Taking of evidence

Estija

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1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The burden of proof is governed by Section 230 of the Code of Civil Procedure (*tsiviilkohtumenetluse seadustik*), which states that, in actions, each party is to prove the facts on which their claims and objections are based, unless otherwise provided for by law. Furthermore, unless otherwise prescribed by law, the parties may agree on a division of the burden of proof different from that provided for by law, and agree on the nature of evidence for proving certain facts. Unless otherwise provided for by law, the court may take evidence at its own initiative in a matrimonial matter, filiation matter, a dispute related to the interests of a child or proceedings on petition.

1.2 Are there rules which exempt certain facts from the burden of proof? In which cases? Is it possible to produce evidence in order to prove that a specific legal presumption is not valid?

A fact that the court deems to be common knowledge need not be proved. A fact concerning which reliable information is available from sources outside the proceedings may be declared as common knowledge by the court. Furthermore, an argument made by a party concerning a fact need not be proven if the opposing party admits the fact. Admission means unconditional and express agreement to a factual allegation by means of a written statement addressed to the court, or made in a court session where the agreement is recorded in the minutes. Admission may be withdrawn only with the consent of the opposing party or if the party withdrawing the admission proves that the allegation concerning the existence or absence of the fact is incorrect, and that admission was caused by an incorrect understanding of the fact. In such cases the fact is not deemed to be admitted. Admission is assumed as long as the other party has not explicitly disputed a claim made regarding a factual circumstance, and the intention to dispute a fact is not evident from the party's other statements.

1.3 To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?

The court evaluates all evidence pursuant to law from all perspectives, thoroughly and objectively, and decides, according to the conscience of the court, whether or not an argument presented by a participant in a proceeding is proven considering, amongst other factors, any agreements between the parties concerning the provision of evidence.

2 The taking of evidence

2.1 Does the taking of evidence always require the application by a party, or can the judge in certain cases also take evidence on his/her own initiative?

Although Section 236(2) of the Code of Civil Procedure states that, in general, the concerned parties should request the court to take the evidence, Section 230(3) of the Code of Civil Procedure provides for cases where the court may take evidence on its own initiative. In particular, unless otherwise provided for by law, the court may take evidence on its own initiative in matrimonial matters, filiation matters, disputes related to the interests of a child or proceedings on petition.

2.2 If the application by a party concerning the taking of evidence is approved, what steps follow?

If the taking of additional evidence is required in order to evaluate evidence, the court will organise this by means of a court ruling which is communicated to the participants in the proceedings. If evidence has to be taken from outside the territorial jurisdiction of the court conducting proceedings in a matter, the court hearing the matter may send a letter of request in order to make a ruling for performance of a procedural act by the court within whose territorial jurisdiction the evidence may be taken. In addition, evidence may be taken outside Estonia.

After making a ruling, evidence is to be taken in line with the provisions governing the taking of evidence, depending on the type of evidence, in Chapters 27–32 of the Code of Civil Procedure.

2.3 In which cases can the court reject an application by a party to obtain evidence?

The court may reject a request for the taking of evidence if:

the evidence has no relevance to the matter (above all, if the fact proven need not be proved or if the court deems that enough evidence has already been provided in proof of the fact);

if pursuant to law or based on an agreement between the parties, a fact must be proven by evidence of a certain type or form, but the taking of evidence of another type or form is requested;

the evidence is not accessible, above all if the witness's details or the location of a document is unknown, or if the relevance of the evidence is disproportionate to the time needed to take the evidence or any other related difficulties;

the request for the taking of the evidence is made late;

the need for taking evidence is not substantiated;

the participant in the proceedings requesting the taking of evidence fails to make an advance payment demanded by the court in order to cover the costs incurred when taking the evidence.

2.4 What different means of proof are there?

According to Section 229(1) of the Code of Civil Procedure, evidence in a civil matter is any information which is in a procedural form provided by law and on the basis of which the court, pursuant to the procedure provided by law, ascertains the existence or lack of facts on which the claims and objections of the parties are based and other facts relevant to the just adjudication of the matter.

Under subsection 2, evidence may be the testimony of a witness, statements given under oath by the participants in the proceedings, documentary evidence, physical evidence, an inspection or an expert opinion. In proceedings on petition and simplified proceedings, the court may also deem other means of proof, including a statement of a participant in the proceedings that is not given under oath, to be sufficient to prove the facts.

2.5 What are the methods of obtaining evidence from witnesses and do these differ from the means employed to obtain evidence from expert witnesses? What are the rules in relation to the submission of written evidence and expert reports/opinions?

1) Witness testimony

According to Section 251(1) of the Code of Civil Procedure, any person who may be aware of the facts relevant to a matter may be heard as a witness unless the person is a participant in the proceedings or a representative of a participant in the proceedings in the matter. Witnesses are to provide information regarding the facts they have directly perceived. A person summoned as a witness is required to appear in court and give truthful testimony before the court with regard to the facts known to them. Instead of witnesses attending a hearing, they may be required to provide written statements, if appearing before the court would be an unreasonable burden on the witness and, taking account of the contents of the questions and the personal characteristics of the witness, giving written testimony is, in the court's opinion, sufficient for providing proof. Alternatively, the court may use the record of a hearing in other court proceedings, if this clearly simplifies the proceedings and the court may be presumed able to assess the record to the necessary extent without directly questioning the witness.

Every witness is heard individually and witnesses who have not been heard are not permitted to be present in the courtroom during the hearing of the matter. If a court has reason to believe that a witness is afraid or has some other reason not to speak the truth before the court in the presence of a participant in the proceedings or if a participant in a proceedings leads the testimony of a witness by interference or in any other manner, the court may remove that person from the courtroom while the witness is heard. In such cases, after the return of that person the testimony of the witness is read to the participant in the proceedings and the participant in the proceedings has the right to question the witness. If the testimony of the witnesses is contradictory, the court may hear and question a witness several times in the same court session.

In the event of written statements, participants in the proceedings have the right to submit written questions to witnesses through the court. The court determines which questions the witness is required to answer. If necessary, the court may summon a witness to a court session in order to give oral testimony.

If a person is unable to appear in court due to illness, old age or disability or for any other valid reason, or if it is necessary for another reason, the court may go to the witness to hear their testimony.

The court examines evidence directly (Section 243(1) of the Code of Civil Procedure). In order to verify the reliability of witness statements, the court may rely on the various methods specified in Sections 262(1) and (8) of the Code of Civil Procedure, e.g. under subsection 1 the court ascertains the identity of a witness and his or her area of activity, education, place of residence, connection to the matter and relationships with the participants in the proceedings. Before giving testimony, the court explains the obligation of a witness to tell the truth and the procedure for refusing to give testimony; under subsection 8, the court shall, if necessary, pose additional questions during the entire questioning in order to clarify or supplement the testimony, or to establish the basis for the witness's knowledge.

2) Expert opinion

In order to clarify circumstances relevant to a matter which require specific expertise, the court has the right to obtain the opinion of experts at the request of a participant in the proceedings. In order to ascertain the law in force outside the Republic of Estonia, international law or common law, the court may ask the opinion of an expert in legal matters at the request of a participant in the proceedings or on the initiative of the court. The provisions concerning the hearing of witnesses apply to hearing persons with specific expertise with the aim of proving a circumstance or event that requires specific expertise in order to be correctly interpreted. If a participant in the proceedings has submitted the written opinion of a person with specific expertise to the court and the person is not heard as a witness, these opinions are considered as documentary evidence. Instead of ordering an expert assessment, the court may use an expert opinion submitted at the order of the court in another court proceedings or an expert opinion prepared at the order of the body conducting proceedings in criminal or misdemeanour proceedings if this simplifies the proceedings and if the court is presumed to be able to evaluate the expert opinion to the necessary extent without organising a new expert assessment. In such cases, the expert may be posed additional questions or summoned to court for questioning.

An expert assessment is conducted by a forensic expert or other qualified person employed by a state forensic institution, by an officially certified expert or by another person with specific expertise appointed by the court. The court may appoint a person as an expert if the person has the knowledge and experience necessary to provide an opinion. If an officially certified expert is available for conducting an expert assessment, other persons are appointed as experts only with good reason. If the parties agree on an expert, the court may appoint that person as an expert if they are able to act in the capacity of an expert pursuant to law.

A participant in the proceedings has the right to pose questions to an expert through the court. The court determines which questions require an expert opinion. The court must set out its reasons for rejecting any such questions. Experts are to submit their expert opinion to the court in writing, unless the court orders them to provide this orally or, with the expert's consent, in another form. An expert opinion should contain a detailed description of any examinations carried out, the conclusions reached as a result of those examinations and reasoned answers to the court’s questions.

Experts are to provide a correct and reasoned opinion on the questions posed to them. In order to provide an expert opinion, an expert may examine any material from the case which is necessary, participate in the examination of evidence in court and request reference materials and additional information from the court.

An expert opinion is disclosed during a court session. Unless the expert opinion is submitted in writing or in a format that can be reproduced in writing, the expert provides their opinion in a court session. The court may summon an expert who has submitted an expert opinion in writing or in a format which can be reproduced in writing to a court session for questioning. The court may also summon an expert who has provided an expert opinion to a court session if this is requested by one of the concerned parties.

After examining an expert opinion, the participants in the proceedings may pose questions to the expert in a court session in order to clarify the opinion, provided that the expert has been summoned to court. The questions may also be submitted to the court beforehand and then forwarded to the expert by the court. The court will exclude any questions that are irrelevant or beyond the competence of the expert.

The provisions concerning the hearing of witnesses also apply to the hearing of experts.

3) Written evidence

Documentary evidence takes the form of a written document or any other document or similar data medium that is recorded by way of photography, video, audio, electronic or other data recording, contains information on the facts relevant to the adjudication of a matter and can be submitted in a court session in a perceptible form.

Official and personal correspondence, decisions from other cases and the opinions of any persons with specific expertise submitted to the court by participants in the proceedings are also deemed to be documents.

Any written documents submitted should be originals or transcripts. If participants in the proceedings submit original documents together with a transcript, the court may return the original documents and include in the file a copy of the transcript certified by the judge. At the request of persons submitting written documents, the original documents included in the file may be returned after the court decision has come into force and the proceedings have been concluded. The transcript is kept in the file. The court may set a deadline for the examination of a submitted document, after which the court is to return the document. In such cases, the transcript of the document is to be kept in the file. If a document has been submitted in the form of a transcript, the court has the right to request that the original document be submitted or the circumstances preventing the original document from being submitted be substantiated. If the demands of the court are not complied with, the court is to decide on the probative value of the transcript of the document.

2.6 Are certain methods of proof stronger than others?

In civil procedures, the general rule of the free assessment of evidence applies, but limitations may be applied with the agreement of the concerned parties. In particular, Section 232(2) of the Code of Civil Procedure states that no evidence has predetermined weight for a court, unless otherwise agreed by the parties. Thus, the parties may agree to assign a decisive weight to certain pieces of evidence.

2.7 In order to prove certain facts, are certain methods of proof obligatory?

Yes. It may arise from law or an agreement between the parties that a certain fact may be proven only with evidence of certain type or in a certain form.

2.8 Are witnesses obliged by law to testify?

Yes. Under Section 254 of the Code of Civil Procedure, a person summoned as a witness is required to appear in court and give truthful testimony before the court with regard to the facts known to him or her.

2.9 In which cases can they refuse to give evidence?

The following persons have the right to refuse to give testimony as witnesses:

the descendants and ascendants of the plaintiff or defendant;

a sister, stepsister, brother or stepbrother of the plaintiff or defendant, or a person who is or has been married to a sister, stepsister, brother or stepbrother of the plaintiff or defendant;

a step parent or foster parent or a step child or foster child of the plaintiff or defendant;

an adoptive parent or an adopted child of the plaintiff or defendant;

the spouse or cohabitant of the plaintiff or defendant, and the parents of the spouse or cohabitant, even if the marriage or cohabitation has ended.

A witness may also refuse to give testimony if the testimony may incriminate them or a person specified above in a criminal offence or misdemeanour.

A witness has the right to refuse to give testimony concerning any facts to which the State Secrets and Classified Information of Foreign States Act (*riigisaladuse ja salastatud välisteabe seadus*) applies.

Any person processing information for journalistic purposes has the right to refuse to give testimony concerning any facts that would make it possible to identify the person who provided the information.

Regardless of the above, a witness is not permitted to refuse to give testimony concerning:

the performance and content of a transaction which he or she was invited to witness;

the birth or death of a family member;

a fact related to a proprietary relationship arising from a relationship under family law;

an act related to a disputed legal relationship which the witness performed themselves as the legal predecessor or representative of a party.

2.10 Can a person who refuses to testify be sanctioned or forced to give evidence?

Yes. If a witness refuses to give testimony without good reason, the court may impose a fine or detain the witness for up to 14 days. The witness is to be released immediately if they give the testimony or if the hearing of the matter ends or the need for the witness to be heard ceases to exist.

In addition, a witness bears the procedural expenses caused by his or her refusal to give testimony without good reason.

2.11 Are there persons from whom evidence cannot be obtained?

Section 256 of the Code of Civil Procedure sets out which persons are not permitted to be heard as witnesses. In particular, ministers of a religious association registered in Estonia or their support staff shall not be heard or questioned with regard to circumstances confided to them in the context of spiritual care. The following are not to be heard as witnesses without the permission of the person in whose interests the duty to maintain confidentiality is imposed:

representatives in civil or administrative matters, counsels in criminal or misdemeanour matters and notaries with regard to facts which have become known to them in the performance of their professional duties;

doctors, pharmacists or other health care providers, with regard to facts which a patient has confided in them, including facts related to the ancestry, artificial insemination, family or health of a person;

other persons who, due to their occupation or professional or economic activities, have been party to confidential information which they are not permitted to disclose pursuant to law.

Professional support staff of the persons referred to above may also not be heard as witnesses without the permission of the person in whose interests the duty to maintain confidentiality is imposed.

2.12 What is the role of the judge and the parties in the hearing of a witness? Under what conditions can a witness be heard via videoconferencing or other technical means?

Section 262 of the Code of Civil Procedure sets out the procedure for hearing witnesses. The hearing of a witness is to start with the court explaining the object of the hearing to the witness and urging the witness to disclose everything that they know concerning the object of the hearing. Thereafter, the participants in the proceedings have the right to submit questions to the witness through the court. With the permission of the court, participants in the proceedings may also pose questions directly.

The court excludes any leading questions and questions that are not relevant to the matter, as well as any questions posed with the aim of revealing new facts that have not been presented before and repeated questions. If necessary, the court has the right to pose additional questions at any point during questioning in order to clarify or supplement the testimony, or to establish the basis for the witness's knowledge.

Under Section 350 of the Code of Civil Procedure, the court may organise a session in the form of a procedural conference so that the participants in the proceedings or their representative or adviser have the opportunity to be in another place at the time of the court session and perform the procedural acts in real time at that place. A witness or expert who is in another place may also be heard, and a participant in the proceedings who is in another place may pose questions to them via a court session held in the form of a procedural conference.

In a court session organised in the form of a procedural conference, the right of every participant in the proceedings to file petitions and applications and to formulate positions on the petitions and applications of other participants in the proceedings is to be guaranteed in a technically secure manner, and the conditions of the court session in respect of the real time transmission of images and sound from the participants in the proceedings not present in court premises to the court and vice versa must be technically secure. With the consent of the parties and the witness and, in proceedings on petition, with the

consent of the witness alone, the witness may be heard by telephone in a procedural conference. The Minister of Justice may establish specific technical requirements for conducting a court session in the form of a procedural conference.

3 The evaluation of the evidence

3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?

Under Section 238(3)(1) of the Code of Civil Procedure the court may refuse to accept evidence and return the evidence if the evidence has been obtained by a criminal offence or unlawful violation of a fundamental right.

3.2 As a party to the case, will my own statement count as evidence?

According to Section 267 of the Code of Civil Procedure, a party who has not been able to prove, by any other evidence, a fact which needs to be proven by him or her or who has not provided any other evidence, has the right to request that the opposing party or a third party be heard under oath in order to prove the fact. In the case of a legal person, a representative thereof may be heard under oath.

The court may also hear, under oath, a party required to provide evidence concerning a disputed fact if one party requests it and the other party agrees. Regardless of the parties' requests and the division of the burden of proof, the court may at its own initiative hear under oath either or both parties if, on the basis of the earlier proceedings and the evidence provided and taken, the court is not able to form a position on the truth of a stated fact that is to be proven. The court may also hear a party under oath on its own initiative if the party required to provide evidence wishes to give statements under oath, without the consent of the opposing party.

In simplified proceedings and in proceedings on petition, the court may also deem a statement from a participant in the proceedings that has not been given under oath to be sufficient in order to prove a fact, unless it arises from the regulation of the relevant type of proceedings on petition that only statements given under oath by participants in the proceedings are admissible. In an action, a decision may not be based on any statement given by a party which was not given under oath.

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