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**MEDIATION AND THE PROTECTION OF THE RIGHTS OF
CHILDREN IN FINLAND**

Bachelor's thesis

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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INTRODUCTION

The European Union aims to secure access to justice, as part of the policy of the European Union is to establish an area of security, justice and freedom. Access to justice covers judicial, as well as extrajudicial, not legally authorized dispute resolution methods.¹ There are traditional and modern ways to settle a disagreement when it comes to family law cases.² Traditional way of settling a dispute is rather court-centered whereas an alternative way focuses on negotiating. Family law cases usually aim to preserve the valuable relationships between the parties. In the center of this paper are family law cases; more specifically custody disputes and matters such as visitation rights, maintenance payable to a child and housing arrangements in Finland. The parents [legal representatives, custodians and guardians will be referred as the parents] of a child may want to go through a trial, but generally this can be seen as time consuming and a burdensome option to all parties in the dispute, including the children. Court proceedings are formal, judicial procedures which do not necessarily promote a mutual understanding between the disputing parties. Moreover, court proceedings have potential to damage the relationships between the parties as the outcome is usually in a form of 'a winner and a loser'.³ A trial can become a slow and arduous process to all concerning parties in custody disputes. In these kind of cases, alternative ways tend to assist the parties to find a durable agreement and the negotiations have potential to promote cooperation between parents and thus the outcome usually satisfies the parties more than trials.⁴

This bachelor thesis will explore two approaches of mediation as negotiation methods; court mediation and outside of court mediation. The suitability of the processes in addressing legal issues regarding children's protection in shared custody cases will be compared. Both approaches will be presented in light of their regulatory framework and suitability to prevent any harmful conditions to a child. Furthermore, any legal gaps and differences that concern the child, depending on the approach chosen to settle the dispute will be evaluated. The essence of this bachelor thesis will be to explore any potential lack of protection of children's rights when mediating cases of this nature depending on

¹ Directive (EU) 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (*OJ L 136, 24.5.2008*).

² Linnanmäki, K. (2019). *Lapsen etu huoltoriidan tuomioistuinsovittelussa*. Lithuania: BALTO print, p. 21.

³ Aaltonen, A-K. (2015). *Huoltoriitojen sovittelu tuomioistuimessa*. Estonia: Meedia Zone OÜ, p. 60.

⁴ Dillon, P. A., Emery, R. E. (1996). *Divorce mediation and resolution of child custody disputes: Long term effects*. American Journal of orthopsychiatry 1/1996, p. 193-224 referenced in Linnanmäki p. 105; Moore, C. W. (2014). *The Mediation Process: Practical strategies for resolving conflict*. (4th ed.) San Fransisco, USA: Jossey Bass.

the form of mediation chosen. Furthermore, the involvement of children to a decision making, which potentially leads to a legally binding agreement between the parties, will be observed. Finally, it will be evaluated which one of these mediation approaches and outcomes potentially protects the rights of a child more effectively. In Finland, court mediation provides professional assistance to the dispute resolution and the court judge acts as a mediator. Mediation that is carried solely out outside of the court is considered as more informal.

This thesis departs from the hypothesis that court mediation supports the rights of a child over mediation due to the professional assistance and the immediate enforceability of the agreement.

To be able to reach a conclusion on these topics, international conventions, European Union secondary legislation and domestic law regarding family law and mediation will be used to support the research. Other than legal sources will be used to an extent that is necessary to support the arguments and the scenarios that are typical in these types of disputes.

This thesis applies qualitative research methodology. The legal research of sources and the data collection is followed by comparison of the data and afterwards it will be placed into the context of the research. The data will be collected from sources such as academic writings, theories, national legislations and practices. The collected data will be processed by identifying and exploring the problems, evaluating the acquired facts and formulating the observations based on these findings.

This thesis consists of four chapters. In the first chapter, dispute resolution methods, the concept of conflict and conflict management will be defined and presented briefly. It is followed by overviews on both chosen approaches and the child's involvement in practice. Both procedures are explored; practice, the benefits of using the alternative dispute resolution (ADR) approaches and certain conditions that may form obstacles for negotiations. The rights of the child and the parents' obligations are observed and put into context of the chosen methods. These are of high importance and closely related when making decisions in shared custody disputes. Finally, the enforceability of the agreements in Finland will be discussed and a comparison and the key findings will be presented based on the research and literature that has been used. The legal base of this thesis will be amended from United Nations Convention on Rights of the Child (UNCRC), international as well as from national legislation. The Mediation Directive 52/2008 will be used as a source to the extent that it can be applied. It can be noted at this point that it is stated in the directive that the provisions of the

directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.⁵

⁵ OJ L 136, 24.5.2008

1. BACKGROUD

1.1. Conflict management and dispute resolution

Conflict can be defined as a serious disagreement between two or more parties.⁶ From a procedural law perspective, conflict is seen as a confrontation between parties, but it can be lacking specific legal content. In some conflict theories, it can also be viewed as a matter which is not solved by court trials. The difference between a dispute and a conflict is that even if a dispute is settled, a conflict isn't automatically solved. It is typical in custody disputes that the structure is multilayered, and it includes both conflicts and disputes.⁷ When deciding which conflict management method to use, it is important to clarify whether the parties are interested in solving the legal dispute or the conflict that has potentially initiated the dispute. If the conflict cannot be prevented, mediation has been seen as one of the best methods to deal with the emotions, satisfy the interests of the parties and help to preserve the family relationships.⁸ A conflict can produce a set of byproducts such as a resolution, a dead end or the outcome could be simply to tolerate the conflict and the opponent. A resolution or a dead end could be in the form of a defined agreement or a tacit agreement. The outcome can benefit both parties or one party could be benefiting at the other's expense.⁹ Conflicts do have the potential to produce negative residues as well; the parties may experience e.g. mutual distrust, lack of commitment or frustration. However, conflicts can create positive opportunities too; creativity and challenging old ideas might take place as a result. Moreover, greater awareness of unrevealed problems, personal development and better self-awareness have potential to take place as the outcome.¹⁰

Regardless of the context of a conflict, most situations benefit from attempts to manage them. The attempt may come from the disputants themselves or from a third party. The disputants might attempt to resolve the matter themselves for a number of reasons; the cost of the conflict becomes too high, their goals change, or the disputants are too exhausted by the situation. The disputing parties can take steps towards facing the conflict; differing interests from positions and listening carefully in order to

⁶ Ervasti, K., Nylund, A., (2014). *Konfliktinratkaisu ja sovittelu*. Helsinki, Edita, p. 7; Ervasti, K., (2004). *Käräjäoikeuksien sovintomenettely. Empiirinen tutkimus sovinnon edistämisestä riitaprosessissa*. Oikeuspoliittisen tutkimuslaitoksen julkaisuja 207, Helsinki p. 48-49 referenced in Linnanmäki p.35

⁷ Linnanmäki p.36

⁸ Ervasti, K., Nylund, A. (2014) p. 9, 85 referenced in Linnanmäki p. 36

⁹ Wall, J. A., Callister, R. R. (1995). *Conflict and Its Management*. Journal of management, 21, (3), p. 525-526.

¹⁰ *Ibid*.

deal with the causes, the conflict itself and its effects. The approaches to manage the conflict might be influenced by factors such as personal goals, interpretations, experiences or culture.¹¹

While the disputing parties can manage their conflict themselves, so can third parties. A third party may intervene to assist in the conflict resolution on its own initiative or it can be called in. This is usually when the disputants are unable or unwilling to handle the conflict themselves. A repertoire of new approaches may take place as the third party intervenes.¹² Various types of conflicts and disputes can be addressed with an assistance from the third party. There is also a variety of alternative dispute resolution methods that can be applied in different situations. These processes can be differentiated from each other e.g. by the formality of the proceedings and the amount of control that the third party has over the process. These can include factors such as whether the negotiations are held in private or public settings, whether it is with or without formal rules of evidence, and whether there is additional participation other than the principal disputants.¹³ In this paper, two approaches of one of these ADR methods will be reviewed more closely; out of court mediation and court-annexed-mediation.

When it comes to the conflict management and negotiations in practice, there are different strategies that can be applied to ensure the relevance of the negotiations. In custody disputes, the parties are natural persons, and emotions are typically involved when the conflict concerns family relationships. To achieve an outcome that addresses the relevant matters, it is suggested to separate the people from the problem; rather than attacking the other party, the participants should be able to collaborate in a sense that they would attack the problem rather than each other. In addition, the focus in the negotiations should lay on interests, not positions. The optimal situation in the negotiations would be to generate a variety of possible outcomes before deciding the final outcome. A wide range of solutions offers the parties a chance to explore shared interests and a possibility to sort out differing interests.¹⁴

¹¹ *Supra nota* 9, 535-540.

¹² *Ibid.*

¹³ Menkel-Meadow, C., (2015). *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*. To be published in International Encyclopedia of the Social and Behavioral Sciences, California, USA: Elsevier Ltd. p. 4

¹⁴ Fisher, R., Ury, W., Patton, B. (2011), *Getting to Yes: Negotiating Agreement without Giving In*, New York, USA: Penguin Group, p. 10-11

1.2. Family and custody disputes

Whether applying ADR methods is a good solution to settle family related disputes, there are a few factors that need to be taken into consideration. Mediation is seen to be most applicable to those families, who are willing and capable to negotiate, able to see their own flaws and perceive the needs of the child. Being concerned about the child and having the willingness to settle the dispute are factors that positively contribute to the negotiations.¹⁵ Even the most complex cases can be handled through mediation.¹⁶ The disputing parties may have lawyers assisting them. The lawyer can evaluate the compatibility of the case to the mediation beforehand and monitor and ensure the client's legal rights during the negotiations. Among other things, a lawyer can bring a general feeling of support to a party in case of a complex dispute.¹⁷ In Finland, every year up to 2000 custody cases are brought before the courts. Out of all custody decisions, only a fraction are actual legal disputes.¹⁸ It is typical in custody disputes that in addition to a legal issue, they involve other issues that cannot be solved using legal standards and these often closely relate to a wider conflict that should not be ignored.¹⁹

There are different interpretations on whether it is profitable to negotiate custody disputes involving a complexity of issues such as domestic violence in addition to the legal dispute.²⁰ All matters are not suitable for mediation. This can be due to the imbalance of the powers, where the stronger party has a position to reach one's goals in an informal proceeding at the expense of the weaker party. Another position where an imbalance of powers may occur can be due to financial status or resources, the level of understanding or an authoritative status.²¹ A few empirical studies have evaluated the effectiveness of mediation in cases where there is a history of domestic violence. The studies that have been done can be considered rather limited, involving only a small number of subjects.²² As mediation has become the norm in family law cases, such as custody disputes and divorces, an increasing number of cases using mediation involve victims of domestic violence as well. Some mediation advocates agree

¹⁵ OM 25/2013 p.31

¹⁶ Aaltonen p. 196, 199-200

¹⁷ *Ibid.*

¹⁸ Linnanmäki p. 108

¹⁹ Auvinen, M. (2006). *Huoltoriidat tuomioistuimissa: Sosiaalitoimi selvittäjänä, sovittelijana, asiantuntijana.* Suomalaisen Lakimiesyhdistyksen julkaisuja A-sarja (272) p.7

²⁰ Ervasti, K. (2014). *Tuomioistuinsovittelu: Käytännön opas.* Porvoo, Finland: Edita. p. 22-23

²¹ Aaltonen p. 181-182.

²² Landrum, S. (2011). *The ongoing debate about mediation in the context of domestic violence: A call for empirical studies of mediation effectiveness.* Cardozo Journal of Conflict Resolution, 12 (2), 425-436.

that cases involving a serious history of domestic violence should be excluded from family law mediations. In this context it would be also valuable to define seriousness as it can be a factor in determining which cases are appropriate for mediation. Definitions that are either too broad or too narrow may include cases that are not appropriate for mediation or exclude cases that could be successfully mediated. Nevertheless, those whose experiences are too recent or do not have support systems in place, may be further harmed by such proceedings. Timing may also be an important factor when determining whether victim can effectively mediate. Over time, the victim could have the tools that are necessary to successfully mediate family law issues.²³

According to the recommendation given by the European Council, it is stated that in case of domestic violence it should be very carefully evaluated by the mediator whether these types of disputes can be mediated.²⁴ These types of disputes have been negotiated through court mediation in Finland, but it requires the assistance of professionals and mediators, who have the ability to understand the concept of domestic violence and the relevance of it in the negotiations.²⁵ Nevertheless, it has been criticized that the reporting and consideration of violence in the custody disputes in Finland has been vague, indefinite and even dismissed by the social services.²⁶

The final decision whether a case is applicable to court mediation is made by a judge who acts as a mediator. The mediator reads the applications and if necessary, the mediator has the possibility to consult the potential assisting lawyers or the parties themselves.²⁷ Despite of the parties' willingness to negotiate, any chance that could be considered to be against the best interests of a child, can form an obstacle to initiate court mediation.²⁸ Furthermore, even though it is possible to mediate complex cases, each dispute is evaluated carefully before entering court mediation. In Finland, court mediation is often seen as the final chance to avoid a trial in cases of custody disputes that include multidimensional conflicts.²⁹ Court mediation may not be suitable in case of the disputing parties'

²³ *Ibid.*

²⁴ Recommendation 1998 Number R (98) 1 21.1.1998

²⁵ Aaltonen p. 190

²⁶ Hautanen, T. (2010) *Väkivalta ja huoltoriidat*. (Dissertation) University of Tampere, Tampere. p.111-202; Aaltonen p.194

²⁷ Aaltonen p. 196-197

²⁸ HE 114/2004 vp. p. 47-48

²⁹ Linnanmäki, p. 112

lack of commitment or if the case includes severe problems such as problems with mental health or drugs.³⁰

³⁰ *Ibid.*

2. FAMILY MEDIATION

2.1. General overview and legal framework

Since the 1970s, mediation has developed into more institutionalized, officially supported and growing tool in decision-making across various fields in solving conflicts or disagreements.³¹ When it comes to ADR, mediation is one of the many methods available for conflict management. Mediation has been broadly examined and it recognizes its own principles and procedures.³² Following the adoption of the Directive 2008/52 on mediation, the Member States of EU were expected to encourage the use of ADR and further develop towards a balanced relationship between alternative and traditional legal procedures. Mediation in particular is expected to create a constructive atmosphere and amicable outcomes in proceedings involving children.³³ After the adoption of the Directive, the Member States have in fact advanced campaigns regarding mediation, building expertise and expanding this method to other fields of law as well.³⁴ In Finland, court mediation was adopted in 2006.³⁵ It is possible in Finland that the agreement following mediation can be enforced to a legally binding agreement. This will be discussed more in the following paragraphs.

Mediation is a form of alternative dispute resolution method, in which a neutral third party assists the disputing parties to negotiate over the matters that they disagree with. The mediator has an impartial role and there cannot be any conflict of interests between the mediator and the disputing parties. The mediator does not have the power to influence in settling the dispute; the parties have to reach the agreement themselves.³⁶ Furthermore, mediation is an ADR method and concept, which covers all activities where an independent third party intervenes between the disputing parties in disagreement

³¹ Roberts, M. (2014) *Mediation in family disputes: principles of practice*, (4th ed.), New York, USA: Ashgate Publishing.

³² *Supra nota* 20, 24-28.

³³ Joamets, K., Vásquez, M. C. S. (2019). *Current challenges of family mediation in Estonia*, published in *Journal of Contemporary European Studies*.

³⁴ Lappi-Seppälä, T., Storgaard, A. (2015). *Nordic Mediation Comparing Denmark and Finland*. *New Criminal Policy* 27 (2), p. 136–147 referenced in Joamets, K., Vásquez, M. C. S.

³⁵ Linnanmäki p. 104

³⁶ Roberts, M. (2008). *Mediation in Family disputes: Principles of practice*. (3rd ed.), Hampshire, UK: Ashgate Publishing.

of any type of issue. Mediation can be used in various types of conflict managements that can be carried out in the form of assisted negotiations.³⁷

The basis and a core fundamental to initiate mediation is that the parties are competent to make their own decisions.³⁸ The role of a minor and the limited legal capacity will be discussed more later. What distinguishes mediation from other forms of dispute resolution is the decision-making of which the parties are responsible for themselves.³⁹ The mediator might use gained knowledge and expertise on collaborative "win-win" negotiation and communication techniques to motivate the parties to adopt new approaches and thus support the durability of mediation outcome. The mediator does not act in representation of anyone or use authority standards to stimulate the results.⁴⁰

Mediation is a consensual process, both in participation and agreements reached. The participation shall be genuinely voluntarily engaged. This ensures the commitment of the parties to the process and the results.⁴¹ As mentioned before, the principles of mediation include that the procedure is facilitated by a third neutral party. The third party i.e. the mediator seeks to develop solutions to the existing problems and a resolution to conflicts in terms of mutual agreement and fairness to the parties.⁴² Furthermore, mediation is based on the principles of confidentiality and self-determination.⁴³ During mediation, the parties to a dispute are given support to understand each other but above all, the tools to negotiate on their own and find the terms of a mutually satisfactory outcome. The success and durability of mediation could depend on the mediator remaining neutral but proactive and promoting understanding between the parties.⁴⁴

At its best, mediation can provide an extrajudicial and cost-effective dispute resolution in family law matters through processes that are suitable to the needs of the parties. Agreements resulting from

³⁷ . Moore, C. W. (2014). *The Mediation Process: Practical Strategies for Resolving Conflict* (4th ed.), USA: Jossey-Bass p.8

³⁸ Roberts (2008), *supra nota* 36, 12.

³⁹ Roberts (2014), *supra nota* 31, 10.

⁴⁰ De Paolo, G., Trevor, M. B. (2012). *EU Mediation: Law and Practice*. Oxford, United Kingdom: Oxford University Press.

⁴¹ Directive 2008/52/EC of the European Parliament and of the council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, art. 6 p. 1.

⁴² Menkel-Meadow, C. (2001). *Mediation: Theory, Policy and Practice*, New York, USA: Dartmouth Publishing Company and Ashtage Publishing.

⁴³ Aaltonen p. 34-35

⁴⁴ Fisher, R., Ury, W., Patton, B. p.57

mediation are likely to be complied and usually the outcome is an amicable and sustainable relationship between the parties.⁴⁵

In Finland, the custody dispute agreements that result in negotiations carried outside of the court, cannot be enforced in court solely on the grounds of the parents' agreement. Because the negotiations are carried out outside of court and the mediator is not necessarily a judge, the agreement regarding the custody and right of access of the child has to be submitted to the social welfare board for confirmation. In order for an agreement to be confirmed, the consent is required from the parent(s), the potential custodian of the child and from a person who has a right to receive confidential information concerning the child.⁴⁶ Yet, mediation that is carried out outside the court does not necessarily provide supervision of professionals during the negotiations. Thus, the negotiations may be carried out on the terms of the parents and it is possible that factors such as imbalance of powers between the parties has an impact to the outcome. One party could benefit in the absence of the professional assistant during the negotiations. Nevertheless, if the parents do find a mutual agreement during the mediation carried outside the court, they must contact the social welfare board.⁴⁷

When the welfare board considers whether an agreement may be confirmed or not, they must evaluate and take into consideration the best interests, wishes and views of the child that are set out in the Act on child custody and right of access.⁴⁸ Furthermore, the child supervisor or the person who is assigned to prepare the confirmation of agreements, shall have a personal discussion with the child. The discussions can be held if the child consents to it and it is considered necessary in order to find out the child's wishes and thoughts.⁴⁹ Another way of enforcing an agreement regarding the practical arrangements, the custody and child related matters as legally binding is the possibility of the parents to submit an application jointly to the court.⁵⁰ This can also be done in the process when submitting a divorce application.⁵¹ If the aforementioned steps are taken and the agreement is considered to be in

⁴⁵ *Supra nota 41.*

⁴⁶ Laki lapsen huollosta ja tapaamisoikeudesta 8.4.1983/361, § 8.

⁴⁷ *Ibid.*

⁴⁸ See § 10 and 11

⁴⁹ *Supra nota 46.*

⁵⁰ Laki lapsen huollosta ja tapaamisoikeudesta 8.4.1983/361

⁵¹ Avioliittolaki 13.6.1929/234

accordance with the best interests of the child, the agreement may be confirmed by the social welfare board which means it is valid and enforceable similarly to a final court decision.⁵²

2.2. Court mediation in custody disputes

In Finland, court mediation was adopted in 2006.⁵³ It has similarities with the mediation process that is carried out outside the court, but there are some significant differences too. In order to initiate a court mediation, the dispute must have actual legal relevancy. Thus, court mediation is a suitable process in addressing conflicts relating to the maintenance payable to the child, custody and visitation rights related disputes.⁵⁴ Court mediation is not necessarily to be compared to a trial in a sense of jurisdiction or substantive law when reaching the agreement.⁵⁵ The purpose of the arrangement is to support the parties and help them to reach the conclusion by facilitating and assisting with the negotiations. The court judge, who acts as a mediator is there to help and support the parties in their discussions and attempts to reach the agreement.⁵⁶ However, reaching the agreement itself should not be the priority and any important facts regarding the child should not be left out.⁵⁷ Legally, the court mediation is connected to its jurisdictional competences; the court decides whether they accept the application to get to court trial and potentially enforces the outcome as a legally binding agreement. As stated earlier, the disputes that involve children must ensure that the decisions made are in align with the Act on Child Custody and Right of Access and Act on child support. According to the first mentioned Act, a matter concerning child custody and right of access shall above all be decided in accordance with the best interest of the child.⁵⁸ This concerns both the mediator and the parties of the dispute.⁵⁹

Court mediation can be initiated with an application or an ongoing matter in trial can be brought to court mediation. If the dispute has been brought from trial to court mediation without reaching an

⁵² *Supra nota* 46, § 8.

⁵³ Linnanmäki p. 104

⁵⁴ Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa 29.4.2011/394 1 §, 10 §

⁵⁵ HE 114/2004 p.23-24

⁵⁶ Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa 29.4.2011/394.

⁵⁷ Aaltonen p.195

⁵⁸ See § 10

⁵⁹ HE 114/2004 vp p. 47; Laki lapsen huollosta ja tapaamisoikeudesta 8.4.1983/361; Laki lapsen elatuksesta 5.9.1975/704

agreement, the trial shall continue.⁶⁰ Court mediation can be entered by submitting a freely formatted application. In the application the applicants of the dispute should be pointed out as well as the legal matters that the court mediation will potentially addressing. Also, a brief commentary about the main disagreements should be pointed out. If one of the parents have submitted the application alone, the court will consult the other parent for an approval.⁶¹ The participants who are considered to be the parties of the dispute are those who the dispute *de facto* concerns.⁶²

Where mediation is based on voluntary participation, so is court mediation. The consent of all participating parties is required. Furthermore, in order for a court mediation to be initiated, it requires that the matter entering to a mediation is suitable for mediation and that court mediation is considered appropriate in proportion to the claims of the parties. Matters concerning the rights and practicalities regarding the child can be addressed in court mediation if they concern matters such as maintenance payable to the child, custody related matters or visitation rights.⁶³ Eventually, the court decides whether mediation can be initiated.⁶⁴ The judge may suggest professional assistance i.e. an auxiliary, if it is considered that the case is of that nature, and necessary. Assistance may be used with the parties' consent.⁶⁵ In custody disputes that are addressed in court mediation, assistance may be given e.g. by a psychologist specialized in parenting or a social worker.⁶⁶ In contrast to outside of court mediation, court mediation is not purely based on facilitating the negotiations for the disputing parties. It applies elements of evaluative structure. The mediator may, on the request or acceptance of the parties make proposals to promote the agreement.⁶⁷ However, this does not mean that the mediator should aim to solve the dispute for the parties, or directly suggest what type of agreement they should find.⁶⁸

What comes to the family relationships, it is more likely to the child to maintain good relationship to both parents if the dispute can be settled voluntarily rather than by a court order where there is

⁶⁰ Linnanmäki p. 159

⁶¹ Huoltoriidan sovittelu tuomioistuimessa. Retrieved from https://oikeus.fi/fi/index/esitteet/riidan_sovittelutuomioistuimessa/esitteen_tulostus.html, 20 July 2020.

⁶² Linnanmäki p. 159

⁶³ Laki riita-asoiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa 29.4.2011/394, § 10.

⁶⁴ Ministry of Justice (2016). *Mediation as an alternative to a long trial*. Retrieved from <https://oikeus.fi/fi/index/esitteet/asiantuntija-avusteinenhuoltoriitojensovittelu.html>, 1 April 2020.

⁶⁵ Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa 29.4.2011/394, § 7.

⁶⁶ Aaltonen p. 95

⁶⁷ *Supra nota* 65.

⁶⁸ Aaltonen p.44

automatically a ‘winner-loser’ situation.⁶⁹ Moreover, it has not been regulated where the hearings and proceedings must take place in and thus the proceeding has potential to maintain the atmosphere as informal and relaxed.⁷⁰ When the settlement of the dispute comes from the parties themselves the outcome is most likely durable, and the parties commit to the solution better than they would to a solution set by a third party e.g. as an outcome of a trial.⁷¹ Between 2006-2009, a study in Finland showed that when a court mediation was initiated, $\frac{3}{4}$ ended up to an agreement. Moreover, when the court mediation process ended without a result, the parties reached agreements afterwards by themselves. This suggests signs that the process assisted the parties and motivated them to reach an amicable outcome after the formal negotiations, even if it took time.⁷² According to the Ministry of Justice, the willingness of the parties to negotiate and settle the dispute is a significant factor in achieving the agreement. Positional bargaining, high level of conflict and principled approach are factors that are not beneficial in negotiations.⁷³ It can be noted however that court mediation is usually most effective in the early stages of the dispute, not when the conflict and the dispute has already escalated into a complexity.⁷⁴

⁶⁹ Ervasti, K. (2005). *Sovittelu tuomioistuimessa*. Helsinki, Finland: WSOYpro

⁷⁰ Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa 29.4.2011/394

⁷¹ HE 114/2004 vp, p. 4, p. 18

⁷² Ervasti, K. (2011). *Tuomioistuinsovittelu Suomessa*. Helsinki, Finland: Hakapaino Oy p. 76

⁷³ OM 25/2013 p. 80-81, 95-96; OM 12/2016, p. 35, 87-92.

⁷⁴ HE 114/2004 vp. p. 29.

3. THE INVOLVEMENT OF A CHILD IN MEDIATION AND COURT MEDIATION

To clarify the child's role and perspective in the legal dispute between the parents, it is important to take into consideration information regarding the impact that of the parents' separation may have on a child. When negotiating the relationship between former partners who remain parents, there are few factors that need to be considered. If children are involved, and the disputants maintain a relationship of some kind, they must determine the handle and share of the practicalities of parenthood and all the common responsibilities regarding the child's everyday life.⁷⁵ The parents' relationship is connected to the child too; if the conflict between the parents can be addressed successfully, it could potentially reduce or prevent disputes in the future. This is directly beneficial for the child as well.⁷⁶ In fact, parental divorce has been reviewed for decades as the cause of a range of behavioral and emotional problems in children and adolescents.⁷⁷ A study that was conducted with a sample of 1400 children from 12 to 16 year olds, indicated that children are adversely affected by their parents' conflict.⁷⁸ The same study also suggests that parents' separation increases the risk for adjustment problems in both children and adolescents.⁷⁹ Furthermore, informing the parents about the child's perspective if the child is heard, has proved to be an effective tool in promoting understanding between parents.⁸⁰

Compared to other age groups over the age of 18, children are granted with special rights such as prioritizing the best interest of the child, right to have protection and right to play.⁸¹ According to Hakalehto, a Finnish associate professor of child and educational laws, when pursuing the best interest

⁷⁵ Emery, R. E., (2012) *Renegotiating family relationships: Divorce, child custody and mediation* (2nd ed.) New York, USA: The Guildford Press, p. 63.

⁷⁶ Linnanmäki p.5

⁷⁷ Kelly, J. B., Emery, R. E. (2003). *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, National Council on Family relations, 52 (4), p. 353.

⁷⁸ Peterson, J. L., Zill, N. (1986). *Marital disruption, parent-child relationships, and behavior problems in children*, *Journal of Marriage and Family*, 48(2), p. 295-307.

⁷⁹ *Ibid.*

⁸⁰ *Lapsiasiavaltuutetun lausunto asiantuntija-avusteisen huoltoriitojen sovittelun laajentamisesta*, 2012. Retrieved from <http://lapsiasia.fi/tata-mielta/lausunnot-2/lausunnot-2012/lapsiasiavaltuutetun-lausunto-asiantuntija-avusteisen-huoltoriitojen-sovittelun-laajentamisesta/> 10 July 2020.

⁸¹ Hakalehto-Wainio, S. (2012) *Oppilaan oikeudet opetustoimessa*. Helsinki, Finland: Lakimiesliiton kustannus p.35, 52; Nieminen, L. (2004). *Koulu lasten perus- ja ihmisoikeussuojan turvaajana – vai rajoittajana?* *Oikeus*, 3, p. 278 referenced in Linnanmäki p. 75

of a child, the best interest of a child means that every child has the right to have his/her interests assessed.⁸²

The best interest of a child and the participation of a child to a decision-making that concerns the child are related closely. The hearing of a child does not mean that the child is given any responsibility or that the decision making is transferred to the child. The participation of a child may be limited only in order to protect the child. This cannot be used in vain, nor can it be used to designedly limit the child's possibilities to express his/her opinion e.g. in separation situations that concern the child closely. Whether the hearing can be limited, must be evaluated case-by-case.⁸³ The aim is to ensure the consultation and participation of the child.⁸⁴

3.1. Legal grounds

From the 1970-1980's, there has been an increasing interest of children's rights and children as their own independent category. A child is not only an object of protection but an independent individual, who has the right to participate to the decision-making process that concern him/her. Instead of viewing the childhood as the pre-stage of adulthood, a child is considered to be an equal individual, who acts and thinks in a way that is characteristics to a child in a certain age.⁸⁵ According to the Finnish constitution and the UNCRC, children are granted with the same human and basic rights as an adult.

The UNCNR states that a child must be granted with the possibility to be heard especially in legal and administrative proceedings that do affect the child directly or indirectly.⁸⁶ The United Nations Committee on the Rights of the Child underlines that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including matters such as separation of parents, custody and care, children in conflict with the law and social security. Typical administrative proceedings include e.g. decisions about children's living conditions, or protection. Both

⁸² Hakalehto, S. (2018) *Lapsioikeuden perusteet*. Helsinki: Alma Talent. p. 50, 97 referenced in Linnanmäki, p. 94

⁸³ OM 1/31/2010 p. 67-68

⁸⁴ Hakalehto-Wainio, S. (2011). Lasten oikeudet lapsen oikeuksien sopimuksessa, Defensor Legis 4/2011, referenced in Timonen.

⁸⁵ Timonen, A. (2017). *Asiantuntija-avusteinien huoltoriitojen tuomioistuinsovittelu Lapsen osallisuus sovittelumenettelyssä*. (Master's thesis) University of Lapland, Department of law.

⁸⁶ See Article 12(2)

administrative and legal proceedings may involve alternative dispute mechanisms including mediation.⁸⁷ It is also set out in the UNCRC, that in all actions concerning children, whether they are undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁸⁸

The Finnish Act on mediation in civil matters and confirmation of settlements in general courts also sets out that in respect of matters that concern the status and rights of a child, maintenance payable to a child, child custody and the right of access are amenable to court mediation.⁸⁹ Court mediation shall be carried out so that the interests of the child are ensured. When considering whether a settlement may be confirmed, the court shall take due note of the provisions of the Child Custody and Right of Access Act and the Child Maintenance Act. When it comes to a child in custody disputes, it is a right of a child to choose whether he/she wants to give an opinion to a conflict. A child has a right but not an obligation to express an opinion.⁹⁰ The participation of a child always requires a consent from the guardians. Moreover, the consent from the child is obligatory. However, regardless of the consent given by a child, if a parent does not give a consent to a child's participation, this prevents the child from participating.⁹¹

The best interest of the child has already been referred in this paper in different contexts. The best interest of a child has multiple definitions, broader and narrower versions. It is a multidisciplinary concept and a principle, that includes various elements that are tied together. The concept can also be seen through different glasses, depending on the profession; whether a lawyer or a psychologist review the same matter, the outcome may be different.⁹² However, for the purposes of this paper, the focus is on the legal perspective. The disputes concerning custody, residence and visitation related matters, have to be resolved in light of the best interests of the child. To perceive the concept better, some definitions are set out in Finnish legislation. The best interest of a child covers matters such as the child's right to adequate maintenance, respect the child's age and stage of development and possible

⁸⁷ UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): *The right of the child to be heard*, 20 July 2009, CRC/C/GC/12.

⁸⁸ See Article 3(1)

⁸⁹ See § 10

⁹⁰ United Nations Convention on Rights of a Child, Articles 16 and 134.

⁹¹ Iivari, J., (2007), *Rikos- ja riita-asioiden sovittelijan opas*, Vaajakoski, Suomi: Gummerus Kirjapaino Oy

⁹² Linnanmäki p.93-94

special needs. The distance between the parents' places of residence and the parents' ability to bear joint responsibility for matters concerning the child and to protect the child from all forms of violence are considered as factors that contribute to the well-being of the child.⁹³ Furthermore, a child shall be ensured with good care, supervision and protection appropriate for the age and stage of development and be protected from all forms of physical and mental violence, maltreatment and exploitation.⁹⁴

Above all, it is stated the Act on child custody and right of access that in a matter concerning child custody and right of access, the child's own wishes and views shall be addressed and taken into account in the extent that this is possible considering the age and stage of development of the child.⁹⁵ The views of the child shall be ascertained tactfully and in a manner that takes the child's stage of development into consideration and does not harm the relationship between the child and his or her parents. The purpose of ascertaining the child's views and the related procedure shall be explained to the child.⁹⁶

If the minor does participate and the consent is given, it should be primarily arranged in a way that the child can get support from his/her parent(s) and that the hearing would be arranged in a way where a parent and a child are both present.⁹⁷ Furthermore, the ombudsman for children underlines that once if a child is heard in mediation procedures, it is essential that a child is provided with a suitable environment and the mediator or the assistants adapt to the child's level. Especially in case of more severe disputes, the discussion with a child should be comprehensive and enough resources and time should be reserved.⁹⁸

3.2. In practice

As mentioned earlier, the parties of a court mediation are those to whom the dispute concerns *de facto*. These are thought to be the same that would be heard in trials.⁹⁹ The Finnish Legal Affairs committee highlighted in their statement that a child would not be considered a participating party in a sense of

⁹³ Laki lapsen huollosta ja tapaamisoikeudesta 8.4.1983/361, § 10.

⁹⁴ *Ibid*, § 1

⁹⁵ See § 4 and 11

⁹⁶ *Ibid*.

⁹⁷ Recommendation No. R (99) 19 15.9.1999.

⁹⁸ OM 1/31/2010

⁹⁹ LaVM 4/2005 vp. p.2-3

having any power on the decision making if the matter was brought to court. Hence, the responsibility lies within the parents. However, it was also stated that hearing of a child in court mediation should be considered with lighter criteria than in case of a trial.¹⁰⁰ In this context, it appears that the committee does not fully take into account the role of the child from a theoretical mediation perspective which could bring more dimensions to the outcome.

When a custody dispute enters court mediation, it must be ensured that in addition to the amicable outcome of the negotiations, the best interest of the child is secured.¹⁰¹ Nevertheless, the general approach in Finland is that the child is not heard in the negotiations. According to the statement of the ministry of justice of Finland, out of all 367 cases that were brought to the court mediation mentioned in a study, the child participated and was heard 14 times.¹⁰² Despite of the rare hearings of the children, the ministry of justice stated that according to the auxiliaries and mediators, the hearings and participation had a positive impact concerning the outcome of the negotiations and helped the parties to reach an agreement.¹⁰³ In most cases, the reason why the child was not heard was because the parents did not suggest it to happen. Many of the parents are assisted by lawyers so this not due to lack of awareness. Also, parents are provided with information before the negotiations take place and told that the child could be present. The report recommends that the parents should be encouraged to use the possibility.¹⁰⁴

Court mediation and its suitability to address custody disputes has been researched in Finland; a study conducted between 2011-2013 under the auspices of the Ministry of Justice consisted of a series of interviews and questionnaires about the functioning of the process, the number of cases and agreements and the experiences of the parties. However, the studies do not indicate detailed information about promoting the best interest of the child other than by promoting the amicability between the parents.¹⁰⁵ Later, Linnanmäki conducted another qualitative research in 2015-2016 in which she randomly selected and monitored six court mediations regarding custody disputes and studied the enforced agreements. In all six cases, a mediator, an auxiliary and the disputing parties i.e. the parents were present. Similarly, in all cases the parents had a shared custody over the child(ren),

¹⁰⁰ *Ibid.*

¹⁰¹ Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa 394/2011.

¹⁰² OM 25/2013 p. 74-78

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Linnanmäki p.229

but the child was living with one parent and the parents were living separately. In three of the six cases, the parents had lawyers with them and one parent had the support of a person external to the process. In all of the cases for both parents the problem concerned visitation rights. Other problems were about living arrangements, custody and the maintenance payable to the child. A common denominator was that the conflict between the parents included distrust and communication problems. In all of the cases the legal issue and the social conflict were intertwined.¹⁰⁶

In her research, Linnanmäki found that the ‘best interest’ of the child was hard to define; both by the mediators and the auxiliaries. The best interest of a child was described as a complex and multilayered concept that includes multiple variables.¹⁰⁷ None of the children were physically present in the negotiations even though the matters closely concerned the children. However, in some cases the mediators or the auxiliaries lead the conversation in a more child-centered direction.¹⁰⁸ Linnanmäki commented that the actual negotiations revealed mistrust in a sense that the mediators and auxiliaries did not seem to trust the parties and rather than focusing on facilitating the negotiations, they evaluated the situation themselves, pushing the conversation to a certain direction.¹⁰⁹ Even though court mediation is not purely based on facilitating, the mediator and the auxiliary should not aim to solve the dispute for the parties, or directly suggest the terms.¹¹⁰

¹⁰⁶ *Ibid* p. 231-239

¹⁰⁷ *Ibid* p. 274

¹⁰⁸ *Ibid* p. 277-278

¹⁰⁹ *Ibid* p. 279

¹¹⁰ Aaltonen p.44

4. COMPARISON OF THE METHODS AND THE PROTECTION OF THE CHILD

On an earlier study, also conducted by Linnanmäki, not involving the child was found to be perceived as the best option from the parents' point of view as the child wasn't put in the middle of their dispute. The parents did not want the child to be put in a role of a "judge" or to give the child too much responsibility.¹¹¹ In the same interviews, that were carried out after the negotiations, an auxiliary mentioned that there is a clear preference between two schools among auxiliaries when it comes to hearing a child; those who emphasize the child's statements and those who highlight the parents' responsibility.¹¹²

Based on the materials, practices and legislation presented in this paper, it can be said that in Finland, the relation between defining the best interest of the child and who should ultimately define it seems to be problematic. Furthermore, the broad interpretation of the definition and concept of the best interest of the child seems to be the factor that enables the variation depending on the case at least to some extent. It appears, that common methods are not available or that the existing methods are not applied systematically by the mediators and auxiliaries. However, ADR methods and assisted negotiation techniques and standards are created to the purposes where negotiations are at the center rather than a regulative framework that would make it more similar to trials. It has also become apparent that the right to be heard is acknowledged for the child, but it is virtually dismissed in practice. Linnanmäki found that some of the mediators thought that in order to ensure the best interest of the child, the child participating during mediation and negotiation at least to a certain extent would be necessary. Her research indicated that resolving the conflict between the parents is in the best interest of the child.

One element that was referred to earlier was the fact that court mediation applies a more evaluative method whereas out of court mediation focuses on facilitating the negotiation without elements of evaluation of the situation, and on assisting the parties to address the issues at hand. The fact that court mediation applies a more evaluative approach can be seen to further ensure the protection of the child, since the disputing parties are supported by professional assistance who in addition to facilitating the

¹¹¹ Linnanmäki p. 289-290

¹¹² *Ibid.*

negotiations, can apply their knowledge and experience to a certain extent. Negotiations that purely facilitate the negotiations were seen as inadequate in case of custody disputes. When it comes to the question on whether an agreement can be enforced, the judge must take into account the provisions set out in the national and international legislation also concerning the best interests of the child and interpret this best interest on his/her own.¹¹³ This is why it would be necessary to apply evaluative elements in the negotiations, which promotes the court mediation over the other types and has more elements to decide on the content. The existence of the auxiliary personnel that exists in Finland in the context of court mediation, also supports this perspective, since the negotiations are guided by a professional.

The guarantees and protective measures that contribute to the best interest of the child in mediation that is carried out outside of the court, are determined by the evaluation made by the social welfare board before the enforcement of the agreement. A social worker consults the situation and discusses with the child too, if necessary. Neither in court mediation or out of court mediation, the agreement can be enforced if it does not promote the best interest of the child. A court must comply with the provisions set out in 361/1983 and 704/1975.

All in all, it seems there is a clear legal framework, which however leaves some areas open to interpretation. The breadth and extent concepts, such as best interest of the child, are very broad and the outcome can depend on the mediator, parents and the auxiliaries. However, regulating the negotiations strictly and adopting practices that would be applied to families as a standard has potential to take the alternative dispute resolution method to a more court-like way. Nevertheless, who is to be the auxiliary in the mediation, a psychologist, a social worker, or someone else, also leaves room for doubts. The reports given by the Ministry of Justice and the recent national legislation suggest that the child should be heard, and all the decisions should take into account the child's well-being and best interests. As it is discussed above, there is a lot variation depending on the case and parents to have a word to say on their child. When it comes to family law cases, the complexity and the unique relationships of the cases have a huge impact to which direction the cases go. The court mediation

¹¹³ Laki lapsen huollosta ja tapaamisoikeudesta 8.4.1983/361, § 10; Lastensuojelulaki 13.4.2007/417, § 4; The United Nations Convention on Rights of the Child, Art. 3; Charter of Fundamental Rights of the European Union, Article 24.

involving a child certainly needs further research also regarding the fulfillment of procedural justice and the right of a child to be heard.

The legislation gives a rather detailed framework on what to prioritize when making decisions in cases of this nature, but in practice and according to the aforementioned study it appears that there is not a general definition nor an understanding what a best interest of a child is in practice. Also, according to Linnanmäki by whom the mentioned study was conducted by, the mediators and auxiliaries did not use their potential and previous experience on child centered negotiations. It also can be noted that the research does not give the most comprehensive results of all cases, since only six cases were in the center of this research. Random sampling and geographical variation was used as to the extent who accepted the request.¹¹⁴

The agreement that is formulated as the outcome of the court mediation can be ratified by a judge. According to the Finnish Act 394/2011 on court mediation, the agreement can differ from the agreement that would have been the outcome of a trial, because the outcome of a mediation is approved by the disputing parties and they have found the mutual understanding themselves; in other words the agreement as the outcome of the court mediation does not have to be materially in accordance to the substantive law.¹¹⁵ However, the agreement must be justifiable morally and ethically as well as in a sense of equality if one party is considered to be in a weaker position. This means that contract law must be followed, and the formulation of the agreement shall not include any elements of duress or fraudulent methods or the agreement is considered as void. Moreover, if the court judge thinks that the agreement is contrary to the child's best interest, the agreement cannot be enforced. All in all, the agreement cannot be unlawful, or the judge has to interfere to the negotiations and close the case.¹¹⁶

If the parties reach a settlement during the mediation, the mediator may, at their request, confirm the settlement. In that case, the settlement constitutes an enforceable decision, by virtue of which for example an agreed payment, damages or maintenance payment may be recovered through enforcement measures. If the settlement is not confirmed, it is deemed an ordinary agreement that is

¹¹⁴ Linnanmäki p. 232

¹¹⁵ HE 284/2010 vp. p. 6

¹¹⁶ Linnanmäki p. 212-213

legally binding on the parties.”¹¹⁷ An agreement also cannot be enforced if it is unlawful or unreasonable or if it violates the right of a third party. A settlement may not be confirmed if it cannot be enforced as provided in the Enforcement Code (705/2007).¹¹⁸

¹¹⁷ Oikeus.fi: Court mediation of disputes. (2020) Retrieved from <https://oikeus.fi/en/index/esitteet/riidansovittelut-uomioistuimessa/sovintovoidaanvahvistaa.html>, 15 June 2020

¹¹⁸ Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa 29.4.2011/394

CONCLUSION

The aim of this bachelor thesis was to compare the two approaches of mediation; court-annexed-mediation and mediation outside of the court and find out about the protection of children in custody dispute cases. The hypothesis of this paper assumed that court mediation has stronger legal grounds and professional assistance to ensure the fulfillment and the evaluation of best interests of the child. In this paper, mediation and court mediation were presented in light of their legal framework, the process in practice and the involvement of the child. These elements were explored and put into the context of the regulating national acts as well as international conventions and directions. In the center of this paper was the best interest of the child in custody disputes. The covered areas included the definition of the best interest of the child, the effect that the chosen method has on the outcome and the legal framework; how well they qualify on ensuring that the outcome of the negotiations guarantee the favorable outcome.

Because the disputing parties apply to the court mediation by clearly defining the legal issue that they want to resolve and the judge i.e. the mediator has the chance to thoroughly consult both parties and lead the negotiations with the assistance from usually a psychologist or a social worker and the form and contents of the agreement can be enforced without the outcome following rigidly the substantial law, it suggests that court mediation has a stronger base to pursue the best interest of the child. Considering all of these elements, the agreement and thus the outcome has potential to be durable and favorable to the child. Mediation does not have the same qualifications to enforce the agreement as such. The mediation is not necessarily supported by a psychologist or a social worker. However, the enforcement of the contract does require an evaluation from the social worker, after which it can be ratified in court similarly to the court mediation agreement.

What was also problematic in the research was the broad and case-by-case evaluation when defining the best interests of the child. Certain main factors that do have an effect to the definition are set out in national legislation as well as in UNCRC. Moreover, the informal environment that the negotiations might take place in, the balance of powers of the parties, the mediator as well as the possible professional assistance are all factors that have an impact to the process of defining what is the best outcome to the child. Even though the negotiations are considered to have durable and positive

outcomes in family law cases, the process and the parties all have an impact to the outcome. Also, the impression on whether the process was more evaluative or facilitating, depended of the mediator. However, the evaluative approach has positive effects regarding the child's best interest, since the participating mediator and the professional assistance have previous experience and expertise from similar cases. Thus, on the grounds of the materials and analysis presented in this paper, it can be stated that the findings support the hypothesis presented.

It was difficult to obtain a significant amount of information from the data that is available about mediation facilitated solely outside the court and ratified in court afterwards. Thus, the comparison was done mainly on the legal basis of the methods and the tools that secure the protection of the child. However, data that is available from court mediation cases was enough to demonstrate the process and support the final results and comparison.

What has been excluded in this research is the training of the mediators. The materials used in this research gave a dissenting overview on the practices of the mediators and the scope that whether it is facilitating or evaluating from the mediators' point of view. Also, in the light of the fact that in court mediation the mediator is the court judge who is trained to use the legal standards and by default use positional arguments, the training of the mediators should be further studied. Further research aiming to find out about the common methods that the mediators apply, if any, relate closely to the topic of this paper. The aforementioned difficulty on the broad definition of the best interest of the child could also need be studied in Finland. However, when dealing with families from different backgrounds, with different matters and personalities, it is almost impossible to have one approach to the best interest of the child. Although the basic elements are set out in UNCRC and national legislation, but the multiple broad interpretation may have an impact to the outcome of a mediation.

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