

Parent's Maintenance Obligation Towards Children and its Legal and Economic Aspects

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Abstract: The present study analyses legal regulations concerning maintenance and current situation in the provision of maintenance in the Czech Republic. The article maps out terms like maintenance obligation, title to maintenance, process principles of non-dispute proceedings, fiction while calculating obligated parent's income situation and overall property situation. Part two provides a comparison of the legal regulation of maintenance in selected countries of the European Union, especially, focussing on Belgium and France. These countries have been selected because they provide advance maintenance in case of failure to pay maintenance. Advance maintenance is currently being asserted in most advanced European countries. The Czech Republic as one of the last countries, provides neither advance nor compensatory satisfaction yet. This matter has now been discussed and made public in the media for several years in the Czech Republic but no positive progress has been achieved until now. The objective of the present study is to compare legal regulation in the particular countries. The analysis is mainly focused on the following areas: calculation of maintenance amount, valorisation of maintenance, minimum maintenance amount, advance maintenance.

Key words: Parent's maintenance obligation, family law, children, advance maintenance, progress, amount

INTRODUCTION

The problem of maintenance obligation ranks among the fundamental problem areas of family law. It is very closely related to court's decision-making on parenting, property law and other legal institutes.

There are over 570,000 incomplete families in the Czech Republic. Almost 46,000 verdicts on determination of maintenance were brought in 2015. According to an estimate of the Ministry of Labour and Social Affairs (MoLSA) in a half of the cases, the obligated parties fail to pay such maintenance.

As a matter of fact, single mothers (and single fathers to a limited extent) consequently live under very poor conditions of existence, sometimes on the verge of poverty.

The Czech government seeks for methods of supporting threatened groups and contemplates advance maintenance which is in place in a number of European countries. Advance maintenance can be further subdivided depending on whether in case of failure to pay maintenance, the government provides advance maintenance (e.g., Belgium, France, Hungary, Germany, Austria, Switzerland, Denmark) or as another option, a so-called substitute maintenance, the recovery of which

is not asserted (e.g., Slovakia and in a certain form also Sweden). After all, the system of advance maintenance has not yet been adopted EU-wide.

The objective of the present study is to map out the area of maintenance from the perspective of terminology, current legal regulation and criteria applied when assessing maintenance amounts. Also, the legal regulation of maintenance in the Czech Republic will be compared with the situation in Belgium and France where advance maintenance is already in place, while in the Czech Republic this topic is subject to intensive debates and its introduction is being contemplated.

MATERIALS AND METHODS

The legal institute of maintenance in Czech Republic:

The fundamental source of family law is the Charter of Fundamental Rights and Freedoms, laying down the legal protection of parenthood and family, guaranteeing special protection to children and minors and special care and protection to pregnant women. Children born in marriage and outside marriage are equal in terms of law.

Another significant source of law is the Convention on the rights of the child, published in the Czech system of laws under No. 104/1991 Coll.

With the new Civil Code No. 89/2012 Coll entering into force, the act on family No. 91/1998 Coll. Became ineffective, so, the legal regulation of family law is now incorporated into the new civil code.

The legal institute of maintenance is one of the essential institutes of family law. The current legal regulation defines maintenance as child's legal share in the provision of funds intended for its subsistence. Title to maintenance persists until children are able to earn their living.

The law provides no concrete definition of "maintenance" but it operates with "maintenance obligation" which is deemed to be the provision and coverage of personal needs between persons in family relationship or a similar relationship.

From theoretical point of view, the following points can be considered the conceptual characters of this legal institute:

- Property value of maintenance with a precisely defined purpose in child's favour
- Existence of a personal family relationship between the beneficiary and the obligated party

Apart from maintenance of minor children, the civil code also regulates other kinds of maintenance such as maintenance obligation of children towards parents, maintenance obligation between other relatives, etc. Maintenance for minor child has from the legal perspective, preferential position which means that in the event of a conflict of maintenance obligations, it cannot be superseded by either of the above-stated maintenance obligations. This fact is further reflected in executive proceedings whereas in case of execution of judgement, maintenance is considered by law as a preferential claim and is satisfied in primarily after governmental costs.

Norms regulating maintenance have mandatory character, meaning that they cannot be altered even by agreement between the beneficiary and the obligated party. The actual title and the corresponding liability are directly established by law. The parties to such a relationship cannot agree on any arrangements, since such legal act would be absolutely void. This mainly concerns arrangements attempting to alter the legal conditions of fulfilment, scope and period of duration of maintenance, etc. Parent's agreements on the amount of maintenance remain hereby untouched as long as such agreements are in the minor child's interest. Only such an agreement will be approved by custodial court. This construction is based on custodial court's position and on the so-called non-dispute proceedings as defined by code of civil procedure. Unlike dispute proceedings (such as remedial actions or status actions), a non-dispute

proceeding concerning care for minors is not a typical dispute but rather a specific type of proceeding taking place to the benefit and for the protection of child, whereas the court has extensive possibilities to take and to adduce evidence and then to decide in the child's best interest. Parent's position in such proceeding naturally entitles parent to provide and to indicate evidence used for proving participant's affirmations.

The scope of maintenance obligation: As far as the scope of maintenance obligation towards children is regarded, the law stipulates no specific amount and so-called "auxiliary tables" issued by Ministry of Justice of the Czech Republic have a merely advisory character. In practice, they are used relatively frequently but they only serve for reference purposes; every case is individual and must be treated with respect to the concrete situation. In these cases, the court is obliged to consider every circumstance revealed in the course of the proceeding. Therefore, the above-mentioned tables are not mandatory and the amount of maintenance corresponds to 15-20% of the obligated parent's net income, depending on the number of maintenance obligations and on legal criteria specified above. Therefore, significantly different resolutions can be encountered in practice. It is no exception that court resolutions differ by several thousand Czech crowns despite equal income situation and comparable property situation of the obligated parent.

Section 913 of new civil code stipulates that the beneficiary's reasonable needs and property situation as well as the abilities and possibilities of the obligated person are decisive for determining the scope of maintenance. When assessing such abilities, possibilities and property situation of the obligated person, it must be also examined whether the obligated person has not given up a more convenient occupation or gainful employment or property benefit without important reason or whether he is taking unreasonable property risks. Further to Section 914, new civil code, the child's standard of living must be in principle identical with that of the parents. This aspect supersedes the aspect of child's reasonable needs. As far as the child's reasonable needs are concerned, their extent is diversified especially by the child's age, health condition, abilities, talents and method of preparation for future occupation.

The new civil code perceives maintenance in a broader concept so that it comprises not only the actual alimentation but also the satisfaction of all indispensable needs of a minor child. This especially includes the satisfaction of cultural, sports, recreational and other needs. The law considers reasonable also generation savings as long as the situation of the obligated person to provide maintenance allows so.

New civil code introduces a change in cases where the obligated parent fails to duly document his income. Section 916, New Civil Code, namely stipulates that in the event that, in the course of proceeding on parent's maintenance obligation towards a child or on maintenance duty of another ancestor towards a minor child that has not yet become legally competent, a person obligated for maintenance fails to provide to court due evidence of his income by providing all documents and other information for evaluating the property situation and fails to provide the court with other facts necessary for resolution by making available data protected by another legal regulation, then the average monthly income of such a person is deemed to be the 25 fold of the subsistence minimum as determined by another legal regulation. This so-called fiction is applied in case of self-employed persons that deliberately conceal their income. Although, even the original act on family also used the so-called fiction of income of such a parent, the originally presumed amount has now been doubled.

Property situation of the obligated person is decisive when stipulating the amount of maintenance. This term was introduced into the law by an amendment from 1998 and is still incorporated in the new civil code. The law works with the premise that when assessing the property situation, it is impossible to only work with actually documented income but that the obligated parent's overall property situation and way of life must be assessed and taken into account, too. Thus, in such case, the court assesses the ownership of tangible and intangible assets, overall way of life such as the obligated person's potential costly hobbies or holidays, meaning all that reflects his actual living standard.

This legal criterion thus, enables courts to take into account also property acquired by heritage, restitution, winning, etc. when determining the amount of maintenance (MS., 2017).

In the event of an unemployed parent working illegally, the court will assess his possibilities by so-called fiction. In similar cases, the court works with the so-called presumed income of the obligated parent. In collaboration with the labour office, it documents his possible income with respect to the level of his education, age, health condition, previous work experience, etc.

When determining the amount of maintenance, the court must also take into account the obligated parent's liabilities such as credits, loans, etc. However, such liabilities do not have a major impact on the stipulation of the amount of maintenance obligation towards the minor child because the fulfilment of maintenance obligation is considered by law to be a preferential claim with respect to protection of minor children as described above.

Furthermore, the law requires courts to take into account whether or not and to what extent the obligated person cares for the minor child.

The judicial practice generally applies the opinion that for children in tender age, the maintenance obligation of the parent who personally cares for such child is completely compensated for by such personal care. For that reason, courts do not impose maintenance duty on the parent to whose care the child has been given.

RESULTS AND DISCUSSION

The actual world situation: The problem area of maintenance also involves the question of so-called advance alimony which has been subject of long-term discussion. Advance alimony is not yet regulated in the Czech Republic.

For the sake of comparison, we will devote ourselves to several countries where advance or substitute maintenance is provided. Countries that regulate advance maintenance include Hungary, Germany, Austria, Switzerland, Denmark, Belgium and France.

Most of them delimit the period of non-payment of maintenance by the obligated person, for which such advance or substitute maintenance is provided. In Austria, Germany and Switzerland, precedent compliance with the maintenance payment obligation is not monitored.

Belgium: Belgian law determines parent's education, care and general maintenance duty, involving also the problem of maintenance payment. The basic framework of maintenance duty can be found in Article 203 Section 1, Civil Code (Code Civil)-1/. Available in French wording under www.droitbelge.be/codes.asp#civ.

"Father and mother are obliged to participate in the care for, maintenance, surveillance, education and upbringing of the child, adequately to their possibilities."

This primarily means obligation to provide upbringing, care and education. However, in the event that this cannot be fulfilled, this obligation can be compensated for by funds provided by the parent. Parent's material possibilities under civil code, specifically Article 203, Section 2, involve their income, property and all other benefits and funds that secure their children's standard of living.

The problem area of advance maintenance is regulated, especially in Act from May 12, 2014, amending Act dated February 21, 2013, on Maintenance Claims Assertion Service whose purpose is to ensure efficient assertion of maintenance claims.

Concretely, in Belgium, advance maintenance is paid out upon complying with the following 4 conditions:

- Maintenance claim creditor must be resident in Belgium
- Maintenance has not been paid completely or partially twice in the course of the latest twelve months prior to filing application
- Amount of maintenance must be determined by resolution of execution court or by public deed
- Net monthly income in the year under consideration must not exceed € 1,800 (€ 66 are added for every following child)

Under these conditions, the government will pay advance maintenance for a period of maximum 6 months with possible recurrence on condition that the payment conditions are still adhered to. If the child in question is handicapped, the amount of advance maintenance is doubled.

The maintenance claims assertion service provides the payment and at the same time asserts this claim from the defaulting parent. This service is entitled to assert both existing and future claims. Access to this service is free of charge. In the event that the service succeeds in recovering the entire amount of a claim, it is entitled to 5% of the amount recovered from the debtor. If the full amount of maintenance cannot be recovered, the 5% are not subtracted.

France: The French legal system regulates the problem of maintenance mainly in the civil code (Code Civil) and in Act on Social Security (Code de la securite sociale).

In original wording available under: http://www.legifrance.gouv.fr/affichCode.do;jsessionid=8604388589DD093358BDA2689073C049.tpdila13v_1?cidTexte=LEGITEXT000006070721&dateTexte=20150528 (Legifrance, 2017a).

In original wording available under: http://www.legifrance.gouv.fr/affichCode.do;jsessionid=3D755422D92FB5E529BA5F738C43B6F0.tpdila13v_1?idSectionTA=LEGISCTA000006156165&cidTexte=LEGITEXT000006073189&dateTexte=20150528 (Legifrance, 2017b).

Based on Article 371-2, Civil Code, parents are obliged to participate in securing and educating the children even in case they do not live in one household with the child. The share should be derived from the parent's possibilities and from the child's needs. Such a support lasts until the child has become financially independent, adult and able to pay its own living, minimally until the age of 20.

Service-Public.fr: Pension alimentaire: fixation et versement, available under: <http://vosdroits.service-public.fr/particuliers/F991.xhtml> (Service Public, 2017).

The amount of maintenance is always fixed by the court and as mentioned above, it should be derived from the parent's possibilities and the child's needs. The determination of maintenance is thus based on an individual assessment of every case.

Advance maintenance is not defined in France but there is an allocation for family support (allocation de soutien familial). Article L 523-1, Social Security Code, specifies the conditions for obtaining this allocation: Title to allocation for family support pertains to:

- Every child whose father, mother or both father and mother have died
- A child whose father has not been legally determined
- A child whose father, mother or both father and mother are unable to or avoid paying maintenance fixed by the court

Such an allocation can thus be considered an advance payment for maintenance claims. Based on Article L581-2, this is usually the case when one of the parents fails to comply with the maintenance obligation for a period of minimum 2 months. The allocation must have the form of an advance payment fixed by the court and the court resolution must be executable for the payment of the relevant amounts. In the event that maintenance is paid at least partially, the allocation amount is reduced by such a portion that the obligated parent has paid.

Ministere des Affaires sociales, de la Sante et des Droits des femmes: Que faire si ma pension alimentaire ne m'est pas versee ou pas totalement versee, available under: <http://femmes.gouv.fr/que-faire-si-ma-pension-alimentaire-ne-mest-pas-versee-ou-pas-totalement-versee/> (MDF, 2017).

These allowances are paid out by an authority responsible for family allowance payments (Organisme debiteurs de prestations familiales), especially, the French Social Security Administration (Caisse d'allocations familiales). Except for certain exemptions, the amounts paid out as advance maintenance are asserted including additional costs of procedure

The Czech government is working to introduce advance maintenance whereas mothers or fathers parenting children will be sent maintenance onto their bank account if the other parent fails to pay maintenance fixed by the court. The expected legal regulation foresees that maintenance would be then asserted by the government from the so-called defaulters. The related expenses are estimated to amount to almost 1 bln. Czech crowns.

The topic of advance maintenance has not been legally regulated so far because the draft law could not be carried through so far. The most powerful argument of its

opponents remains the expected unenforceability of claims from defaulters and inadequate load of the state budget.

CONCLUSION

The problem area indicated in the text above comprises a number of other disputable questions. Predominately, it is the question of determining a minimum maintenance amount for a minor child. No provision dedicated to this regulation can be found in the civil code of the Czech Republic.

The amount of monthly maintenance varies from CZK 1,000 to CZK 5,000. Even resolutions imposing the obligated person to pay monthly maintenance charges amounting to CZK 10,000 or more are not exceptional. Since the amount of maintenance is derived from the possibilities and abilities of the obligated parent, courts arrive at different conclusions. Although, the law stipulates that a minor child is entitled to maintenance, no legal regulation stipulates any specific minimum maintenance amount per minor child.

Therefore, in certain cases, resolutions are made, imposing only a minimal amount of maintenance on an obligated parent with reference to the provisions of civil code concerning the maintenance duty of an obligated parent. In this regard, in our view the law protects minor children insufficiently, especially, considering the fact that costs of subsistence, clothing or hygienic needs mainly of small children are considerable (Adema, 2012; Fagnani, 2012). Therefore, as the law stipulates no minimum maintenance amounts, this maintenance duty is transferred to the parent having the child in his custody.

The absence of legal regulation regarding minimum amounts of maintenance for minor children, reflecting the needs adequate to their age, causes uncertainty both for the parent having the child in his custody and for the parent obligated to provide maintenance.

Another question that is currently coming to the foreground, especially for parents with a minor child in their custody is the question of raising maintenance charges with regards to the increasing needs of the child. It is no secret in legal environment that, due to the trend fostering alternating custody in the recent decade, parents having the child in their custody show little proactive approach in filing requests for increase of maintenance for minor children. Obviously, this is due to their concerns of counter-requests raised by the other parent, involving alternating custody. This matter is a frequent complication of court proceedings and these requests are filed as revenge to the other parent who

dared file a request for an increase of maintenance. As the person entitled to file a request for an increase of maintenance is the parent in charge of custody, it is obvious that also in this case the legal regulation should foresee an increase of maintenance with regards to the children's age and should not leave both children and parents on thin ice which only complicates the situation in divorced families over time. The theory of law says that law should be predictable. In our opinion, the current trend in family law is unpredictable both for parents and for the actual judges. In their further research, the researcher will focus on the problem area outlined in the discussion and conclusion of the present study.

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