opinion No 13 (CCJE 2010)[97] on the role of the judiciary in the enforcement of judgments, the European Consultative Council of the Judiciary pointed out that the independence of the judiciary and the right to a fair trial (Article 6 of the ECHR) are useless if a judgment is not enforced. Enforcement procedures must be established in a way that is compatible with fundamental rights and freedoms (Articles 3, 5, 6, 8, 10 and 11 ECHR, data protection, etc.).
In this opinion, the Consultative Council of the European Judiciary (CCJE) points out that in some systems parties may be forced to comply with judgments by indirect means of coercion. For example, by imposing fines or by laying down legal rules under which criminal charges can be brought in the event of non-compliance. In the CCJE's view, such indirect means of coercion

[95] Coordination chart for the draft law. Retrieved from: https://eelnoud.valitsus.ee/main/mount/docList/b2962c6c-492b-410d-bd6d-711b263b4a30#KsTzOHDs Last accessed 10.05.2022
[96] *Ibid.*
[97] CCJE opinion nr 13 [14] (2010) "Arvamus kohtunike rolli kohta kohtuotsuste täitmisel. Retrieved from: https://www.riigikohus.ee/et/printpdf/20718 Lase accessed 25.04.2022

should in any event be laid down by law and approved by the judge both at the time of the decision and afterwards. Important in this respect is the guarantee of enforcement in urgent cases where there is no substitute for specific enforcement and in family cases where the use of coercion may be detrimental to the interests of the children. Under the current legislation, mediation was carried out by a judge, and was therefore very different from the new system of family mediation.

The Explanatory Memorandum to Article 12(1)(1) of the draft states that a family mediator must have the knowledge to identify and support victims of intimate partner violence[98]. What are the specific characteristics and techniques of working with victims and what options are currently available at national, local authority and third sector level to support victims?

Where necessary, experts in the field of domestic violence, violence against women or other forms of violence should be involved and consulted. It is also crucial that both the state and the mudslinging authorities also recognize violence against men and plan to support men who are not victims of violence, with the help of experts, as early as the family settlement phase.

According to § 13(2) and (3) of the draft Resettlement Act, this Act puts the Social Security Office on an equal footing with the judge, who assesses the enforceability of the reconciliation agreement and its compatibility with the best interests of the child. It is not clear from the Bill or its explanatory memorandum on what basis the Social Insurance Board assesses the best interests of the child and who specifically does the assessment, including the education and training of the coordinator.

The amended wording of Section 561(2) of the CCP does not achieve the desired objective, as a petition may also be brought before the courts by an abusive parent.

As the court has to send the parent to a mediation as soon as the petition is admitted, the other party, for example the victim of violence, does not even have the opportunity to express to the court the view that there is a case of intimate partner violence, child abuse or neglect, or if one of the parents has a mental disorder or mental illness. According to Article 561(5) of the CCP, parents are placed in an unequal position because no account is taken of the fact that the other parent against whom the court is being seised, i.e. the person concerned in the proceedings, may instead be a victim of violence, a person with a mental disability or a person with a mental disorder. It has been assumed that it is only the parents who are brought before the courts with a petition who

[98] Law on national family support services. RT I 31.03.2022, 15.

should be taken into account in the specific circumstances of family maintenance. It is also contrary to the best interests of the child to assess whether or not child abuse has occurred on the basis of a single parent's application. A parent who is himself or herself abusing a child is unlikely to disclose this to the court in his or her application. The procedure is designed in such a way that the court does not clarify with the parties the circumstances of the violence and, if the application does not refer to violence and the court refers the parents to the CFCA for family support services, the CFCA determines the existence of violence or other specific circumstances. In cases of violence, the parents will only be provided with a family support service if the parent who has suffered violence requests it. If the parent who has suffered violence does not wish to participate in the mediation procedure, the court proceedings continue[99].

It has been pointed out that Social Insurance Board coordinators will be trained to identify cases of intimate partner violence and the different types of violence[100]. To this end, cooperation with the Victim Support Service is being developed and a service has been designed for cases of intimate partner violence. In cases where the nature of the case is not suitable for family mediation (e.g., cases of persistent violence), the Social Insurance Board service can be refused. Here, the identification and differentiation of intimate partner violence is at risk, which the draft leaves to the professionals of the Social Insurance Board, who must be highly trained and experienced in differentiating between manipulation and other elements of the relationship, so as not to create situations of re-victimization for the victims. Resettlement cannot take place between unequal partners.

In cases of intimate partner violence, careful consideration should be given to who and whether parenting mediation can be carried out, but traditional family mediation should not be carried out in such cases. Parenting mediation in cases of intimate partner violence, or where one partner is mentally incapacitated, or other circumstance precluding or aggravating family maintenance, must also be a special procedure alongside new parenting mediation. In such a process, it is not sufficient to have only two persons trained by the Social Insurance Board as mediators, but the competence must be much broader and these persons must be selected separately. The mediators conducting the special procedure must also understand the hidden violence and have the competence to work towards a balanced parenting agreement in the best interests of the child, while avoiding recidivism.

[99] Law on national family support services. RT I 31.03.2022, 15
[100] *Ibid*.

The Estonian Women's Association and the Estonian Women's Shelters Association have pointed out in their recommendation that the requirement to pass the examination in § 6(2) is a national service for currently active mediators registered in the professional register, where both the examination and the training are organized by the same mediator[101]. However, this process does not address the shortcomings of the current family mediator qualification, which is that neither level 6 nor level 7 of the family mediator qualification provides that a family mediator should have skills in child interviewing. Listening to the child is, however, an essential part of identifying the child's best interests[102].

Also author agrees with concerns about the content of the basic training on family mediation commissioned by the Social Insurance Board which overlaps with publicly available training in Estonia. By completing this training, future public service providers will not acquire the necessary knowledge to identify violent relationship dynamics and the current situation of ignoring psychological violence in the family support process will continue. And although the training program has been developed on the basis of a document developed by the European Commission and the International Mediation Institute, which aims to provide guidance to Member States on the development of a quality training program and thus to harmonize the quality of mediators across Member States, it certainly needs to be implemented in order to achieve positive results in practice. In addition, it is foreseen that family mediators involved in mediating specific cases will have to undergo additional training modules to provide them with the necessary competences to mediate specific cases.

The explanatory memorandum of the draft also states that the requirements for family mediators do not include the acquisition of the profession of family mediator, as the current professional system does not meet the desired conditions[103]. The requirement to obtain a professional qualification would help to harmonize standards, but at the moment the professional system has not been developed as it should be. All family mediators providing a national family mediation service will receive training in child interviewing.

[101] Law on national family support services. RT I 31.03.2022, 15.
[102] Coordination chart for the draft law. Retrieved from: https://eelnoud.valitsus.ee/main/mount/docList/b2962c6c-492b-410d-bd6d-711b263b4a30#KsTzOHDs Last accessed 10.05.2022
[103] Law on national family support services. RT I 31.03.2022, 15.

The Explanatory Memorandum to the Draft Act states that according to § 15 (1) of the Civil Code, the residence of a minor with limited legal capacity is deemed to be the residence of his or her parents or guardian. If the parents are separated, the minor is deemed to be domiciled with the parent with whom he or she is living. If one of the parents is living abroad, it is important that jurisdiction is established by the court before family maintenance is provided[104].

Confusion in determining jurisdiction may arise from § 2(1) of the draft, which provides that family maintenance services shall be provided where the parents and the child in dispute are domiciled in Estonia. However, in non-action family matters, jurisdiction is determined according to the child's place of residence, in accordance with § 103 of the Code of Civil Procedure on jurisdiction in maintenance proceedings and § 116 on jurisdiction in non-action family matters. On this basis, it is not reasonable to link the receipt of family maintenance not to the residence of the parents but to the residence of the children themselves. Linking the parties to the place of residence in Estonia creates a situation where, if one parent lives abroad (e.g., in the Republic of Finland), the parents have to go to court to obtain conciliation services, which is not in line with the aim of the proposed Act to reduce the number of court proceedings and the time spent on child-related disputes. In order to avoid divergent interpretations, it should also be made clear in the determination of residence whether the place of residence is to be taken to mean the place of habitual residence, the place of permanent residence or the place of permanent residence as shown in the financial register, or, in the case of several places of residence, one of these at the choice of the parent. Determining the jurisdiction of a commuter could also be problematic.

In the opinion of the author, the new law has been drafted in a way that does not take sufficient account of the gender equality and other requirements of family maintenance in other countries, which the EU and international recommendations allow. And if it has already been pointed out at EU level and elsewhere that the setting of qualification requirements is an important component in ensuring the competence of family carers in various fields, this should also be clearly and unambiguously laid down at national level. This is because the qualification requirements for family workers are important in the context of the globalisation of society, and family workers cannot be competent only in the sense of the country in which they operate[105].

[104] CCJE opinion nr 13 [14] (2010) "Arvamus kohtunike rolli kohta kohtuotsuste täitmisel. Retrieved from: https://www.riigikohus.ee/et/printpdf/20718 Lase accessed 25.04.2022

[105] Valma, K. Surva, L. Hääl, H. (2014). Lepitusmenetlus perevaidlustes. - *Juridica* I, 86 – 103.

CONCLUSION

The aim of this study was to find out whether the exclusion of qualification requirements for family guardians from the national legislation on family support services, which will enter into force in Estonia in 2022, will have a negative impact on the protection of children's rights.

In the first chapter of the thesis, the author discussed the developments in the protection of the best interests of the child and the factors influencing them over the last decade, as well as providing an overview of the nature and principles of the best interests of the child at national and international level. In the second chapter, the author gave an overview of the European Commission's Green Paper, which has so far been an important framework document for the establishment of a mediation service in any field. In chapter two, the author also analysed the current legislation on family mediation in order to identify possible bottlenecks.

The protection of the rights of the child has been important in the political arena as well as elsewhere, and a number of treaties are in place at international level to ensure the protection of children's rights. In Estonia, the Constitution of the Republic of Estonia, which obliges the person responsible for the development of the child to ensure the conditions for the child's development and well-being, applies to the care and upbringing of the child and the protection of the child and the parent. Under the international Convention on the Rights of the Child, the same obligation is also incumbent on executive or legislative bodies, including the State itself, the judiciary and private social welfare institutions, all of which have the common objective of giving priority to the best interests of the child in any matter relating to the child. Due to the challenges posed by globalisation and the workload of many agencies in child-related disputes, attention has turned to a method that has existed for several decades. The ADR method has been in use across the EU for some time now and has produced good results in resolving disputes in various areas. Its success in other areas is the reason why it was also sought to be applied to family matters.

In the course of the research for this thesis, the author came to the conclusion that there is a sufficient framework and recommendations at international and EU level to enable national action to ensure the quality of family support services through qualification requirements.
Despite the fact that the protection of the rights of the child and the best interests of the child have long been on the agenda of various officials and agencies, there has long been a situation where there are no solutions or no possibilities or both to develop the best solutions to ensure the best interests of the child, and a major shortcoming so far has been the lack of appropriate legislation. The current legislation has not been sufficient and the author fully agrees with this, but any future legislation should take more account of the experience gained in this area and use methods that have worked well in other countries. Also, the author, while analysing the new legislation, came to the conclusion that there is some room for improvement in the new law, as the need to assess the existence of violence, specific cases and other factors in the context of family maintenance is written into the new law, but the criteria for qualification of the meditator is not mentioned. In essence, the only qualification requirement so far mentioned is the training that has existed on the market, which is already known not to have been sufficient and has not so far produced the necessary results.

Firstly, one of the minimum requirements should be at least a first level of higher education. At the level of the law, there should be a clear legal basis for the qualification of future family carers, as well as certification for the profession and minimum requirements in terms of work experience before becoming a family carer. Family carers are a highly skilled profession, and the responsibility is immeasurable because children are the society of our future. The healthier the children, the healthier the society we will live in and will also help the country save costs in the long run. Secondly, the importance of continuing training cannot be underestimated. With the world around us changing so rapidly, the author believes that for a profession such as family caregiving, it would be prudent to continually educate oneself to keep up with the changes around us and to be aware of these changes in family care and family dynamics.

In the longer term, such an important field could have its own specialisation, covering international and national legislation on children, the mental well-being of the child, the functioning of the family model, different reconciliation methodologies, different aspects of cultural differences, etc[106]. The EESC believes that the need for a specialisation in this field is

[106] Collins H. (1995). European Private Law and the Cultural Identity of States. European Review of Private Law, 3, 2.

essential. There should also be a legal basis for non-renewal of the certificate after a certain period of time, for suspending the validity of the certificate pending re-examination or training. As an additional point, the author strongly recommends that consideration be given to the issue of better public information, which has received little attention to date, as well as to the issue of involving and informing the non-Estonian-speaking part of society.

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