

LEGAL ASPECTS OF THE CHILD GUARDIANSHIP REGULATION

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Abstract

The relevance of this study. The institute for the care of minors is receiving a great deal of attention nationally, as the state's priority is the growth of the child in the family. According to the report on the activities of the Adoption Rights Protection Authority in 2021, is noted that in 2021 the number of children in guardianship in Lithuania was 963 of them in temporary guardianship 921 children, with a permanent population of 42 children indicating that the need for care is high. It is in the interest of the valet that children grow up in a family and the state initiative is undergoing a care reform aimed at abolishing institutional care homes and creating conditions for children to grow up in a family. **The main problems.** The article examines the issues in the context of guardianship. The most frequent reason for the loss of guardianship of a child is the alcoholism of the parents, neglect of the child and violation of their interests, which is manifested in three different ways: 1. Failure to respect the principle of guardianship by separating brother and sister. 2. Transferring a child deprived of parental care to a health authority if no illnesses are detected. 3. A small number of guardianship due to low awareness. **The following tasks:** 1. Define the concept of child guardianship. 2. To analyse EU international and Lithuanian national legal acts regulating child guardianship. 3. Identify case law on the legal regulation of the child guardianship. **The aim of this work:** to analyse the aspects of the legal regulation of the institution of child guardianship to ensure the best interests of the child. **The paper concluded:** The analysis of national legal acts and case law has shown that the Civil Code of the Republic of Lithuania must be applied in a mandatory manner when applying the principles the child guardianship. **The novelty** – In Lithuania, the Civil Code of the Republic of Lithuania is the main legal act regulating the institute of child guardianship, but the peculiarities of the principles of child guardianship are not clearly disclosed, as each situation depends on its own individual variant. The article analyses all the principles governing the custody of a minors with a view to highlighting the peculiarities of the custody institute and preventing violations of the child's interests. **As the result** – In Lithuania, there are situations when a child is removed from parental care and transferred to health care institutions with the hope of finding a safe place for him/her quickly, but for a healthy child, this is not an appropriate solution, as the child's best interests are at stake – a health care institution is not a home-like environment. The Civil Code of the Republic of Lithuania establishes the procedure for location fostering a child, and a health care institution is not a suitable place for fostering. It has been established that failure to respect the order of priority causes violations of the child's best interests and causes severe stress for the child deprived of parental care. **The used methodology** the work applies the analysis of scientific literature, which helps to deepen the specifics of this institution, analyses the legal acts regulating the institute of custody, and analyses the case law related to the institute of child custody.

Keywords: child guardianship, child's interests, guardian.

Introduction. Statement of the problem.

The article examines the issues in the context of guardianship. The most frequent reason for the loss of guardianship of a child is the alcoholism of the parents, neglect of the child and violation of their interests, which is manifested in three different ways: 1. Failure to respect the principle of guardianship by separating brother and sister. 2. Transferring

a child deprived of parental care to a health authority if no illnesses are detected. 3. A small number of guardianship due to low awareness.

Relevance of the topic at international and national level, the best interests of the child take precedence. This priority is reflected in international conventions and national legislation. The Republic of Lithuania has ratified the 1980 European Convention on the Recognition and Enforcement of Decisions Relating to the Custody of Children and on the Protection of Children (European Convention on the Recognition and Enforcement of Decisions Relating to the Guardianship of a Child and the guardianship of children 1980). Another important Convention is the 1980 Hague Convention on Convention on the Civil Aspects of

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International Child Adoption..., 1980). Article 7 of the Convention on the Rights of the Child states that the child has the right to a nationality, to an identity, to be taken into care (Convention on the Rights of the Child..., 1989). In Lithuania, child guardianship is organised and managed by the State Child Rights Protection and Adoption Service (Lithuanian Child Rights Protection and Adoption Service..., 2022). This service was established for Lithuania.

Lithuania ratified the 1993 “Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption in the field of international adoption” (Convention on Protection of Children and Cooperation in respect of Intercountry Adoption..., 1993). In 2005, the name of the Adoption Service was changed in accordance with the Decree of the Republic of Lithuania No. 184 and regulations, on the basis of which the activities of the Adoption Service were expanded for the benefit of children (Republic of Lithuania The Lithuanian Office for the Protection of Child Rights and Adoption..., 2022). In accordance with the provisions of the Adoption Rights Protection Service 2021, the number of children in child guardianship in Lithuania in 2021 was 963, of which 921 children were in temporary care and 42 children in permanent care and the deinstitutionalisation process is not complete (Activity Report..., 2019). In Lithuania, there is currently little research on the legal regulation of the child guardianship because guardianship process transformation. It has been noted that researchers are focusing more on the social aspect of this institution. For example, Jozeliūnienė, I., Martinkėnė, G., Budginaitė – Mačkinė, I., Žilinskienė, L., Genienė, R., have carried out research on guardianship in the social context. Therefore, this article aims to deepen the information on legal issues related to guardianship and to reveal the problems of legal regulation and ways of solving the problems in order to improve the legal regulation of guardianship institute.

The aim of the research to analyse the aspects of the legal regulation of the institution of child guardianship to ensure the best interests of the child. **Results.** In Lithuania there are situations when a child is removed from parental care and transferred to health care institutions with the hope of finding a safe place for him/her quickly, but for a healthy child, this is not an appropriate solution, as the child’s best interests are at stake – a health care institution is not a home-like environment. The Civil Code of the Republic of Lithuania establishes the procedure for location fostering a child, and

a health care institution is not a suitable place for fostering. It has been established that failure to respect the order of priority causes violations of the child’s best interests and causes severe stress for the child deprived of parental care.

Concept of the guardianship of minors the purpose of child guardianship is to guarantee the upbringing and care of the child in order to provide him/her with safe and appropriate conditions (Mikelėnas, 2009). The Civil Code of the Republic of Lithuania lays down the principles that must be followed when dealing with custody of minors. These principles are: the priority of the child’s interests, the priority of the child’s relatives or persons with close ties to the child to become his/her guardians, the guardianship of the child in the family, the non-separation of siblings, and the stability of the place of guardianship of the child (Civil Code of the Republic of Lithuania..., 2001). It has been established that the legislator gives priority to the child being cared for by the family.

Article 3.252 of the Civil Code of the Republic of Lithuania establishes the types of guardianship: temporary guardianship and permanent guardianship (Civil Code of the Republic of Lithuania..., 2001). Temporary guardianship of a child is understood as a type of guardianship in which the child is taken into care with the intention of returning him/her to his/her biological family, it is this form of guardianship is applied when the child remains without parental care and it is necessary to represent, care for and educate the child until the situation improves in the biological family or the grounds for which the child was taken from the parents’ custody are removed. Permanent guardianship is understood as the guardianship of a child left without parental care due to various circumstances with the aim of representing the child’s interests. Permanent guardianship of a child is special in that it is established by a court order (Lithuanian Office for the Protection of the Rights of the Child and the Adoption of the Child..., 2022).

In order to clarify the concept of child guardianship, it is necessary to discuss the forms of child custody and their specific features. The Civil Code of the Republic of Lithuania states that “a child shall be fostered in a family, a foster home, a foster care centre, a child care institution” (Civil Code of the Republic of Lithuania..., 2001). These different forms of child care are therefore necessary to briefly discuss each of them separately. Family care is a form of care in which the child is placed with other children, ranging in number from four

children to eight children. The legislator has specified the conditions under which the numbers can be lower or higher, it is. The principle of non-separation of siblings and in the case of care for disabled persons (Mikelėnas, 2009).

A family home is a non-profit organisation established by a legal person, because during the process of deinstitutionalisation, the establishment of family homes started with the abolition of state-run orphanages (Kirtiklienė, 2021). Another form of child care is family care. This form is regulated by Article 3.259 of the Civil Code of the Republic of Lithuania. The Constitution of the Republic of Lithuania establishes that the family is the basis of the State (Constitution of the Republic of Lithuania..., 1992). The legislator gives priority to the care of the child in the family, because it is only in the family that the child will grow, develop and develop best. The author points out that institutional care is inappropriate because it causes tension and anxiety for the child and influences a difficult adaptation in an institutional home. (Sakalauskienė, 2022). The Civil Code of the Republic of Lithuania specifies that the number of fostered children ranges from three to six children, the legislator has established exceptions for the application of the principle of non-separation of siblings and the preference for the fostering of children by close relatives ("Civil Code of the Republic of Lithuania..., 2001).

Institutional care is being abolished because the state's priority is to create conditions for children to grow up in a family. Since 2012, Lithuania has been organising a transformation from institutional care homes to care for children in families and communities. Since 2014, a decree has been adopted according to which it is planned to abolish state-run orphanages from 2014 to 2020, but this transformation is still underway because there is a shortage of foster carers and adoptive parents and a lack of public information about foster care, it is there is a lack of information about the possibility of becoming a foster carer ("Transformation of foster child guardianship..., 2021", 2021) Child foster care in a foster centre. Fostering centres in Lithuania started to be established in 2018 with funding from the European Union.

The purpose of a foster child guardianship center is to ensure that each child is provided with temporary or permanent care when needed, it is in the best interests of the child, to provide them with care in the home of a temporary guardian. This form of guardianship is special in that the guardian on duty

does not become the child's legal representative, it is he or she remains the foster child guardianship center, which concludes an agreement with the temporary guardian for the care of the child. The standby guardian carries out his/her activities on the basis of his/her internal activities and receives a salary for this (Genienė, R., Nedveckė, R., 2021). After discussing all the forms of child care, it was found that family care is the most acceptable form of care for a fostered child, as it provides the child with the right conditions for growth, development and development, but that foster care in care centres is the only form in which the temporary guardian can receive a salary for the care of the child. Article 3.251 of the Civil Code of the Republic of Lithuania establishes two concepts of guardianship and custody of a child, which are distinct in that guardianship is established when the child is under 14 years of age and custody is established when the child reaches the age of 14 years (Civil Code of the Republic of Lithuania..., 2001). An analysis of the legislation shows that child guardianship is: "the care, upbringing and education of a child without parental care who has been entrusted to a natural or legal person in accordance with the procedure established by law, the creation and maintenance of other conditions suitable for the child's spiritual and physical growth, and the protection and representation of his or her personal and property rights and legitimate interests" (Lithuanian Office for Protection of the Rights of the Child and the Office of Child Protection and Adoption..., 2022).

Principles and conditions for prospective guardians of minors

Article 3.269 of the Civil Code of the Republic of Lithuania states that a person who has attained the age of 21 and is not older than 65 years may be a guardian. The legislator has provided for exceptions to the age limit when a relative seeks child guardianship (Civil Code of the Republic of Lithuania..., 2001).

The Vilnius City District Court, in a case concerning the return of a child to the family, was dealing with a case in which, according to its findings, the guardianship of a minor child was awarded to a grandmother who was over 65 years of age and when the child was eleven years old. In this case, the child's biological mother considered that the grandmother, who was 67 years old, could not have custody of a grandchild over the age of ten, but an exception to the law was applied in accordance with Article 3.269 (1) (7) of the Civil Code, it was established that the paternal grandmother was

a close relative. The Supreme Court of Lithuania has stated that close relatives have the right to take care of a grandchild older than ten years (2018 of the Vilnius District Court decision November 29 decision in civil case..., 2018).

The second condition for guardianship is legal capacity. Article 2.5 of the Civil Code of the Republic of Lithuania states that: “the capacity of a person to acquire civil rights and to create civil obligations by his or her own acts (civil capacity) shall be fully established when the person reaches the age of majority, i. e. when he or she reaches the age of 18 years” (Civil Code of the Republic of Lithuania..., 2001).

The third condition is that the child must not be separated from his/her parents or that parental authority is restricted. Guardians are checked in the database for criminal record, physical and mental health and these requirements are the main ones applied in the selection process to become guardians (Civil Code of the Republic of Lithuania..., 2001). The legislator states in Article 3.24 of the Civil Code that the guardianship of a child is governed by the principle of the best interests of the child. The content of this principle is disclosed. In the case of the Klaipeda Regional Court of 2021 on the temporary limitation of the mother’s authority and appointment of another guardian. from the transition from institutional care homes to child care In this case the court found that this principle is revealed in the Law on the Protection of the Rights of the Child and is understood by a personal assessment of what is best for the child at the current time and in the future (2021 of the Klaipeda Regional Court decision September 30 decision in civil case..., 2021).

Another important principle of priority for becoming a child’s guardian applies to relatives of the child who are emotionally involved with the child. This principle was revealed in a 2020 case of the Panevėžys Court, where the paternal grandmother of a child decided to take custody of her grandchild. The case states that the grandchild and the grandmother are emotionally connected, also they communicate by telephone (2020 of the Panevėžys District Court decision May 20 decision in civil case..., 2020).

The next principle is child guardianship in the family. The Kaunas District Court ruling of 2020 establishes that the form of child guardianship in the family is leading over other forms of guardianship and guardianship in the family is the most suitable form of guardianship for the child to grow, develop,

and improve both physically and mentally (2020 of the Kaunas District Court decision May 14 decision in civil case..., 2020).

The current reform of foster care in Lithuania aims to abolish state-run orphanages and create community-based homes to create a family-like environment for children, but according to a study carried out by the Ombudsman for the Protection of Children’s Rights, there are many problems with the implementation of the reform in 2020.

In particular, it has been found that children removed from unsafe environments due to parental drinking, neglect, violence or other circumstances are placed in health care institutions, but it is debatable whether we can consider a health care institution as a family-like environment (2019 Activity Report..., 2021).

Article 3.264 (5) of the Civil Code of the Republic of Lithuania sets out a list of the order in which a child deprived of parental care shall be transferred, this list does not include health care institutions (Civil Code of the Republic of Lithuania..., 2001).

The best interests of the child have been found to be harmed by the loss of custody of the biological parents due to an unsafe environment and by the transfer of the children to health care institutions when they are fully healthy. It is recommended that the order of priority of Article 3.264 (5) of the Civil Code should be followed when deciding on the custody of the child.

Another principle is brothers and sisters not be separated, except where this is not in the child’s best interests. The Kaunas Regional Court case of 2018 dealt with custody, residence and maintenance of minors. The case established that the siblings do not communicate and that no close ties have been formed between them. The Court stated that the principle of the best interests of the child in custody prevails over other principles and that other principles may be overridden in certain situations.

The Court found that there was no evidence of a close relationship between the brothers and sisters and therefore decided that their separation would not be detrimental to the best interests of the children. In the article on divorce, it was emphasised that the brother and sister relationship is the longest lasting family relationship, as they share a common childhood. It was found that the decision to separate the siblings is based on the establishment of a close relationship between them, and that the decision to separate them is taken only later (Sibling Separation Due to Parental Divorce: Diagnostic Aspects...,

2022). The last principle of child guardianship concerns the permanence of the child's place. This principle was newly introduced in the Framework Law on the Protection of the Rights of the Child of the Republic of Lithuania on 10-11-2020 with the aim of facilitating the child's guardianship by separating the child from his/her parents and finding an environment closer to his/her former home. The legislator is aware that a child removed from his/her biological family is under great stress and that moving them away from home causes negative emotions. The principle of permanence of the child's environment and place of care has been established as a means of facilitating the care of the child.

Conclusions.

1. An analysis of the legislation shows that the legislator gives priority to the family form of child guardianship.

2. It has been established that child guardianship in a guardianship centre is a new form of guardianship since 2018, created with the aim of involving the public in guardianship children, and is the only form of guardianship where the guardianship carer is paid a salary.

3. It has been established that child guardianship and care child are different concepts, as guardianship is established when the child is

under 14 years of age and care is established when the child is 14 years of age.

4. The analysis of the legal acts has established that the guardianship of a child is the care, education, representation and protection of his/her personal property and non-property rights of a child who has been deprived of his/her parental care and entrusted by law to another natural or legal person.

5. Article 3.24 of the Civil Code of the Republic of Lithuania does not equate the principles of guardianship, as the principle of the best interests of the child is given priority at both national and international level.

6. It has been established that the interests of the child are being undermined in the context of the guardianship restructuring, since the removal of the child from the biological parents and the transfer of the child to a health institution, provided that the child has no health problems, violates the provisions of Article 3.264 of the Civil Code and the order of the children's transfer sequence.

7. Brothers and sister's relationships have been found to be the longest-lasting, but separability issues should be guided first by the determination of the closeness of the relationship and then by the decision to separate the brothers and sisters, depending on the situation.

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ПРАВОВІ АСПЕКТИ РЕГУЛЮВАННЯ ОПІКИ НАД ДИТИНОЮ

Анотація

Актуальність даного дослідження. Інституту опіки над неповнолітніми в країні приділяється велика увага, оскільки пріоритетом держави є виховання дитини в сім'ї. Згідно зі звітом про діяльність Управління захисту прав усиновлення у 2021 році, зазначається, що у 2021 році кількість дітей під опікою в Литві становила 963, з них під тимчасовою опікою – 921 дитина, при постійному населенні 42 дитини, що свідчить про необхідність для догляду висока. В інтересах камердинера, щоб діти росли в сім'ї, державна ініціатива переживає реформу опіки, спрямовану на ліквідацію інтернатних закладів та створення умов для виховання дітей у сім'ї. Основні проблеми. У статті розглядаються питання в контексті опіки. Найчастішою причиною втрати дитиною опіки є алкоголізм батьків, нехтування дитиною та порушення їхніх інтересів, що проявляється трьома різними способами: 1. Недотримання принципу опіки шляхом розлучення брата та сестра. 2. Передача дитини, позбавленої батьківського піклування, до органу охорони здоров'я за відсутності у неї захворювань. 3. Мала кількість опіки

через низьку поінформованість. Завдання: 1. Дати визначення поняття опіки над дитиною. 2. Проаналізувати міжнародні правові акти ЄС та національні правові акти Литви, що регулюють опіку над дітьми. 3. Визначте судову практику щодо правового регулювання опіки над дитиною. Мета роботи: проаналізувати аспекти правового регулювання інституту опіки над дитиною для забезпечення найкращих інтересів дитини. У документі зроблено висновок: Аналіз національних правових актів і судової практики показав, що Цивільний кодекс Литовської Республіки повинен застосовуватися в обов'язковому порядку при застосуванні принципів опіки над дітьми. Новація – у Литві Цивільний кодекс Литовської Республіки є основним правовим актом, що регулює інститут опіки над дітьми, але особливості принципів опіки над дітьми чітко не розкриті, оскільки кожна ситуація залежить від свого індивідуального варіанту. У статті аналізуються всі принципи опіки над неповнолітніми з метою висвітлення особливостей інституту опіки та запобігання порушенням інтересів дитини. Як наслідок – у Литві бувають ситуації, коли дитину забирають з-під батьківського піклування та передають до закладів охорони здоров'я з надією швидко знайти для неї безпечне місце, але для здорової дитини це не підходить, оскільки йдеться про найкращі інтереси дитини – заклад охорони здоров'я – це не домашнє середовище. Цивільний кодекс Литовської Республіки встановлює порядок розміщення дитини на вихованні, а заклад охорони здоров'я не є придатним місцем для виховання. Встановлено, що недотримання черговості спричиняє порушення якнайкращих інтересів дитини та викликає сильний стрес у дитини, позбавленої батьківського піклування. У використаній методології в роботі застосовано аналіз наукової літератури, що дозволяє поглибити специфіку даного інституту, проаналізовано нормативно-правові акти, що регулюють інститут опіки, а також проаналізовано судову практику щодо інституту опіки над дітьми.

Ключові слова: опіка над дитиною, інтереси дитини, опікун.

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