The Establishment and Enforcement of Maintenance Obligations in the Relations between Divorced Parents and their Minor Children

Văleanu Maricica[1]

Abstract: The entry into force of the new Civil Code has, among other merits, that of calling into question the main institutions of private law. The maintenance obligations occupy in its end a central place in the economic relations between parents and children, whereas it was primarily established to ensure good material conditions of growth and education of minors. Through the clearer marking within the present Civil code of the execution of maintenance obligation in nature, in practice the way in which the sentences regarding the establishment of the maintenance obligation in the relations between divorced parents and their underage children are requested and arranged will have to adapt.

Keywords: maintenance obligation; child support; shared parental authority; the child's best interests; ways of execution

1. Introduction

In light of new regulations which provide the common parental authority after divorce, the corresponding articles suggest the preference of the legislator for the alimony paid in kind, for the establishment of child support proportionally with the real needs of the child for sustenance, growth and education in relation to both parents.

This possibility, although regulated at the level of rule, it is difficult to put into practice, both in terms of courts, as well as in that of the parents; the preference continues to be for the payment of an amount of money (child support).

The enforcement of the legal provisions in the field is with immediate date. The rules relating to the modification and cessation of the maintenance obligation are also applicable in the case of child support fixed by judicial decision prior to the coming into force of the current Civil Code.

Article 530, paragraph 1 of CC, which sets out the general framework regarding the establishment and execution of maintenance obligation, shows that its main

[1] Lawyer, G. Bacovia University, Bacău, România. Address: Bacău, 96 Pictor Aman Street, 600196, Bacău, România, tel. : 0728179798. Corresponding author: ursu.mary@yahoo.com.

way of execution shall be made in nature, by providing the basic needs and, if necessary, expenditure for education, learning and professional training.

Unlike the family code[1] who, through the provisions of article 93, paragraph 1, thesis I, provide the possibility of execution of this obligations, alternatively, in nature or by payment of a sum of money and leaves to the discretion of the Court to establish ways of execution depending on the circumstances of the case, the new provisions institute the rule establishing the contribution in kind and, only if it is not executed voluntarily, its establishment as child support fixed in amount worth.

Regarding this aspect, the INM session on "Provisions of the new civil code in matters of family law - unification of judicial practice" (Conference abstract booklet,2012, page 37) it was established that "article 530 paragraph 1 of the Civil code establishes the rule in this matter and constitutes an application of the principle on execution in nature of the obligations, the possibility of execution mainly through the payment of a sum of money cannot be justified except, possibly, by the fact that such regulation is placed in a general applicable title and the peculiarities of this subject which require compliance with the best interests of the child should be considered (...). The establishment by the legislator of the rule establishing the contribution in kind and, only if it is not executed voluntarily, its establishment as child support is justified based on similar principles to those for which the new institutions – type of fatherly authority exercised in the common - were devoted to; we should not leave from the premise that the parent with whom the child does not live is clumsier than the another".

Surely, through the establishment of these legal provisions, it was desired that the decisions concerning the child taken after the divorce by of mutual agreement between the two parents, in accordance with the spirit of joint parental authority introduced, by imposing on them to cooperate at least in terms of the formation of the budget allocated to this purpose.

Although laudable, this new rule may lead to problems in terms of putting them into practice, both at the level of sentences related to the establishment of the maintenance obligation and its actual execution by the debtor.

As any maintenance obligation, even in the case it is due to the minor, it will be established by taking into account the possibilities of the debtor and needs of the creditor. According to the article 525 Civil Code, the minor may request maintenance from his parents if he cannot support itself from his work, even if he had goods. The limits imposed by article 529, paragraph (2) and (3) of the Civil code must be taken into account. The maximum ceiling must not be exceeded meaning a maximum ceiling up to a quarter of net monthly income of the parent for a child, a third for two children and a half for three or more children, so the

[1] The Family Code was adopted by Law No. 4 of January 4, 1954 and was repealed by Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code.

amount of maintenance owed to the children, together with maintenance owed to others, according to the law, must not exceed half of the net monthly income of the obliged. The court must establish the amount that both parents will cover the needs of the child, through the execution of maintenance obligations in nature.

First of all it should be stressed that the percentage values of the income of the parent established by law for the maintenance of the children (25% of net income for one child, 33% of net revenues for the two children, 50% of net income for three or more children) should be calculated in relation to the difference arising as a result of the deduction from the parent's net income of the amount of rates that the borrower parent (in most cases) has contracted with the bank for real estate loans contracted earlier unbundling or divorce. The determination of the amount will be based on calculating the income of each parent, with continuity, and not those obtained by chance (Turnu Magurele Court, Civil Sentence, 2009)

At the same time, the legal coefficients established for the maintenance of children represent the maximum ceiling up to which a court may decide to establish the amount of the obligation. There are cases in which, because of the parent's high salary, it would be able to reach significant differences between the amounts decided by a court and the actual costs of maintenance of the child.

In all cases, the amount of maintenance owed to the child, together with the maintenance owed to other people, according to the law, cannot exceed half of the net monthly income required.

Definitely, the most difficult problem in the framework of executing in nature the maintenance obligation is represented by the quantification of attributes that each parent is going to be owe compared to the actual needs of a child. This issue should be clarified and assessed by the Court based on a social investigation that, contrary to current practice, has expressly stated this objective, both at the moment of establishing the initial amount and in any situations where the issue is analized again because it proves to be inappropriate.

In the doctrine an opinion is expressed, judiciously. According to it in order to comply with the rule dictated from article 530, paragraph (1) the contribution in kind with reference to a limit, fixed in an amount of money, just as in this case, in particular for assumptions in which between the parents there was no collaborative relationship, should be indicated, in addition to the ceiling, the manner in which the actual contribution is based in nature (Baias et al., 2012, p. 440)

In practice, most of the solutions however aim at the execution of the maintenance obligation by child care established exclusively in the responsibility of the parent with whom the child does not live in a constant way, in the sense of article 400 of the CC. On this aspect, in the same framework session to which I referred to above "the majority opinion agreed to establish the contribution of the parent with whom the child does not live with to growth, education and professional training expenses

and if it is not necessary or the interest of the child requires it, its execution in nature can be ordered (...). There cannot be an order of priority concerning the mode of establishing maintenance obligation; it must be adapted from case to case. As any maintenance obligation, is established taking into account the needs of the creditor and the debtor; therefore the contribution of parents may be different, in relation to the means of each parent" (Conference abstract booklet, 2012, p. 38).

In the light of those findings, it can be affirmed that, in matters of family law, derogates from the rule according to which the maintenance obligation is established and run in nature and, in alternative by equivalent, through the payment of a sum of money. It seems as though the rules of law imperatively require, the material execution in nature of this obligation. Through a jurisprudential way it is created the possibility of execution of maintenance obligation towards the child, in an alternative mode both in nature and through the payment of a sum of money.

In practice, I appreciate this solution as being grounded, whereas obligating the parents to execute in nature the obligation only solves the formal appearance of the problem and it is desirable to avoid the inconsistencies of opinions about the child's basic needs or other disputes between parents that lead to a factual situation contrary to public interest.

Of course that the Court will opt for one of these two ways, depending on the concrete circumstances of the case, taking also into account an eventual agreement of former spouses regarding this aspect. It is worth mentioning the fact that, according to article 375 of the Civil Code, this obligation may be assumed by the parents whose divorce proceedings were made by a notary; they can choose between one of the modalities of implementation of this obligation.

So, in both of the situations presented above in the case they are not executed voluntarily, in accordance with paragraph (2) of the article 530 of the Civil Code, the guardianship court shall order its execution through payment of child support, established in the money. Child support may be set in the form of a fixed amount or a percentage share of net monthly income of the person who owes maintenance. Child support established in a fixed amount is indexed, quarterly, depending on the inflation rate. Failure can also be partial; it is important to prove the parent borrower has the necessary means to execute the obligation as well as the bad faith with which he has not fulfilled its obligation towards the minor.

If, according to the agreement of the parties or the decision of the Court of guardianship (duly motivated) opted for payment of the child care, the execution of maintenance can be done through payment of a lump-sum advance to cover the maintenance needs of the child over a longer period or for the entire period in which the maintenance, to the extent that the parent obliged in this way has the necessary means to cover this obligation.

According to the legal provisions on the issue, both the father and mother are obliged, jointly, to give maintenance to their underage children as well as the major ones, if they further continue their studies, until their completion, but without exceeding the age of 26 years. The Court will therefore have to establish, for each of the parents (and not just for the parent with which the minor does not live with), the amount and the manner of execution of maintenance obligation.

Whether, during the divorce proceedings made by the Court, ancillary or incidental demands, were formulated or not, on the establishment of the amount of parental contribution to the costs of raising and educating children, the Court is obliged to pronounce on this issue, as being, one of the cases in which the *extra petita* pronouncement is imposed by law, a true exception from the availability principle that governs the civil procedure (Piperea et al., 2012, p. 919).

The most common situations encountered in practice are those in which the parent who wants to obtain the common residence with the minor addresses the Court a solicitation to compel the defendant to pay child support, in order to ensure the receipt of a monthly sum of money. On the other hand, the main requirement addressed through a counterclaim with regard to this aspect usually refers to the decline in the amount of child support, without requesting the execution of this obligation in nature. In the example given, considering the fact that the Court is invested with an application which exclusively concerns the execution of maintenance obligations by periodically paying an amount of money, without any counterclaim to require the changing of the execution way the court cannot raise, ex officio, the rule concerning the execution in nature of this obligation.

Regarding the dissolution of marriage through the notary procedure, in case the marriage resulted in minor children, parents must agree on all aspects relating to the exercise of parental authority, establishing the child's home after divorce, how to preserve personal ties between the separated parent and each child, as well as the establishment of the parents' contribution to expenditures relating to the growth, education, teaching and professional training of children. This agreement should respect the principle concerning the best interests of the child and must meet the findings of the social inquiry report that is mandatory drawn up, in the framework of this procedure. If parents do not agree on all these issues, or the surname that each of them will have after divorce, the marriage application will be rejected and the parties will refer the matter to court.

According to the article 532 of the Civil Code, the date from which the child support is the date of the application for judgment summons. This is the date on which the debtor may be forced, by court decision, to the payment of child support and it should not be confused with the date on which the maintenance is owed, because this is owed from the moment the conditions stipulated by law are met. In the case of the minor, the need state is presumed if he cannot maintain itself from his work, even if he had the goods.

As an element of novelty in the new legislation, paragraph (2) of article 525 of the Civil Code provides that, if the parents could not provide maintenance without endangering their own existence, the Guardianship Court will agree that the maintenance will be provided by the capitalization of the minor's goods, except those of strict necessity.

The measures concerning the rights and duties of divorced parents towards their children and, ordered by the guardianship court through the divorce judgement have a temporary character in nature; they can be amended, in compliance with art. 403 of the Civil Code at the request of any of the parents or another family member or child care institution, specialized public institutions for child protection or the Prosecutor in the case the circumstances considered in determining the initial rights and duties of the divorced parents towards their children change. At the same time, the Guardianship Court can enlarge or shrink the child support or may decide to terminate its payment, if a change appears in what concerns the means of the one who provides maintenance and the need of that who gets it.

At the same time, throughout the divorce process, through Presidential Ordinance, provisional measures may be taken regarding the maintenance obligation of children, which means that even a measure taken through a presidential ordinances can be suspended or even replaced by another, on the hypothesis in which, during the trial, the condition which formed the basis of that governmental decisions have changed (Piperea et al., 2012, p.896). The party which requests for provisional measures with respect to the establishment of the minor's home, the maintenance obligation, the collection of the State allowance for children and the use of the family home, will no longer be obligated to prove the condition of urgency, it being presumed, it is true, in a relative way. (Leş, 2007, p. 1274).

The provisions of article 531 of the Civil Code relating to the modification and cessation of the child support are applicable even in the case of child care fixed by judicial decision prior to the coming into force of the Civil Code[1].

With respect to the immediate applicability of these rules and to the claims brought before the entry into force of the Civil Code contained in the ways of attack, through the appeal in the interest of the law promoted by the Ministry of Public on January, 17, 2013, showed that "*best interests of the child is circumscribed to the child's right to physical and moral development, to socio-emotional equilibrium, family life, as asserted by the article. 8 of the European Convention on human rights(...) Therefore, as long as, during the course of settlement of the case it intervened this legal disposition edict just in the interests of the child, it must be of*

[1] According to art. 51 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, No. 409 of June 10, 2011,"*the provisions of art. 531 of the Civil Code regarding the modification and termination of child support are also applicable in the case of child support established by court prior to the entry into force of the Civil Code*".

immediate application, including ways of attack, or appeal or review(...). It is obvious that even if the parties do not require the application of the provisions of the new Civil code in resolving claims relating to the exercise of parental authority, in the appeal, the Court may make their application immediate, without violating the principle of availability(…). Concluding, we appreciate that the new civil code provisions are of immediate application even in the requests formulated before its entry into force, found in appeal, and the solution is justified in consideration of the best interests of the child and on the fact that, in this special matter, we witness a special mitigation of the availability principle."

This point of view was judiciously shared by the High Court, which, through decision no. 4/2013[1], fallow up of the interpretation and application of the provisions of art. 223 in relation to article 39, paragraph 2 of law No. 71 in June, 3, 2011 for the enforcement of Law no. 287/2009 on the Civil Code[2], determined that "*the provisions of art. 396-404 of the new Civil Code, concerning the effects of divorce on the relationships between parents and their underage children, are also applicable to the applications for divorce made before the entry into force of the new civil code and pending before the courts of law on appeals.*"

Because the establishment of the maintenance obligation must be reported to the real needs that the child has, if, for any reason, it turns out that maintenance, done voluntarily or pursuant to a court decision is not owed, in accordance with article 534 of the Civil Code, the one who executed the obligation can require the repayment from the one who received it or from the one who had in reality, the obligation to provide it, in this latter case, on the basis of unjust enrichment. The example that can be often met in practice is the one of the parent that continues the child support's payment to the child who become major without having continued his studies and even if the child continues his studies and in over the age of 26 years,. In the latter case the child may be liable for the reimbursement of the amounts of money received or the equivalent of maintenance rendered in nature and which were not owed.

In order for the refund of the maintenance to be requested by the one who would have had an obligation to actually provide, given that both parents are obliged to provide maintenance to a child, it will be required in advance, for the child's affiliation to be established through recognition or by court decision towards another parent or to be successfully promoted an action challenging affiliation. In this case, the debtor who provided maintenance can take action against the person for whom the affiliation was established or against the other parent to restitute the

[1] Decision No. 4 of I.C.C.J. 03/18/2013 was published in the Official Gazette of Romania, Part I, no. 226 of 04.19.2013.

[2] Law no. 287/2009 on the Civil Code was republished under article 218 of Law no. 71/2011 for the implementation of the law no. 287/2009 in the Official Gazette of Romania, Part I, no. 505/2011.

equivalent of the maintenance obligation which was executed in nature or of sums of money paid as maintenance of the child, based on enrichment without just cause.

References

Baias, Flavius-Antoniu; Chelaru, Eugen; Constantinovici, Rodica & Macovei Ioan –(coord.) (2012). *Noul Cod civil.Comentarii pe articole/ New Civil Code.Comment on articles*. Bucharest: C.H. Beck.

Piperea, Gheorghe; Antonache, C.; Piperea, P.; Dumitriu, Al.; Piperea, M.; Ratoi, Al. & Atanasiu, A. (2012). *Noul Cod de procedură civilă. Note.Corelaţii. Explicaţii/ New Code of Civil Procedure. Notes. Correlations. Explanations*. Bucharest: C.H. Beck.

Leş, I. (2007). *Codul de procedură civilă. Comentarii pe articole/ Civil Procedure Code. Comment on articles, 3rd edition*. Bucharest: C.H. Beck.

*** Sesiune susţinută în cadrul Programului de formare continuă 2012 al Institutului Naţional al Magistraturii,2012,având ca temă "Dispoziţii ale Noului Cod civil în materia Dreptului familiei – unificarea practicii judiciare", Broşură rezumat conferinţă/Session sustained in the Continuous training programs 2012 of the National Institute of Magistracy, 2012, with the theme "Provisions of the New Civil Code in matters of family law - unification of jurisprudence", Conference abstract booklet,according to http://www.inm-lex.ro/arhiva/index.php?MenuID=13, accessed on April, 25, 2014.

*** Through Civil Sentence no.1672/22 October 2009, Turnu Magurele Court upheld the civil action to increase child support. In determining the increased child support, the court took into account the defendant's income base on a continuing basis, respectively the pension which he obtains and not the money he obtained from the sale of an inherited property (so, asset) as the applicant requested; the amount did not have a permanent character -http://jurisprudentacedo.com/Obligatii-de-intretinere.-Majorare-pensie-de-intretinere.-Conditii-privind-debitorul-obligatiei-de-intretinere.-Cuantumul-obligatiei-de-intretinere.html, accessed on April, 18, 2014.