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**OFFICIALS' COMPETENCY IN CUSTODY DISPUTE
PROCEDURES AND THE BEST INTERESTS OF THE CHILD**

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

Separation and family breakdown is extremely difficult for both parents and child. When this is compounded by a custody battle in court, it is essential that the best interests of the child are safeguarded in the court proceedings and in the decision making process, and that the child's living arrangements are stabilised as painlessly as possible. It is essential to analyse the impact of decisions on the child before taking decisions affecting children more generally.

The aim of the thesis is to find out whether the current regulations in Estonia are in line with the best interests of the child. The author analyses the situation where the officials have been given the appropriate competence in these custody dispute processes, but problems in practice raise questions: How the competence is regulated, does it ensure the protection of the rights of the child? Are these regulations in force governing these disputes and the regulation of state aid ensuring the protection of the rights of the child? Are there norms in Estonian legislation to fulfil the aims but maybe the norms implemented are not enforced? Based on the aim of the thesis, the author formulates the following hypothesis: Regulation of officials' competency in custody dispute procedures does not ensure the protection of the rights of the child.

In this empirical research, the analytical and comparative research methods are applied, several interpretation methods are used, mainly literal and teleological. Qualitative data collection methods include aggregating texts and other documents. The original sources of the thesis are legislation, international agreements and legal literature, additionally the practice of Estonian courts has also been vital. The author examines the existing regulations, their implementation and case law to reach a conclusion on whether the problem can be solved legally. The importance of the work lies in the better protection of children's interests and will have an impact on the development of the law, in so far as the work may lead to an appropriate solution to the problem.

Keywords: best interests of the child, custody disputes, state aid, mediation, child access arrangement

INTRODUCTION

The subject of this Master's thesis is Officials' competency in custody dispute procedures and the best interests of the child. The thesis explores the legal regulations and implementation in the light of protection of the best interests of the child.

The choice of topic is vital because parental separation is one of the major risk factors affecting the well-being of the child and there is an increasing focus on children's rights and the need to respect them in all proceedings. Although there has been previous work on the topic of parent-child interaction, the problem statement of this thesis differs from that of previous papers. From the author's point of view the concept of the best interests of the child in the different legal instruments is too general and not further explained. The process of determining best interests in custody disputes is complex and requires a case-by-case assessment - thus depending on the mere professionalism of the assessor, which in turn does not guarantee consistent quality.

Based on the aim of the thesis, the author formulates the following hypothesis: Regulation of officials' competency in custody dispute procedures does not ensure the protection of the rights of the child.

This research will be a qualitative study, using different methods of legal interpretation, in particular empirical and teleological interpretation. In support of the arguments, the extent to which and the ways in which the current regulations may conflict with the principle of the best interests of the child is identified. In analysing the data, both national and international law has been used. In particular, the research sources in legal databases are relied upon to support the arguments.

Indicating the relevance or problematic nature of the topic, the author analyses the situation where the officials have been given the appropriate competence in custody dispute processes, but problems in practice raise questions: How the competence is regulated, does it ensure the protection of the rights of the child? Are these regulations in force governing these disputes and

the regulation of state aid ensuring the protection of the rights of the child? Are there norms in Estonian legislation to fulfil the aims but maybe the norms implemented are not enforced?

It is necessary to address these issues in order to show the extent to which the concept of the best interests of the child has been considered in custody disputes in general, and whether this has been taken into account in decision-making at all. The author deems it necessary to analyse in her work also the right of access and the related complexities, as the right of access as such very often plays a role in parental custody disputes, and a parent's disregard of a court-established right of access is contrary to the interests and rights of the child.

The author analyses whether, and to what extent, existing regulations and norms may conflict with the general principle of the best interests of the child. In addition to the problems mentioned above, the author's personal experience in litigation contributed to the choice of the topic. Having been involved in court proceedings for personal reasons for a number of years - from the Harju County Court to the Circuit Court and from there to the Supreme Court – the author recognises the problems and inconsistencies in understanding the best interests of the child, in identifying the best interests of the child and in ensuring the best interests of the child in court proceedings and in the enforcement of court orders.

Taking into account the context of the paper, the thesis is divided into two main parts, the first of which provides a general overview of identifying the best interests of the child and the legal framework with it, author discusses about nature of parenthood, family values and impact of parental separation on children, additionally the author analyses about the rights of the child and the concept of custody, limitation of custody, guardianship and definition of child access arrangements. The second chapter covers the assessment of the best interests of the child in custody disputes, additionally author discusses about hearing the child in court. According to previous, author also analyses the role of local government, state aid and judge in custody cases and, in turn, the variants of mediation and conciliation and the role of bailiffs in custody disputes. The entire research focuses primarily on the process of determining and interpreting the best interests of the child in custody disputes between parents. The author analyses the process of the child's hearing, as well as the role of the child's representative and the child protection worker in identifying and safeguarding the child's best interests in the proceedings. The author identifies the problematic issues and makes suggestions.

1. IDENTIFYING THE BEST INTERESTS OF THE CHILD

The world is continually changing, posing new threats in child welfare for which quick solutions are required. Child welfare must be of such a high standard that it ensures the child's right to specific growth conditions, a broader and more diverse upbringing and special care.¹

It is clear that children are vulnerable because of their young age, and that the environment and the situations they experience greatly shape who they are. As a child, life skills are learned and the child's understanding of the world in general develops. The early childhood period is crucial and has a major impact on the rest of a child's life, and it is therefore important that the right conditions are created for successful development.²

The author agrees that the principle of the best interests of the child and the definition of well-being is sometimes vague and ambiguous but considers that it is not possible to define it more specifically, as each child is a separate individual whose well-being and needs must be assessed on a case-by-case basis. Such an approach will guarantee the rights of the child if these principles are effectively applied. The principle of the best interests of the child is to protect children and to create favourable conditions for their self-fulfilment and development. The aim is to ensure that children's rights are fully exercised by both the parent and the state by establishing a general framework. The best interests of the child are paramount and must be taken into account in all circumstances.

¹ UN High Commissioner for Refugees (UNHCR) (2014). Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe. Retrieved from <https://www.refworld.org/docid/5423da264.html>, 01.02.2022.

² Johnson, A. (2005). Meeting the best interest of the child: Reconsidering Massachusetts' foster care system. *The Boston University Public Interest Law Journal*, 14(2), 277.

1.1. Legal framework

The basic principles of child protection derive from the UN Convention on the Rights of the Child (UNCRC)³ and its comments – at the international level it is the most important international agreement for putting the best interests of the child first. Article 3(1) of the UNCRC explicitly states: “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.”⁴ The Convention on the Rights of the Child seeks to emphasise that any decision must be preceded by an analysis of its potential impact on children and that any decision must be motivated and explained.⁵

A child's well-being is linked to his or her own well-being, that of the people around him or her and the environment. A child's immediate environment is a 'microsystem', which includes the home and family, the people directly around the child, the physical conditions and economic opportunities of the environment, as well as social relationships and the emotional climate. Child well-being is a dynamic process that is the result of the child's own internal, interpersonal, social and cultural processes. The child has an important subjective role to play in the perception of his or her surroundings and this is in line with the principles of the UNCRC.⁶

It should be noted that the assessment⁷ and determination⁸ of the best interests of the child are the two stages that must be completed before a decision concerning the child can be taken. First, the elements relevant to the best interest's assessment must be identified and given specific content in the context of the specificities and realities of each case. The Committee on the Rights of the Child (Committee) stresses that the circumstances to be assessed are unique for each child and each group of children. The Committee does not provide an exhaustive list of elements, but does, however, set out in its opinion the elements⁹ that it considers should be taken into account when assessing and determining the best interests of the child. The Committee notes, however, that some

³ Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

⁴ *Ibid.*

⁵ Aru, A., Paron, K. (2015). Lapse parimad huvid. *Juridica*, 6, 375-386.

⁶ Reinomägi, A., Sinisaar, H., Toros, K., Laes, T.L., Krusell, S., Kutsar, D., Ilves, K., Abel-Ollo, K. (2014). Lapse heaolu mõõtmise käsitus. *Statistikaamet*.

⁷ Committee on the Rights of the Child. (2013). General Comment No. 14 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. Retrieved from https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf, 02.02.2022.

⁸ *Ibid.*

⁹ *Ibid.*

elements may be taken into account in the assessment and others not. The assessment of the best interests of the child therefore involves describing and balancing all the elements that concern the child or group of children (see point 3 for more details on balancing). The assessment is carried out by the decision-maker and, preferably, his or her multidisciplinary team, and the child's participation in the assessment is mandatory. However, the identification of best interests can be understood as the identification of best interests based on the description of the elements and the outcome of the assessment process.¹⁰

Thus, the first principle is that all the rights of the child as set out in the UNCRC must be respected and taken into account when determining the best interests of the child. Although sufficiently general and incomplete, the primary starting point for determining the best interests of the child in a particular case is the sum of the rights set out in the UNCRC. Article 28 of the UNCRC states that it is in the best interests of the child to have access to education, Article 8 states that it is in the best interests of the child to have a family relationship, Article 7 states that it is in the best interests of the child to know and be cared for by his or her parents, Article 12 states that it is in the best interests of the child to participate in decisions affecting his or her life, Article 16 states that it is in the best interests of the child to be respected and treated as an individual. Article 19 of the UNCRC also makes clear what is not in the best interests of the child: for example, to be subjected to physical and psychological violence, abuse, neglect, negligent or cruel treatment or exploitation; to be separated from one's parents without just cause, Article 32 to perform work which is dangerous or harmful to the child, Articles 33 to 36 to be otherwise exploited or abused.¹¹

Another important principle is that the assessment of the best interests of the child must respect the right of the child to express his or her views freely. For the correct implementation of Article 3(1) of the UNCRC, the requirements of Article 12 of the UNCRC must be complied with, as the two articles are complementary: the first aims at the realisation of the best interests of the child, the second provides a methodology for hearing the views of the child or children and involving them in all matters concerning the child, including the assessment of his or her best interests.¹²

¹⁰ *Ibid.*

¹¹ Hammarberg, T. (2008). *The Principle of the Best Interests of the Child – What it Means and What it Demands from Adults*. Lecture, Commissioner for Human Rights Council of Europe. Retrieved from <https://rm.coe.int/16806da95d>, 02.02.2022.

¹² Committee on the Rights of the Child. (2013). *Supra nota 7*.

The UNCRC values the child as an autonomous legal subject. Article 12 of the UNCRC, which obliges States Parties to the Convention to involve the child in the resolution of any matter that concerns him or her, is the practical implementation mechanism of the child's autonomy. To this end, the child must be heard and his or her views must be given due weight. The author agrees with the view of Paron, K. that maturity is an undefined legal concept and, according to the explanations of the Committee on the Rights of the Child, means the capacity of the child to express his or her views in a reasonable and independent manner.¹³

The principle of putting the best interests of the child first has three levels:¹⁴

a) The substantive level: includes the right of the child to have his or her best interests assessed and given priority when different interests are weighed in deciding on the matter under consideration, as well as guarantees that this right will be applied in decisions concerning the child, an identified or unidentified group of children or children in general.

Committee on the Rights of the Child article 3(1) creates a domestic obligation for States Parties, is directly applicable and can be invoked before a court.

b) The fundamental principle of interpretation of the law: where a rule of law is open to different interpretations, the interpretation which best serves the best interests of the child must be chosen. The rights enshrined in the UNCRC, and its Protocols provide the necessary framework for interpretation.

c) The rule of procedure: when a decision is to be taken which affects a particular child, a specific group of children or children in general, the decision-making procedure must include an assessment of the potential impact (positive or negative) of the decision on the child or children concerned. The assessment and determination of the best interests of the child requires procedural safeguards. Moreover, the statement of reasons for the decision must show that the child's rights have been directly taken into account. In the light of the foregoing, States Parties must explain how this right has been taken into account in the decision, i.e. what has been considered to be in the best interests of the child, what criteria the decision is based on, and how the best interests of the child have been weighed against other circumstances, whether broad policy issues or individual cases.¹⁵

¹³ Paron, K., (2021). Lapse osalemine teda puudutava küsimuse otsustamisel. Kuidas hinnata lapse küpsust ning anda tema arvamusele kohane kaal? *Juridica*, 9, 647-657.

¹⁴ Committee on the Rights of the Child. (2013). *Supra nota 7*.

¹⁵ *Ibid.*

Committee on the Rights of the Child has clarified that the implementation of the principle requires the adoption of a three-tiered approach to maximise the assessment of the best interests of the child.¹⁶ Firstly, the situation has to be considered from a substantive point of view, weighing up the interests of all parties, with priority given to the interests of the child.¹⁷ Subsequently, if there is a possibility for different interpretations of the fundamental value, the situation must be assessed in such a way that the principle of the UNCRC is guaranteed in the best possible way.¹⁸ The decision-making process must also include an impact assessment, which must show whether and to what extent the decision to be adopted is likely to affect the child, and how these have been taken into account in the decision-making process.¹⁹

The author considers that by using the above three-level approach, it is possible to identify the child's needs and to make an assessment of each individual case. Since it is not possible to define children's needs unambiguously, the conditions listed above are entirely proportionate.

In addition, the UNCRC has clarified how the principle should be assessed and how it should be implemented to ensure that the best interests of the child are put first and mainstreamed across all areas. The first step is to clarify the factual circumstances of a particular case, their substantive meaning and the interests of the different parties and their respective considerations.²⁰ Procedural rules must be followed to ensure that everything is legally correct and the impact on children must be assessed and clarified before a decision is taken.²¹

At the European level the human and fundamental rights to family life and the protection for it, is guaranteed by Article 8 of the European Convention on Human Rights (ECHR).²² In the European Union, the principle of the best interests of the child is understood to mean, in particular, 'what is in the best interests of the child's mental, moral, physical and material well-being.'²³ This is why

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² 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.

²³ Atangcho, N. A. (2010). Excursion into the Best Interests of the Child Principle in Family Law and Child-Related Laws and Policies in Cameroon. *International Survey of Family Law*, 63, 65.

children are at the centre of legal and political decision-making, and why the state must take all the necessary measures to ensure their permanent protection in all circumstances.²⁴

The Charter of Fundamental Rights of the European Union has as its main objective the protection of the fundamental rights of the individual, and Article 24 sets out the right of the child to express his or her views freely and to have them taken into account in matters relating to the child, in accordance with the age and maturity of the child, to have the best interests of the child a primary consideration in all actions of public bodies and private institutions relating to children, and the right of every child to maintain regular personal contact and direct contact with both parents, unless this is contrary to the best interests of the child.²⁵

Under the Estonian Constitution, the family has the right to family and private life, and interference is only possible in cases provided for by law.²⁶

At the national level, the fundamentals of a child's access and custody arrangements are outlined in the general requirements of the Family Law Act²⁷ and the Child Protection Act.²⁸ In Estonia, Family Law Act (FLA), regulates the questions of parental responsibility. As well as according to the Constitution of the Republic of Estonia²⁹, parents have the right and the duty to raise and care for their children. Also it is stated in the Chapter 8 of the Estonian Family Law Act that the persons required to provide maintenance are adult ascendants and descendants related in the first and second degree and persons entitled to receive maintenance are a minor child and a child who is acquiring basic, secondary or higher education or formal vocational education as an adult but not more than until he or she attains 21 years of age.

The principles of ensuring the rights and welfare of the child are also set out in § 4 and § 5 of the Estonian Child Protection Act.³⁰ Child Protection Act § 5 section 3 states that in all action concerning children, the best interests of the child shall be a primary consideration'' and section 4 states that every child has the right to independent opinion in all matters affecting the child and the right to express his or her views.

²⁴ *Ibid.*

²⁵ Charter of Fundamental Rights of the European Union. (2007/C 303/01), art 24.

²⁶ The Constitution of the Republic of Estonia, RT I, 15.05.2015, 2, 49.

²⁷ Family Law Act, RT I, 22.12.2021, 15.

²⁸ Child Protection Act, RT I, 12.12.2018, 49.

²⁹ *Supra nota 26.*

³⁰ *Supra nota 28.*

Paragraph 27(4) of the FLA³¹ provides for the right of the state to lay down rules to help ensure the fulfilment of parental duties and to protect children from breaches of parental duties.³²

Enforcement of child access procedure orders is governed by § 179 of the Estonian Code of Enforcement Procedure,³³ which contains imprecise provisions and does not provide clear rights and obligations for bailiffs in enforcing child access procedure orders. The procedure for the enforcement of a child access order is very different from that for the enforcement of other claims, in particular pecuniary claims. As a child has the right to communicate with both parents according to § 143(1) of the FLA,³⁴ therefore it must be guaranteed the opportunity to communicate with the separating parent, regardless of the difficult relationship between the parents.

Paragraph 116 (1) of the Estonian Family Law Act lays down the principles of parental custody, according to which it is the duty and right of the parents of a child to care for their minor child, and according to § 118 (1) the parents shall exercise joint custody of the child and fulfil the duty of care on their own responsibility and in unison, having regard to the best interests of the child.³⁵

In general, it can be said that there is a common goal in society: to ensure a safe environment for children, and the UNCRC principle of the best interests of the child is, in theory, just about guaranteed by this.³⁶ However, in practice, the definition of the principle is problematic and rather vague, and the Convention lacks enforcement mechanisms.³⁷ From the author's point of view the States need to develop transparent and objective processes through which the impact of children's rights can be assessed at all levels of legislation and policy, so that the potential consequences can be assessed and anticipated, not only at a given point in time, but also in the future.³⁸ The author agrees that the need to amend the Estonian Family Law Act is vital, but the impact of the amendments needs to be further analysed to ensure that they do not conflict with ECHR³⁹,

³¹ *Supra nota 27.*

³² Ahas, E. (2015). Kas perest eraldamine on liigne sekkumine perekonnaautonoomiasse või üks lapse huve tagavatest meetmetest? - *Juridica*, 6, 397-404.

³³ Code of Enforcement Procedure, RT I, 12.03.2022, 8.

³⁴ Family Law Act. *Supra nota 27.*

³⁵ *Ibid.*

³⁶ Engle, E. (2011). The Convention on the Rights of the Child. *Quinnipiac Law Review*, 29(3), 802.

³⁷ *Ibid.*

³⁸ Joseph, M. (2015). When are the best interests and welfare of the child relevant and how can they be used in housing-related claims? Part 2: application. *Journal of Housing Law*, 18(1), 2.

³⁹ Charter of Fundamental Rights of the European Union. (2012/C 326/02).

UNCRC⁴⁰ and the principles of safeguarding children's rights and welfare under the Estonian Child Protection Act.⁴¹

1.2. Nature of parenthood, family values and impact of parental separation on children

The family within the meaning of this provision includes the relationship between parents and children. It is irrelevant whether the child is born in or out of wedlock, whether he or she is a stepchild, a foster child or an adopted child. Parental custody is an expression of the parents' natural connection with and affection for their children, as well as a framework for action. It expresses basic human needs: to have an object of affection, to watch a person grow, to care for and protect him or her.⁴² As a right and an obligation, it includes all the activities of the parents which are necessary and essential, in physical and mental terms, for the protection and development of the child.⁴³

The definition of a parent's right of custody in the Estonian legal order derives from paragraph 116(1) of the Estonian Family Law Act which lays down the principles of parental custody, according to which it is the duty and right of the parents of a child to care for their minor child, and according to § 118(1) the parents shall exercise joint custody of the child and fulfil the duty of care on their own responsibility and in unison, having regard to the best interests of the child.⁴⁴ Additionally parental duties are including taking care of the child's personal well-being (personal custody) and the child's property (guardianship) and deciding on matters relating to the child (right of decision). Pursuant to § 120(1) of the Estonian Family Law Act, the custodial parent is generally the legal representative of the child (right of representation). In scope, the right of representation extends as far as the right of custody. If custody is limited, so is the right of representation.⁴⁵

The author believes that the most effective possible exercise of the rights of the child requires state support and the establishment of appropriate regulations, as well as the control of their implementation, thus creating the appropriate environment for parents and children. Parents are

⁴⁰ Convention on the Rights of the Child, *Supra nota* 3, 49.

⁴¹ Child Protection Act. *Supra nota* 28.

⁴² Lüderitz, A. (2005). *Perekonnaõigus. Õpik*. Tallinn: Juura, 286.

⁴³ *Ibid.*, 300..

⁴⁴ Family Law Act, *Supra nota* 27.

⁴⁵ Uusen-Nacke, T., Göttig, T. (2010). Perekonnaõiguse seosed teiste tsiviilõiguse valdkondadega. *Juridica*, 2, 91.

primarily responsible for children, but the state must ensure that parents and officials and the courts also fulfil their responsibilities. Children's rights and values are not so different from those of adults, and children also need equal treatment if they are to be full members of society.⁴⁶

The author considers that, first and foremost, it is the responsibility of parents to ensure the general well-being of children and the legitimate exercise of their rights. In the event of separation, the children must be guaranteed their former way of life, which means that they must be able to resume life as it was when living with both parents. – However, this is again an individual matter, as in some cases separation is more likely to improve the child's quality of life. Your children watching you stay in a toxic relationship does more damage than being single.

Since parenthood entails both rights and obligations, the author considers that the use of coercive measures may be justified under specified conditions. Insofar as the best interests of the child must come first and the inaction of the parents must cease, parental visitation rights should also be restricted under certain conditions in cases of non-payment of maintenance / non-compliance with court-ordered contact arrangements.⁴⁷ Parents do not get to choose which rights and responsibilities they exercise, but must exercise them all and as effectively as possible to ensure the child's well-being. If a parent wishes to exercise his or her rights, the responsibilities that go with them must also be fulfilled.⁴⁸

It is generally considered to be in the best interests of the child to have two custodial parents in the event of parental separation, even after the parents' marriage or cohabitation has broken down. Custody should, however, only belong to a parent to the extent that that parent actually participates in the child's upbringing.⁴⁹ Joint custody can be modified or terminated by petitioning the court, and the court must make a decision based on the best interests of the child. In resolving a claim for termination of joint custody, courts have very often tried to reconcile the parties, to direct them to counselling and to encourage compromise.

⁴⁶ Tobin, J. (2013). Justifying Children's Rights. *The International Journal of Children's Rights*, 21(3), 395-441.

⁴⁷ Fenton-Glynn, C. (2014). Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings. *Journal of Comparative Law*, 9, 141.

⁴⁸ *Ibid.*

⁴⁹ Arrak, L. (2011). Vanema õigused ja kohustused lapse suhtes ning avaliku võimu sekkumine vanema ja lapse õigussuhtesse. *Sotsiaaltöö*, 5, 9.

However, the parent's willingness and readiness to exercise custody over the child should be the determining factor in deciding on the custody of the child. The law cannot be designed to coerce the will of a parent who lives separately from the child but is unwilling and unable to exercise custody. Bonding with parental figures is also necessary for the socialization process, wherein a kid learns societal values and standards and can connect with everyone else. Therefore, parents should consider family values a compass while having custody of their child. They should help to direct parents and children toward the types of persons they want to be and, eventually, the types of lives they want to live. Creating a distinct culture may help each member grow in character and make decisions, resulting in a happy family and preparing children for a healthy process of transitioning into adulthood.⁵⁰

Children are a population group whose welfare is critical in terms of their overall health and quality of life, also in terms of future investment. A child's welfare is determined by the extent to which their human and citizenship rights, social justice, and civil society participation are protected.⁵¹

Based on the foregoing, the author considers, that family as a whole must be analysed when assessing the well-being of the child, as parents and their involvement in family life are a direct and major factor influencing children. Parents shape the living environment and the security of their children, and they enable children to do the same through various means. In situations where a child's well-being is threatened by the behaviour of parents, the child must be given priority and, where necessary, parents' rights must be restricted.⁵²

1.3. The rights of the child and the legal rights of the child

The child is treated as a special legal subject in legal relations.⁵³

Adopted in 1989, the UNCRC is the normative basis for addressing the well-being of the child, emphasising the integrity of child development, the individuality of each child and the importance of realising the child's innate potential. The Convention's internationally recognised framework of

⁵⁰ Boele-Woelki, K., Martiny, D. (2007). The Commission on European Family Law (CEFL) and its Principles of European Family Law Regarding Parental Responsibilities. *ERA-Forum*,8(1), 125-143.

⁵¹ European Commission, Migration and Home Affairs. *Best Interests of the Child (BIC)*. Retrieved from https://ec.europa.eu/home-affairs/pages/glossary/best-interests-child-bic_en, 02.02.2022.

⁵² Ahas, E. (2015). *Supra nota* 32, 402.

⁵³ Arrak, L. (2011). *Supra nota* 49.

principles, its comprehensive nature and its legally binding character provide the basis for assessing children's situation and opportunities and for improving the situation of children. Under the UNCRC, every child has the right to grow up in a society that promotes his or her development and well-being. The rights of the child are an integral part of the child's well-being and can therefore be seen as a basis for assessing well-being.⁵⁴ UNCRC is seen as a turning point in the treatment of the rights of the child, through which the recognition of a more competent child has been translated into legislation.⁵⁵ UNCRC divides into three broad categories according to their content: rights related to care, rights related to protection, and rights related to autonomy and participation.

The Charter of Fundamental Rights of the European Union has as its main objective the protection of the fundamental rights of the individual, and Article 24 sets out the right of the child to express his or her views freely and to have them taken into account in matters relating to the child, in accordance with the age and maturity of the child, to have the best interests of the child a primary consideration in all actions of public bodies and private institutions relating to children, and the right of every child to maintain regular personal contact and direct contact with both parents, unless this is contrary to the best interests of the child.⁵⁶

At national level, The Constitution and the Family Law Act govern children's and parents' relationships in Estonia. The principles of a child's rights of access and custody are defined in both the Child Protection Act and the Family Law Act. According to the Child Protection Act, the principle of child protection is to put the best interests of the child first at all times and in all places, and to treat each child as a person, respecting his or her individuality, age and gender. According to § 28 of the Estonian Child Protection Act, a child who is divorced from one or both parents have the right to maintain personal relations and contact with both parents and close relatives, unless this would harm the child. Section 143 of the Estonian Family Law Act also provides for the right of the child to have personal contact with both parents.

Additionally, according to § 7(1) and (2) of the General Part of the Civil Code, the legal capacity of a child begins with the child's live birth and from that moment the child is capable of having

⁵⁴ Reinomägi, A., Sinisaar, H., Toros, K., Laes, T.L., Krusell, S., Kutsar, D., Ilves, K., Abel-Ollo, K. (2014). *Supra nota 6*.

⁵⁵ Verhellen, E. (2006). Convention on the Rights of the Child. Background, Motivation, Strategies, Main Themes. 4th edition. *Antwerp: Garant*, 9.

⁵⁶ Charter of Fundamental Rights of the European Union. *Supra nota 25*.

civil rights and incurring civil obligations. Because of his or her limited capacity to act and to understand, his or her independent participation in legal proceedings is substantially limited, which is why, under the second sentence of Paragraph 8(2) of the General Part of the Civil Code, the child has a limited capacity to act. The legal system is based on the principle that a child generally needs parental care until he or she reaches the age of majority, and that once he or she has attained full legal capacity, the child becomes independent and parental responsibility for the child ceases, but the rights and duties of the parent and the child by affinity, as well as certain consequences of parental responsibility, remain.⁵⁷ Pursuant to § 8(2) of the General Part of the Civil Code Act, persons who have reached the age of 18, i.e. adults, have full capacity to act.

The ability of a child to exercise rights and accept responsibility for decisions and acts grows in sync with the child's growth. This is also the basis of the UNCRC, which relates a child's entitlement to enjoy rights and fulfil obligations to their age and level of development. It implies that as the child gets older, so does their right to make their own decisions. Unless a child is incapable of exercising their rights, their parents or representatives will do so on their behalf.⁵⁸ The child's interests must always govern the exercise of a child's rights.

The Estonian law provides that children have the right to the best existing medical services, safe running water to drink, healthier meals, and an unpolluted and secure surroundings in which to live. Everyone, including adults and children, should be conscious of being in good health and safe.⁵⁹ At the same time, the law provides that every kid who has been taken away from home for their care, safety, or health should have their condition regularly reviewed to ensure that everything is running smoothly and that this is still the perfect place for the kid to stay. As a signatory to the UNCRC, the Republic of Estonia has observed that children with disabilities or special needs must live a whole and comfortable life. Such environments must safeguard identity, support the implementation of self-assurance, and allow children to actively participate in society for their well-being.

Based on the above, the author believes that children want to be actively involved in decision-making processes that affect them and to feel that their views are taken into account. It is important

⁵⁷ Arrak, L. (2011). *Supra nota 49*.

⁵⁸ Convention on the Rights of the Child, *Supra nota 3*, 49.

⁵⁹ Luhmann, N., Ziegert, K., Kastner, F., Nobles, R., Schiff, D. (2004). *Law as a social system* (Oxford socio-legal studies). Oxford [etc.]: Oxford University Press.

to point out that respect for the best interests of the child is one of the fundamental principles of the protection of the rights of the child, which means that children must be given the opportunity to express their views on issues that concern them.

1.4. The concept of custody, limitation of custody, guardianship and definition of child access arrangements

At the core of a parent's custody is the care of the child's person. As a right and a duty, it includes all the activities of the parents which are necessary and essential in physical and mental terms for the protection and development of the child.⁶⁰ A review of parental custody usually becomes inevitable when the parents have decided to separate and it is important to clarify to what extent and in what way each parent will participate in the upbringing of the child.

The definition of a parent's right of custody in the Estonian legal order derives from § 116(2) of the Family Law Act, according to which a parent has the right and the duty to take care of his or her minor child, including taking care of the child's personal well-being (personal care) and the child's property (guardianship) and deciding on matters relating to the child (right of decision). According to § 120(1) of the FLA, the custodial parent is generally the legal representative of the child (right of representation). In scope, the right of representation extends as far as the right of custody. If custody is limited, so is the right of representation.

Pursuant to subsection 137 (1) of the FLA, if the parents who have joint custody are permanently separated or for some other reason do not wish to exercise joint custody in the future, either parent has the right to apply to the court in a non-appealable procedure to have custody of the child transferred to him or her in whole or in part. Pursuant to § 137(3) of the FLA, the court shall base its decision on the award of custody to one parent primarily on the best interests of the child, taking into account, among other things, the mental and economic readiness of both parents to raise the child, the emotional attachment to the child and their previous commitment to caring for the child, and the future living conditions of the child. It is in the best interests of the child to maintain a stable living arrangement which the child understands and foresees. It is also important that siblings grow up together.

⁶⁰ Lüderitz, A. (2005). *Supra nota 42*.

According to § 143(1) of the FLA, it is presumably in the child's best interests that the child can have contact with the separated parent, and that the parent must not harm the child's relationship with the other parent. Only if communication with the separated parent would not be in the best interests of the child, including if it would have a detrimental effect on the child, may the parent prevent the separated parent from communicating with the child in order to safeguard the welfare of the child. Under § 143(3) of the FLA, the court may restrict the right of communication in the best interests of the child if communication between the parent and the child is not in the best interests of the child and would be detrimental to the child's health and development. According to Section 123 of the FLA, the court, when hearing all matters relating to the child covered by this Chapter, shall give its decision primarily in the best interests of the child, taking into account all the circumstances and the legitimate interests of the persons concerned.

The circuit court explains that since the termination of joint custody and the granting of sole custody to one parent, as well as the determination of the rules of contact, is a discretionary decision of the court, the higher court will only intervene if the lower court has exceeded the limits of its discretion or has substantially violated a procedural rule.⁶¹⁶²

Parents have an important role to play in ensuring that a child can communicate freely with both parents. According to the Supreme Court, a parent living with a child is generally obliged to allow the child to communicate with the parent who is separating and to support the contact between the child and the other parent in every way, including encouraging the child to communicate with the other parent, providing emotional support and not undermining the child's natural relationship with the other parent.⁶³

Based on the foregoing, the author agrees with the opinion, that any agreement can be watertight in cases where the parties are willing to honour it, do not seek outside help, and never start legal proceedings to annul or correct what has been agreed.⁶⁴ The child is not responsible for the circumstances that led to his or her conception and the possible consequences that the parents had

⁶¹ Supreme Court judgment of 12 February 2016 in civil case no. 3-2-1-159-15.

⁶² Supreme Court judgment of 6 April 2018 in civil case no. 2-15-16111.

⁶³ Supreme Court judgment of 14 March 2012 in civil case no. 3-2-1-6-12.

⁶⁴ Turkin, V. (2018). *Kokkuleppelapsed jäävad pigem erandiks*. Postimees. Retrieved from <https://arvamus.postimees.ee/4452239/vandeadvokaat-viktor-turkin-kokkuleppelapsed-jaavad-pigem-erandiks>, 01.10.2021.

in mind and agreed between themselves.⁶⁵ Parents may not exercise their rights in a way that it can damage the welfare of the child.⁶⁶

As a child has legal capacity, he or she can own property. If the child owns property, however, he or she cannot dispose of it because of his or her limited legal capacity, which is why the Estonian FLA provides for the concept of guardianship. Guardianship is governed by Section 127 of the FLA, which provides that guardianship includes the right and duty to manage the child's property, including the right to represent the child. This does not exclude the right of the child to manage the property independently in the cases provided for by the law. Paragraph 133(1) of the FLA imposes a duty on parents, in exercising their right of guardianship of the child, to show the same care as they normally exercise in their own affairs.

In custody disputes, in a situation where a child needs to be able to communicate with his or her separating parent in order to ensure the continuation of the child's relationship with the former parent, it is reasonable for the court to determine the child access arrangement in accordance with § 28 of the FLA Act and § 123(1). Accordingly § 143(1) Child Protection Act, taking into account in part the proposals of the parents, the views of the child's representative and the local authorities, and giving priority to the best interests of the child.

Psychologists involved in court proceedings have repeatedly drawn attention to the dangers of this type of situation, in which a child of pre-school or younger school age is forced to make choices between his or her parents and is confronted with them. In such a situation, irreversible damage to the child-parent relationship is inevitable. Ignoring the child's real interests and mechanically equating them with the child's wishes can later damage the child's entire future life.⁶⁷

"The public authorities have a duty to ensure communication between parent and child, even where there is a conflict in the relationship between the parents themselves" (European Court of Human Rights (ECtHR), Santilli v Italy). "Failure of the parents to reach an agreement between themselves is not a justification for inaction on the part of the public authorities" (ECtHR, Z. v. Poland). It is

⁶⁵ *Ibid.*

⁶⁶ Kullerkupp, K. (2001). Family Law in Estonia. *International Survey of Family Law*, 105.

⁶⁷ Turkin, V. (2017) *Justiitsministri seisukoht avab tee lastega manipuleerimisele*. Postimees. Retrieved from <https://arvamus.postimees.ee/4051343/viktor-turkin-justiitsministri-seisukoht-avab-tee-lastega-manipuleerimisele>, 01.10.2021.

the violation of the above principles that has led to the ECtHR's numerous harsh judgments against various Central and Eastern European countries.⁶⁸

Ensuring the enforcement of a court decision is a constitutional obligation of the state, also in the case of decisions on the child contact arrangements. The ECtHR has held that failure to enforce such judgments constitutes a violation of Article 8 of the European Convention on Human Rights, which guarantees, inter alia, respect for family life (ECtHR Pakhomova v. Russia).⁶⁹

The current legislation of Estonia allows for such diverse and lengthy judicial, enforcement and administrative proceedings in matters of access and custody that these proceedings have lost their purpose. In numerous cases, proceedings are conducted for the sake of proceedings, without any result, but the problem of the parent who has gone to court remains permanently unresolved. The regulation of the enforcement of a court order determining the child access arrangements should work even if one of the obligated parties does not wish to comply consistently. Indeed, the regulation in this area must be conflict-centred and aimed at resolving the conflict, because without conflict there would be no need for enforcement.⁷⁰

Normally, the child is placed with one parent and the other parent is given a child access arrangement, which in itself can be quite extensive. Such a solution is also possible as a result of a judicial compromise.⁷¹ Child access arrangement might be problematic if children were upset with their non-resident guardian or parent, either because of the divorce or their parent's future conduct.

Frustration and sadness were also fueled by resentment at their non-resident parent's lack of involvement in their upbringing, as well as emotions of rejection. Another factor that dampened their desire for connection was being let down or disappointed by their non-resident parent. The search for organized amusement with their non-resident parents bore some offspring. Even while a dispute over child access arrangement schedules was a concern for just approximately a fifth of the children, it was a cause of pain and unhappiness where it did occur. There were instances of parents bad-mouthing the other parent over arrangements or change over periods.⁷² Kids used

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² European Commission, Migration and Home Affairs. *Supra nota 51.*

analogies such as a brawl, the eye of a cyclone, an elastic band, and being in the center of World War III. These words express how children might feel torn by their parents' continual dispute. Children discussed ways for escaping the conflict, such as going into their rooms and leaving the room or watching films. Contact with children's non-resident parents was a cherished and vital aspect of the majority of their upbringing, and most would have preferred more frequent and more extended contact. On the other hand, kids' accounts of interaction time imply that, in addition to offering vital continuity of parenting, child access arrangements may cause some distress.

The level of engagement in family choices that the children have and desires vary. Some children valued having the option of choosing the person to stay with and not being compelled to visit a parent with whom they did not want contact.⁷³ Others said that having to make such a decision would be tough. The most prevalent engagement was the kids having some say in at least some of the choices that affected them. Although they did not make the ultimate choice on residency or contact, the children enjoyed and treasured that their opinions were asked. They additionally appreciated having enough versatility in their relationships to make changes based on their varying requirements. Even if they were not contacted initially, the children seemed to value the knowledge that they could affect change and the assurance that their opinions would be heard.

In the case of parental separation, the primary means of determining the communication arrangements between the separating parent and the child is agreement between the parents FLA § 143(21). For both the child and the parents, agreeing on the communication arrangements is preferable to having them determined by the court, as it creates less tension between the parents, saves time and money in disputes and allows for more flexibility in determining the communication arrangements.⁷⁴

From the author's point of view, the imposition of a child access arrangement order is not in the best interests of the child and is detrimental to the child's mental health and development in a situation where the child is stressed, anxious and tense after meeting the parent, or where the child's behaviour has become aggressive. The author concludes that the assessment of the best interests of the child must take into account the impact of the interaction with the parent on the child and

⁷³ UN High Commissioner for Refugees (UNHCR). (2014). *Supra nota 1*.

⁷⁴ Lillsaar, M., Siimula-Saar, K. (2013). *Vanematevahelised vaidlused hooldusõiguse ja suhtlusõiguse kindlaksmääramisel – kes on võitja, kes kaotaja?* Riigikogu toimetised. Retrieved from <https://rito.riigikogu.ee/eelmised-numbrid/nr-27/vanematevahelised-vaidlused-hooldusõiguse-ja-suhtlusõiguse-kindlaksmääramisel-kes-on-voitja-kes-kaotaja/#>, 02.02.2022.

on the child's behaviour. Particular attention should be paid to the child's age and level of development, his or her personality and tendencies, the child's special needs, the distance between the parents' residences and the parents' ability to share responsibility for the child and to protect the child from violence. Although the law does not explicitly provide for it, the author agrees with L. Arrak assessment that the child should also agree to the compromise proposed by the parents, since the child's rights are also directly affected by the arrangements for communication with the child.⁷⁵ From the author's point of view, if a child expresses disagreement with a compromise agreement, this may be an indicator for the court to decide whether a child access arrangement in the agreement may be contrary to the best interests of the child.

⁷⁵ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne*. Tallinn: Juura, 599-600.

2. ASSESSING THE BEST INTERESTS OF THE CHILD IN CUSTODY DISPUTES

Family law problems are delicate and need to be approached on a personal basis. Mostly, where the cohabitation of a child's parents has come to an end and the parents have not reached and cannot reach an agreement on where their joint child should live and where the child should attend nursery school, the inability of the parents to agree on some matters that are important for the child creates problems. The idea of child-friendly justice, which ensures the preservation of a child's welfare when they encounter the legal system, is also becoming increasingly popular these days. The judicial system must be modernized, focusing on the child's interests and asking for their input when they encounter the judicial process to provide a child-friendly legal environment.⁷⁶

The transfer of custody to one parent must be in the best interests of the child. In general, it is in the best interests of the child's development that the child has a centre in his or her life, i.e. a place that the child can call home. In addition to stability, this also ensures that at least one parent has a good overview of what is happening in the child's life, whereas in the case of an alternating residence, there is a risk that neither parent has a comprehensive overview of what is happening in the child's life and is therefore unable to exercise custody effectively in practice. An almost inevitable prerequisite for shared residence is, *inter alia*, that the parents are able to cooperate and exchange information in the best interests of the child.

If the parents reach an agreement in the course of proceedings concerning the child, the judicial compromise must be in the best interests of the child. The local authority and the child's representative can give their views on the compromise. However, if they do not agree to the compromise on the grounds that it is contrary to the best interests of the child, the court may confirm the compromise by reasoned order.⁷⁷

Although in disputes with children, the behaviour of parents based on emotion rather than rationality is understandable to a certain extent, parents must comply with court orders and

⁷⁶ European Asylum Support Office. (2016). *EASO Practical Guide on Family Tracing*. Retrieved from <https://euaa.europa.eu/publications/practical-guide-family-tracing>, 02.02.2022.

⁷⁷ Kőve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

agreements between themselves, as well as treat the other parent with respect, especially in the best interests of the child. Among other things, both parents have a legal obligation according to § 144 of FLA to provide the other parent with information on important matters relating to the child's person (e.g. the child's health, well-being, activities, etc.).

Thus, it can be seen that under Estonian law the court must determine the child access arrangements primarily on the basis of the best interests of the child. In each case, the court must determine which child access arrangements are in the best interests of the child. By consistently assessing and considering the child's financial and emotional needs, the child's interests are given real meaning.⁷⁸ Children must be treated equally and given the same opportunities, whether they live with both parents or only one.⁷⁹

2.1. The role of local government, state aid and judge in determining the best interests of the child

On the implementation of the Convention in Estonia, attention has been drawn to the need to develop principles based on the best interests of the child both at the state and local government level, by creating relevant materials and conducting relevant training, and it is emphasised that the process of impact assessment should be mandatory at several levels.⁸⁰ The role of local government, state aid, and judge in determining the child's best interests is to ensure the best interests of the child principle applies.⁸¹ They also provide that a child-friendly justice system is in place. Aspects of constitutional protections, such as the fundamentals of constitutionality and procedural fairness, the assertion of sincerity, the right to due process, and access to appeal guidance, are provided by local authorities.⁸² They also give children the ability to access the court system, and the right to appeal should be guaranteed for children in the same way that they are for adults and should not be minimized or denied based on the child's best interest. This is true for all

⁷⁸ Clark, C. (1999). Imputing parental income in child support determinations: What price for a child's best interest? *Catholic University Law Review* (1975), 49(1), 167.

⁷⁹ Saler, C. (2002). Pennsylvania law should no longer allow a parent's right to testamentary freedom to outweigh the dependent child's "absolute right to child support." (Case Note). *Rutgers Law Journal*, 34(1), 235.

⁸⁰ Chancellor of Justice of Estonia. (2015). *Eesti Vabariigi õiguskantsleri raport ÜRO lapse õiguste konventsiooni täitmisest Eesti Vabariigi kolmanda ja neljanda perioodilise aruande kohta*. Retrieved from https://www.oiguskantsler.ee/sites/default/files/est_i_vabariigi_oiguskantsleri_raport_uro_lapse_oiguste_konventsiooni_taitmisest.pdf, 01.10.2021.

⁸¹ European Commission, Migration and Home Affairs. *Supra nota 51*.

⁸² Lüderitz, A. (2005). *Supra nota 42*.

judicial, non-judicial, and administrative processes, which are only brought to life by local government, state aid, and judges.

Child well-being includes the need to ensure a safe and stable environment for a child to grow and develop. When a family breaks up, the emotions of adults often come first and children often take second place, making it difficult for parents to understand the real impact of their behaviour on their children. They struggle with their own emotions, and if the separation is not amicable, the most vulnerable are the joint children, who are unwittingly placed in a situation where their safety and stability are threatened. Author states, that while parents are primarily responsible for their children, it is the duty of the state to ensure that children's best interests are legitimately and maximally taken into account.

2.1.1. Local government and child protection officers

It is clear from the case-law on the child access orders that the local authority also submits an opinion to the court on matters relating to the child access arrangement. For example, in proceedings to determine rights of access and to terminate custody, the local authority gives an opinion and an assessment of how often and where, in the best interests of the child, the child and the separating parent should communicate. As far as the author knows, this is not done in every local authority as it should be, and is not based on the best interests of the child, but on internal relations within the local authority, hand-in-hand. This practice should be equally feasible in the case of two separating parents, not a procedure for one parent only. The local authority should also monitor the separating parent's living conditions at home and report back to the court. The court is obliged to ask the local government for its opinion in proceedings to determine the right of access pursuant to § 552 (2) of the Code of Civil Procedure. Thus, when a court order regulating parent-child contact is submitted to the bailiff for enforcement, the bailiff must check whether the parents have undergone the mandatory conciliation procedure (Code of Civil Procedure § 563(8)).

Some parents contact their local authority child protection worker to find an out-of-court solution to disputes with children, and the local authority has developed an indicative guide to social services, including a description of family support services. However, there is currently no clarity at legislative level as to who should provide family support services.⁸³ In addition to the opinion of the representative, the opinion of the child protection worker plays a very important role in the

⁸³ Hääl, H. Surva, L. Valma, K. (2014). Lepitusmenetlus perevaidlustes. *Juridica*, 1, 86-103.

decision of the judges. Once a custody dispute between parents has reached court, the child protection worker has a necessary role to play - to represent the child and to give the court an overview of the child's rights, needs, wishes and opinion.

The Child Protection Act is a general law that provides a general framework for child protection activities throughout the country and aims to ensure that the rights and welfare of the child are fully safeguarded.⁸⁴ Pursuant to § 3(1) of the Child Protection Act, the provisions of the Child Protection Act apply to the authorities of the state and local authorities and their officials, legal persons in public or private law and natural persons who come into contact with children and child protection in their activities. It can therefore be seen that the provisions of the Child Protection Act must apply to almost all persons who come into contact with children.

Based on authors own experience, the author agrees with the opinion of V.Turkin, that child protection officers have the tendency to fear numerous complaints and the explanations that go with them and have essentially distanced themselves from the issue and no action is taken to protect the rights of the child and the other parent.⁸⁵ The inability and failure of child protection workers to carry out their duties properly and with the best interests of the child at the forefront will ultimately lead to dangerous precedents. If a parent who is raising a child has the ingenuity and audacity to systematically violate the child's rights and ignore all court decisions, while complaining to all parties involved, the courts, bailiffs and child protection workers will eventually be forced to raise their hands. All in all, one cannot help thinking that this example could be followed by many others, that it could make the workload of the above-mentioned institutions much heavier and the problems much more complex.⁸⁶

The child protection worker must be a highly qualified professional. The need for training has also been highlighted by lawyers themselves. As they are lawyers, not psychologists, but they have to identify the best interests of the child, training and guidance materials explaining what can and cannot be asked and what techniques to use when dealing with children of different ages would be

⁸⁴ Lastekaitseeadus. *Seletuskiri lastekaitseeaduse eelnõu juurde*. Retrieved from <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/f3beec87-7caf-4aad-afa0-aacbdde93a4c/Lastekaitseeadus/>, 01.10.2021.

⁸⁵ Turkin, V. (2013). *Lastekaitse – kellele ja milleks?* Postimees. Retrieved from <https://arvamus.postimees.ee/1227052/viktor-turkin-lastekaitse-kellele-ja-milleks>, 02.02.2022.

⁸⁶ *Ibid.*

helpful.⁸⁷ Taking the best interests of the child into account does not always have to come at the expense of something else, but it is also possible to find solutions that better safeguard all the different interests. If there are several ways of achieving a particular objective, the best interests of the child should be considered wherever possible.⁸⁸

Pursuant to § 552(2) of the Code of Civil Procedure, the court shall also ask the municipality or city government for its opinion in proceedings concerning a minor or a ward. The opinion of the child protection worker is classified as written evidence in disputes concerning the award of custody, which the court may also collect itself in summary proceedings pursuant to § 5(3) and § 230(3) of the Code of Civil Procedure. The court is not obliged to ask the local authority for its opinion on the case to specify what evidence should be submitted - it is usually up to the child protection worker to decide what material to forward to the court. The child protection worker's opinion is a weighty piece of evidence and child protection workers bear a heavy responsibility in custody disputes, as the child protection worker is the main source and interpreter of information about the child's welfare and best interests in many disputes, and it is often the child protection worker's opinion that the court relies on in its decisions.⁸⁹

Child welfare assessment is the resolution of cases involving children, and child protection workers follow the requirements of the UNCRC: firstly, identifying the child's interests and needs (fact-finding, hearing the parties involved, including the child). Secondly, considering the child's interests and needs in the interests and in the context of the needs of others and of the public and, thirdly, making a decision that takes the child's interests (needs and well-being) into account to the maximum extent possible. Assessment is by its very nature a process that accompanies the work of case management and is about understanding the situation of the child and the family. The child protection worker's task is to find an answer to the question of the readiness of the parent and the child's environment to ensure the child's well-being.⁹⁰

Assessing the current situation, the competences and skills of child protection workers vary widely. As there is a known shortage of competent child protection workers in Estonia, their

⁸⁷ Espenberg, K., Soo, K., jt. (2013). Vanema ja hooldusõiguse määramise uuring. *Lõppraport*. Tartu Ülikool: RAKE, 97.

⁸⁸ Lastekaitseeadus. *Seletuskiri lastekaitseeaduse eelnõu juurde*. *Supra nota 84*.

⁸⁹ Espenberg, K., Soo, K., jt. (2013). *Supra nota 87*.

⁹⁰ Sotsiaalministeerium. (2012). *Lapse heaolu hindamise abivahend lastekaitsetöötajatele*. Retrieved from www.perenou.ee/public/documents/Heaolu_hindamise_juhis_koos_essonaga.pdf, 01.10.2021.

workload is inevitably very high. This jeopardises a child-centred approach and allows generalisations to emerge. However, the range of tasks and expected professional competences is significantly greater than the tasks and expectations of existing child protection workers today.⁹¹

One of the bottlenecks that often arise in the involvement of child protection workers in the procedure is cases where the child and the parents have different places of residence and the court has involved several local authorities to give an opinion. In such cases, the views of child protection workers may differ. The quality of the work of local government professionals in shaping opinions on parental custody varies. The study on the allocation of parental custody pointed out that it depends both on the local authority (e.g. some do not have a separate child protection specialist) and on the personal characteristics of the individual child protection worker - there are those who do their job with total commitment and those whose work was criticised by the parties to the proceedings.⁹²

It has always been stressed that child protection workers should be neutral in their dealings with parents and do not pick sides, as they are employed to protect children and therefore always have the best interests and welfare of children at heart. The author concludes that this fiery working landscape for child protection workers creates a breeding ground for rapid burn-out. The author considers that, as child protection workers have an important role to play in representing and defending the interests of children in custody disputes, it would be important to organise regular legal training for child protection workers in this area. Adults involved in custody disputes - judges, lawyers, social workers, psychologists and teachers - tend to identify too easily with parents by identifying with parents' problems, their needs for children and their attempts to stay together with children. Even when the child's interests are taken as a starting point, they are often identified with the needs and interests of the parent.⁹³ In the light of the foregoing, however, it is important that all parties involved in the child-related proceedings in one way or another are aware that the solution must first and foremost be in the best interests of the child and no one else.

⁹¹Sotsiaalministeerium. Seletuskiri lastekaitseaduse eelnõu juurde. Retrieved from [https://www.sm.ee/sites/default/files/content-editors/Lapsed ja pered/Lapse oigused ja heaolu/seletuskiri.pdf](https://www.sm.ee/sites/default/files/content-editors/Lapsed_ja_pered/Lapse_oigused_ja_heaolu/seletuskiri.pdf), 01.10.2021.

⁹² Espenberg, K., Soo, K., jt. (2013). *Supra nota 87*.

⁹³ Holmberg, B., Himes, J. (2005). *Vanemlik vastutus versus riigi kohustused. Eseeede kogumikus laste õigused. ÜRO lapse õiguste konventsiooni põhimõtete rakendamine praktikas* (Toim. P. Pedak). Tallinn: Lastekaitseliit, 72.

2.1.2. State aid

It is the responsibility of the state to ensure that the rights of the child are fully protected in judicial proceedings. It goes without saying that a child lacks the capacity to represent himself/herself in court and to defend his/her interests, and is not familiar with the judicial system.

Pursuant to § 219 (1) of the Code of Civil Procedure, the court may appoint a representative to represent a person who is incompetent to stand trial in civil proceedings concerning him or her, if this is necessary to protect the interests of that person. Pursuant to subsection 2(3) of the same provision, a representative must be appointed where the court is dealing with the application of measures to safeguard the welfare of the child relating to the separation of the child from his or her family or to the deprivation of parental responsibility. The appointment of a representative for a child is made in accordance with the provisions of the Legal State Aid Act upon submission of a court order to the Estonian Bar Association for the provision of state legal aid for the representation of a person in pre-trial proceedings and in court. Pursuant to Section 18(1) of the Legal State Aid Act, the Estonian Bar Association shall immediately appoint a lawyer to provide state legal aid on the basis of an order of a court, prosecutor's office or investigative authority.

The lawyer appointed by the Estonian Bar Association undertakes to provide state legal assistance without delay and to organise his or her activities in such a way as to be able to take part in the proceedings in good time. The obligation of the Estonian Bar Association to ensure the participation of the lawyer in the proceedings also follows from § 219(5) of the Code of Civil Procedure. If the child is represented in the proceedings by a representative appointed for that purpose, the parents do not have the right to represent the child in the proceedings themselves pursuant to § 217(7) of the Code of Civil Procedure. Pursuant to § 219(6) of the Code of Civil Procedure, a court-appointed lawyer receives remuneration from the state to the extent and in accordance with the procedure provided for. A review of the remuneration fixed for a lawyer for a part of a civil case in court proceedings shows that, when this remuneration is compared with the normal hourly rate for lawyers, a maximum of five hours is allowed for the resolution of a case. For particularly labour-intensive cases, an increase of 50% is allowed, but in practice, children's representatives try to manage with five hours, as it is a complex process to request an increase in fees.⁹⁴

⁹⁴ Espenberg, K., Soo, K., jt. (2013). *Supra nota 87*.

The child's representative appointed by the state must ensure that the child's best interests are always safeguarded in custody disputes between parents. This can only work if there is a relationship of trust between the lawyer and the child and the child understands that the lawyer's role is to protect the child's interests in the proceedings. It is the duty of the lawyer to explain to the child his or her role in the ongoing court proceedings and the implications of the decision for his or her future life. The child's representative in the proceedings acts as an intermediary between the court and the child. The author agrees with Espenberg and Soo statements - that the current system lacks control over the specific skills and training of child advocates. Child advocates have been accused of having too little and too superficial contact with the child.⁹⁵

The opinion of the child's representative has been the most frequently invoked by the courts in their decisions. The opinion of the child's lawyer is therefore of considerable weight in the proceedings. Custody disputes between parents are not only legal disputes, but also require other expertise - e.g. in psychology, pedagogy and social work - to represent the interests of the child. Therefore, the author considers that it would be important to set certain criteria for lawyers representing and defending children in court. It would also be appropriate to supplement the rules on the remuneration of lawyers representing children. The representation of children should not be an easy matter for lawyers. If a child's lawyer does not take the representation of the child seriously, the inevitable consequence is that the child's interests are harmed rather than protected.⁹⁶

Based on the above, the author considers that such system does not give the lawyer the opportunity to have access to all the facts and thus to ascertain the best interests of the child in the dispute, because the number of hours he or she is paid is so limited. As a result, there is no incentive for lawyers to work for free. From the author's point of view, the commitment of child representatives depends on the individual – there are those who take the role seriously and those who do not. The role, competence and motivation of advocates to participate in the process and to represent the child is sometimes problematic and certainly a situation worthy of separate study. As there are no specific criteria or standards for the representation of children, but the basic requirement of the Code of Ethics for Lawyers is that a lawyer must act only in the best interests of the client, i.e. the child, when providing legal services.⁹⁷

⁹⁵ Espenberg, K., Soo, K., jt. (2013). *Supra nota 87*.

⁹⁶ Lillsaar, M., Siimula-Saar, K. (2013). *Supra nota 74*.

⁹⁷ Eesti Advokatuuri eetikakoodeksi § 8 lg 1. Retrieved from: www.advokatuur.ee/est/oigusaktid/eetikakoodeks, 02.02.2022.

2.1.3. The role of judge and hearing the child in court

One of the most important parts of family law litigation is the litigation over the ways of right of custody, power of decisions and child access arrangements. Determining the best interests of the child can only take place once the child's opinion on the matter has been ascertained. States Parties shall ensure the right of the child, who is capable of expressing his or her views independently, to express his or her views freely in all matters affecting him or her, the views of the child being assessed according to his or her age and maturity. To this end, the child shall be given the opportunity to express his or her views, in particular in any judicial or administrative proceedings concerning him or her, directly or through a representative or appropriate body, in accordance with national standards of procedure.⁹⁸

At the national level, the obligation to hear the child arises first of all from § 552¹ of the Estonian Code of Civil Procedure, according to which the court shall hear the child of at least 10 years of age in person in a case concerning the child, unless otherwise provided by law. This provision also gives the court the right to hear a child under the age of 10. Under subsection (3) of the same provision, the court has the right to waive the hearing of the child for one good reason only. Pursuant to § 552¹ (1) of the Estonian Code of Civil Procedure, the court shall hear the child in the child's usual environment. Thus, the Estonian Code of Civil Procedure does not impose any restrictions on the place where the child is heard – it can take place in court or outside the courtroom, for example at school, kindergarten or even at the child's home. Ideally, the hearing should take place in a place where the child feels comfortable, safe and ready to open up to the judge.⁹⁹

In addition to the obligation to take the child's interests into account, subsection 137(2) of the Estonian Family Law Act sets out additional requirements as to the extent to which the court must take the child's opinion into account in the matter of parental custody.

If the parents are involved in a custody dispute in court, the child is a party to the proceedings but, in principle, not an active participant. Developments in society and in the law suggest that society is increasingly taking into account the views of the child, as well as the interests of the child.¹⁰⁰

⁹⁸ Convention on the Rights of the Child, art. 49., art 12 (1), (2).

⁹⁹ Hunter, R. (2007). Close encounter of a judicial kind: “hearing” children’s “voices” in family law proceedings. *Child and Family Law Quarterly*, 19 (3), 298.

¹⁰⁰ Liiv. E. (2006). Lapse ärakuulamine tsiviilkohtumenetluses. *Juridica*, 4, 257.

Children must be given a say in all decisions that directly affect them. It is important to show the child that his or her opinion matters not only at home but also at national level.

The practice among judges varies as to the age of the child to be heard - some judges consider it important to hear children younger than 10, but there are also judges who hear children over 10 but not younger.¹⁰¹ However, when involving children in family disputes, it is important to ensure that the child's right to be heard is balanced with the child's right to be protected from pressure and conflict from adults.¹⁰²

Taking into account the will of the child must not give the child the impression that the decision is made by the child instead of the judge. In a dispute between parents, the child must not be given the impression that he or she has to decide between the parents (so-called conflict of loyalties). The child must be interviewed without being given the answers he or she wants. That's why it's wrong, for example, to ask a child who he or she wants to live with. By asking the child to choose between the parents, the judge would place the responsibility for resolving the conflict on the child, but this would not be the right approach. For the child, answering such a question would at the same time be a betrayal of the other parent, creating a sense of guilt and damaging his or her relationship with the excluded parent.¹⁰³

The presence of a parent is justified in certain circumstances, for example if it would help the judge to understand the relationship between the child and the parent, especially in cases where the child is in conflict with the parent or the child has not been in contact with the parent for so long that he or she is estranged from the parent.¹⁰⁴

Assessing the best interests of the child as a procedure should also enable the child's opinions to be granted appropriate weight based on age and maturity. It enlists judgment with proper knowledge and weighs all necessary criteria to determine the optimal alternative.¹⁰⁵ There will be a spectrum of substantial to weak discretion for legitimate interpretations of the child's best

¹⁰¹ Göttig, T, Uusen-Nacke, T. (2013). Vanema õigused ja kohustused lapse suhtes. Eesti Vabariigi Riigikohus. *Kohtute aastaraamat*, 57.

¹⁰² Tapp, P., Taylor, N., Henaghan, M. (2007). Respecting Children's Participation in Family Law Proceedings. *The International Journal of Children's Rights*, 15(1), 61-82.

¹⁰³ Liiv, E. (2006). *Supra nota 100*.

¹⁰⁴ *Ibid.*

¹⁰⁵ Luhmann, N., Ziegert, K., Kastner, F., Nobles, R., Schiff, D. (2004). *Supra nota 59*.

interests, depending on the degree of control that lawmakers grant to professional decision-makers in child protection agencies and courts. Disputes involving the child are resolved in the best interests of the child and, regardless of the agreement of the parents, the matter can always be reviewed by the court for this reason if one of the parties has doubts as to whether such an agreement is in the best interests of the child or if some circumstances have changed significantly in the meantime.¹⁰⁶

In order for the child to live with both parents for an equal amount of time, there must be good understanding and communication between the parents, regardless of their separation. And, of course, they must live in the same administrative unit. It would be difficult to imagine a situation where, for example, one parent lives in Tallinn and the other in Tartu, and the child would therefore have two schools or kindergartens, a leisure club and so on. Of course, there are also families who have arranged for their child to live in this way by mutual agreement, that is, without the help of the courts. Going to court in itself shows that there is an unresolvable conflict between the parents through traditional methods and that in such a situation a so-called two-home order is presumably not appropriate.

The best interests of the child must always come first when decisions affecting children's lives are taken. The interests of parents, the community and the state should never take precedence. It is important to take children's best interests into account when making decisions, assessing each case differently. The best interests of the child are superior and any court has to show that the principle has been effectively applied when making decisions.¹⁰⁷

The Supreme Court has held that in certain situations, where there is no single correct decision, it is necessary to call in experts to give their own assessment of the situation, since the judges do not have the necessary expertise. As far as the author is aware, little use is made of this possibility, although the involvement of experts can add value and help find the best possible solution. 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.¹⁰⁸ Only if the child's contact with the separating parent

¹⁰⁶ Turkin, V. (2018). *Supra nota 64*.

¹⁰⁷ Peens, B., Louw, D. (2000). Children's rights: A review. *Medicine and Law*, 19(1), 31-48.

¹⁰⁸ Court of Appeal judgement of 16 February 2021 in civil case no. 2-19-18142.

would have an adverse effect on the child, may the parent prevent the separating parent from contacting the child in order to ensure the welfare of the child. Whether the prevention of contact is justified in the best interests of the child shall be assessed by the court in determining the child access arrangements.¹⁰⁹

Similarly, the Supreme Court has held that it is not appropriate to determine the child access arrangements in a situation where a child with sufficient capacity to understand does not know his or her parent. In such a situation, the child's real interest would be disregarded, since it is not known what effect the knowledge of the parent would have on the child, whether and how quickly the child would adapt to the situation and what contact it would establish with the separating parent.¹¹⁰ It follows from the foregoing that, while parents have the right to communicate with their children, the best interests of the child must be the primary consideration in regulating communication between the child and the parent.

From the author's point of view, no two disputes or cases are alike, and that each case should be analysed individually, on the basis of reliable facts gathered by the relevant professionals, in such a way that the outcome is as accurate as possible and the views expressed are specific, and that, on this basis, discretion can be exercised in the decision-making process, and different solutions can be clearly identified and justified in substance. According to previous, based on the best interests of the child, taking into account the discrepancies between the parents, the emotional attachment of the parents to the child and the commitment of the parents to the care of the child, it is justified and necessary to terminate the parents' joint custody as requested by the parent. Since the parents are unable to communicate peacefully, an equally shared contact arrangement is not justified. There is no general formula for assessing a child's well-being, but as mentioned above, each specific situation needs to be assessed individually. In general, a child needs the love and care of both parents, and this is essential for the well-being of the child. However, there are situations where a child's existing bond with the cohabiting parent is valued more highly than contact with both parents, and in some cases the rights of the separating parent are limited.¹¹¹

For example, in civil case no. 2-19-18142, the district court did not grant the petitioner's request to limit joint custody to the other parent, nor did it transfer partial decision-making rights to the

¹⁰⁹ Court of Appeal judgement of 16 February 2021 in civil case no. 2-19-18142.

¹¹⁰ *Ibid.*

¹¹¹ Supreme Court Judgment of 12 February 2016 in civil case no. 3-2-1-159-15.

other parent. No attention was paid to the other parent's mental disorder, among other things no attention was paid to addictions and criminal background. Such compulsion completely damages the child's nervous system and the parent is supposed to protect the child, but the court order in force says otherwise.¹¹²

As an aside, an analysis of civil case no. 2-20-2190, where disputes still continue through the various levels of court, and a perfectly competent parent, an autonomous father, simply because of the mother's displeasure, was partially deprived of decision-making rights, including the right to decide on the child's residence, whereabouts, education, travel and health.¹¹³

This is a thought-provoking and perplexing state of affairs at the level of the legal system and at the level of the state in general, and one that calls for critical reflection not only on the part of the author of this study, but probably also on the part of all others involved in the field. Who, and how, actually pays attention and ensures the best interests of the child in these disputes? Based on the above mentioned civil cases, there are a lot of officials involved, even specialists in their field, but analysing just two of these examples reveals a great deal of injustice and inequality, and reality is far from the best interests of the child.

2.2. The role of mediation, conciliation, and the role of bailiffs in enforcing judgments on child access arrangements

Mediation and conciliation are separate methods of out-of-court settlement, but the legal literature has found that the two concepts are now intertwined and the distinction is generally semantic. Mediation is a method in which the parents seek the assistance of an independent third party (mediator) who listens to the views of the parties and then meets with them, mediates their views and tries to persuade them to adjust their views to those of the other party. The conciliator, on the other hand, also provides the parties with the terms of what he considers to be a fair settlement.¹¹⁴ The mediation process must, among other things, identify the hidden needs and interests of the parties, which are the real cause of the conflict.¹¹⁵ The mediator does not represent the interests of

¹¹² *Ibid.*

¹¹³ Court of Appeal judgement of 19 January 2021 in civil case no. 2-20-2190.

¹¹⁴ Nurmela, I., Pöldvere, P.-M. (2014). Vaidluste efektiivne kohtuväline lahendamise. *Juridica*, 1, 3-16.

¹¹⁵ Trossen, A., Hofmann, R., Rothfischer, D., Leesik, M., Schnur, J., Laanjärv, V. (2008). *Mediatsioon: Mediatsiooni teoreetilised ja praktilised alused*. Tartu: Eesti Õiguskeskus.

either party, but acts as a go-between in the talks.¹¹⁶ The aim of both procedures is to achieve the unhindered exercise of the right of access as a result of cooperation between the parents. Most separated couples are advised to work together with the best interests of the child in mind, but a paradigm shift is needed in cases of domestic violence. The focus should be on a plan to protect victims and children in the process. Domestic violence requires a different approach, which could be limited or supervised meetings with the child or a total ban on contact to ensure the safety of the children and the other parent.¹¹⁷

One important difference between conciliation and mediation is that, while the court in conciliation offers the parties concrete proposals for a solution,¹¹⁸ the mediator merely identifies the wishes of the parties, but does not propose a concrete solution to the parties during the mediation process.¹¹⁹ The Estonian court must conduct the conciliation within 60 days (8 weeks and 4 days).¹²⁰

Preparations are underway for a National Family Maintenance System in Estonia. The National Family Guardianship Scheme will be launched on 1 September 2022. As of September 2021, the Social Insurance Board has started a pilot project for the National Family Support Service, under which parents already have the possibility to receive free family support. The Family Support Service launched under the project is intended for parents of a minor child or children who have separated or are separating and who have not been able to agree on the child's living arrangements (such as child access arrangements or maintenance). The family mediation service is run by a family mediator who, as a neutral party, helps parents to mediate and resolve disagreements. This ongoing project is characterised by that, the resettlement is voluntary. Family mediation is a quicker, less costly, more mentally healthy and child-friendly method for parents, with agreements between parents that are more effective than court proceedings. Parents are equal and will seek the best possible solution for the child themselves. The family mediator is a neutral mediator with professional expertise and training. This mentioned service is not suitable for violent relationships,

¹¹⁶ Göttig, T. Uusen-Nacke, T. (2017). Lapsega suhtlust korraldav kohtulahend ja selle täitmine. Võrdlev analüüs. November, 55. Retrieved from https://www.just.ee/sites/www.just.ee/files/suhtlusoiguse_uuring27112017.pdf, 01.10.2021.

¹¹⁷ Jaffe, P., Crooks, C., Bala, N. (2009). A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes. *Journal of Child Custody*, 6(3-4), 169-188.

¹¹⁸ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

¹¹⁹ Nurmela, I. Pöldvere, P-M. (2014). *Supra nota 114*.

¹²⁰ Code of Civil Procedure, RT I, 22.12.2021, 23, § 563, 9.

as the parents are not equal parties. Family mediation offers the possibility to make out-of-court settlements and to remain supportive parents after separation.¹²¹

2.2.1. Mediation

The aim of family mediation is for parents to reach an agreement between themselves, as it is best for the child to settle child-related matters by agreement. Unfortunately, however, the reality is that neither party is prepared to make substantive concessions and both parents wish to continue to argue in court in order to achieve their goal. In the family mediation procedure, the court's role is to guide the parents in resolving disagreements about their child's communication by agreement. To this end, the court may discuss with the parents the situation that has arisen and its impact on the child's welfare. The court can support the parents in their negotiations, mediate between them and invite them to reconcile. As a mediator, the court must play an active role in the parents' negotiations and offer the parents concrete proposals for resolving their differences.¹²² L. Arrak has clarified that in order to carry out the family mediation procedure, the court must summon the parents without delay. At the family mediation meeting, the court must explain to the parents the consequences for the child of not complying with the right of access. If the parents do not understand that their disagreement is detrimental to the welfare of the child and that the parents' failure to cooperate in the best interests of the child is an obstacle to the exercise of the right of access, the court must draw the parents' attention to the possibility of seeking advice from a family counsellor.

Estonia's paid family mediation system can be compared with Sweden, Denmark and Norway, where the service is free of charge for the parties involved.¹²³ In Estonia, family mediation is often not used precisely because of its high cost. In the author's view, greater use of family mediation would be helped by partial or full state funding of its use. Failing to use family mediation as a cheaper option could result in significantly higher costs for the state - if these cases have to be resolved through the court system. Family mediation is certainly not appropriate in cases of

¹²¹ Riikliku perelepitussüsteemi loomine. (2021). *Sotsiaalkindlustusamet*. Retrieved from https://sotsiaalkindlustusamet.ee/et/riiklik-perelepitusteenus?fbclid=IwAR3StIpDLrkOquPgnwRvc11O5WgT5JDSMcxafwpFhl_17WgzDipBtHSH4Ak 01.05.2022.

¹²² Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

¹²³ Social Policy and Family Law: Marriage, Divorce and Parenthood. Council of Europe Family Policy Database 2009, 8, 22, 37. Retrieved from: www.coe.int/t/dg3/familypolicy/Source/4_2_iii%20Family%20mediation.pdf, 01.10.2021.

domestic violence. The success of the family mediation process depends on the parties being equal and seeking the best solutions to their issues with the help of an impartial third party, the mediator.

In family mediation proceedings, the court cannot itself refer parents to family counselling, but only has a duty to explain. In addition, the court must draw the parents' attention to the measures it intends to apply in the event of the failure of the presumed family mediation procedure.¹²⁴ Consequently, the court will already make clear in the family mediation procedure that, in the event of non-compliance by the parents, the next possibility to enforce the right of access is enforcement proceedings, where coercive measures may be taken against the parent.

A family mediation procedure can be considered successful if the parents understand that they must exercise their right to communicate with the child in order to ensure the child's well-being.¹²⁵ It is also successful if the parents do not wish to continue with the mediation, but wish to resolve their child access arrangement problems with the help of a family counsellor.¹²⁶ If family counselling proves unsuccessful, the court may find, when a new mediation application is filed, that the mediation failed earlier and that this is a ground for the court to refuse a new mediation. However, this should not preclude the possibility of remedies arising out of the failure of the mediation, as otherwise the unsuccessful family counselling would be followed by the impossibility of enforcing the right of access.¹²⁷ Family mediation does not directly guarantee compliance with the obligation, but it is a possible alternative to reduce the burden on the courts in family disputes.

The author agrees, that based on the above and according to Joamets, K. and Solarte Vásquez, M., at national level Estonia struggles with challenges on family mediation in Estonia, because according to legal framework there is a lack of prevent progress in terms of general awareness, understanding and professionalization.¹²⁸ While judicial proceedings are primarily concerned with establishing the facts and applying the law to those facts, the aim of mediation is to reach a solution that is satisfactory to both parties and to preserve human relations.¹²⁹

¹²⁴ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

¹²⁵ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Joamets, K., & Solarte Vásquez, M. (2019). Current challenges of family mediation in Estonia. *Journal of Contemporary European Studies*, 27(1), 109-120.

¹²⁹ Erne, J. (2003). Vahendusmenetlus tsiviilvaidluste kohtuvälise lahendamise võimalusena. *Juridica*, 7, 487.

2.2.2. Conciliation

According to § 563 (2) of the Estonian Code of Civil Procedure the court initiates a conciliation procedure if one of the parents informs the court that the other parent is in breach of a court order or a notarised agreement ordering contact with the child, or is making it more difficult to comply with it. Conciliation may also be carried out if the parents have agreed on a form of communication other than a notarised form, and this arrangement has been in place for a long period of time in the past, and such an arrangement for communication with the child broadly corresponds to a normal reasonable arrangement (Section 563 (2)). L. Arrak has the opinion that the court must also initiate conciliation proceedings in a situation where one parent alleges a violation, but the other parent claims that the communication arrangements are in place.¹³⁰

From the author's point of view, the conciliation procedure and the enforcement procedure are similar in that both procedures are initiated when one parent violates the right of access and does not allow the other parent to communicate with the child. The main difference is the way in which each procedure is used to induce the parent to fulfil his or her obligation. Conciliation is not a magic bullet, but as an intelligent and communicative way of resolving disputes quickly, it is a serious alternative to court proceedings in some cases.¹³¹

The court shall declare the conciliation proceedings to have failed by order and shall set out what coercive measures are to be taken, to what extent the contact order is to be amended or what changes are to be made to the parent's rights in relation to the child.¹³² Section 563 (7) (1) does not clearly specify which coercive measures the court can apply. L. Arrak has pointed out that it is for the court to examine of its own motion whether measures to safeguard the best interests of the child should be applied and, if so, what measures.¹³³

It is important that parents are conciliated and guided towards an agreement in matters of rights of access, in order to avoid proceedings to enforce access, which are burdensome for both parents and child and create a lot of tension. It is in the child's best interests that the parents are reconciled, since if the court is able to influence, even partially, the parents' attitudes towards communication

¹³⁰ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

¹³¹ Laidvee, K. (2013). Lepitusmenetlusest. Kuidas toimub lepitamine? *Juridica*, 4, 516.

¹³² Code of Civil Procedure, *Supra nota 120*. § 563, 7.

¹³³ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

rights as a result of the conciliation procedure, this would also make it easier for the child. The author therefore considers that judicial mediation should be compulsory for parents.

The court has an unavoidable duty of conciliation in cases involving children.¹³⁴ Section 561(1) of the Estonian Code of Civil Procedure also provides that in proceedings concerning a child, the court must draw the attention of the parents to the possibility of using the assistance of a family counsellor. This provision has been interpreted in the legal literature as meaning that in disputes concerning the organisation of contact with the child, the court may order the parents to participate in out-of-court conciliation proceedings.¹³⁵ The family worker works with parents to explore options, make decisions and reach agreement, prioritises the role of the child and seeks to normalise the relationship between parents and rebuild trust.¹³⁶

2.2.3. The role of bailiffs in enforcing judgments on child access arrangements

In a situation where a court has imposed a child access order, it is likely that sooner or later the order will not be complied voluntarily and enforcement of the order will be necessary. As the UNCRC has been criticised in the past for being vague and ambiguous, it has been considered that it should be interpreted as a set of rules.¹³⁷ Consequently, it can be concluded that where there are shortcomings in the enforcement of the principles, the best interests of the child have not been fully taken into account, which in turn may lead to the conclusion that the best interests of the child are less or more compromised. As much as author knows, no attempt has been made to alleviate this situation by various coercive means, however, this is unlikely to produce the expected result and the enforcement of court orders remains a topical problem that needs to be addressed.

Based on the foregoing, the author discusses what should be done, or what enforcement proceedings, coercive measures or similar, should be used to deal with situations where a court order has entered into force and a parent fails to comply with the obligations imposed on him or her. It would also not guarantee the rights of the child, but would be primarily a punishment for the person who is not fulfilling his or her obligations, which suggests that such a solution would

¹³⁴ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2017). *Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne*. Tallinn: Juura.

¹³⁵ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

¹³⁶ Hääl, H. Surva, L. Valma, K. (2014). *Supra nota 83*, 86-103.

¹³⁷ Lastekaitse Liit. (2005). *Laste õigused ÜRO lapse õiguste konventsiooni põhimõtete rakendamise praktikas*. Tallinn, 33.

not solve the problems of maintenance obligations, as it would make it more difficult to prosecute the person concerned. It is clear from the analysis, that although such an approach will be time-consuming and costly, it will be necessary to find the means and introduce changes to the current regulations at national level to make prosecution a real possibility. Otherwise, the reform will not achieve its purpose, but will remain rather theoretical.

There is an important difference in that in Estonia the competence to enforce communications settlements is given to bailiffs in the same way as for other claims, whereas in Finland and Sweden the enforcement of communications settlements is handled by the courts. Also in Estonia, the Ministry of Justice would like to give the court the possibility to apply coercive measures to ensure the enforcement of the communication order, on the grounds that the court would be able to apply the measures much more efficiently and flexibly.¹³⁸ The bailiff is a freelance person holding a public office to whom the State has delegated the exercise of some of its powers. According to A. Alekand, the bailiff is functionally part of the executive branch of the State but, despite his function of exercising State authority, he is not a public official.¹³⁹ The author considers that, although the bailiff is not a public official and acts in a freelance capacity, what is more important is the fact that he holds a public office and exercises public authority,¹⁴⁰ therefore, the author takes the position that the bailiff must also be guided by the principles set out in the Child Protection Act § 3(1). Pursuant to § 21 (1) of the Child Protection Act, the interests of the child must be ascertained when making all decisions affecting the child, when deciding whether or not to adopt a decision and when choosing between different options when planning a decision, and the child's interests must be the primary consideration when making a decision. The Explanatory to the Child Protection Act explains that the scope of the provision in Section 21(1) of the Child Protection Act is very broad. The best interests of the child must be safeguarded more broadly than just in the decisions of public or private social welfare institutions, courts, executive or legislative bodies as referred to in Article 3 of the UNCRC.¹⁴¹ Article 3 of the UNCRC includes acts, procedures and measures concerning children.¹⁴²

¹³⁸ *Perekonnaseaduse, tsiviilkohtumenetluse seadustiku ja täitemenetluse seadustiku muutmise seaduse eelnõu väljatöötamise kavatsus.* (2019). Retrieved from https://www.just.ee/sites/www.just.ee/files/vtk_suhtlusoigus_15.04.19_1.pdf, 01.02.2022.

¹³⁹ Alekand, A., Kool, J. (2017). *Täitemenetlusõigus* (3., täiend. ja parand. tr.. ed.). Tallinn: Juura.

¹⁴⁰ *Ibid.*

¹⁴¹ Seletuskiri lastekaitseaduse eelnõu juurde. Sotsiaalministeerium. *Supra nota* 91.

¹⁴² Committee on the Rights of the Child. (2013). *Supra nota* 7.

As the law does not contain a specific list of the bailiff's rights and obligations, it is unclear in which case it can be said that the bailiff has taken all legal remedies and made every effort to obtain enforcement of the child access arrangement. With regard to the obligations of the bailiff arising from § 8(1) of the Code of Enforcement Procedure¹⁴³, it is legitimate to ask whether, in view of the specific nature of the enforcement of judgments on contact with children, these obligations of the bailiff should be interpreted more broadly. Accordingly, the author raises the question whether the rights and obligations of the bailiff in cases of child access arrangements are in accordance with the principle of the enforcement procedure and whether the bailiff must take the best interests of the child as a basis for the enforcement procedure.

Pursuant to the § 23(1) of the Code of Enforcement Procedure, the bailiff carries out enforcement proceedings on the basis of the claimant's petition (application for enforcement) and the enforcement document. The list of enforcement documents is set out in § 2(1) of the Code of Enforcement Procedure. However, there is an important difference with regard to the enforcement document when it comes to the enforcement of child access arrangements in order to ensure the enforcement of a court order regulating contact with the child, enforcement proceedings may only be brought on the basis of an order by which the court has declared the conciliation procedure unsuccessful and, inter alia, specified the coercive measures to be taken in the enforcement proceedings.¹⁴⁴ A pre-conciliation court order regulating the relationship between parents and child is not enforceable.¹⁴⁵

Also, in the case of breach of the parents' out-of-court agreements, they are not enforceable until conciliation has taken place.¹⁴⁶ Consequently, not all documents governing the communication between a child and a parent are enforceable. Namely, § 563(7)(1) of the Code of Civil Procedure stipulates that the court shall determine in the order declaring the conciliation unsuccessful, inter alia, which coercive measures are to be applied. Section 563(8) of the Code of Civil Procedure provides that enforcement proceedings may be brought only on the basis of an order under Section 563(7)(1) of the Code of Civil Procedure. Consequently, in matters relating to the rules of procedure, the claimant cannot apply to the bailiff for the application of coercive measures other than those provided for by the court order.

¹⁴³ Code of Enforcement Procedure, *Supra nota 33*.

¹⁴⁴ Code of Civil Procedure, *Supra nota 120*. § 563 (7) p 1, (8).

¹⁴⁵ Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota 75*.

¹⁴⁶ *Ibid.*

Section 21(1) of the Estonian Child Protection Act does not provide that in the event of a conflict between the interests of the child and the interests of other persons or other circumstances, the best interests of the child shall always outweigh everything else. Special weight must be given to the best interests of the child, i.e. the best interests of the child should be considered to take precedence over the other circumstances.¹⁴⁷ In the context of enforcement proceedings, this would mean that if the bailiff is faced with discretionary decisions when conducting enforcement proceedings, he or she should give preference to a solution that is in the best interests of the child. If the interest and right of the separating parent to meet and communicate with his child under the conditions set out in the contact order would conflict with the best interests of the child, the bailiff should consider whether the best interests of the child outweigh the interest of the parent. In order to make such a determination, the bailiff should first ascertain the best interests of the child. For example, in a situation where the child expresses to the bailiff that he or she does not wish to communicate with the separating parent, the bailiff should assess whether communication with the parent is in the best interests of the child.

Thus, when opening enforcement proceedings, the bailiff carries out a formal check of the prerequisites for the opening of the proceedings: whether the enforcement document is included in the list of enforcement documents contained in § 2 of the Code of Enforcement Proceedings, whether the enforcement document has entered into force and whether the claimant's application meets the requirements. The bailiff cannot check the existence and validity of the claim to be recovered, as a substantive check of the enforcement document is not in the nature of enforcement proceedings.¹⁴⁸

If the parents do not agree on the further enforcement of the order, but reach an agreement on the right of access which differs from the one laid down in the court order, the agreement is recorded as a judicial compromise and the court confirms it by an order which replaces the earlier court order.¹⁴⁹ Nonetheless, the court may not approve an agreement the performance of which would be contrary to the best interests of the child.¹⁵⁰

¹⁴⁷ *Ibid*, 52.

¹⁴⁸ Alekand, A., Kool, J. (2017). *Supra nota* 139, 76.

¹⁴⁹ Supreme Court judgement of 16 June 2010 in civil case no. 3-2-1-64-10.

¹⁵⁰ Järvekülg, I. Kõve, V. (2017). *Tsiviilkohtumenetluse seadustik II. Kommenteeritud väljaanne*. Tallinn: Juura, 971.

According to Linnumäe, C., the aim of enforcement proceedings is to ensure that judgments are enforced, irrespective of the debtor's attitude to the outcome of the dispute. Thus, if a parent cannot communicate with a child, regardless of the communication arrangements established, the State should provide support and facilities to achieve compliance with the communication arrangements in enforcement proceedings. In 2019, however, the Republic of Estonia was ordered to pay compensation for non-material damage to a parent on the grounds that the state had failed to ensure compliance with the communication order by effective legislation.¹⁵¹

First, the court can order enforcement proceedings to enforce the right of access. If, in the event of a failure of the conciliation procedure, the court orders that the court order or agreement providing for contact with the child is enforceable, this means that the bailiff can take enforcement measures both to allow contact with the child and, if necessary, to impose a penalty payment.¹⁵² In addition, the court may order that the bailiff may, as an extreme measure of restraint, use force to enforce the order.¹⁵³

As a result of the principle of formalisation, the bailiff is obliged to accept all enforcement documents that formally meet the requirements for an enforcement document: the document must be included in the list in § 2(1) of the Code of Enforcement Procedure, must have been drawn up by a competent body, must meet the formal requirements and must be presented as an original document or as a notarised copy. The bailiff does not rule on the substantive legality of the instrument permitting enforcement.¹⁵⁴ Therefore, it is not the task of the bailiff to verify that the enforceable right of access is in the best interests of the child.

The law of enforcement proceedings is a law of interaction, i.e. the fundamental rights of two persons are in conflict when enforcing a private claim, which is why the principle of proportionality also plays an important role in enforcement proceedings. The bailiff has to take account of the proportionality requirement in enforcement proceedings where the legislator has left to him the right to decide on the appropriate procedural step.¹⁵⁵ For example, in cases concerning access to a child, the bailiff has discretionary powers regarding the use of force against the debtor. The bailiff has the possibility to use force if the court has provided for this possibility

¹⁵¹ Linnumäe C., (2021). Kohtutäituri õigused ja kohustused suhtluskorra lahendite täitmisel. *Juridica*, 2, 112-120.

¹⁵² Kõve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota* 75.

¹⁵³ *Ibid.*

¹⁵⁴ Alekand, A., Kool, J. (2017). *Supra nota* 139, 47.

¹⁵⁵ *Ibid.*, 52.

(TMS § 179 lg 4). The bailiff has the right, but not the obligation, to use force. In matters of rights of access, this means that the bailiff must ensure that the separating parent has the right of access to his or her child, but in the least harmful way possible for the parent living with the child.

If the parent does not agree with the bailiff's decision and the reasons for it, he or she has the right to appeal against the decision to the county court (TMS § 218 lg 1). The court has the power to annul an act done by a bailiff, to order the bailiff to perform an act or to order him to perform an act again in accordance with the law.¹⁵⁶ It has been noted in the legal literature that TMS § 179 lg 1 the bailiff must directly enforce the arrangements for contact with the child and arrange for the transfer of the child from one parent to the other.¹⁵⁷ TMS § 179 lg 4 gives the bailiff the possibility to use force against the debtor, if authorised by the court, so that it can be concluded that the use of force against the debtor requires the bailiff to verify directly on the spot the fact of the breach of the communication and, in certain situations, to intervene to prevent the enforcement of the communication. As the court only grants the possibility to use force to the bailiff, the author considers that it is not possible to use force against the debtor without the bailiff being directly present. However, the law does not stipulate that the bailiff is obliged in each individual case to ascertain the fact of the breach of the right of access directly on the spot, which justifies the question of when the bailiff must directly verify the enforcement of the right of access.

§ 7 (1) of the Code of Enforcement Procedure states that in Estonia, a bailiff may refuse to execute an enforcement order on the basis of this provision only on the grounds laid down by law. However, there is no basis in the Code of Enforcement Procedure for a bailiff to refuse to enforce a judgment on the ground that it is contrary to the best interests of the child. Since the Code of Enforcement Procedure does not oblige the bailiff to give priority to the best interests of the child in enforcement proceedings, it is appropriate to assess whether the obligation to take the best interests of the child into account in enforcement proceedings can be derived from other legislation, in particular the Convention on the Rights of the Child and the Child Protection Act.

From the authors point of view the enforcement of court-ordered child access arrangements by bailiffs is essentially similar to child protection work, but bailiffs lack both the responsibilities and the professionalism to do this. Therefore, the leading role of the court in enforcing judgments should be increased and the role of the bailiff reduced. It would be important to develop real

¹⁵⁶ *Ibid.*, 184.

¹⁵⁷ Köve, V., Järvekülg, I., Ots, J., Torga, M. (2018). *Supra nota* 75.

coercive measures against co-habiting parents who do not comply voluntarily with a court order determining the right of access. Coercive measures should be aimed primarily at bringing the non-compliant parent to justice.

However, since the main function of the bailiff is to ensure the enforcement of the judgment, and not to make substantive decisions as to whether a meeting between the child and the parent is in the best interests of the child, placing such an obligation on the bailiff would not be in line with the general nature of enforcement proceedings, and it may therefore be considered that the bailiff would not be able to discharge this obligation effectively. Moreover, the child's opinion, which would be significantly easier for the bailiff to ascertain, does not equate to the best interests of the child.¹⁵⁸ The obligation to take the best interests of the child into account is also derived from Article 3 of the UNCRC. The Chancellor of Justice has found that the Code of Enforcement Proceedings is in conflict with Articles 3 and 12 of the UNCRC, as bailiffs cannot put the best interests of the child first in enforcement proceedings and refuse to execute an enforcement measure.¹⁵⁹ The Chancellor of Justice found that by enforcing a decree on the right of the child to communicate with the parent in a formalised enforcement procedure, which does not allow the best interests of the child to be assessed, a situation is created in which the child is essentially obliged to communicate with the parent requiring enforcement of the decree, regardless of his or her will.¹⁶⁰

In the study, the author came to the conclusion that although the rights and obligations of bailiffs mainly derive from the Code of Enforcement Proceedings, when conducting enforcement proceedings, bailiffs must also be guided by Article 3(1) of the UNCRC and Section 21(1) of the Child Protection Act, which provide for the obligation to take the best interests of the child as a primary consideration when conducting enforcement proceedings. However, the regulation of the right of access does not allow the bailiff to take into account the best interests of the child or to refuse an enforcement measure on the grounds that communication with the parent is contrary to the best interests of the child. In refusing enforcement, the bailiff would be obliged to make substantive changes to the right of access, which, however, do not fall within the competence of the bailiff due to the formal nature of enforcement proceedings. The author considers that the

¹⁵⁸ Child Protection Act, *Supra nota 28*. § 21 (3).

¹⁵⁹ Õiguskantsleri märgukiri. Täitemenetluse seadustiku kooskõlla viimine põhiseadusega. (2015). 11. Retrieved from https://www.oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_margukiri_taitemenetluse_seadustiku_kooskolla_viimine_pohiseadusega.pdf, 01.10.2021.

¹⁶⁰ *Ibid.*

bailiff cannot be obliged to refuse enforcement if this would be contrary to the best interests of the child, since this would be in substantial conflict with the principle of formalisation and the bailiff cannot be given the power to reassess the facts established by the court in the enforcement proceedings.

CONCLUSION

Laws are complex to read and even more complex to understand, but family law affects us all. It is clear from the materials in the case-law that when it comes to custody disputes, there are a lot of officials involved and unfortunately they do not act in the best interests of the child. Every person involved to these cases should understand that their behaviour has a profound impact on the child's emotions and psyche, and that what is happening around the child now may leave a lifelong mark.

In the thesis, the author focused on the nature of the best interests of the child in general through the legal framework, then on ensuring the best interests of the child in custody disputes, and, based on the above, on identifying and ensuring the best interests of the child in contacts with the state, the role of the court, and in turn focused on the contacts of child protection workers and legal state aid in such cases. According to previous, the author also addressed the possibility of conciliation and mediation in family disputes and the role of the bailiff in enforcement proceedings in the case of enforceable judgments. Additionally the author discussed at how the best interests of children could be better protected in litigation.

The main findings of the study were that representatives from different roles often come into contact with such cases, but that there are a number of barriers to ensuring the best interests of the child. There is also a lack of theoretical knowledge. There is a clearly perceived illusion of neutrality in current society. Different professionals need specific knowledge, awareness and skills.

Conclusively, the aim of the thesis was to open the gateway to research and to get information on the Estonian legal landscape's exposure to the best interests of the child in custody disputes. The aim was also to investigate what difficulties or barriers are experienced by different parties in these complex cases. Finally, to develop an understanding of the kind of support the whole legal system would need to protect the best interests of the child at all possible stages.

From personal experience of authors own two children's custody battles, the author acknowledges the impact this has on their psychology. In conducting the research, the author was aware of the sensitivities of the subject due to personal experience, and made herself aware of the importance

of keeping the two different roles separate and took care not to let her own opinions guide these conclusions and interpretations.

Author is aware that in the background of all the custody disputes, the contradiction screams and the attitude of officials that a badly behaved parent does not pose a threat to the child is striking. It can be concluded that, although the first signs exist, there is a failure or unwillingness to recognise them. Author has the opinion that there is no coherent theoretical approach to best interests of the child among child protection professionals. As a result, professionals do not have a theoretical tool to identify harmful behaviour as early as possible.

From the author's point of view, children's needs are different and depend on many factors, which is why a child's best interests need to be assessed on an individual basis, and there is certainly no one-size-fits-all yardstick. Author states that under the current regulations and in the outcome of civil disputes, the will and victory of one party often outweighs over the wishes of the child.

Conclusively, the author raises the question of what to do in a situation where the court order has entered into force, but the other party to the dispute - the party who sought the rights and to whom the court granted the rights - does not comply with the valid court order. The author believes that this situation is worrying and that the question of why such a pattern exists in today's society needs to be answered. It is necessary to get to the root of the problem and, on this basis, to develop appropriate changes that would help to change the overall approach. At a theoretical level, a lot has been done and the law has been changed, but whether in practice these changes have protected the best interests of the child is more likely to be a doubt. Children divided by court order is still a major problem in society and the state has failed to address the situation. The author considers that this is one part of the problem that needs to be solved immediately in order to stop the daily violation of children's best interests.

It is critical to follow the core procedural protections proposed in these Guidelines outlined by the UNHCR to ensure the integrity of the best interests of the child process.¹⁶¹ The appropriate child engagement, the inclusion of people with various relevant skills, and the comprehensive documenting of every aspect of the operation. Collecting and analysing thorough information about the kid and their environment are significant in this setting. People with experience in child

¹⁶¹ European Commission, Migration and Home Affairs. *Supra nota 51*.

welfare, outreach programs, or child protection need to be carried out as the foundation for a decision by a multiskilled best interests of the child committee. Appropriately competent persons with knowledge in various industries should be included in the decision-making process. The best interests of the child are generally the child's well-being. The definition of well-being encompasses an individual's (including the child's) judgements and aspirations. In examining quality of life and well-being, children's own judgements, assumptions and expectations must be taken into account. The well-being of the child should not be confused with adults' perceptions of the child's well-being. An adult's assessment of an aspect of a child's life is not a substitute for the child's own perception of it - they are different perspectives.¹⁶²

In conclusion, the best interests of the child can be seen as a set of child welfare and rights. The research has shown that the concept of the best interests of the child is open to different interpretations and that the process of determining this in custody litigation between parents is complex. Definitions describing the best interests of the child are presented without explaining the content and facts in relation to a particular child. The description of best interest and its presentation is fragmented, lacks a general framework that requires professionalism from the evaluators and does not guarantee a consistent quality.

Even legal procedures can harm a child's well-being. There are cases that go on for years without finding a satisfying solution.

From the author's point of view, the main issues to be discussed should be the funding of legal state aid and improving the quality of legal education and services. In the case of legal state aid, there is a clear need to increase the rates of fees, but also to widen the circle of lawyers providing national legal aid. From the author's point of view, there are currently too many applications to court with no prospect of substantive success, and that lawyers could do more to explain the lack of prospect to clients. Improving the quality of legal services should also be addressed, as well as making legal education at different universities more comparable and encouraging mobility between legal professions.

¹⁶² Reinomägi, A., Sinisaar, H., Toros, K., Laes, T.L., Krusell, S., Kutsar, D., Ilves, K., Abel-Ollo, K. (2014). *Supra nota 6*.

In the light of the above, the author proposes to:

1. A system of training for judges should be set up to promote their pedagogical as well as psychological skills and to teach them useful techniques for listening to children.
2. From the author's point of view, current legal state aid system does not give the lawyer the opportunity to have access to all the facts and thus to ascertain the best interests of the child in the dispute, because the number of hours he is paid is so limited. As a result, there is no incentive for lawyers to work for free.
3. The child's representative must be a highly qualified professional. Courts should evaluate the lawyer's work and ask for feedback from the parties. Those child advocates who are unable to adequately fulfil their role in the proceedings should be removed from the job. There should be specific criteria and guidelines for the role of the respective advocate, providing a general framework for the assessment of the person's qualifications to represent children.
4. Ideally, the role of the state-appointed lawyer in family disputes should be carried out in close cooperation with the child protection worker, so that the most objective opinion possible can be formed. The child's representative on the State side should represent the child protection worker's opinion in court, in the light of all the duties incumbent on the child protection worker, and the child protection worker should, where necessary, act as a witness in court, explaining and defending the child's case, and also making his or her own suggestions in the child's best interests. In order for the child's representative to be able to fulfil his or her role in a professional manner, prior pedagogical training is necessary, covering both the developmental aspects of the child and the assessment of the child's welfare and best interests.
5. Based on the foregoing, the author considers that it would be important to raise the level of lawyers representing children in the state legal aid system, by establishing specific criteria and standards for them. Since the case-law also reveals that many lawyers do not meet with children or, in some cases, do not meet with them at all, it should be made compulsory for both children's representatives and child protection workers. In the author's view, it is inconceivable that the child's position and best interests can be ascertained without meeting the child or by doing so superficially.
6. In order to make the involvement and hearing of children in family disputes more effective, it is essential to train social workers, judges, lawyers and psychologists with specific skills to approach the hearing of the child in a way that takes into account the child's maturity

and level of development, the child's sensitivities and needs, and ensures that the child feels safe talking to a specialist.

7. A round table should be convened from time to time to brainstorm ideas and solutions to problems of parent-child communication and communication rights.
8. Child protection workers certainly need the theoretical knowledge to identify alienation as early as possible, so that they can take early action for the child. A knowledge of the manifestations of domestic violence would also be useful in order to keep better within professional boundaries and to avoid becoming a victim or tool of violence. It is important to raise awareness of one's own attitudes and the impact of personal experience on one's work. Personality development courses, individual counselling, individual and group counselling, which could be made available by local authorities, are useful for this purpose. Child protection workers certainly need protection and support from their structures to maintain their mental health in this difficult landscape.

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