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## PROBLEMS OF IMPLEMENTATION OF THE RIGHTS OF THE CHILD, DETERMINING THE PLACE OF RESIDENCE OF THE CHILD, IN THE CASE OF PARENTS DIVORCE IN LITHUANIA

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### Abstract

The relevance of this study. According to the data of the Lithuanian Statistics Department, 8,683 families divorced in the Republic of Lithuania in 2019, in 2020 – 7544. Of them in 2019, 6,659 children remained living with one parent, in 2020 – 6118 (Portal of Official Statistics). Divorce of parents is one of the most painful experiences for children, the consequences for children are irreversible and devastating (R. C. van der Wal... 2019). The preamble of the United Nations Convention on the Rights of the Child enshrines the principle that the full and harmonious development of a child is possible only when growing up in a family, therefore it is necessary to ensure the child's right to family ties with the help of legal measures. The participation of both parents in the child's education is necessary; the communication between the child and the parents must be direct and constant. The main problems. The Civil Code of the Republic of Lithuania stipulates that if the parents have not agreed peacefully. In the case of divorce, the court determines the permanent place of residence of the child only with one of the parents, and the order of communication must be determined with the father or mother living separately (Civil Code of the Republic of Lithuania..., 2000). Does such regulation not violate the child's right to family ties? The problem arises because in case of divorce of the parents, if no agreement is reached, the place of residence of the child is determined only with one of the parents. In this way, not only is the right of the separated father or mother to communicate with the child not ensured, the parental conflict is encouraged, but the child's interests and his right to family ties are often affected as a result. The child's right to family relations is not ensured by legal instruments but becomes dependent on the understanding and goodwill of the father or mother living with the child. The following tasks: 1) analyze the concept of child rights; 2) to examine the responsibilities of parents to their children; 3) to analyze the implementation problems of the child's rights in case of parental divorce regarding the determination of the place of residence in Lithuanian court practice. The aim of this work: after examining the legal regulation and court practice in Lithuania, to assess the protection of the child's rights regarding the determination of the child's place of residence in case of parental divorce. The paper concluded: The analysis of the judicial practice of the Republic of Lithuania showed that the court can determine the child's place of residence. Only with one of the fathers, but it can be concluded that according to the latest practice of advanced countries, the court must have wider powers to decide on the determination of the child's place of residence. The novelty – in some Western European countries, the so-called shared residence model is common, according to which the child's place of residence is determined with both parents, and the specific time when the child lives with each parent is determined considering the child's needs and interests. Parliamentary Assembly of the Council of Europe in 2015 October 2 Resolution 2079 (2015) also recommended that member states enshrine in their legislation a model of variable residence for the child, which could be limited in cases of abuse of parental responsibilities, child neglect or domestic violence. In the practice of the Supreme Court of Lithuania, the position is taken that the child's place of residence is determined with one of the parents. As the result – establishing children's residence with both parents at their separate residences would encourage parents to agree and cooperate. The used methodology document analysis and systematic method.

**Key words:** child's rights, parents' responsibilities, place of residence.

### Introduction

#### Statement of the problem

In practice, parents often disagree about determining the child's place of residence or determining the order of their communication, because they fear losing contact with the child in the future.

It should be noted that in Lithuania, the Civil Code provides for the place of residence of the child after the divorce of the parents only with one of the parents and determines the order of communication. Although the Civil Code stipulates that the father or mother with whom the child lives and/or with whom the child's place of residence has been determined by a court decision must not prevent the other parent from communicating with the child and participating in its upbringing. Failure to fulfill this duty is considered an abuse of parental authority, for which the father (mother) is responsible in accordance with the law.

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However, practice shows that problems often arise related to the implementation of the child's right to communicate with both parents, as well as the right of one parent to communicate with a child living separately and to participate in the child's upbringing and life. Most often, these rights are violated when one of the parents, at his own discretion, limits the opportunity for the separated father (mother) to communicate with the child, does not ensure the formation of a permanent and emotionally stable relationship between them. This violates the child's rights to family ties, the right to communicate with both parents (Child Rights Protection Controller of the Republic of Lithuania, 2020). It should be noted that in Lithuania, regarding the change of the child's place of residence, the law and court practice do not specifically specify the essential circumstances that make it possible to change the child's place of residence.

**Relevance of the topic** Ensuring the rights of the child is a public duty. The child's well-being, rights and interests are primarily ensured by his immediate environment – the family. Article 38 of the Constitution (1992) established the provision that “The family shall be the basis of society and the State”. It is also stated that “The right and duty of parents is to bring up their children to be honest people and faithful citizens” (Constitution of the Republic of Lithuania, 1992). However, regardless of the fact that the family should be the safest environment for a child, children still remain the most vulnerable social group in society, whose rights are usually violated in families. Family divorce has a negative impact on the child's well-being. Many scientists recognize this and emphasize various aspects of the negative impact (Žiobienė, 2013; Emery, 2013). According to statistics, the number of divorces in Lithuania is quite high. In the period from 01/01/2022 to 09/30/2022, 6,297 divorces were registered (Statistics data, Center of Registers). Although compared to 2021 the number of marriages is lower, but this indicator remains considerable. Since families with children also differ, for example, according to the 2021 report on the examination of civil cases, in the cases of the first instance regarding the determination of the child's place of residence. 2593 cases were examined, it is important to ensure the rights of the child in case of family divorce (Report on the examination of civil cases... 2021). It should be noted that ensuring the rights of the child is the object of international and national legal regulation (Tamošiūnas, T., Želvytė, V. 2010).

**The aim of the** after examining the practice of legal regulation and courts in Lithuania, to assess the protection of the child's rights by determining the child's place of residence in case of parental divorce.

### Results

In practice, the established legal regulation in the dispute about the child between parents who do not live together very often leads to great competition and “competition” between them, which harms the child's interests.

### Analysis of the concept of child rights

Republic of Lithuania Law on Fundamentals of Protection of the Rights of the Child established the rights of the child: the child's right to live, the right to have parents, the right to education. The right to identity and its preservation, the right to private life, personal integrity and freedom, the right to be heard, the right to adequate living conditions, the right to housing, the right to freedom of expression, rest and leisure, the right to live and communicate with one's parents and relatives, etc. The latter right must be ensured by various state-sanctioned separation of the child and his parents' cases, as well as when children live separately from their parents due to personal reasons or peculiarities of family life. Communication of the child with one of the parents who lives separately, must be safe, direct and regular, i.e. such communication must be aimed at separately. It would be possible for a living single parent to create and maintain permanent personal relationships, to ensure stable relationship between the child and his parents (Activity Report of the Child Rights Protection... 2021). A child is a person with his own opinion and self-determination (Limantė, 2018). Thus, although the rights of the child are the same as human rights, they are distinguished as a separate group, because of which children need special protection. Parents and other adults help to realize these rights of the child. Article 4, Part 1 of the Law on Fundamentals of Protection of the Rights of the Child stipulates that parents, other legal representatives of the child, state and municipal institutions and bodies, non-governmental organizations, other natural and legal persons must follow the principle of the priority of the child's best interests, i.e. decisions or actions taken regarding the child must be based on what is best for the child. Therefore, persons and institutions responsible for the protection of children's rights must promptly and effectively apply the most diverse measures to protect the child's interests and defend his rights,

to create conditions for the child in which they can develop healthily, develop their abilities and self-esteem (Covell, Howe and Blokhuis, 2018). Thus, a child is a full-fledged human being with rights, but at the same time an object of care, because he requires care and protection, which is why he is closely related to his parents and other adults. The rights of the child include the rights of provision and protection, which ensure their physiological and essential needs, as well as participation, social and cultural rights, which ensure the child the opportunity to learn, develop, and participate in society.

#### **Analysis of parental responsibilities**

First of all, the child's family – the parents – take care of the child's growth and development needs, ensuring his rights and legitimate interests. The rights and duties of the latter are primarily defined by Article 20 of the Constitution. Which states “the right and duty of parents to raise their children as virtuous people and loyal citizens”. Article 3.155, Part 2 and Article 3.165, Part 1 of the Civil Code of the Republic of Lithuania stipulate that parents have the right and duty to decently raise and look after their children. Also to take care of their health, to support them, taking into account their physical and mental condition, to create favorable conditions develop fully and harmoniously, take care of their spiritual and moral education, so that the child is prepared for independent life in society. All issues related to raising children are resolved by both parents by mutual agreement (Article 3.165, Part 3 of the Civil Code), because to ensure the child's safety and education, the parents' cooperation with each other and with the child is necessary. That is why parents must try to resolve all issues related to the child peacefully. For that purpose, parents can use mediators, mediators, psychologists, etc. for help, because only the decision found by the parents on how to best raise the child can be carried out in good faith and will best meet the interests of the child (the Lithuanian Supreme Court of February 3, 2016 in civil in case No. 3K-3-16-706/2016). If the parents do not agree on issues related to the upbringing of the child, the contested issue is decided by the court (State Child Rights Protection and Adoption Service, 2019).

The Civil Code enshrines the duty of parents to financially support children. Both parents must provide material maintenance for their minor children in proportion to their financial situation. The Civil Code establishes that the amount of maintenance must be proportionate to the needs of minor children and their parents' financial situation and ensure the necessary

conditions for the child's development. Thus, parents must support the child equally and the obligation to support the child cannot be applied to only one parent. Since the duty of parents to maintain children is personal property, it cannot be transferred to other persons. The non-fulfillment or improper fulfillment of this duty cannot be justified by a bad financial situation, the formation of other family ties, departure or other reasons. Therefore, if the father or mother of the children does not provide maintenance to the minor child, the other parent has the right to apply to the court for the award of maintenance and arrears of maintenance to the children.

#### **Implementation problems of the child's rights in the case of parental divorce in determining the child's place of residence in Lithuanian court practice**

During a divorce, the child is often included in the conflicts between the spouses. According to Navaitis divorce often seems to “transfer” the problems between the spouses to the children (Navaitis, G., 2013). Also, in the case of divorce, the interests of the spouses (parents) collide with the interests of the child. The child's parents' interest is in the divorce and the child's interest is in preserving that relationship so that he or she can benefit from the possibility of being brought up by both parents. Such antagonism of the interests of the two groups makes it difficult to ensure the rights and best interests of the child in the event of a family divorce. According to Lithuanian Supreme Court judge G. Sagatys, one of the reasons why children suffer in the divorce process of parents is that parents are afraid of losing their child (Sagatys, G., 2021). As a result, each parent wants the child's place of residence assigned to him. It is easier to ensure the rights and interests of the child if the divorcing spouses reach an amicable agreement during the divorce. When a peaceful decision cannot be made or there is no desire to do so, disputes arise between the spouses. In the event of disputes, the following problematic issues related to paternity or motherhood must be legally resolved: 1) the procedure for child maintenance has been established; 2) the child's place of residence has been determined (Maslauskaitė and Kuconytė, 2016). Article 3.169 of the Civil Code provides that when father and mother live separately, the child's place of residence is determined by parental agreement. But if there is a dispute between the parents regarding the determination of the child's place of residence, the child's place of residence is determined by a court decision with one of the parents.

Thus, when the parents live separately, the permanent residence of the child can be established only with one of the parents, usually with the one with whom the child remains living. The order of communication with the father or mother living in the unit is determined, and the place of residence of the father or mother living in the unit can be considered as the child's non-permanent place of residence. Such regulation of the child's place of residence does not violate the child's rights to family ties, but on the contrary, it ensures it. However, determining the child's place of residence with only one parent creates a few difficulties in ensuring the implementation of the child's interests and rights. It can be assumed that in such a case, the child's right to family ties is not ensured by legal means, but begins to depend on the father or mother living with the child, on his or her understanding and benevolence. Such a legal regulation, when the state exclusively protects the rights of the child only when he is with the parent with whom the place of residence is determined, should be considered discriminatory towards the parents living in the unit and violating the child's right to family ties. For example, in civil case no. E2A-1227-854/2020, the plaintiff D. B. appealed to the court, requesting to determine the child's place of residence with father D. B. The plaintiff stated that although the procedure for communicating with the child was established, after the conclusion of the settlement agreement. The defendant illegally took her son to live in a foreign country without the knowledge of the plaintiff. And also ignored the mandatory prohibition established by law to take the child to live in a foreign country without the other parent's written consent and that is an indisputable basis for changing the place of residence, i.e. i.e. change the child's place of residence by determining together with the father. The defendant, by isolating the plaintiff from his son, prevented any communication of the plaintiff with the child, unjustifiably and unlawfully deprived the plaintiff of the opportunity to participate in raising his son, seeks to eliminate any communication with the father from the child's life, to eliminate the relationship between the child and the father. The fact of the abduction of the child was established in the 2019 rulings of the Hague courts. June 26 (in the first instance) and 2019 August 14 (appellate instance) decisions. The appellate court noted that it agrees with the plaintiff's statements that according to the practice of the cassation court, the removal of a child to a foreign country without the other

parent's knowledge is considered legally significant circumstances when deciding on the implementation of the father's rights contrary to the child's interests. But in the case under consideration these circumstances alone do not constitute grounds for changing the child place of residence, i.e. i.e. they must be evaluated in the context of the overall circumstances. The Court assessed the child's roots and adaptation in the Netherlands and Lithuania. As well as the relationship with the parents, emphasized that the mother is the main figure in the life of the child of the parties and he is very attached to her, decided that the child's interests lie in the Netherlands, here, the child's social connection is established, so the plaintiff's appeal was rejected. This presupposes that in not rare cases the father or mother with whom the child's place of residence is determined prevents the separated father or mother from exercising their rights and duties, the separated father or mother is often eliminated from the child's life, has to settle for rare meetings and often cannot participate in your child's education. As in the previously mentioned case, the child was taken to live in a foreign country, thus complicating the child's communication with the father. Although the CC of the Republic of Lithuania declares the equal rights and duties of both parents in relation to the child, regardless of whether the marriage is terminated or the parents live separately. In practice the father or mother who lives separately usually acquires only the duty to pay maintenance on a regular basis, and the natural child and the separated father or mother have the right to communicate and participate in the upbringing of their child is not ensured or only partially ensured, for example, by determining the order of communication between the child and the father or mother living separately, the implementation of which is not controlled. It all depends on the father or mother with whom the child stays after the goodwill of the divorce. In this way, the child's right to family ties is not ensured when the parents live apart (Maslauskaitė and Kuconytė, 2016).

In order to reduce as much as possible, the risk of a child losing family ties, the legal model of "shared parenting" or "shared residence" (Sagatys, 2021) is used in foreign countries. In the Lithuanian legal system, this model is only applied with the agreement of the parents, but in judicial practice, the position is taken that the child's place of residence is determined with one of the parents. And when resolving a dispute regarding the order of communication between a father (mother) living separately and a child,

the maximum time that the child spends with each parent on weekends, holidays and vacations, equalizing and determining a certain amount of time that the child could communicate with the separated parent on weekdays, without harming the child's normal daily routine. However, as practice shows, setting the order of communication does not guarantee that the order will be followed. Therefore, taking into account the possibility provided in the legal systems of Western European countries for the court to determine the child's place of residence with both parents in the case of divorce, such a legal model in the Republic of Lithuania could potentially help to solve the implementation of the child's rights, ensuring his interests.

As mentioned earlier, the laws of Lithuania state that the child's place of residence is determined not with both parents, but with one of the parents. However, court practice is being formed in Lithuania, according to which a model of the child's communication with the father (mother) living separately is possible, when the child spends the same amount of time with the father (mother) living separately as with the parent with whom the child's place of residence is established ("50 : 50 percent of the time"). The Supreme Court in case No. e3K-3-279-969/2019 noted that the form of implementation of the 50:50 model can be applied even in the absence of all in the decree no. 3K-3-99-969/2016, it is a parental agreement regarding the procedure for the communication of a father (mother) living separately with a child. It should be noted that the court can only establish such a procedure for the parent (mother) living separately with the child ("50:50 percent of the time") only after finding that it is in the best interests of the child. In the case under consideration, the court, determining the procedure for the defendant's communication with the child, relied on the following arguments: 1) maximum communication of the child with both parents; taking this into account, the courts decided that maximum communication in the ideal sense of the term means that the child spends 50 percent of the time with each parent. I.e. the life of the child of the parties for a week with each parent is a guarantee of stability for him – to feel the love and attention and care of each parent; 2) this communication procedure, in the case of particularly high levels of mutual conflict between the parents, will eliminate (or at least reduce) the conflict of loyalty experienced by the child every time or the ability of the parents themselves to manipulate situations when handing over the child

to each other; 3) both parents are caring, loving and seek to ensure not only the basic but also other needs of the child.

Article 3.174 of the Civil Code on the 4th it is established that if the circumstances change or one of the parents with whom the child's place of residence is determined. If the child is given to be raised and live with other persons, the persons referred to in paragraph 1 of this article may file a repeated claim regarding the determination of the child's place of residence. However, as can be seen from court practice, changing the child's place of residence is difficult. For example, in case no. In E2A-708-253/2019, the appellate court decided to annul the ruling of the court of first instance, which found that the mother used physical violence against the child, and this is an essential circumstance, due to which the child's place of residence must be changed. However, the Panel of Judges did not agree with such arguments. The Court of Appeal stated that from the beginning of the pre-trial investigation until now, the child lives with the mother and the plaintiff or VAT did not initiate any processes to remove the child from, according to the plaintiff, an unsafe environment for him. The defendant sought to change her inappropriate behavior and this is confirmed by the training she attended, i.e. i.e. positive parenting training, seminars. The court noted that the circumstance of the use of physical violence against the child is not new, it was explained when deciding the issue of determining the child's place of residence when making a decision on divorce.

So, this implies that changing the child's place of residence is difficult, there must be certain essential circumstances. It should be noted that any change in the circumstances that led to the establishment of the child's place of residence with one of the parents is considered fundamental. I.e. i.e. constituting a sufficient basis for deciding the issue of changing the child's place of residence, is not established in the law, but is developed in the practice of the cassation court by providing examples of this. A change in the behavior of the father with whom the child lives, a change in the material situation, a deterioration in the upbringing of the child, an improvement in the material situation of the other parent (Lithuanian Supreme Court ruling in civil case No. 3K-3-269/2013). Change of the child's wishes (taking into account the child's age and maturity) (Lithuanian Supreme Court ruling in civil case No. 3K-3-207/2003); other circumstances, due to which the essential change is decided in each specific

case. It should also be noted that when changing the child's family environment, it is necessary to determine that the existing environment has become unsafe for him. No longer meets the requirements for the normal development of a healthy child, and such an environment would be created for him by changing the child's place of residence by establishing it with another of his parents (ruling of the Supreme Court of Lithuania in a civil case No. E3K-3-277-969/2019). The stability of the environment in which the child lives is a significant factor influencing the child's psychological state, so when the child lives in a certain environment for more than one year, the possibility of changing it must be evaluated especially carefully.

Thus, the best interest of the child principle is followed when making decisions about the child's well-being and ensuring rights in the event of a family divorce. Unfortunately, in practice, it is not always possible to unambiguously assess what specific criteria determine the content of this principle and what is actually best for the child in specific circumstances, so the court decides in a specific case individually.

### Conclusions

1. Parents and other adults help to realize the child's rights. Therefore, it is important that the parents responsible for the child protect his interests and rights, so that conditions are created for the child in which he can develop healthily, develop his abilities and self-esteem. One of the child's established rights is the right to live and communicate with his parents and relatives.

2. The legal acts of the Republic of Lithuania regulate the universally recognized principle of parental equality, which states that both parents have equal rights and equal responsibilities for their minor children.

3. In the legal system of the Republic of Lithuania, a legal model is established, according to which parents live separately, if the parents do not agree, the child's place of residence is determined

with one parent, and the other determines the order of communication with the child. This is causing difficulties in the Republic of Lithuania. All this is reflected in legal practice, as these legal difficulties are associated not only with the limitation and violation of parental rights and obligations, but also with the implementation of the child's rights. Analyzing the court practice, it was found that the interests of the child are the most important criterion in resolving the dispute regarding the determination of the child's place of residence. The practice of the Court of Cassation has been formed on the issue of determining the child's place of residence. This practice directs the courts, when examining the case, to be guided exclusively by the interests of the child, which must be individualized in each considered case. However, when analyzing court practice, it was found that the child's right to communicate with both parents, his right to family relations, is often violated by the other parent with whom the child's place of residence is determined, thereby violating the child's interests. In Lithuania, a practice is formed where after a divorce, the place of residence is determined with one of the parents. And the order of communication is determined with both parents 50:50 is not common. Although such a communication model could potentially help resolve disagreements between parents, it would help the child exercise his rights to not lose contact with both parents. Therefore, taking into account the possibility provided in the legal systems of Western European countries for the court to determine the child's place of residence with both parents in the event of a divorce. It should also be established in the Lithuanian law, according to which, if there is a dispute between the parents regarding the determination of the child's place of residence and parental custody, until the parents reach an agreement, the child's place of residence could be determined by a court decision with both parents according to a variable schedule.

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## **ПРОБЛЕМИ РЕАЛІЗАЦІЇ ПРАВ ДИТИНИ, ВИЗНАЧЕННЯ МІСЦЯ ПРОЖИВАННЯ ДИТИНИ ПРІ РОЗДІЛЕННІ БАТЬКІВ У ЛИТВІ**

### **Анотація**

Актуальність даного дослідження. Згідно з даними Департаменту статистики Литви, у 2019 році в Литовській Республіці розлучилися 8683 сім'ї, у 2020 році – 7544. З них у 2019 році 6659 дітей залишилися жити з одним батьком, у 2020 році – 6118 (Портал офіційної статистики). Розлучення батьків є одним із найбільшочіших переживань для дітей, наслідки для дітей незворотні та руйнівні (R. C. van der Wal... 2019). У преамбулі Конвенції ООН про права дитини закріплено принцип, згідно з яким повний і гармонійний розвиток дитини можливий лише під час виховання в сім'ї, тому необхідно забезпечити право дитини на сімейні зв'язки за допомогою правових заходів. Необхідна участь обох батьків у вихованні дитини; спілкування між дитиною і батьками має бути безпосереднім і постійним. Основні проблеми. Цивільний кодекс Литовської Республіки передбачає, що якщо батьки не домовилися мирно. У разі розірвання шлюбу суд визначає постійне місце проживання дитини лише з одним із батьків, а порядок спілкування має бути визначено з батьком чи матір'ю, які проживають окремо. Право дитини на сімейні відносини не забезпечується правовими інструментами, а стає залежним від розуміння та доброї волі батька чи матері, які проживають з дитиною. У статті зроблено висновок: Аналіз судової практики Литовської

Республіки показав, що суд може визначити місце проживання дитини. Тільки з одним із батьків, але можна зробити висновок, що згідно з новітньою практикою передових країн, суд повинен мати ширші повноваження для вирішення питання про визначення місця проживання дитини. Новизна – у деяких країнах Західної Європи поширена так звана модель спільного проживання, згідно з якою місце проживання дитини визначається з обома батьками, а конкретний час проживання дитини з кожним із батьків визначається з урахуванням потреб дитини та інтереси.

**Ключові слова:** права дитини, обов'язки батьків, місце проживання.

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