

TALLINN UNIVERSITY OF TECHNOLOGY

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**THE COURT'S DISCRETIONARY POWERS IN THE EVENT
OF A FAMILY DISPUTE IN A MULTICULTURAL FAMILY.
CHILD'S RIGHT TO BE PART OF THE CULTURE OF BOTH
PARENTS**

Master 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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ABSTRACT

The aim of the master's thesis is to give a review of the child's right to culture on the example of the court practice of custody disputes in Harju County Court. The family as an institution is constantly changing in a globalizing world. In families where parents come from different cultural backgrounds and have different social values, cultural conflicts may occur, that affect, among other, the interests of mutual children. If the parents do not agree on the exercise of joint custody in the event of separation, the court must decide to whom custody belongs. When deciding whether to terminate joint custody, the court must take a decision on the basis of securing the best interests of the child. The Universal Declaration of Human Rights and the Convention on the Rights of the Child state that every person, including the child, has the right to culture, language and religion and it is in the best interests of the child to be part of their parent's culture. In opening the topic, the author discusses the child's right to the culture of the parents by analyzing both national and international legislation and case law. In analyzing the cases of Harju County Court, the purpose of the thesis is to find out whether the court applies the law in a different way in a dispute containing cultural conflict. Author analyzes the court decisions of Harju County Court from the period of 2012-2020 and gives an overview of how the court has taken into account the right to culture and the best interests of the child in a cultural conflict.

Keywords: family law, children's rights, right to culture, right of custody, court's discretionary powers.

INTRODUCTION

Over the past decades, the number of children affected by the divorce of their parents has grown steadily. 1.9 million marriages and an estimated 0.8 million divorces took place in the EU in 2017, according to the most recent data available for all EU Member States.¹ It is obvious that the disarray caused by a divorce increasingly contaminates the structure of the modern family and affects the psychological functioning of children. Even if each situation is different and it seems adventurous to establish generalities, divorce always involves consequences not only for the man and the wife who separate, but also and especially for the child who suffers the effects of this action. In a situation where the parents are unable to reach an agreement on matters important to the child, both parents have the right to go to court to protect the best interests of the child to regulate the legal relationship between the parents and the child. There are no statistics for the whole of Europe, but there were 2309 non-contentious court proceedings concerning children² in Estonian county courts based on 2020 statistics only.³

The main thrust of court proceedings concerning children is one - to put the best interests of children first.⁴ The protection of the best interests of the child in custody disputes is generally well covered by the law, the legal literature and case law - When determining parental rights and deciding on the procedure for communicating with a child, the court must make a discretionary judgment based on a value decision. In doing so, the court must take into account the interests of the child, the rights of both parents and consider all the circumstances that affect the purposes of exercising custody. The court must consider all the circumstances that may affect the child's well-being and development.⁵

But what if the parents have different cultural backgrounds? Do the cross-cultural differences bring a new dimension to court proceedings that both the judiciary and the parties of the

¹ EUROSTAT. Marriage and divorce statistics. https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics. Last accessed 27.02.2021.

² According to Code of Civil Procedure § 550 (1) 2 non-contentious family matters concern *inter alia* determination of a parent's rights to a child, including deprivation of parental rights from a parent, and regulation of access to a child (matters of the right of custody).

³ Procedural Statistics for Courts of First and Second Level in 2020. <https://www.kohus.ee/et/eesti-kohtud/kohtute-statistika>. Last accessed 27.02.2021.

⁴ United Nations Conventions on the Rights of the Child (UNCRC), Art 3 (1) - In all actions concerning children, whether 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.

⁵ UNCRC, Art 3; CFR, Art 24.

proceedings must observe? Should the law be applied differently to multicultural family disputes?

This master thesis provides a review on cultural conflicts in court cases concerning family law - whether and in what way the case law of Harju County Court is following the best interests of the child in a multicultural family⁶ disputes.

More narrowly the thesis deals with disputes concerning the termination of a parent's right of custody to a child in multicultural families - the right of a child to become part of the culture of both parents. Have legislators adequately regulated the identification of the best interests of the child in the context of cultural conflict? While in the case of parents living in the same country with a similar cultural background, the courts generally consider that the child must be able to communicate with both parents, in this master's thesis, the author wants to find out whether Harju County Court takes this into account in the case of cultural conflict between the parents. It is important to understand whether and how the courts, in a globalized world and in the context of changed family relationships, take into account the child's right to be part of the culture of both parents.

The topic of the master thesis was first of all inspired by the position of the author - the secretary of a judge specializing in family law in Harju County Court. In family law proceedings, reliance on procedural rules is less important than the actual situation, and the court has a much greater role to play in the conduct of the proceedings and personal persuasion. Thus, the author has been exposed to the greater discretion of the court.

Secondly, the choice of topic has been inspired by the issue of shaping the child's identity, and maintaining freedom of expression in court proceedings. This brings a new dimension to litigation concerning children, as the interests of people with different cultural values, traditions, knowledge and behaviors emerge. The right to culture, language, and religion of origin is particularly important for children because it is at this stage of a person's development that they construct their identity.

The work is divided into two main chapters, the first of which opens the topic of cultural conflicts in family law through legal norms and -concepts, and the second analyzes whether the court also follows them in practice. When opening the topic, the keywords used in the work are

⁶ In this work, multicultural families are considered, where one parent is from Estonia and the other from another nationality.

first explained: cultural conflicts – multicultural family - best interests of a child – parent's right of custody. Explaining the principles of cultural conflict and the best interests of the child has been used to create the background for the topic. Previous research and literature are also discussed, perhaps more importantly Bethania Dababneh's dissertation *Is family dispute resolution facilitating the child's rights to culture?*⁷ Estonian authors have not written narrowly about the protection of children's rights in the context of multicultural families. In the Estonian context, Kristi Joamets has previously dealt with the issue of multicultural families, discussing the future of family law in a multicultural Europe.⁸

Next, the work deals with the legislative side - which legal norms regulate the issue. In addressing the legal issue, the thesis addresses which international and national legislation, case law and guidelines the court must follow in the event of a custody case to ensure that the best interests of the child are protected. The relationship between the child and the parent is protected by both national and international law. It is not only a subjective right deriving from family law, but a human and fundamental right that falls within the scope of the right to family life and the protection of which is guaranteed by Article 8 of the European Convention on Human Rights (ECHR)⁹. The most important international agreement on putting the best interests of the child first is the Convention on the Rights of the Child (UNCRC) and its comments. UNCRC is an integral part of the Estonian legal system and is directly applicable in court. At the national level, Family Law Act (FLA)¹⁰ regulates the questions of parental responsibility.

Based on the aim of the master's thesis, the author of the thesis puts forward the following hypothesis: In Harju County Court, the international and generally accepted principle of the child's right to participate in the culture of both parents has not been followed in disputes related to children from multicultural families.

Different methods of legal interpretation are used in the interpretation of legal norms. Scientific literature, court decisions, international and national legislation have been used as sources. The

⁷ Dababneh, B. (2014). *Is family dispute resolution facilitating the child's right to culture?* University of Western Sydney, 2014.

⁸ Roots, L.; Joamets, K. (2018). Cultural Aspects and Human Rights of Minors in the Process of Marriage in the European Union. *Studii Europene*, 11, 11–34; Joamets, K. (2017). Kas Sagrada Familia või klaasmaja: Milline on rahvusvahelise perekonnaõiguse tulevik? *Riigikogu Toimetised*, 35, 165–170.

⁹ Council of Europe. (1988). Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as amended by Protocol No. 11. In *Council of Europe Treaty Series 155*. Council of Europe.

¹⁰ Family Law Act. RT I, 27.10.2020, 15.

thesis is qualitative research. The decisions of Harju County Court in 2012-2020 have been studied and a considerable part of the work is devoted to the analysis of these decisions.

As a result of the analysis of the work, the author would like to find an answer to the question of whether the court applies the law accordingly in multicultural family cases to ensure the child's right to culture.

1. CULTURAL CONFLICTS IN 21ST CENTURY FAMILY LAW IN THE EUROPEAN LEGAL ORDER

1.1. Terminology

When opening the topic, it is important to get acquainted with the basic definition of the terms. Today's societies are more and more various, diverse. Diversity, whether it concerns groups or individuals, is an inherent characteristic of any society. These differences in identity, culture and religion, require capacities for understanding, communication and cooperation which are conducive to enrichment, under penalty of degenerating in the form of conflicts, violence and violations of human rights. Diversity itself creates conflicts. Conflict is any condition of disagreement between individuals, groups or groups of people, expressed in attitudes or behavior.¹¹

Cultural diversity is a source of conflict. Jonathan H. Turner¹² defines *cultural conflict* as a conflict caused by differences in cultural values and beliefs that place people at odds with one another.¹³ The theory of cultural conflict has been dealt with mainly in the field of criminal law. Sociologist and internationally-recognized criminology expert Thorsten Sellin described the cultural conflict of the late 1930s as a result of the reciprocal entry of norms of conduct.¹⁴ In the field of private law, the concept of cultural conflict has been addressed by Robert Post¹⁵, according to whom culture, like all things human, is continuously evolving. It creates meanings that allow for the possibility of dispute and contest. When the law is invoked to enforce "cultural values," therefore, it is often being used to advance one or another side of an ongoing cultural disagreement. About resolving cultural conflicts he marks the following: the question of how law ought to respond to cultural conflict is deeply dependent upon the specific nature, content and history of proposed legal interventions, as well as their likely consequences.¹⁶

Conflicts itself are necessary to give the law an indication of how to deal with them in the best possible way. The word conflict derives from the Latin word *conflictus*, which means collision with each other in the broadest sense. The two frequently mentioned conflicts are the conflict

¹¹ W. C. Levin. Sociological ideas. Belmont (California): Wadsworth 1991 3rd ed, p 93.

¹² Professor of sociology at University of California, Riverside.

¹³ Turner J. H. Sociology (2006). Prentice Hall. p 87.

¹⁴ Sellin, Thorsten. Culture Conflict and Crime. New York: Social Science Research Council 1938, p 63–67.

¹⁵ Sterling Professor of Law at Yale Law School. Robert Post is a member of the American Law Institute and a fellow of both the American Philosophical Society and the American Academy of Arts and Sciences.

¹⁶ Post, Robert. (2003). Law and Cultural Conflict. Chicago-Kent Law Review. p 78.

of information and the conflict of values.¹⁷ Professor Niklas Luhmann¹⁸ states, that the law regulates modes of behavior that are themselves provided with the capacity for conflict. The law itself creates the conflicts that it needs for its own evolution, and thereby perfects its own autopoiesis. The evolution of law then begins with the loosening of the structures of segmentary societies, and especially with the introduction of a sufficient measure of uncertainty into social conflicts.¹⁹ A similar view is taken also by Patrick Devlin²⁰, according to whom society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically.²¹

In this master's thesis, the phrase *cultural conflict* is considered as the incompatibility of norms and values. There are many forms of conflict and it is always difficult to grasp the causes. Yet conflict is a very damaging phenomenon for families. It is essential in this case to be able to distinguish between a cultural conflict and a personal conflict.

What do we understand by "personal conflict"? They are also called "conflicts of interest" and they arise when the motivations or goals of two (or more) people conflict. Cultural conflict is different: it is based on a misunderstanding between two cultures whose values and uses differ.²² And it is often more difficult to identify the causes because if each of the individuals does not know the culture of the other and it is likely that the misunderstanding will drag on and end up making the situation worse.

What meaning should be given to the words *culture* and *identity* in case of a cultural conflict?

Per Cambridge Dictionary, the phrase *culture* means the way of life, especially the general customs and beliefs, of a particular group of people at a particular time. On a social level, culture is the blueprint that gives people their multiple

¹⁷ Moore, C. (1986). *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass Publishers.

¹⁸ Professor of Sociology, University of Bielefeld. Visiting Professor of Law, Northwestern University School of Law.

¹⁹ Luhmann, Niklas. (2004). *Law as a Social System*, eds. Klaus Ziegert et al. Oxford: Oxford University Press, p 180-199.

²⁰ British High Court judge and legal philosopher.

²¹ Devlin, Patrick. (1965) *The Enforcement of Morals. Morals and the Criminal Law*. Oxford University Press, p 180.

²² Avruch K. (2002). *Cross-cultural conflict*. UNESCO Encyclopedia of Life Support Systems, p 5.

identifying features and observable patterns of behavior, including: their habits and practices, their language and shared systems of beliefs, values and assumptions.²³

Identity is defined as who a person is, or the qualities of a person or group that make them different from others.²⁴ Identity is considered a crucial aspect of individual development and psychological wellbeing. The Treaty on the European Union (TEU) Article 2 states that the Union shall respect the equality of the Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Who is considered a family depends on how society and family life are understood in society. Therefore, the approach to the family is broad and changes over time.²⁵ Family is based either on a stable and close personal-intimate relationship or on close affinity.²⁶ A relationship with a foreigner is an alliance not only with another person, but also with a different tradition and culture with different origins. The choice of a partner belonging to a culture other than oneself can be interpreted as a transgression to one's own culture, and to one's family ideals, since a foreigner will transmit values that are different from oneself to one of his own.²⁷ The globalization of the world and its people lead more and more unions and relationships to become mixed. Understanding that no society is homogenous, the cultural interactions of the global economy, the development in communications technologies and the ease of migration has led to a permeability of boundaries between cultures.²⁸ In the context of a breakdown of a family, cultural conflict primarily affects the child, who will inevitably be at the crossroads of a conflict of values and for whom his parents or in this case - the state - will have to decide whose interests and how to consider in resolving such a conflict.

What does *multicultural / intercultural / bicultural family* means? According to the Cambridge Dictionary, *multicultural* means - relating to a number of different cultures, while British

²³ Valma Murry M., Smith, E. P., & Hill, N. E. Race, ethnicity, and culture in studies of families in context. (2001), *Journal of Marriage and Family*, 63(4), 911-914

²⁴ Feraon, D. J. (1999) What is Identity (As We Now Use The Word). Department of Political Science Stanford University Stanford. Unpublished manuscript p 2.

²⁵ ECHR. *Emonet and Others v. Switzerland* (application no. 39051/03) p 66: „The Convention and its Protocols must be interpreted in the light of present-day conditions“.

²⁶ Olm, A. (2013). Non-married Cohabiting Couples and Their Constitutional Right to Family Life. *Juridica International* 20, p 107.

²⁷ Yörük, T. N. (2016). Examining Marital Satisfaction In Binational Marriages, From An Ecosystem Perspective. Dissertation thesis. Middle East Technical University, p 8.

²⁸ Dababneh (2014) p 3.

English defined it as something relating to or including people from different cultures. Term *intercultural* is defined as - relating to or involving more than one culture. The term *bicultural* is defined by social, and cultural researchers Seth J. Schwartz and Jennifer B. Unger, according to whom *biculturalism* includes two identities at once: proficiency in one's mother tongue and the state language, social responsibilities, family relations, and mutual acceptance of responsibilities and rights. According to the theory of social identity, *biculturalism* can cause problems in the formation of identity due to differences in the values and behaviors of two cultures.²⁹ The issue in this case is whether individuals must choose between two conflicting identities or can establish a bicultural ethnic identity and, if so, whether that is adaptive.³⁰ In this master's thesis, the key term is considered to be the phrase *multicultural families* because it conveys a universal definition of a family model, where different nationalities live together with different beliefs and habits.

Living in a mixed family is a challenge that implies that the couple, the families of origin and the broadest social context should find a way to combine differences and negotiate cultural aspects. An increase in dual nationality and circular migration patterns has led many individuals and families to maintain multiple affiliations over time.³¹ It becomes necessary to reconsider the hierarchies of values, both at the individual and a family level due to the different cultural belonging of the partners. By doing this, they will guarantee their children access to their respective cultures and provide them with the support they need to build their own identity.³²

Parental responsibility covers all rights and obligations relating to the person of the child and his or her property.³³ Term *parental responsibility* is defined by the Council of Europe as a collection of duties and powers, which aim at ensuring the moral and material welfare of children. In particular care and protection, maintenance of personal relationships, provision of education, legal representation, determination of residence and administration of property.³⁴

²⁹ Schwartz, S. J., & Unger, J. B. (2010). Biculturalism and context: What is biculturalism, and when is it adaptive? *Human Development*, 53(1), p 26.

³⁰ Phinney, Jean. (1990). *Ethnic Identity in Adolescents and Adults: Review of Research*. Psychological bulletin. 108. p 501.

³¹ Estin A. L. (2017). Marriage and Divorce Conflicts in International Perspective, *Duke Journal of Comparative & International Law*, volume 27, p 488.

³² Crespi, I, Meda, S. G, Merla L. (2018). *Making multicultural families in Europe*. Switzerland: Palgrave Macmillan, p 14.

³³ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Official Journal L 048. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003D0093:en:HTML>.

³⁴ Committee of Ministers of the Council of Europe CM/Rec (2015)4, Committee of Experts on Family Law of the European Council (CJ-FA) Report on Principles Concerning the Establishment and Legal Consequences of Parentage – „The White Paper“, 15-17.11.2006.

The right of custody can be a joint or sole right of custody. The definition of *joint custody* is determined by national family law since it does not concern the spectrum of competencies of the EU.³⁵ Estonian Family Law explains, if the parents have joint custody of the child, they must exercise custody of the child and fulfill the custody obligation on their own responsibility and in unison, with a view to the child's full well-being.³⁶ As long as the parents live together, they usually take care of their children together. In a separation or divorce, parents must make a decision about child custody. Difficult to take, it can lead to deep disagreement between parents.

If the parents cannot reach an agreement, it may be necessary to go to court. First of all, in the event of disagreement, the judge must attempt to reconcile the parents through mediation, by a compromise or in another manner by agreement of the parties.³⁷ It is only as a last resort that the judge should make a Court's decision. The court may decide to award custody of the child to both parents or to one of the parents. The court must follow the principle of putting the best interests of the child first when processing custody.³⁸

To make his decision, the judge can rely on several elements. It can first take into account the previous agreements made between the parents. It can also rely on the expertise and social surveys it has ordered. The review of child custody arrangements falls within the discretionary power of the family court judge, depending on the facts put forward to him by the respective parties. The expulsion of a parent without their child will almost always be an interference with the family life and the legality with the measure will turn on its justification – whether it is prescribed by law and necessary in a democratic society.³⁹ In all cases, the judge rules taking into account the best interests of the child. Although joint custody is the preferred method of custody by judges and parents separating amicably, it nevertheless imposes certain conditions. Even after a separation, both parents are responsible for making important decisions by mutual agreement, regardless of the type of custody (sole or joint).⁴⁰

³⁵ Division of competencies within the European Union. Summaries of EU legislation. Publications Office. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0020&from=EN>.

³⁶ Judgment of the Supreme Court of Estonia (07.06.2011) no. 3-2-1-45-11, p 19.

³⁷ Code of Civil Procedure § 563; Judgment of the Supreme Court of Estonia (16.06.2010) no. 3-2-1-64-10.

³⁸ FLA § 123 (1)

³⁹ Davies, G.(2012). *The family rights of European children: expulsion of non-European parents*. EU Working Paper RSCAS. European University Institute, p 10.

⁴⁰ FLA § 145 (1); Judgment of the Supreme Court of Estonia (07.12.2018) no. 2-17-3347, p 16.

1.2. Legislation

It is not possible to compare two or more elements of legal order without knowing them, one and the other, to a sufficient extent. Thus, an overview of relevant international law and EU legislation is given first, before proceeding to Estonian national law – deriving from the principle from the universal to the specific. This subchapter deals in more detail with three important legal issues – the person's right to culture, the rights of the child and Estonian national family law. All of these principles are important for opening up the subject, as well as in court proceedings, helping the judge make a fair decision.

The concept of family varies, changes shape over time, but it never ceases to be regarded as one of the foundations of society, even in times of crisis. The right to the protection of family life as enshrined in international texts has two facets. On the one hand, public authorities must take appropriate measures to achieve the living conditions essential for the full development of families. On the other hand, public authorities must refrain from interfering in families, spaces of private life.

The integrity of family life is protected by the Universal Declaration of Human Rights (UDHR). Article 12 of the UDHR states, that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms enshrines the right to respect for private and family life, Article 7 of the EU Charter of Fundamental Rights (CFR) provides for respect for private and family life.

Everyone, including children, has the right to respect for his or her private and family life. This is also supported by Estonian national legislation. According to § 26 of the Constitution, everyone is guaranteed the right to respect for family and private life. § 27 (1) of the Constitution values the family as one of the fundamental rights of everyone and the family is under state protection. The family within the meaning of § 26 of the Constitution generally includes the core of the family, the parents and their minor children, between whom there is a relationship of dependence. "Respect" for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally.⁴¹ The protection of family life includes, in particular, the right of family members to live together to meet each other's emotional and social needs. One of the most important parts of family life is the

⁴¹ ECHR. *Marckx v. Belgium*, Application no. 6833/74, 13 June 1979, para 34.

relationship between the parent and the child, and the protection of family life includes the parent's communication with the child.⁴²

According to Article 49 of the Constitution, every person, regardless of his or her nationality or citizenship, has the right to national identity and the related practice of language and culture, and to the observance of religion and traditions.⁴³ The right to identity is one of the civil rights and freedoms of both adults and children. The most relevant supranational provisions in the European area concerning identity as a fundamental right are those protecting the right to private and family life, namely Article 7 of the EU Charter⁴⁴ and Article 8 of the ECHR.⁴⁵ Articles 7 and 8 of the UNCRC contain the basic principles of the child's identity. Under Article 7, the child has the right to a name and a nationality from birth, and the right to know and, to the extent possible, to receive parental care from his or her parents.

Article 27 of the UDHR, which protects the right of minorities, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their language. The Court's standard consideration on identity and the right to private life includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity.⁴⁶

The Commission on European Family Law (CEFL) is responsible for harmonizing the principles applied and being established in EU family law.⁴⁷ The Commission was composed of experts on family law in the EU, which led to the creation of the „Principles of European Family Law“⁴⁸. This set of principle aims to harmonize family law within the EU both in the framework of partnerships (marriage, etc.) and parental relations. The establishment of the principles will contribute to the creation of a unified system of family law across the jurisdictions of the Member States within the EU, which in turn will support freedom of movement within the EU.⁴⁹ The principles provide a basis on which Member States should base their family law. The principles bring together common European values regarding the

⁴² Judgment of the Supreme Court of Estonia. 03.07.2012, 3-3-1-44-11, p 64.

⁴³ The Constitution of the Republic of Estonia. RT I, 15.05.2015, 2, para 49.

⁴⁴ Everyone has the right to respect for his or her private and family life, home and communications. CFR Art 7.

⁴⁵ Everyone has the right to respect for his private and family life, his home and his correspondence. ECHR Art 8.

⁴⁶ ECHR. *Mikulić v. Croatia*: para. 53

⁴⁷ Boele-Woelki, K., Ferrand, F., González Beilfuss, C., Jänträ-Jareborg, M., Lowe, N., Martiny, D., Pintens, W.: (2007) *Principles of European Family Law Regarding Parental Responsibilities*. European Family Law Series No. 16. p 161.

⁴⁸ CEFL. Principles of European Family Law Regarding Parental Responsibilities. Available at: <http://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf>.

⁴⁹ Boele-Woelki, K. and others. (2007), p 161-162.

child's rights and welfare, including issues governing the child's identity, the child's rights, parental responsibility and the exercise of custody of the child. CEFL explains parental responsibility as being collection of rights and duties aimed at promoting and safeguarding the welfare of the child.

1.2.1 Cultural Human Rights

The term „culture“ can be used to designate the entire way of life, activities, beliefs and customs of a people group or society.⁵⁰ Cultural rights are often qualified as an underdeveloped category of human rights. It suggests that, in comparison with other categories of human rights - civil, political, economic and social-cultural rights are the least developed as far as their scope, legal content and enforceability are concerned.⁵¹ Cultural rights hinge on the perceived uniqueness of the legacy that binds a group or community to a shared memory upon which the powerful sentiment of belonging and identity is built.⁵² UDHR was adopted by the General Assembly of the United Nations in 1948. It was designed to protect the freedom and dignity of individual human beings.⁵³

In 1960's The right to enjoy and benefit from culture is contained in article 27 of the International Covenant on Civil and Political Rights (ICCPR)⁵⁴ and article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁵. While ICESCR provides the right for everyone to take part in cultural life, ICCPR-s scope is more limited as the rights mentioned only protect ethnic, religious and linguistic minorities. Neither Convention defines the term „culture“.

On the contrary – the right to culture it is the central theme of that of The United Nations Educational, Scientific and Cultural Organization (UNESCO). According to the statement UNESCO Universal Declaration on Cultural Diversity (UDCD, 2001): "No one can invoke

⁵⁰ Smith, P. Riley A. (2001). *Cultural Theory: An introduction*. Oxford: Blackwell Publishing p 2.

⁵¹ Symonides, J. (1998). Cultural Rights: A Neglected Category of Human Rights (1995). *International Social Science Journal*, p 595.

⁵² Francioni F., Scheinin M. (2008). *Cultural human rights: International studies in human rights*. Boston: Martinus Nijhoff Publishers., p 3.

⁵³ The Preamble of The Universal Declaration of Human Rights.

⁵⁴ United Nations Office of the High Commissioner for Human Rights (1966) International covenant on civil and political rights. Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

⁵⁵ United Nations Office of the High Commissioner for Human Rights (1966) International covenant on economic, social, and cultural rights. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

cultural diversity for violate human rights guaranteed by international law, nor to limit their scope”and“ everyone must be able to participate in the cultural life of their choice and exercise their cultural practices, within the limits imposed by respect for human rights and fundamental freedoms.”⁵⁶ The emphasis is on the recognition, understanding and tolerance of other cultures based on a binding global ethic that builds on universal values and mutual respect across cultural boundaries.

Culture is a right because it is a factor in human improvement and development. This right is understood as a right of access to universal culture. Culture is what people open up to the universal, gain access to universally valid knowledge and discernment of universal values. UNESCO is the main place where reflection on human rights relating to culture and cultures could develop.

Article 27 of UDHR states that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Cultural rights are, therefore, inseparable from human rights, as recognized in Article 5 of the UDCD, and can be defined as the right of access to, participation in and enjoyment of culture. This includes the right of individuals and communities to know, understand, visit, make use of, maintain, exchange and develop cultural heritage and cultural expressions, as well as to benefit from the cultural heritage and cultural expressions of others.

The 2001 Declaration prefers to change the subject and declare the rights not of the individual, but humanity or each person as a human being. The duty to respect diversity corresponds not to the right of everyone to their culture, but to the right of man or humanity to the diversity of cultures. Cultures in their diversity form a common heritage to which all individuals have a right. Cultures are not entitled to their particularity, they can only exist for the common good of humanity.

It prefers to say that we have, rather than the right to a culture, but the duty to respect the diversity of cultures. The right to freely exercise or manifest one’s religion or beliefs and the right to participate in cultural life are enshrined in international human rights law.⁵⁷ However, varying degrees of cultural rights may be recognized, as cultural rights cannot be used as a

⁵⁶ UDCD (2001), Articles 4 and 5.

⁵⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>. Last accessed 16 March 2021.

justification to limit other human rights enshrined in international law. Cultural rights may in no case be invoked or interpreted in such a way as to justify an act leading to deny or violate human rights or fundamental freedoms. Any act committed in the name of a cultural tradition that violates human rights constitutes an abuse of cultural law.⁵⁸

The inclusion of cultural rights within the human rights system constitutes the basis and the *sine qua non* of intercultural dialogue. Cultural rights are part integral part of human rights following the principle of indivisibility. It can be concluded from the above that the practice and consumption of culture as a human right is also a child's right and in his or her best interests. It shapes the child's identity and social and historical belonging, and it is, therefore, the parents' responsibility to ensure to practice the child's culture of origin.

1.2.2. Convention on the Rights of the Child

The Convention on the Rights of the Child (UNCRC) provides a framework for interpreting the best interests of the child. At the end of the 20th century, with the emergence of the new roles for the parents, the state began to intervene in areas which until then had been regarded as areas only for family concern, thus establishing a clear link between the state's responsibilities and the child.⁵⁹ The UNCRC is the most important legal instrument that sets out the rights of the child, as the fundamental pillar of the Convention is the best interests of the child. The Convention on the Rights of the Child enshrines internationally recognized children's rights. The Convention emphasizes the importance of the rights of every child, girl and boy, and defines a child as "every human being under the age of eighteen". Its fundamental role is to enable the application of all the rights of each child under the jurisdiction of a State.

The UNCRC is the most widely and quickly ratified international treaty: 196 states have ratified it to date, the last one being Somalia in 2015⁶⁰ It is the first binding text for state parties and the only treaty that recognizes fundamental rights for children. UNCRC is the first international legal instrument with the force of law that recognizes civil, cultural, economic, political and

⁵⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 21 (Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights), para. 19, U.N. Doc. E/C.12/GC/21 (21 December 2009)

⁵⁹ Bueren Van G. (1998). *The International Law on the Rights of the Child*. Boston: Martinus Nijhoff Publishers, p 21.

⁶⁰ UN Treaty Collection. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en.

social rights for children.⁶¹ With the Convention, the world recognized that children, too, had rights.

The Convention is universal since it concerns all children regardless of their origin or the situation in which they find themselves.⁶² Each State must implement, according to its own means, the rights common to all children. In addition, all rights are indivisible and interconnected. It is important that all rights are respected to ensure the full development of children and adolescents.

UNCRC sets out four general principles⁶³: the prohibition of unequal treatment, the best interests of the child, the safeguarding of the survival and development of the child, and the consideration of the views of the child. These four form the basis of the Convention and the standard of a child-friendly society, if followed, every child can develop harmoniously and realize his or her full potential.

A specific committee was set up in 1991 by the United Nations to ensure the implementation of the Convention. The Committee on the Rights of the Child is an independent expert body that monitors the implementation of the UNCRC by state parties, as well as the implementation of the two Optional Protocols to the Convention. Under the article 44 of UNCRC, each State party undertakes to submit reports to the Committee on the Rights of the Child on the measures taken to give effect to its obligations under the Convention. Two years from the date of ratification and every five years thereafter, States must submit a report to the Committee on the Rights of the Child on the progress made in the enforcement of the rights provided for in the Convention.⁶⁴ The Committee is made up of eighteen independent experts⁶⁵, however, the Convention provides for ten.⁶⁶ Members speak out, through general comments and recommendations, on a variety of themes affecting children, such as justice youth, education and the health of children and adolescents.⁶⁷ Recommendations of the CRC Committee may be either general and overarching or related particularly to the child-protection system.⁶⁸ The

⁶¹ Dababneh (2014) p 53.

⁶² UNCRC Art 2.

⁶³ European Commission. Convention on the Rights of the Child and its Four Guiding Principles. <https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.7.html>. Last accessed 20.03.2021.

⁶⁴ United Nations Human Rights Office of the High Commissioner. The Committee on the Rights of the Child. <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>. Last accessed 12.03.2021.

⁶⁵ Ibid.

⁶⁶ UNCRC Art 43.

⁶⁷ The Committee on the Rights of the Child (CRC). United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>. Last accessed 12.03.2021.

⁶⁸ Luhamaa K. (2015). International Human-Rights Supervision Triggering Change in Child-Protection Systems? The Effectiveness of the Recommendations of the CRC Committee in Estonia. *Juridica International* 29, p 9.

Committee set out four principles intended to facilitate the interpretation of the rights provided for in the Convention⁶⁹ - non-discrimination, the best interests of the child, the right to life, survival and development and participation. The rights given in the Convention are indivisible and interrelated, and cover all aspects of the child's life.

1.2.3. National law of the Republic of Estonia on the right of custody

The most important part of the rights of a parent and a child is the right of custody, which means that a parent has the obligation and right to take care of his or her minor child, including taking care of the child's personal well-being, child's property, and to decide important matters related to the child.⁷⁰ In Estonia, the questions of parental responsibility are regulated by Family Law Act (FLA) which entered into force on 1 July 2010.

Parent with custody is also the child's legal representative according to § 120 (1) of the FLA. Pursuant to § 82 of the FLA, the mutual rights and obligations of parents and children arise from the descent of children, and according to § 116 (1) of the FLA, parents generally have equal rights and obligations towards their children. According to § 124 (1) and § 126 (2) of the FLA, the parent's right of personal custody includes, *inter alia*, the parent's obligation and the right to raise the child, supervise him or her, determine his or her place of residence and social circle. The right of a custodial parent to determine the child's place of residence and social circle also includes the parent's right to determine where and with whom the child lives, and it also creates preconditions for raising and caring for the child.⁷¹ The Estonian Supreme Court has emphasized in the judgment of 07.06.2011 in civil case no. 3-2-1-45-11 that serious and repeated disagreements of parents on issues of raising a child may indicate that maintaining the joint custody of parents may not be in the best interests of the child.⁷²

§ 137 (1) of the FLA provides that if parents with joint custody permanently live apart or do not wish to exercise custody jointly for any other reason, each parent has the right to apply to the court for partial or full custody of the child.

⁶⁹ Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, p 32. https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf. Last accessed 27.02.2021.

⁷⁰ FLA § 116 (2).

⁷¹ Supreme Court judgment of 7 June 2011 in civil case no. 3-2-1 -45-11, p 17.

⁷² *Ibid*, p 20.

First, custody can be transferred fully to one parent. According to the instructions of the Supreme Court, termination of joint custody is justified in two main situations - if the parents are unable to reach an agreement on important issues concerning the child's life, and in other cases when one parent actually takes care of the child, the other parent does not want to take part in the child's life and decisions. The real situation should be in accordance with the legal situation.⁷³

The right of custody can also be terminated partially. Partial transfer of custody usually refers to the determination of the child's place of residence and stay, the choice of educational institutions and issues related to the child's health. According to § 119 of the FLA, it is possible to give the right to decide on certain matters to one parent if the parents do not reach an agreement on a matter important to the child. Issues such as residence, education, health and hobbies are important factors for the child, as they affect the child's long-term development as well as future.

According to the Code of Civil Procedure⁷⁴ § 550 (1) (2) the Court adjudicates the custody matter in an action proceeding by the petition of the petitioner. The Court shall involve the child's representative in the proceedings⁷⁵. According to the State-funded Legal Aid Act⁷⁶ § 18 (1) the Bar Association shall immediately appoint a lawyer providing state legal aid at the request of the court. In addition, the Court asks for the opinion of the rural municipality or city government.⁷⁷

If the application is submitted for partial or complete termination of the joint custody, then according to § 137 (1) of the PKS, the Court must establish whether there are grounds for terminating the joint custody. To resolve the application, the Court must therefore determine whether the partial termination of joint custody and the transfer to one parent is justified and in the best interests of the child. According to § 137 (3) of the FLA, upon the termination of joint custody, the Court shall primarily decide on the best interests of the child when deciding on custody of one parent, taking into account both parent's mental and economic readiness to raise the child, spiritual connection with the child. The Court also decides whether the parent, taking into account the circumstances specified in § 137 (3) of the FLA, he or she will be able to exercise the right of custody alone in the future. The termination of joint custody and the

⁷³ Supreme Court judgment of 7 June 2011 in civil case no. 3-2-1-45-11, p 21.

⁷⁴ Code of Civil Procedure. RT I, 03.03.2021, 6.

⁷⁵ Code of Civil Procedure § 219 (2).

⁷⁶ State-funded Legal Aid Act. RT I, 22.12.2020, 45.

⁷⁷ Code of Civil Procedure § 552 (2).

granting of decision-making power to one parent is a discretionary decision of the Court, in which the higher Court intervenes if the lower Court has exceeded the limits of discretion or has significantly violated the rule of procedural law. Whether and to what extent the satisfaction of a claim is justified is a matter for the Court's discretion, which depends on the specific life circumstances.

The Supreme Court has stated that by terminating the joint custody of parents or giving one parent the grant powers of decision, the rights of the other parent may be restricted only to the extent necessary to ensure the best interests of the child. The aim is to preserve, as far as possible, maintain joint custody of both parents.⁷⁸ In the best interests of the child, it is generally the case that, in the event of the parents' separation, he or she has two custodial parents even after the parents' marriage or cohabitation has broken down.

There is no legal definition of "best interests of the child" in Estonian law, but as discussed earlier, the best interests of the child derive from UNCRC, which has been transposed into Estonian law. When deciding on the right of custody, the principle of the best interests of the child must be taken into account (Article 3 (1) of UNCRC, Article 24 (2) of the CFR § 123 (1) of the FLA and § 2 of the Child Protection Act⁷⁹).

The Chancellor of Justice of the Republic of Estonia has explained that the adoption of the Convention was intended to emphasize that the child is a person and has the same rights, obligations, interests and needs as an adult. The Convention understands the child, the child has human rights and no one has ownership of the child. The child has the right to personal life, communication and friendship. The privacy of the child is also supported by Article 16 (1) and (2) of UNCRC, which states that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence.⁸⁰

According to § 27 (3) of the Constitution, parents have the right and obligation to raise and care for their children. § 116 (1) of the FLA provides that parents have equal rights and obligations towards their children unless otherwise provided by law. According to § 143 (1) and (2) of the FLA, a child has the right to communicate personally with both parents. Both parents have a duty and the right to communicate with the child personally. § 143 (2) of the FLA provides that

⁷⁸ Supreme Court judgment of 12 February 2016 in civil case no. 3-2-1-159-15, p 30.

⁷⁹ Child Protection Act. RT I, 12.12.2018, 49.

⁸⁰ Chancellor of Justice of Estonia. Parental rights and responsibilities. <https://www.oiguskantsler.ee/et/lapsevanema-%C3%B5igused-ja-kohustused-1>. Last accessed 05.03.2021.

a parent must refrain from activities that damage the child's relationship with the other parent or make it more difficult to bring up the child. According to § 118 (1) of the FLA, parents have an obligation to perform the duty of care concerning the comprehensive well-being of the child. As long as the parents have joint custody of the child, they must exercise custody of the child pursuant to § 118 (1) of the FLA and fulfill the custody obligation according to § 118 (1) of the FLA on their responsibility and in unison, taking into account the child's comprehensive welfare.

According to § 145 (2) and (3) of the FLA, the parent with whom the child is currently staying decides on issues of the child's daily life. Thus, in the case of joint custody, both parents generally retain equal rights and obligations towards the child, including the right to unanimously determine the child's place of residence and to agree with which parent the child mainly lives and how the child can communicate with the other parent. The primary purpose of the right of access is to ensure the establishment and continuation of personal relations between a parent and a child.⁸¹

According to § 3 of the Child Protection Act of the Republic of Estonia, the principle of child protection is always and everywhere to put the interests of the child first. § 8 of the Republic of Estonia Child Protection Act mentions the inherent right of every child not only to life and health, but also to development and well-being. Child who is separated from one or both parents has the right to maintain personal relations and contact with both parents and close relatives, unless this is prejudicial to the child.⁸² According to § 21 (1) of the Child Protection Act, the interests of the child must be ascertained and all decisions taken as a matter of priority must be taken into account when making all decisions affecting the child and failing to make a decision.

In its ruling 3-2-1-13-11 of 04.05.2011, the Supreme Court has taken the position that the complete deprivation of a parent's right of custody of a child is an extreme measure. When applying measures restricting parental rights, the court must consider both the best interests of the child and the rights of the parent and apply the least restrictive measures to ensure the welfare of the child. When choosing a measure, the court must take into account the principle

⁸¹ Supreme Court judgment of 14 March 2012 in civil case no. 3-2-1-6-12, p 18.

⁸² Supreme Court judgment of 21 March 2007 in civil case no. 3-2-1-13-07 p 33.

of family autonomy and, if possible, give preference to such measures that support the family and help to strengthen or restore the parent-child connection.⁸³

1.3. The best interests of a child. Child's right to be part of the culture of both parents

The realization of the rights of the child in the context of the family is essential for the "practical and effective"⁸⁴ protection of UNCRC. The notion of "the best interests of the child" has developed as a result of the changing Western image of the child.

The principle of putting the best interests of the child first can be found in several international conventions and declarations currently in force. The concept of the best interests of the child is complex. It must be adapted and defined on a case-by-case basis according to the specific situation in which the child or children are involved, taking into account their personal context, situation and needs. In each individual decision, the best interests of the child must be assessed and determined in the light of the specific circumstances of the child in question. In the case of collective decisions, such as those of the legislator, the best interests of the child must be assessed and determined in the light of the situation of the particular group and/or children in general. In both cases, the assessment and determination must be carried out in full respect of the rights enshrined in UNCRC and its Additional Protocols.⁸⁵

UNCRC does not give a strict definition of this concept. However, it tends to strengthen the protection of the child. As a result, when making a decision concerning a minor, it helps to preserve their well-being and their right to develop in an environment favorable to their mental and physical health. The obligation to take the child's views into account does not mean that the best interests of the child should be determined solely based on what the child wants but that the best interests of the child must take precedence over other circumstances.⁸⁶

EU legal system grants the highest level of protection to the right to identity. As a model of the construction of identity, culture is in fact the means of elaboration of the forms and contents of

⁸³ Supreme Court judgment of 4 May 2011 in civil case no. 3-2-1-13-11, p 14.

⁸⁴ ECHR. *Airey v. Ireland* (Application no. 6289/73) 9 October 1979, para 24.

⁸⁵ Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, p 32. https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf. Last accessed 27.02.2021.

⁸⁶ Hammarberg T., *The Principle of the Best Interests of the Child – What it Means and What it Demands from Adults*. Lecture, 30.05.2008, p 6. Available at: <https://rm.coe.int/16806da95d..>

identity. As addressed earlier, culture is the collective summation of a group's innate subjectivities, values, beliefs, customs, language, history and traditions. Far from being reduced to a right of "access to culture", cultural rights are more centered around the notions of free determination, free expression and access to cultural expressions and heritage in their great diversity. They are the rights and freedoms for a person, alone or in common, to choose and express his identity and to access cultural references as so many resources which are necessary for his process of identification, communication and development.⁸⁷ Culture is thought to be a learnt behavior not biologically inherited.⁸⁸ Since the first studies in the sociology, the family has appeared as the main body for transmitting cultural awareness to the child.⁸⁹ The child's socialization and training in the family's culture is primarily dependent upon their families. The family is primary in acculturating the child's sense of self. Social psychologists Jean Phinney and Victor Chavira studied children's socialization issues and found, that parents pass onto their children their sense of pride in their culture, their cultural knowledge and cultural traditions from the time a child is born. Involvement in a community's cultural life is an important element of children's sense of belonging.⁹⁰ Children inherit and experience the cultural and artistic life of their family, community and society, and through that process, they discover and forge their own sense of identity and, in turn, contribute to the stimulation and sustainability of cultural life and traditional arts.⁹¹

Children from mixed marriages have in common that they belong to family spaces marked by two (or more) sets of practices. Ideally, these individuals should be the synthesis of dual belonging. Because their parents are mixed, they benefit, depending on the case, from a bond direct with two languages, two religions, two countries. This contact has various effects on the children's lives which vary according to the exploitation made of them by the parents and by the family.⁹² It is therefore a question of understanding the transmission of the double cultural

⁸⁷ UNCESCR, General comment No. 21.

⁸⁸ Kroeber Alfred L; Kluckhohn, C. (1952) Culture: A Critical Review of Concepts and Definitions. Harvard University Peabody Museum of American Archeology and Ethnology Papers, p 47.

⁸⁹ Bornstein, M. Putnick D., Lansford J., (2011) Parenting Attributions and Attitudes in Cross-Cultural Perspective. *Parenting. Science and Practice*. <https://www.tandfonline.com/doi/abs/10.1080/15295192.2011.585568?journalCode=hpar20>. Last accessed 23.03.2021.

⁹⁰ Dababneh (2014) p 32.

⁹¹ Committee on the Rights of the Child. General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31).

⁹² ECHR. *G.S. vs Georgia*. Application no 2361/13, 21 July 2015, para 45. Available at: <http://hudoc.echr.coe.int/eng?i=001-156273>.

reference by mixed couples to their children and describe the elements that make up the new area culture created by these couples.

According to Schwartz and Unger, children in multicultural homes and environments are not mono-cultural but rather are a culturally enhanced hybrid, as each combination of cultures introduces different choices for adaptation and valuation. Familial ethnic socialization – the extent to which parents teach their children about (and expose them to) the language, symbols, and traditions from the family's heritage culture most strongly differentiated bicultural individuals from those adopting other approaches to acculturation.⁹³

Phinney and Chavira's founding was also, that the younger the child the greater the influence of cultural socialization. Culture for the child emphasizes the interdependence of a family unit that teaches the child behavioral competencies, values, language, and gives the child their cultural identity. Thus, the family environment and parental attitudes to culture are important in the child's cultural socialization. The family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children.⁹⁴ Culture strengthens, preserves and promotes the interdependent relationship between parents and children, and is central to a child's physical and psychological development. Culture is understood to instill in children the attitudes and values that influence their view of themselves and constructs their sense of identity and belonging.⁹⁵ As the UNCRC states, that children have the right to be cared by both parents, then it can be concluded, that children also have the right to engage with the cultural background of both parents and it is in the child's best interests.⁹⁶

Cultural rights include rights in four main areas: the right to know and enjoy culture (i.e., to practice culture); the right to formulate a cultural identity, that is when an individual legitimizes culture by identifying with its context; the right to use a language and religion associated with a culture; the right to learn or access information and artefacts of a culture.⁹⁷

Participation in cultural life is meant the concrete opportunities guaranteed for all groups or individuals to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, harmonious life and the cultural

⁹³ Schwartz and Unger (2010), p 28.

⁹⁴ The Preamble of UNCRC.

⁹⁵ Dababneh (2014), p 147.

⁹⁶ The Preamble of UNCRC; Freeman M. (2011). Culture, Childhood and Rights. *The Family in Law* 5/15, p 21

⁹⁷ UNCESCR General comment No. 21, para. 1 (a).

progress of society.⁹⁸ UNCRC considers participation in culture to be in the best interests of the child in several sections. First, it is already stated in the preamble of the Convention that the importance of the traditions and cultural values of each nation for the protection and harmonious development of the child has to be taken into account by the State Parties. The right to cultural identity has been indirectly protected under various articles of the Convention, namely in Article 8 and the right to lead one's life in accordance with cultural identity and the right to choose freely a cultural identity. Cultural identity for the child is important because it allows the child to bond with members of their family and facilitates constructive contact with others of that culture. This requires the preservation of meaningful relationships between the child and members of the child's family and cultural group.⁹⁹

Article 20 of the ECHR deals with the child's right to the culture of his or her origin. Regarding religious and cultural identity, Convention also states, that children have the right to practice their culture, to profess and practice their religion, and to use their language.¹⁰⁰ The decision-maker must take into consideration this specific context when assessing and determining the child's best interests.¹⁰¹ When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.¹⁰²

Article 29 directs States Parties to foster respect for the child's parents, his or her cultural identity, language and values, the national values of his or her country of residence, his or her country of birth and other cultures other than his or her own. The ECHR has stated that education for children must be objective, critical and pluralistic in order to take into account the religious and moral convictions of parents. Parents must be given the opportunity to teach their children their beliefs and values.¹⁰³

Beyond this positive character, this notion can leave such leeway to decision-makers, that they can impose their own conception of this principle to the detriment of the child. Although preservation of religious and cultural values and traditions as part of the identity of the child must be taken into consideration, practices that are inconsistent or incompatible with the rights

⁹⁸ UNCRC General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) para 2 (a).

⁹⁹ UNCRC General comment No. 14 (2013), para 89.

¹⁰⁰ UNCRC Art 9.

¹⁰¹ UNCRC General comment No. 14 (2013) p 56.

¹⁰² UNCRC Art 20 para 3.

¹⁰³ ECHR. *Kjeldsen, Busk Madsen & Pedersen v. Denmark*. Application no. 5095/71; 5920/72; 5926/72, 7 December 1976, para 50. Available at: <http://hudoc.echr.coe.int/eng?i=001-57509>.

established in the Convention are not in the child's best interests. Cultural identity cannot excuse or justify the perpetuation by decision-makers and authorities of traditions and cultural values that deny the child or children the rights guaranteed by the Convention.¹⁰⁴

1.4. Cultural conflict in a termination of joint right of custody

The right of the child to family life is protected under the Convention (art. 16). In accordance with Article 18 § 1 of the UNCRC, States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. Article 9 of the UNCRC deals with the child's right to maintain a personal relationship with both parents. Under Article 9 (3) of the Convention, Member States are required to respect the right of the separated child to maintain a personal relationship and regular direct contact with both parents. According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and establish legal safeguards that render possible the child's integration in his family.¹⁰⁵

The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8.¹⁰⁶ A child of parents from two different cultures can find himself in complex and sometimes paradoxical situations. In this context, the upbringing that a child has, would develop around two different cultural backgrounds. When the joint custody of the parties is terminated, the child's current life regime will also end. When parents decide to end their cohabitation, their interests, as well as their internal conflicts, however, divide them each because of the challenges and ambitions they set for themselves and also for their children.

In this work, the author does not seek to position herself for or against the practice of different cultures, nor does she question the impact of the beliefs, religion and traditions on the family.

¹⁰⁴ UNCRC General comment No. 14 (2013), p 57; Breen, C. (2002). The standard of the best interest of the child. A western tradition in international and comparative law. *International Studies in Human Rights*, Vol 72, p 135.

¹⁰⁵ ECHR. *Kroon and Others v. the Netherlands*. Application no. 18535/9, 27 October 1994, para 3. Available at: <http://hudoc.echr.coe.int/eng?i=001-57904>.

¹⁰⁶ ECHR. *K.A v Finland*. Application no 27751/95, 14 January 2003, para 84. Available at: <http://hudoc.echr.coe.int/eng?i=001-60885>.

The presumptions that arise from the law, are, that it is in the best interests of the child to be part of the parents' culture if that does not endanger the health and well-being of the child and; when exercising his parental rights, a parent must always take into account the best interests of the child and exercise parental rights in good faith.¹⁰⁷ This study focuses on the conflict dynamic from a cultural perspective, namely how two cultures are guaranteed for children, what are the elements that have generated conflicts between these two cultures and what are the strategies adopted - how the courts ensure that the child has the right and a possibility to enjoy their culture and maintain a healthy relationship with parents.

While not all cultural practices will benefit children, generally exposure to familial and community culture gives the child a sense of belonging, self-worth and personal value. Culture is thought to aid the emotional, psychological and social development and adjustment of the child.¹⁰⁸ Parents usually want to transmit their culture, their language, their ideologies, their family values, native identity, history and cultural heritage, beliefs and peculiarities. As both parents wish to safeguard their culture, a struggle for influence can intervene through the processes of transmission. Some of the issues are to do with different ways of doing things each spouse has been socialized into from their home cultures. Child-rearing or gender roles are laden with socio-cultural and religious differences. People care for their children differently and have different expectations for men and women.¹⁰⁹ When parents separate and are conflicted or cannot agree on the post-separation care of their children, the cultural supports and connections provided by parents, grandparents and even the wider cultural community, may be compromised.¹¹⁰ When children experience family disputes, especially when the dispute has elements of conflict due to the cultural differences between parents, the socialization of children may be disrupted.

Influences on child behavior include the parenting style a parent adopts, the stressors and conflict following family separation, and the amount of support a child receives during this time. These influences have been found to exert a direct influence on the child's development. When children experience family disputes, especially when the dispute has elements of conflict due to the cultural differences between parents, the socialization of children may be disrupted.

¹⁰⁷ Civil Law Act § 138 para 1; Court ruling of the Civil Chamber of the Supreme Court May 30th 2011, in civil case no 3-2-1-32-11, p 15.

¹⁰⁸ Dababneh (2014) p 4.

¹⁰⁹ Hua Z. (2018) *Exploring intercultural communication: Language in action*. London: Routledge, p 71.

¹¹⁰ Dababneh (2014) p 4.

The Estonian FLA stipulates that the precondition for the termination of joint custody is that the parents with joint custody permanently live apart, do not wish to exercise custody jointly in the future for other reasons or cannot reach an agreement when deciding important matters. Generally, the reason for going to court is deciding the child's place of residence, kindergarten, choice of school, family doctor and traveling. The author of the master's thesis does not claim that the reason for the separation of multicultural families is cultural differences between parents - although such families may have other conflicts over values, traditions and language on the ground in addition to other reasons for terminating joint custody. For example, Western culture has a plurality of opinions regarding premarital sexual behavior, abortion, same-sex sexual behaviour, some parents may resort to using more physical punishment than is appropriate.¹¹¹ Differences may arise in the choice of surname and in matters related to the child's religion (eg baptism, circumcising). It should also be noted that these issues are decided at an age when the child does not have an opportunity to have a say. Disagreements can also arise over a child's choice of school and language learning (an educational issue) and about eating habits, vaccinations or blood transfusions (a health issue).

These identity choices, which may be linked to the culture and religion inherited by each of the parents, will potentially lead these couples to discuss, negotiate, defend, justify and promote their individual desires in terms of transmission of identity to the child. Parents should guarantee their children access to their respective cultures and provide them with the support they need to build their own identity.¹¹² The courts believe that they should not interfere with the way parents transmit their religious and cultural values to their children. The rights to respect for family life and religious freedom as enshrined in Articles 8 and 9 of the Convention, together with the right to respect for parents' philosophical and religious convictions in education, as provided in Article 2 of Protocol No. 1 to the Convention, convey on parents the right to communicate and promote their religious convictions in the bringing up of their children.¹¹³ Thus, the child may find himself in a conflict that has a detrimental effect on his psychological well-being.

¹¹¹ Knapp, S., VandeCreek L., 2007. *When Values of Different Cultures Conflict: Ethical Decision Making in a Multicultural Context*. Professional Psychology: Research and Practice, vol 38, p 661.

¹¹² Garman, J. (2007) International Law and Children's Human Rights: International, Constitutional, and Political Conflicts Blocking Passage of the Convention on the Rights of the Child. *Valparaiso University Law Review* 2007/2, p 682.

¹¹³ ECHR. *Vojnity vs Hungary*. Application no. 29617/07., 12 February 2013, para 37. Available at: <http://hudoc.echr.coe.int/fre?i=001-116409>.

The child's natural developmental environment is the family. The autonomy of the family is inviolable. The primary responsibility for raising and developing a child lies with his or her parents. The child has the right to parental care and the right to communicate with both parents even if the parents do not live together. The family is the shaper of a child's identity and parents have a duty and a right to care for their child. As culture also plays a major role in shaping identity - its practice and consumption, it can be concluded that cultural diversity in the family is in the best interests of the child's development. This view is supported by both the CRC and the ECHR, in addition to case law. However, we must not forget that every family and every situation is unique, which must be viewed in the interests of a particular family and child. In the case of a family dispute, the awareness of the deciding instance (court) about the law is important, but also the discretion of a judge and the aggravation of the family's inner life

2. CASE LAW OF THE REPUBLIC OF ESTONIA IN RESOLVING MULTICULTURAL FAMILY DISPUTES ON THE EXAMPLE OF DECISIONS OF HARJU COUNTY COURT

2.1 Court's discretionary powers in family matters

The function of the court's decision is to find a solution to conflicts of interest that arise in society. If the content of a civil matter is to decide on the welfare of the child, the best interests of the child must be taken into account. Of course, the judge must base his decision on the law, but in civil cases, especially family cases, judges have a wide margin of discretion. However, this also means an increased obligation for judges to state reasons for decisions. The theory of the court's discretionary powers is undoubtedly one of the most important, but also one of the most delicate topics in law. In addition to the fact that judges must base their decisions on the law, the notion of discretionary power concerns the assessment of the advisability of measures to be taken by the Court. We say that there is discretionary power when a judge, in the presence of given circumstances, has the power to act in one direction or another. In other words, to use a traditional formula "there is discretionary power whenever an authority acts freely, without the conduct to be taken being dictated in advance by a rule of law". Discretion is the power given to a person with authority to choose between two or more alternatives when each of the alternatives is lawful.¹¹⁴

In exercising its discretion, a judge proceeds from the law, evidence and his or her internal convictions. Discretionary powers permits judges to exercise judgment based on what, in their opinion, is fair under the given circumstances while also following the rules and principles of the law. Discretionary decisions are those where the judge has an area of autonomy, free from strict legal rules, in which the judge can exercise his or her judgment in relation to the particular circumstances of the case.¹¹⁵ The parties desire a solution to the specific conflict between them. But the judge must also take into account the past and his integration into it and the future and the expectation for its development.

In Estonia, the Court's discretion is regulated in administrative law, as the Court is an administrative body. Administrative Procedure Act § 4 defines the right of discretion as an authorization granted to an administrative authority by law to consider resolving or choose

¹¹⁴ Barak A, 1987. *Judicial Discretion*. London: Yale University Press, p 7.

¹¹⁵ Hawkins, K. (1992). *The Use of Legal Discretion: Perspectives from Law and Social Science*, p 11.

between different resolutions. Discretion is necessary because the legislator cannot unambiguously imagine and prescribe all possible situations that may arise.

In addition to being guided by law and experience, a judge makes a discretionary or value decision by looking into the life of a particular family. To this end, there are certain procedural rules in proceedings concerning a child, which the court must follow when conducting the proceedings. In family matters, the child is a party to the proceedings, so the court must take into account certain principles governed by both EU and national law when conducting the proceedings. UNCRC guides the Court on how to conduct proceedings concerning a child. It is first necessary to identify the elements that are relevant to the assessment of the best interests in the context of the specificity and reality of each case, and then to assess them to identify the best interests of the child. UNCRC does not set out an exhaustive list of elements for determining the best interests of the child, but sets out the elements it considers to be taken into account: the child's opinion, identity, family life, vulnerable situations, the child's right to health and education.¹¹⁶

Committee of Ministers of the Council of Europe has issued specific guidelines for child-friendly justice, which should be followed by all EU Member States.¹¹⁷ The definition of child-friendly justice emphasizes that, in the context of international human rights, the child is considered to be the holder of all rights and the right to participate fully in activities concerning him or her. As explained by the Council of Europe, child-friendly procedures are accessible, age-appropriate, prompt, diligent, focused on and adapted to the needs of the child.¹¹⁸ UNCRC Article 12 lays down the obligation to ensure that a child who can take an independent position has the right to express his or her views freely in all matters concerning him or her, and that the child's views be assessed in accordance with his or her age and maturity. Article 12 (2) gives the child the right to be heard in judicial and administrative proceedings concerning him or her.

The child's procedural rights are regulated at the national level by Civil Procedure Act § 552-553, which provide for the child's independent right of appeal and the obligation to hearing of a child. Civil Procedure Act § 522 (1) provides that the court shall personally hear a child of at least 10 years of age in a matter concerning a child and the court shall have the right to hear

¹¹⁶ UNCRC General comment No. 14 para 32-35, p 9.

¹¹⁷ Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010). <https://rm.coe.int/16804b2cf3>. Last accessed 25.03.2021.

¹¹⁸ Ibid p 17-19.

younger children as well. In determining the parental rights of the child and organizing communication with the child, as well as in case of adoption, the above requirements are supplemented by the condition that the court must hear the child if the child's wishes, relations and will are relevant to the settlement.¹¹⁹ Children and parents should be involved in decision-making to the extent, that they are heard, that their perspectives and interests are included and considered and that they are given adequate information.¹²⁰ In proceedings concerning the parental rights of a child, the court hears the parents.

All this gives the judge the opportunity to form an impression of the object of the dispute and thus internal conviction through direct perception. Within the framework of reasonableness, and based on reasonable considerations, every judge is entitled to choose the possibility that seems to him to be the best. The weights he gives to the various considerations and the balance he strikes among them are the fruits of his personal experience and his worldview as a judge. Therefore, different judges reach different results.¹²¹ In proceedings for custody of children where compelling consideration cannot be reduced to rules, the judicial determination must be left, to no small extent to the disciplined, but no less personal feelings of the judge.¹²²

2.2. Termination of joint right of custody in Harju County Court

2.2.1. Specifics

The author observed the court proceedings on custody in the multicultural families of Harju County Court in the period 01.01.2012-31.12.2020. The period was chosen because it was long enough to examine both the content and manner of proceedings over the years. In addition to analyzing whether the court had applied the law uniformly during the period or whether external or internal factors had changed the courts' discretion in these matters. It is also important that this is almost the entire period from the beginning of the entry into force of the new FLA in 2010, so the selection will give an extremely good overview of the situation in Harju County Court.

¹¹⁹ Civil Procedure Act § 559 (1) and § 566 (1).

¹²⁰ Berrick, J. Dickens, J. Pösö, T. Skivenes M. (2016). Parents' involvement in care order decisions: a cross-country study of front-line practice. *Child & Family Social Work*. 22(2), p 1.

¹²¹ Barak (1987), p 123.

¹²² Finlay A. H. 1976. *Judicial Discretion in Family and Other Litigation*. Monash University Law Review, vol II, p 224.

A total of 79 civil cases were analyzed during the period, in which the author identified a claim for termination of joint custody of a multicultural family. In these civil cases, 51 cases included a claim for complete termination of custody and a claim for partial termination occurred 28 times. A total of 37 claims were fully satisfied by the court, 9 applications were partially satisfied, 4 applications were rejected. A compromise was reached on 14 cases. The court refused to process 11 cases, the petitioner withdrew the petition 5 times. In 9 proceedings, the court determined the custody in such a way that the person/respondent concerned did not participate in the proceedings and did not express a substantive opinion. In 23 statements, the author identified that one of the reasons for the termination of joint custody was cultural conflict.

The author analyzed only the procedures concerning the right of custody, the author did not examine the procedures of the application for right of access to the child, unless the application was submitted together with the request for termination of the right of custody. Nor did the author analyze proceedings in which only an application for interim relief was made (before the application was submitted) or solutions in which the court had determined custody under interim relief in a situation where the judge hearing the main proceedings was absent.¹²³ Nor did the author analyze the claims/counterclaims which were later joined to the main proceeding. The analysis is based only on substantive final rulings for the complete or partial termination of joint custody. Also, this master's thesis does not use the materials of confidential proceedings, as the proceedings have been declared closed for the protection of the interests of children.

It should also be noted that the author only analyzed finished civil cases and uses only the rulings, that are currently in force. For reference - family proceedings are lengthy and many cases are not finished until years after several court proceedings in second instance court and the Supreme Court. Therefore, it is not reasonable to compile statistics by years, because the matters started in recent years may not have been completed by the time of writing this master's thesis.

2.2.2. Termination of joint right of custody in case of cultural conflict in Harju County Court

2.2.2.1. Child's right to use the language of their parents

¹²³ In these situations, a new court procedure will be established, which may affect the statistical value of the present study.

The most common cultural conflict in custody cases was due to the language of the child or parent, where the parents could not agree on the linguistic environment in which the child should grow up. There were two issues with language. First, it was pointed out that the inability of one parent to exercise custody of a child was allegedly because they could not communicate with each other. The child does not speak the language of the other parent and the other parent was therefore less prepared to exercise custody. In civil case 2-16-846, the mother wanted the custody to be transferred in full to the applicant. As a petitioner, the mother found that the child's father was not able to communicate properly with the child and exercise custody in the best possible way because the son did not have sufficient knowledge of the father's home language, ie Italian. In the said civil case the court did not agree with the petitioner and only partially satisfied the petitioner's petition. The court found that the different home language of the father and the son was not an insurmountable obstacle to the communication between the father and the son. According to the procedural documents submitted to the court, the mother, as the child's main educator, had not helped the child to express his needs to the father, but merely stated that the child did not understand the father. The court ruled that the better a father and son learn each other's languages to understand each other, the more they will have the opportunity to communicate.

The author agrees with this court's approach because it takes time, motivation and opportunity to communicate to acquire a language. To learn a language, you must hear and use it. The child's language skills are shaped by the language in which they are communicated, and the acquisition of each subsequent language is in any case positive for the child's development. In addition, as it is the mother tongue of the child's father, it gives the child the opportunity to learn about the child's father's culture, and the ability to speak a second language supports the child's mental development and self-image, and cultural identity.

In civil case 2-12-27883, one of the reasons for the petitioner, ie the mother of the children, to terminate the joint custody was that the children and the father do not understand each other, as the children's father's mother tongue is Arabic and the children only speak Estonian. However, the dissenting Muslim father objected that the children's mother refused the last of the children's free Arabic language courses so that the children could communicate better with the father. According to the children's mother, the father restricts the children's freedom of thought by teaching them Arabic. The court did not take a position on the children's language issue in the decision in this civil case. The court found that since the minor children of the parties have lived

in Estonia and the Estonian cultural space since birth, it is not in the interests of the children to change it, so the court ruled in favor of the mother.

This position of the court conflicts with the case-law of both Estonia and the European Union. The FLA clearly states that depriving one parent of custody is an extreme measure, and it should be established that one parent is dangerous to the children or his or her behavior prevents him or her from exercising custody. The Supreme Court in case no. 3-2-1-45-11 noted that according to § 137 (1) of the FLA, a parent does not necessarily have to demand the complete termination of the joint custody. In the event of parental separation, the parents may partially retain joint custody of the child and the court may grant sole custody to one parent only in part, i.e. in so far as the parents are unable unanimously to exercise joint custody in the best interests of the child. Under Article 18 (1) of the UNCRC, States Parties shall make every effort to ensure that the principle of joint responsibility for the upbringing and development of the child is recognized. Parents or, in some cases, legal guardians, have the primary responsibility for the upbringing and development of the child. In civil case 2-12-27883, however, the children's father had a close interest to communicate with children as much as possible on Skype and directly in Estonia, the father agreed to pay for the children's Arabic language courses so that he could better communicate with the children. Nor was there any indication that the father's desire to communicate with the children in Arabic would have been dangerous for the children.

Another problem identified related to language, was that parents had different views on the language in which their child should be educated. It is elementary that both parents want the child to learn their mother tongue, and often speaking to the child in their mother tongue is not a problem, but the problem starts with choosing an educational institution, for example, when parents have different opinions about in which language the child should receive an education. For example, in civil case 2-18-860, the child's father wanted to place the child in an international English-speaking school in Estonia because it is the language of communication between the child and the father and it is also the language that the child has used the most since birth. This was also one of the father's reasons for applying for the termination of joint custody. The mother disputed the statement on the grounds that if the child lives in the Republic of Estonia, in order to ensure his best education and future, he should first learn the national language. The mother emphasized that receiving a foreign language education for the child hinders the child's development. The court agreed with the child's father and found that English-language education was more appropriate for the child's future and the family's international background.

The author partially agrees with the position of the court. It was a long and complex dispute, which also concerned the decision-making power of the place of residence, which was assigned to the child's father. It seems to the author that since the court assigned the right of residence to the child's father and the child's father was not able to communicate in Estonian and help the child with schoolwork, the inevitable decision was that the child's father also received custody and the right to place the child in English-speaking school. According to the author, the court did not sufficiently substantiate why a child living in Estonia whose parent is an Estonian should receive education in English, especially in circumstances where the mother strongly disputed that the child attended an English school.

The problem of the language environment also arose in a civil case 2-16-13569, where the child's Israeli father suggested that the child should go to a Jewish kindergarten or an English-language kindergarten so that the child could develop in a multicultural environment and that kindergarten teachers could provide information to the child's father. In that civil case, the court held that if no specific problem had arisen in the direction of the choice of an educational institution at the time of the proceedings, the court would not terminate joint custody in that case. The court found that in the case of hypothetical problems that may arise in the future, one parent can later apply for sole discretion in this matter, but the court will not limit the parent's right of custody in advance.

The author fully agrees with such an approach, it is supported by both the Family Law and case law - as long as the parents only express an opinion on their wishes, there is no reason to terminate joint custody.

2.2.2.2. Child's right to residence

One of the problems of multicultural parents in court proceedings was the issue of the child's residence. Often the separation parent wishes to take the child abroad, either temporarily or permanently, on the grounds of the child's strong family, social and cultural ties in the applicant's home country.

In civil case 2-12-42414, the mother requested the complete termination of joint custody, as it would be against the interests of the children to maintain joint custody, which would allow the father to take the children to Egypt. The children also had Egyptian citizenship. The mother feared that because Egypt was not bound by the Hague Child Abduction Convention, the mother

would not be able to file child abduction proceedings even if the situation arose, and she was in real fear of losing her children. The father objected to the statement, arguing that the simultaneous membership of children in Europe and the Arab world gives children a good opportunity and added value to be positively different in adult life. It is clearly in the interests of children to grow up in such a way that they have a lasting connection with Arab society, without losing touch with Europe. The lives of the children in Egypt were significantly better secured financially, and the children's father did not want this situation to change. The court granted the children's mother's application and granted sole custody to the mother. The court found that, according to the case, the dispute was where the children should live and how often they should visit Egypt with their father. According to the court, the conditions necessary for the normal growth and development of children in Estonia have been created only by the mother, her commitment to caring for the children has been proven, the court found that the sole custody of the children must be granted to the petitioner. According to the court, the children already attend kindergarten in Estonia, they have a family doctor in Estonia and age-appropriate care is guaranteed.

The author partially agrees with the position of the court. The author notes that the reasons given by the court in determining the whereabouts of children tend to fall within the scope of child abduction proceedings - whether the child currently has a family doctor in Estonia or a kindergarten place does not indicate the role of who exercises custody better and to what extent. According to the author, it is likely that the children would have a family doctor and a kindergarten while living in Egypt as well. However, the author agrees with the court's reasoning that since the children's father did not provide any convincing evidence that he had exercised custody of the children remotely, i.e. from Egypt, until the commencement of the proceedings, the fact that the children's mother had exercised it, must be considered correct. In the author's opinion, however, it would have been sufficient to transfer the right to decide on the place of residence, as there were no such compelling circumstances in the proceedings as to completely restrict the father's right of custody. This is also supported by Estonian legislation. In Supreme Court Decision No. 3-2-1-142-13 p. 15, the court is of the opinion that in order to ensure the welfare of a child, the least restrictive measures of parental rights must be applied, ie measures that are purposeful and proportionate considering the risk, giving priority to measures that support the family and help strengthen the bond between parent and child. According to § 28 of the Child's Protection Act, a child who is separated from one or both parents has the right to maintain personal relations and contact with both parents and close

relatives, unless this harms the child. Given the above, it is generally in the child's best interest to communicate with the parent living abroad, including in the parent's normal living environment, so that the child can also participate in the life, language, and culture of the living parent.¹²⁴

Traveling with a child to the other parent's country of origin was a very strong argument in the civil case 2-17-4101. The conflict between the parents was that the Italian father of the child wanted the child to live in Italy, as the child had a changing residence between Estonia and Italy until the beginning of the court proceedings. The father also claimed that in Italy the child has better opportunities to get an education and get to know Italian culture. The child also had Italian citizenship. The father states that for the best development of the child, it is important that the child also has contact with his close relatives and knowledge of the father's roots and culture. The child should have knowledge of Italian culture and Italian identity. According to the father, the mother significantly harms the child's interests and prevents the child's father from participating in the child's upbringing as a custodial parent by not allowing the child to travel to Italy to broaden the mind, develop language skills and communicate with paternal relatives. The child's mother disputed the allegations and stated that commuting the child between Estonia and Italy would be exhausting and stressful for him and thus deprive the child of his homeland. The child's mother wanted the child's father to introduce the child to his culture in Estonia, incl. teach the language and invite paternal grandparents to visit. The court did not satisfy the application of the child's father and partially satisfied the mother's application for the transfer of joint custody. The main issue was the right to decide on the place of residence, which was transferred to the mother of the child living in Estonia. The Court analyzed the right of the child to the culture of both parents in this solution, relying very much on upon, *inter alia*, Article 9 of the UNCRC and Article 24 (3) of the CFR. The court found that although the fact that the child's parents currently live in different countries makes it difficult to exercise the joint right of custody together, it does not make it impossible. The child has been in frequent contact with the father since birth and has been with his father in his homeland for up to 2.5 years, so the child has lived part of his life in Italy. During the last year, the child has met his father in Estonia. The court noted that the child's mother herself considered the child's father to be such a trustworthy and dignified person that he had chosen him as the father of his child and had

¹²⁴ Supreme Court Judgment of 5 November 2014. in civil case no 3-2-1-113-14, p 26.

always known that custody was the responsibility of both parents and that the child had the right to communicate with his father. The court also referred to civil case no. 3-2-1-113-14 of the Supreme Court, where the court has taken the position that according to § 28 and § 30 (1) of the Child's Protection Act and the first sentence of § 143 (1) of the FLA, it is in the child's best interest to communicate with both parents, including in the parent's normal living environment, so that the child can also take part in the life, language and culture of the separated parent. The child's father can arrange the acquisition of a common language of communication between him and the child, including teaching the child Italian following the child's age and reception capacity. The court agreed with the child's father that the child, as an Italian citizen, has the right and must be able to visit his father's home country, and see his paternal relatives and become part of Italian culture.¹²⁵

The author fully agrees with this court's approach. This is in line with FLA and the practice of the Supreme Court as well as the case law and legislation of the EU. The father was extremely active in court proceedings and showed a willingness to exercise custody of the child and to communicate with him. The child's father wanted to introduce him to the Italian language and culture and to do so precisely through travel and communication with paternal relatives. In the case of such conduct, the requirement of full transfer of joint custody could not be satisfied, since the father's conduct was in no way prejudicial to the child. According to the author, there may be a situation where parents living in different countries are harmful to the child if the parent living in another country would not be interested in the child and would not actually exercise the child's right of personal or property custody. However, there was no such situation in the present proceedings, the parent must communicate with the child personally and the exercise of the child's right of custody is the primary duty of the parent. Deprivation of custody is the greatest restriction on parental responsibility and must be an extremely compelling reason for such a decision.

The situation when the parents are located in different countries can be an obstacle to exercising custody if the separated parent has no interest in the child. For example, in civil case 2-17-3283,

¹²⁵ The court of appeal later partially annulled this ruling, finding that the county court had made a procedural error. As both parents applied for the termination of joint custody, the court cannot dismiss it. The court of appeal amended the order and granted the mother's application for the termination of joint custody. However, the author uses this civil case as an example, as the court of appeal did not identify any deficiencies in the county court's decision as regards the analysis of the cultural issue. The court of appeal admitted that it is in the child's interest to spend time with the father in the father's usual living and language environment and to get to know the paternal relatives.

the child's father lived in Mexico, and had not been interested in the child's situation since the child was born and had not paid maintenance. Although the child's father replied to the court that he wished to exercise custody, the court terminated the father's right of custody completely. The court justified this on the grounds that the child's father had not credibly explained to the court how he planned to exercise custody while living in Mexico, which had so far prevented him from taking an interest in the child's well-being. According to the court, the father's behavior towards the child has been nonchalant and there is no interest in taking care of his child. The court noted that the child's father would not be deprived of anything when he was deprived of custody, as he had already effectively waived custody himself. The father of the child does not exercise the parental custody of the child and, as a result, the petitioner should have custody of the child because she actually exercises it already. The Supreme Court has also reached this position in its decision no. 3-2-1-45-11, according to which, in the event of parental separation, the rights and obligations exercised by each parent must be fully reviewed and the factual situation must be brought into line with the law. It was therefore justified to terminate the joint custody of the child and to transfer the sole custody of the child to the petitioner.

Among the court decisions analyzed were several families where the parents live in different countries. Regardless of whether or not one of the parents left Estonia before the end of the family relationship, the exercise of the right of custody from a distance is difficult, but not impossible. There are millions of families in the world who do not live together physically, not even in the same country, yet consent to children can be given remotely. Surprisingly, the court found in civil case 2-12-27883 that if the parents live in different countries, the parents cannot have joint custody. The court terminated the joint custody of the parents and transferred it entirely to the mother, arguing that as the parties currently live in different countries and the relationship between them is tense, joint custody and joint decisions are practically impossible and custody must be transferred to one parent. Children are used to living in Estonia and are guaranteed a stable rhythm of life, age-appropriate development and care by their mother, and changing it is certainly not in the interests of children. A similar solution was offered by the court in civil case 2-12-35571, where the court found that since the child's father lives permanently elsewhere, rarely meets the child, does not show interest in or take responsibility for issues important to the child, the father has not been able to ensure the child's normal development. These principles are contrary to the practice of EU and national law as well as case law.

2.2.2.3. Child's right to enjoy the culture of their parents

The central issue of many family disputes was parents' differences of opinion on each other's cultures of origin, which prevented one or both parents from exercising custody in the best possible way. In civil case 2-12-42414, the mother of the children applied to terminate the joint custody of the parents and to grant sole custody to the applicant. The children's mother argued that if the parties retained joint custody of the children, the children's father could leave the EU with the children without their mother's consent and take their children to Egypt, where Sharia law and European practices are not followed. According to the mother, the father is a Muslim, with whom cultural differences arose because the man wanted the right under Muslim custom to decide unquestionably over a woman's life and to physically punish her in the event of her disobedience. There were also differences over what food children should eat. According to the mother, the separation of children from their mothers is permissible and socially acceptable in Arab countries. According to Muslim traditions, the child's father's family has the right to take the child away from the mother and not allow the child and the mother to be reunited. The children's father asked that the application be rejected. He said, that the mere fact that he is a member of the Arab world was not a ground for terminating joint custody. The change in custody stems from the child's factual needs, but not from the parent's unfounded presumption that the other parent may abuse custody. The father noted that part of the mother's reasoning was that children should be protected from their father's influence in connection with the fact that the children's father derived from the Arab world. The father is convinced that custody must be changed not based on the parent's nationality, but on the need to resolve important issues relating to the child which the parents could not resolve unanimously. The children's father considered that the mother's allegations concerning possible situations in the Arab world were irrelevant to the outcome of the case. The father exercises custody in good faith and does not want to abuse his rights towards the children. The father's belonging to the Muslim world does not mean that the defendant does not have the ability to raise children. The father can make reasonable decisions in agreement with the mother. The nationality of the father is not a restriction on deciding matters in the interests of the children. The court fully satisfied the application of the children's mother and transferred the right of custody to her, noting that since the mother has provided the necessary care for the children in Estonia, it is in the children's interest that this situation continues.

The court did not analyze the children's right to culture in the decision, nor did it take into account the father's claims that children should participate in the father's native culture. The author partially agrees with the court decision and its reasoning. According to the author, the issue could have been resolved by transferring the right to decide on the place of residence of the children. The father wanted to have a say in important decisions concerning the children's lives, and the father cannot do this if he has been deprived of custody. The mother's fear that he would take the children to Egypt without her knowledge would have resolved the mother's right to determine where the children would stay. The father did not dispute that the place of residence of the children is Estonia, but instead wanted the joint custody to be maintained to the extent that the father had the opportunity to travel to Egypt with the children as a custodial parent. Nor has the father filed a counterclaim for the transfer of joint custody to him, even in part, which already shows that it cannot be in the father's interest to bring the children to Egypt.

The court thoroughly considered the child's right to the culture of both parents in civil case 2-20-6691. The child's mother applied for termination of joint custody because the father of the child had moved to Ecuador and was not able to exercise custody of the child in the best way from a distance, and the father's views on custody issues were radically different from those of the mother. The father objected to the application and stated that he had not actually challenged any decision made by the mother regarding the child's place of residence, choice of school or health issue, moreover, he had moved to Estonia again. The court agreed with the father and found that it is in the best interests of the child to have two parents with custody if the parents actually exercise custody. It is in the best interests of the children that both parents introduce their views and beliefs to them. Cultural diversity is undeniably developing children and enriching their world. Together with her father, the child can get to know her paternal roots and learn Spanish, with the mother, the child can get to know the mother's beliefs and interests. It is in the best interests of children that parents' worldviews balance each other.

The author agrees with the court here. The father did not obstruct the exercise of custody of the child, and was not in any way dangerous or harmful to her. He wanted to exercise custody in the best possible way and to bring more cultural value and diversity to her upbringing. It is in the best interests of the child to have the right to be part of the culture and language environment of both parents.

In civil case 2-16-846, the petitioner requested the full transfer of joint custody on the grounds that the child's father was domiciled in Italy but his work was closely linked to travel and

therefore he did not have a fixed residence and his lifestyle was not linked to family responsibilities. It was alleged that the father did not know the way of life of the child's country of residence, i.e. Estonia, and the father has also been away from Estonia and the child for a long time. The father has neglected his custody responsibilities. The father disputed the statement and took the position that the mother must be just as ready to restore the bond between the child and the father, even if the father has been away from Estonia a lot in recent years. The father wanted the connection between the child and the father to be maintained and the child to get to know his father, paternal relatives, Italian culture and his ethnic origin in the coming years, and it should also be possible to travel with the father to Italy. The court granted the child's mother's application in part and transferred to the mother the right to decide on the child's place of residence. The court agreed with the child's father that the child has the right and must be able to visit his father's home country and see his paternal relatives and become part of Italian culture as an Italian citizen. A safe relationship with both parents is important for the child's development, and the court did not consider it right for the child to get to know the parent living apart. Therefore, the complete termination of the joint custody was not justified.

According to the author, the court made a fair and reasoned decision that was in the best interests of the child. The child's father wanted to take part in the child's life and take decisions relating to the child, so the demand for the complete termination of joint custody could not be justified. The child's father was not dangerous to the child and did not harm the child's interests in any way. As small circumstances play a role in the judgment in proceedings in which the parents are in an equally good custody position, the court further analyzed the child's right to his native culture and language and the right to visit the father's country of origin, Italy. This approach is correct and in line with the EU and national case law as well as with the principle that the child should be part of the culture of both parents, has a right to maintain his native identity as this is in his best interests.

In civil case 2-17-191, the children's mother applied for sole custody. The statement revealed that there were cultural and religious differences between the parents that began to overshadow family life. According to the mother of children, the relationship between men and women in Egypt is different from what we are used to seeing in the European cultural area. Family models are different, and women receive a very different treatment from men than we are used to seeing in Europe. The children's mother feared that if the father had custody of the children, he could take the children to Egypt without the mother's knowledge. The children's father did not express an opinion in the proceedings, but repeatedly asked the court to translate the application and

court documents into English, as he does not understand Estonian. The court rejected this request and did not translate the procedural documents for the father. The circumstances of the proceedings showed that the children's father wished to take part in the decisions concerning the children and also to communicate with the children both in person and via Skype.

Unfortunately, the court completely terminated the joint custody of the parents and handed it over to the mother of the child. The court did not analyze the issues of cultural differences between the parties in the decision, which were one of the circumstances of the application, the court made the decision based on the fact that since the children currently live in Estonia, changing it would not be in the best interests of the children. This position is in conflict with the case-law of both Estonia and the European Union. In that civil case, the partial termination of custody would have been entirely sufficient, since there were not sufficiently serious circumstances for its full transfer. According to the author, the fear of the mother of the children that the children would be taken abroad without her knowledge would have been alleviated only by a court order transferring the right to decide on the place of stay. The Supreme Court has previously noted that by terminating the joint custody of parents or giving one parent the right to decide, the rights of the other parent may be restricted only to the extent necessary to ensure the best interests of the child and the joint custody of both parents may be maintained. The Supreme Court is also of the opinion that to ensure the welfare of the child, the least restrictive measures of parental rights must be applied, i.e. measures that are purposeful and proportionate in the court's view, giving priority to measures that support the family and help strengthen parent-child ties.¹²⁶

In civil case 2-17-8000, the joint custody of the parents was also terminated completely. According to the statement, parents have differences due to cultural differences, which lead to different perceptions of raising children. The conversation with the parents revealed that the different cultural backgrounds of the parents and the principles of the child's father, according to which some physical punishment of children is also allowed, have caused problems in raising children. According to the father physical punishment is an appropriate way to discipline children, as it is done in his country of origin. The father of the children also did not consider the choices of the children's mother to be suitable for the children's school and kindergarten in the small municipality near Tallinn where the children live, considering them to be isolated from the rest of the world. During the proceedings, the children stated that they longed to spend time with their father, and one of the children also made efforts to communicate with the father.

¹²⁶ Supreme Court Judgment of 4 December 2013 in civil case no 3-2-1-142-13 p 15.

Unfortunately, the father was not prone to communicate with the children because he had problems with the children's mother and grandmother, nor did he pay maintenance to the children.

The court terminated the joint right of custody and granted it to the mother, because the parents could not exercise custody by agreement, because they did not agree on the upbringing of the children and they did not communicate. The mother of the children organizes the lives of the children alone, and it is in the interests of the children if the actual is officially confirmed with the court ruling.

The author would have agreed to the maximum transfer of custody of the children from the place of residence of the children and the right to decide on educational matters, which were also the problem areas identified in the application. The petitioner had pointed out a situation where the father did not allow the children to change their place of residence. In the remaining cases, the full transfer of custody was not justified. The children wanted to communicate with their father, which was their right, and the children's father has a legal obligation to communicate with his children. It was noteworthy that the parents had been married and living together as a family for more than 10 years before the custody dispute, so the children could not be estranged from their father. Exercising part of the joint custody would not have been detrimental to the children, it is in the best interests of the children to have two custodial parents. In this procedure, it turned out that there is a conflict between the parents (and in this case, with also the grandmother of the children) not between the children and the parent. The court could also have heard the children and found out their views, which was not done. In the proceedings, the older child repeatedly told both the child protection service worker and the lawyer that she missed the father and made the effort to call the father himself - this can be considered proven that if the child has an interest in communicating with the father, it would be against the child's interests the custodial parent to completely disappear.

Unlike the two previous examples, the court applied the principle of investigation and the principle of independent taking of evidence very thoroughly in civil case 2-17-5212, where the conflict between the parents had arisen due to the cultural background of the child's father. The mother requested the partial termination of joint custody and the transfer to the petitioner of the sole right to decide on the child's place of residence, education, health, hobbies and property. As a justification for the application, the child's mother pointed out that the child's father did not exercise custody of the child properly during the cohabitation due to the father's opinion that women and men have different tasks and jobs at home, which is a different treatment from

the values valid in Estonia. This did not coincide with the child's mother's vision of family life, and the child's health was mentally damaged as a result. According to the mother, the child took the example of his father and did not engage in cleaning, doing laundry, slept in and was behaving humiliatingly towards the mother. The child's father forced the family to eat spicy Indian food and also kept an Indian brasserie at home. The father forced the child to watch Indian cartoons. The mother also pointed out that the child's proficiency in Estonian has decreased because the father communicates with the child in English. The father disputed all the points in the statement. In addition to the court's obligation to involve the child's rural municipality of residence and the child's representative in the proceedings, the court also turned to the child's psychologist for additional information to establish the facts of the application. In addition, during the proceedings, the court asked the parties to submit their opinions three times, although the written opinion is usually presented once and the second time at an oral hearing. As a result of the application of the principle of investigation, the court rejected the application of the child's mother for partial termination of joint custody on the ground that the court did not find a violation of the exercise of custody by the father. The court did not find that the parents were unwilling to co-operate with the other parent in resolving important issues concerning the child's life and that the partial termination of the joint custody of the parents would be in the best interests of the child. The court clarified that the complicated relationship between the parents cannot be the basis for terminating the parental custody of the child, but it still depends primarily on whether or not the termination of custody is in the best interests of the child. Concerning the conflicts between parents resulting from different values, the court found that the court does not determine in a court order the mutual obligations of parents to behave politely towards each other and not to emotionally influence the child, as these obligations are covered by morality and ethics. However, the court noted that a parent must not impair the child's natural relationship with the other parent.

The author fully agrees with the court's approach, as it is in line with both national and EU case law. According to § 137 (2) of the FLA, an application shall not be satisfied if there is reason to assume that the termination of the joint custody and the granting of sole custody to the petitioner is not following the interests of the child. The ECHR has seen two main issues in the best interests of the child: that his or her family ties are maintained and that he or she can develop in a suitable environment. Therefore, the termination of joint custody was not necessary for these reasons.

2.2.2.4. *Child's right to profess the religion of their parents*

In many civil cases, disputes between parents were caused by the religious beliefs of one or both parents. In civil case 2-18-6140, the applicant explained, *inter alia*, that the children's father had probably converted to extreme Islamic faith and that his beliefs about life and attitudes towards women caused great strife in the family. The father taught the son that he must insult his sisters, men are more important than women, and mother and sisters do not have to be noticed. The father's religious preferences lead to unacceptable behavior in society and the family - the husband is the master of life and the women are submissive slaves, the violence is acceptable. Since the children have Russian citizenship, the mother feared that the father would take the children to Russia, which he had threatened to do. Children are afraid of their father because of this behavior and do not want to communicate with him. The father disputed such claims and found that he was not a religious extremist but tolerant of all religions. The court sent the parents to family reconciliation and heard the minor child and concluded that since the mother's financial and mental readiness to raise the children is greater than that of the father, custody must be transferred in full to the mother.

The author agrees in principle with the resolution of the decision, because one of the biggest problems in this dispute was that the children are afraid of the father, but according to the author, the court violated the duty to state reasons. In particular, since one of the aspects of the present application was the issue of children's citizenship - the children had Russian citizenship, this fact was not analyzed by the court, nor did the court address the fact that Russia was subject to several similar court proceedings in Russia. In proceedings without action, the court should have an independent investigative principle, the court may gather evidence itself and is not bound by the views of the parties to the proceedings. The court did not take a position on all the allegations in the application and counterclaim and made a rather brief and concise court decision. It is not clear from the court order on what specific circumstances the satisfaction of the application is based on.

The issue of religion was also addressed in civil case 2-14-51494, where the petitioner requested the full transfer of custody based on that the child's father was Egyptian. According to the statement, Egypt is a Muslim country with very strict Quranic laws. This country has a very special relationship with boys because they are heirs and successors. The petitioner fears that even if the child visits Egypt once, he will lose his son forever. There is also ongoing religious unrest, acts of terrorism, and inter-ethnic conflicts in Islamic countries. The court refused to accept the application, explaining that the allegations that the child's father lived in Egypt, that

Egypt was a Muslim country with strict laws and that there was constant unrest there, were no grounds for terminating joint custody. The court clarified that the complete termination of joint custody of parents is an extreme measure. In the present case, the petitioner should consider other measures, such as the partial transfer of custody to the petitioner as regards the determination of the child's place of residence.

The author fully agrees with the court's approach, the application was completely unfounded and the parent cannot be accused of exercising custody poorly on the basis of nationality. Freedom of religion or belief is a human right enshrined in Article 9 of the ECHR. Article 2 of the CRC also prohibits the right of the child not to be discriminated against on any grounds, including religion.

In civil case 2-12-27883, the child's father asked that since the children have a Muslim father, it would be appropriate for them to participate in this culture as well. The father had asked the mother to put the children in Arabic language courses, but the mother has refused, although the courses are free and are only a 10-minute walk from home. According to the father, the children are also Egyptians and Muslims and the father also wants to go to the mosque with the children. It is the fate of children that they are born to two parents from different cultures and both parents should learn the culture of the other parent and it is also unfair that children are taught one culture and ignored the other. For example, a mother refuses her children's free Arabic language courses and forbids them to meet his grandfather, who is 82 years old, and his half-sister and -brother. The father also asks that the child and the father be able to celebrate the anniversaries of the Muslim calendar together. According to the mother, the father restricts the children's movement and freedom of thought by teaching them Arabic and Islam. In this civil case, the court ruled that the complete termination of joint custody is justified because children are accustomed to living in Estonia and are guaranteed a stable rhythm of life, age-appropriate development, and care by their mother, and it is certainly not in the child's interest to change it.

Although the father of the children has highlighted the problem of cultural conflict very strongly, the court did not take it into account or even analyze it when determining custody. The court assumed that the parties live in different countries and that it is therefore practically impossible to exercise joint custody and take joint decisions. The author does not agree with this court's approach. The court did not take into account that the children were born to parents from different cultural backgrounds. It is the destiny of children that they were born from two parents with different cultures. Children should learn about the culture of both parents. It is unfair that children are taught one culture and ignored. The complete cessation of joint custody

was not justified because the activities of the children's father (introducing the children to their father's culture) were not in any way harmful to the children. The children's father was active in the proceedings, wanted to communicate actively with the children and exercise custody, the children interacted with the father and their paternal relatives in Egypt, the children agreed to learn Arabic and go to the mosque.

Examination of court decisions and the court's reasoning revealed that judges treat the child's right to culture in very different ways in multicultural family conflicts. This is due to the different circumstances of each case, the competence of the representatives involved in the proceedings, the evidence and requests submitted and, of course, the internal discretion of the judge. It is difficult to draw general conclusions, but the author presents some recurring trends in these procedures.

First, the change in the treatment of this issue over the years has become apparent. The court decisions made at the beginning of the observed period (since 2012) deal with the issue from the point of view of parental rights and took less account of the child's best interest in participating in culture. In the case of older civil cases, it was striking that the court's views were rather inclined to the wishes of the child's mother, and even if one of the parents pointed out a cultural conflict, the court did not take it into account when making its decision. The court decided the issue of custody rather on the basis of the decision of the Supreme Court 3-2-1-45-11, stating that a factual situation must be brought into line with the law. Using this basis, custody disputes often ended in the complete termination of joint custody, even when the separated parent participated in the child's life, albeit at a distance. This position is not in itself wrong, but in the author's opinion, if a separated parent wishes to exercise custody and points out various aspects of the child's interests, including the child's right to be part of both parents' culture, the court should take it into account or at least take a position about the statement. It is generally in the best interests of the child to have two custodial parents in the event of parental separation, which is supported by both legislation and national and EU case law. The ECHR has seen two main issues in the best interests of the child: that his or her family ties are maintained and that he or she can develop in a suitable environment.

The family is the most important influencer of a child's development and identity, and the child's rights and needs are part of the knowledge, traditions, values and beliefs of both parents. The years ahead, the more judges used the independent opportunity to take evidence and the

principle of investigation in non-action proceedings and heard children. It also led to different court decisions that took more account of the child's cultural rights. Apparently, the development of Estonia as a world view of society in the last decade, as well as the acquaintance of judges with EU case law, have contributed to such a tendency. Courts are increasingly considering whether a joint custody application is justified at all in the circumstances set out. For example, the fact that the other parent lives abroad does not, in the court's view, prevent the exercise of custody of the child. Also, in the opinion of the court, the submission of an application for termination of joint custody is not justified on the grounds that the cultural background of the parent of the divorce is radically different from that of the petitioner. Even if the petitioner has pointed out circumstances that may come from a different cultural background (separation of the child, gender role in the family, overriding importance of the child's grandparents), the court does not generally consider such factors to be a real threat to the child's development and custody. Termination of joint custody and restriction of parental custody is an extreme measure and must be very considered, the court does not generally consider the parents' belonging to a different cultural space to be a threat to the child.

An analysis of the cases revealed that some cultural factors were considered by the courts to be more in the best interests of the child than others. When examining court decisions, the tendency was struck that the courts were rather positive about the child's multilingualism. In many disputes concerning the child's language environment or the child's education, the court held that the best possible language development was in the best interests of the child's development and rather supported the separation parent's efforts to shape the child's language environment through (partial) custody. Courts have been almost unequivocal in their view that multilingualism promotes a child's development and that language development requires listening to and using the language - that is, communicating with a parent from another language environment. In such cases, an attempt was made to preserve the joint custody of the parents as much as possible.

Courts also generally favored the child's travel to the separated parent's country of origin. From the reasoning of the courts, it became apparent that in order to develop the child's cultural horizons and form an identity, traveling with the parent, cultural exchange, getting to know the family of origin and maintaining contact with them is the basis. The courts consider that traveling with a parent also supports the relationship between the child and the parent. This is considered by the courts to be in the best interests of the child and is also in line with the UNCRC and case law.

The civil cases were more complex, where conflicts of religious beliefs were cited as the reason for terminating custody. This is probably the case in Estonian atheistic society, but on several occasions, the judges decided in favor of the joint termination of custody on the grounds that the religion of one parent was different from the values widely prevalent in Estonia. This in itself is not a misconception - it can be relied upon and the decision can be justified, rather the question is, whether it may be an infringement of fundamental rights if one parent is favored or rejected because of his or her religious beliefs in the 21st century. Moreover, the child's right to practice and participate in religion and, in fact, to choose his or her own beliefs cannot be ignored.

Civil proceedings are adversarial proceedings, decisions are made on the basis of evidence, evidence is answered with evidence. It is therefore very important what evidence the parties bring to court. Contract agents, lawyers and advocates have a big role to play here. When examining civil cases, it came as no surprise that if a party had a representative in the proceedings, his legal position was stronger before the court and the other party. In particular, when the representative referred in his pleadings to the CRC, the ECHR and EU court decisions, he requested that psychologists be heard and that psychiatric examinations be carried out to establish the parent's readiness to raise a child. In such a case, the court certainly cannot reject that evidence and disregard it. It must therefore be concluded that if a party had a competent representative in the proceedings who referred to the child's right to be part of the culture of both parents, the court would certainly have had to consider this fact significantly more in the best interests of the child. However, it cannot be concluded that the more competent the representative and the more evidence they provide, the more positive the court decision - the submitted evidence, applications, case law analyzes broaden the judge's knowledge and worldview and must be considered.

For the sake of clarity, it should be noted that in the cases analyzed, which concerned the termination of joint custody, the reason for the application was not only the cultural conflict between the parties. The court also based its decision on the violence of the parent, the violation of the right of custody and, most importantly, the wishes of the child. In making a decision, the court takes into account the child's spiritual connection with the parents, the parents' participation in the child's life so far, as well as the parents' material possibilities and vision for the future in raising the child. However, it can be said that the courts have increasingly started to consider the child's right to the culture of both parents on the basis of independent discretion and consider it to be in the child's best interests. The general position of the courts on this issue

is that if the parent's cultural background and values are not a threat to the child's person, it is in the child's best interest to be a part of it.

CONCLUSION

The aim of the master's thesis is to give a review of how the court treats the child's right to culture in multicultural family disputes. The analysis is based on the court decisions of the Harju County Court on the termination of joint right of custody in 2012-2020. The hypothesis of the master's thesis is that the court does not take into account the child's right to become part of the culture of both parents when resolving a custody dispute.

The globalizing world of the 21st century, which provides the opportunity to work, study and live in different countries, has created a situation in which relationships arise between people from different cultural backgrounds. A multicultural family is defined as a family model, where different nationalities live together with different beliefs and habits.

Human rights guarantee everyone the opportunity to preserve their identity, the same right extends to the child. The main designer of identity is the family, which must ensure a safe development environment for the child. The right to cultural identity has been protected under various articles of the United Nations Convention on the Rights of the Child (UNCRC), namely in Article 8 and the right to lead one's life in accordance with cultural identity and the right to choose freely a cultural identity. Cultural identity for the child is important because it allows the child to bond with members of their family and facilitates constructive contact with others of that culture. This requires the preservation of meaningful relationships between the child and members of the child's family and cultural group. In the case of a multicultural family, the question of identity is more acute because people with different values, traditions and understandings live under one roof - this situation can lead to cultural conflict. Cultural conflict is based on a misunderstanding between two cultures whose values and uses differ.

As the child has the right to grow up in a family and it is in the child's interest to have two custodial parents, the child also has the right to be part of the culture of both parents. This view is supported by both Universal Declaration of Human Rights as well as United Nations Educational, Scientific and Cultural Organization (UNESCO). The child's right to culture is regulated by international and national law and case-law of European Court of Human Rights which states that the child has the right to practice and participate in the parent's culture, religion and to maintain relations with both parents' families of origin.

However, if the parents have decided to separate or are unable to reach an agreement, partial or complete termination of joint custody may be justified. Full termination of joint custody is

regulated by § 137 of the Family Law Act of Estonia (FLA) and partial termination by § 119 of the FLA. A parent has the obligation and right to take care of his or her minor child, including taking care of the child's personal well-being, child's property, and to decide important matters related to the child. Personal care means the parent's responsibility and right to ensure the child's physical and mental development and well-being. The court decides on the question of the right of custody on the basis of an application of one or both parents. The FLA stipulates that the precondition for the termination of joint custody is that the parents with joint custody permanently live apart, do not wish to exercise custody jointly in the future for other reasons or cannot reach an agreement when deciding important matters. Generally, the reason for appealing to court is to decide the child's place of residence or resolve disputes over child's education, health issues and travelling.

The court must follow the principle of the best interests of the child and make a discretionary decision based on the evidence gathered in the case and the judge's internal conviction. Discretionary decisions are those where the judge has an area of autonomy, free from strict legal rules, in which the judge can exercise his or her judgment in relation to the particular circumstances of the case. In the case of a multicultural family dispute, the difference in making a discretionary decision is that the judge must decide who the right of custody belongs to, and at the same time determine as to which cultural space the child will more or less be a part of.

A total of 79 civil cases were analyzed during the period, in which the author identified a claim for termination of joint custody in a multicultural family. The reasons for applying for custody varied, but were mostly the question of deciding the place of residence, choosing the language space, the practice of religion, the child's right to communicate with the family of origin abroad and the child's right to participate in the cultural traditions with the parent. Examination of court decisions and the court's reasoning revealed that judges treat the child's right to culture in very different ways in multicultural family conflicts. This was due to the different circumstances of each case, the competence of the representatives involved in the proceedings, the evidence and requests submitted and, of course, the internal discretion of the judge. The author did not identify the common practice of judges in resolving custody disputes in multicultural families, but found some common trends in court proceedings.

The change in the treatment of the issue over the years became apparent. The court decisions made at the beginning of the observed period dealt with the issue from the point of view of parental rights and took less account of the child's best interest in participating in culture. In the case of older civil cases the court's views were rather inclined to the wishes of the child's mother,

and even if one of the parents pointed out a cultural conflict, the court did not take it into account when making its decision. The years ahead, the more judges used the independent opportunity to take evidence and the principle of investigation in non-action proceedings and heard children. It also led to different court decisions that took more account of the child's cultural rights and child's best interest being part of the culture of both family. The development of Estonia as a society in the last decade, as well as the acquaintance of judges with EU case law, have contributed to such a tendency. Courts are increasingly considering whether a joint custody application is justified at all in the circumstances set out.

The author found that courts do not always use the principle of an independent inquiry, but cannot ignore the evidence and requests submitted to them by the parties to the proceedings. Thus, it became clear that the more active the parties were in referring to both international and national law and case law on the child's right to be part of the culture of one or both parents, the more the court took this into account in decision making. In the course of the analysis, the hypothesis that the Harju County Court does not take into account the child's right to the culture of both parents in family disputes was not confirmed. The final decision is a matter of internal discretion of each judge and it differs for each proceeding and family.

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