The powers of a judge in family law cases

Since the field of family law is a very wide one it has been decided to restrict the topic to civil court proceedings concerning children, but excluding adoption of children.

(I)

1. In your legal system are civil cases concerning children heard in specialist family courts or by judges with special training in family law?

In Lithuania family cases are heard by the courts of general jurisdiction. There is no specialized family courts or family cases divisions in the courts of general jurisdiction.

It should be mentioned however that Article 111 of the Constitution of the Republic of Lithuania provides for the possibility of establishment of specialized family courts. The need of specialization in family cases and possible solutions is still an object of continuous discussions.

In 2002, carrying out the programme of Juvenile justice and following the agreement between the Ministry of Justice and Legal Institute, the special working group was created, which carried out a research on the needs and possibilities of establishment of specialized courts for hearing family and juvenile cases¹. The conclusion of the mentioned research was negative towards the establishment of specialized family courts (mainly for the economic reasons), but militated for the establishment of specialized divisions (in the Supreme Court, Court of Appeals, regional courts and local courts with more than 10 judges) or appointment of specialized judges (in local courts with less than 10 judges) for the hearing of family and juvenile cases within the courts of general jurisdiction.

¹ Legal Institute. Research “On the needs and possibilities of establishment of specialized courts for hearing family and juvenile cases”.
However for the moment this proposal has not been realized. There is no specialization of judges for hearing family cases. Training in family law is included in general judicial training programmes.

2. **What orders may the court make concerning the welfare of children?**

   (a) Orders regulating with which parent (or other person) the child should live;

   (b) Orders regulating the contact which the child should have with the parent with whom the child is not living;

   (c) Orders relating to the payment by a parent of money for the maintenance of the child;

   (d) Orders relating to such matters as the education, religious upbringing or medical treatment of the child;

   (e) Orders relating to the administration of any property owned by the child;

   (f) **Orders depriving a person of his or her parental rights or responsibilities.**

   The court of general jurisdiction may make any of the listed orders:

   a. According to the Articles 3.169, 3.174 of the Civil Code of Lithuania, if there is a dispute between the parents (living separately) with which of them the child should live, the place of residence of a child is determined by court. The court is obliged to solve the case following the best interests of a child and taking into account his/her wish (unless in the opinion of a court the wish of a child is contrary to his/her interests).

   b. According to the Article 3.170 of the Civil Code, a child has a right to maintain contact with both parents, despite the fact with whom of them he/she resides. If parents disagree on the participation of parent living separately in the upbringing of a child and/or contact with him/her, the order of participation in the upbringing of a child and the order regulating the contact which the child is determined by the court. The court is obliged to solve the case following the best interests of a child and creating the maximal possibility for the parent living separately to participate in the upbringing of a child.
c. According to the Article 3.194 of the Civil Code, in case if parents (or one of them) fail to fulfil their obligation to endow their minor children, or if there is no agreement made on the sustentation of a child in case of divorce or separation, the sustenance is awarded by the court. The obligation to endow children remains even if the parental authority is restricted, unless a child was adopted (Article 3.195 of the Civil Code).

d. Indirectly. Education, religious upbringing or medical treatment of the child is the right and responsibility of parents. The court may intervene only if there is a violation of parental obligations.

According to the Articles 3.155, 3.159 of the Civil Code, parents have a right and obligation to upbring their children upright and to foster them, to take care of their health, maintain them, create favourable conditions for their versatile and harmonious development (parental authority). Parental authority may not be used against the interests of a child. For non-realisation or abusement of parental authority legal liability is applied.

Main rights of a child, including right to education and right to good health are determined by the Constitution of the Republic of Lithuania, the Civil Code, the Law on Education, the Law on the Fundamentals of Protection of the Rights of a Child, as well as ratified international conventions, such as UN Convention on the Rights of a Child.²

Education in Lithuania is compulsory for children under the age of 16. According to the Article 35 of the Law on the Fundamentals of Protection of the Rights of a Child, parents and other legal representatives of the child must create conditions enabling the child to acquire the compulsory education or a possibility of study until the age of 16. Individuals who fail to implement this requirement are held liable according to procedure established by laws.

In case of violation of rights of children (including violations of right to education or good health), or non-realisation of parental responsibilities, parental authority may be temporarily or permanently restricted by the court. In this case a child is placed under custody by the same decision. Administrative or even criminal responsibility may also be applied for the parents. However, the court does not make any orders directly related to the education or medical treatment of a child.

According to the Article 26 of the Constitution of Lithuania, parents and legal guardians shall look after the religious and moral education of their children without restrictions in accordance with their own convictions. Thus a court can intervene only if there is a disagreement on this issue between the parents (Article 3.165 of the Civil Code).

² Came into force from 1992 03 01, ratified from 1995 07 03
(e) Property of a child is administered by his/her parents under the title of usufruct. If there is a disagreement between the parents, the order of administration of property is determined by court. If parents administrate the property of a child improperly, violate the proprietary interests of a child, the court, on the request of public prosecutor or institution for protection of rights of children, may deprive parents of right of usufruct and appoint an administrator of the property. (Article 3.185 of the Civil Code).

According to the Article 3.188 of the Civil Code, an interim authorization of court is needed for:
1) transfer, mortgage of property of a child, or placement of any other restrictions on it;
2) acceptance or refusal of legacy in the name of a child;
3) conclusion of lease contract for the property of a child if the term of contract is longer than 5 years;
4) conclusion of arbitral agreement in the name of a child;
5) conclusion of loan contract in the name of a child if the amount of the loan exceeds 4 minimal monthly salaries³;
6) investment of funds of a child if the sum exceeds 10 minimal monthly salaries.

If a conflict of interests arises between a child and parents (or one of them) the court may appoint ad hoc trustee for the conclusion of the contract.

(g) If parents can’t live together with a child for objective reasons (e.g. sickness), a court may decide to temporarily separate a child from his/her parents. In this case, only the right to live with a child is suspended. Other parental rights and obligations are preserved, if they are possible to realize without living together with a child. (Article 3.179 of the Civil Code)

If parents (mother or father) derogate from their duty to upbring children, abuse the parental authority, behave cruelly, make a negative influence on children or neglect them, a court may place temporary or permanent restriction on parental authority. In this case all parental rights are suspended, with the exception of right of contact with a child (this right may be also suspended if the court finds that remaining in contact contradicts the interest of a child). If restriction of parental authority is permanent, the child may be adopted without consent of parents. (Article 3.180 of the Civil Code)

³ Presently 1 minimal monthly salary amounts to 500 Litas (approximately 145 euros)
3. In deciding whether to make an order is the criterion which the court applies that of the best interests of the child?

Yes. The principle of priority of interests of a child is clearly defined in the Civil Code, various norms of Code of Civil Procedure as well as special laws, such as Law on the Fundamentals of Protection of the Rights of a Child.

4. To what extent may a judge dealing with a case involving children be more pro-active than in other cases?

The new Code of Civil Procedure, which came into force from the 1st of January 2003, provides for the more active role of court in certain types of civil cases (so-called non-dispositive cases), including family cases. In particular the court hearing family case is enabled:

- to collect evidence *ex proprio motu*
- to exceed the claims presented
- to resolve matters that, although not presented to the court, are directly connected to the initial claim
- to apply the alternative remedy *ex proprio motu*

Some cases involving children (e.g. adoption cases) are also heard under the rules of non-contentious proceedings. Hearing a case under the rules of non-contentious proceedings, the court is obliged to take any measures necessary for the thorough discovery of the particular circumstances of a case (Article 443 para 8 of the Code of Civil Procedure).

In particular:

(a) May the judge make an order relating to the welfare of the child which has not been sought by either of the parents (or other parties in the case)?

Yes, if it is in connection with the initial claim (Article 376 para 3 of the Code of Civil Procedure)

(b) May the court on its own initiative (*ex proprio motu*) cause investigations to be made into the circumstances of the child and the parents?

Yes, the court can collect any evidence it finds necessary for the proper determination of dispute (Article 376 para 1 of the Code of Civil Procedure)

(d) May the court call for expert reports by, for example, a child psychologist?
Yes, call for export reports is possible in any kind of civil cases. In cases involving children call for report of child psychologist may be especially advisable bearing in mind the obligation for the court to ascertain the willingness of a child (Article 380 of the Code of Civil Procedure)

(e) May the court require both parents to attend personally at any hearing?

In some types of family cases the law expressly provides for the obligation of parents (one of them) to attend personally at any hearing (e.g. in filiation cases personal participation of defendant is compulsory). In other cases the court may declare personal attendance of the party obligatory.

**Are there any other procedures for investigation or for case-management specially available to the judge dealing with a case involving children?**

In cases involving children participation of state institution for protection of rights of children is obligatory (Article 3.178 of the Civil Code).

Family cases are tried in close hearing if at least one of the parties so request (Article 379 of the Code of Civil Procedure).

There are specific conditions set for the examination of juvenile witnesses (e.g. participation of pedagogue) (Article 194 of the Code of Civil Procedure)

5.  **Is a family mediation service available in your country? If so, may the court refer the case to mediation, or is it obliged to do so?**

There is no family mediation service in Lithuania. However, the court hearing a family case is obliged to pursue the amicable settlement of a dispute (Article 376 para 2 of the Code of Civil Procedure).

The absence of family mediation service is regarded as a serious shortcoming of the national legal system. The annual reports of Children’s Ombudsman point to the fact that in Lithuania a great number of issues involving children are dealt with by the courts. Participation in official court sessions may negatively influence the emotional status of a child. This negative consequence could be at least partially avoided if mediation service was available.\(^4\)

\(^4\) Annual report of Children’s Ombudsman for the year 2003
6. Is a court hearing a case concerning a child obliged to give the child an opportunity to express his or her views? If so, does this depend on the maturity of the child? What methods are used in your legal system for ascertaining the views of the child?

Yes. According to the Article 3.177 of the Civil Code, the court, hearing a case concerning a child, is obliged to hear a child, if he/she is able to express his/her views, and to ascertain his/her willingness. It is compulsory to take into account the willingness of a child, unless it is contrary to his/her interests.

A child must be heard personally, or, if it is impossible, via representative (article 3.164 of the Civil Code).

According to the Article 380 of the Code of Civil Procedure, views of a child may be expressed orally, in written, or by other means chose by a child. If a child is aged 14, his/her agreement or disagreement with a claim must be written or minuted.

The requirement under the law is that “a child able to express his/ her views” must be heard.

Possibility to express views is dependant on the maturity of a child. Sometimes the law directly provides for the cases when age of a child is important in making certain procedural decision (e.g. according to the Article 3.142 of the Civil Code, if the child is aged 10, paternity can be determined by the court only with the written consent of a child). Otherwise, the age of a child can be important for choosing of methods for ascertaining the views of the child. A child aged 10 usually must be heard in person, during the court session. A child aged 14 can also personally apply to the institutions for children protection or court and act personally in some types of proceedings. A child under the age of 10 is usually heard with the assistance of parents or guardians, institutions for children protection, pedagogues and psychologists outside the court and his/her opinion is presented to the court in written.

7. By what means can a judicial decision regarding a child, in particular a decision about residence (custody) of the child or contact (access or visiting rights), be enforced in your legal system? May the court call for assistance from non-judicial bodies such as the police or social work authorities?

Judicial decisions regarding a child, including decision about residence of a child, are executed by bailiffs. As decision is executed only after it has become res judicata, the court itself doesn’t have to call for assistance from non-judicial bodies such as the police – execution is under
the responsibility of bailiff. Municipal institutions of children protection as well as police officers may be called into assistance.

Executing a judgement concerning the rendition of a child, participation of representative from state institution for protection of rights of children is compulsory. It must be ensured that the rights of a child are protected (Article 746 of the Code of Civil Procedure).

If a judgement contains an obligation to perform or refrain from performing certain actions, which can be made only by the defendant himself/herself (such as for example judgement on rights of access), the court can order the defendant to execute judgement under penalty of a fine. Respective application to the court is made by the bailiff responsible for the execution (Article 771 of the Code of Civil Procedure).

Annual report of the Children’s Ombudsman, however, points to the existence of certain problems in the course of execution of judgements regarding a child, in particular non-monetary judgements. Inactivity of municipal institutions of children protection and police officers, ignorance of claims on the non-execution of judgements on the residence of the child or contact with the child (access or visiting rights) is indicated. It is supposed that main reasons for those problems is insufficient knowledge of the members of publics about the execution procedure as well as unclear reglamentation of competence of institutions, participating in the execution of judgements regarding a child.

8. **To what extent may the courts in your legal system enforce judicial decisions regarding children which have been pronounced in another country? Which international treaties or conventions apply, in your country, to the enforcement of foreign decisions or to the return of children wrongfully removed from a foreign jurisdiction into your country?**

Main provisions on the recognition and enforcement of foreign judgements in Lithuania are fixed in the Code of Civil Procedure (Articles 809-815) as well as in the international agreements, both bi-lateral treaties and international conventions. Foreign judgements, if recognized, are enforced following the same rules as judgements of national courts.

Among the applicable international conventions, the following should be mentioned:
- Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations

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5 Annual report of Children’s Ombudsman for the year 2003
6 Ratified from 2002 04 02
9. Are the powers available to a judge dealing with cases concerning children in your legal system satisfactory and do those powers allow the judge to be sufficiently pro-active? Are there any proposals for reform?

As it was already mentioned above, the reform was made quite recently, after the adoption of the new Code of Civil Procedure. Presently powers available to a judge dealing with cases concerning children in Lithuania are satisfactory.

II

Which points would you like to discuss in detail?

III

(In order to frame the conclusions)

To what extent do you consider that a judge dealing with cases involving children should have a pro-active rôle? How should the exercise of that rôle be regulated?

As it was already mentioned, presently laws in Lithuania provide for the sufficient activity of a judge dealing with cases involving children. In cases concerning children the judge should be able to order the necessary investigations and take the urgent measures necessary for the protection of a child on his own initiative. Taking into account the best interest of a child, powers to exceed the claims presented or to apply the alternative remedy *ex proprio motu* are also important.

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7 Ratified from 2003 07 03
8 Ratified from 1997 11 07, came into force from 1998 08 01
9 Ratified from 2001 08 02, came into force from 2002 01 22 (with exceptions)
10 Ratified from 2002 03 19; came into force from 2002 09 01
As to the existing shortcomings, the need of specialization of judges and special training in family law should be discussed more intensely. The lack of mediation service should also be regarded as shortcoming.

IV

What topic do you suggest for next year?