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LEGAL CONSEQUENCES OF VIOLATION OF A CHILD SUPPORT AGREEMENT

ABSTRACT

The article offers a comprehensive approach to determining the legal consequences of violating the child support agreement. Termination of the contract is a necessary condition for the exercise of the right to apply to the court with a statement or claim for the collection of alimony and additional expenses. Therefore, it is expedient for the SC of Ukraine to provide for the right to unilaterally withdraw from the contract in the event of a delay in the performance of the obligation, to define in the contract the meaning of the concept of "substantial breach of contract - delay within a certain period of time", which may be grounds for terminating the contract.

The Civil Code of Ukraine provides for the right to collect a penalty (penalty) only if the arrears arise due to the fault of the person who is obliged to pay alimony. The principle of "the best interests of the child" dictates the need to extend these provisions to cases of late payment of additional expenses for the child. It is also important to provide a penalty for late fulfillment of the obligation to maintain in kind. Before making the appropriate additions to the SC of Ukraine, it is advisable to provide a penalty clause in the contract. In order to improve the legal regulation, it is necessary to provide a condition for the application of the general rule for determining the amount of the penalty in accordance with Part 1 of Art. 196 of the Civil Code of Ukraine, unless otherwise stipulated by the contract.

The child may also have the right to compensation for damages and (or) moral damage. In order to avoid future disputes, it is advisable in the contract to provide for the obligation to compensate moral damages in the event of a delay in the maintenance obligation and the amount of compensation for moral damages.

Keywords: maintenance, alimony, additional expenses for the child, agreement on child maintenance, penalty, interest, damages, moral damage

JEL Classification: K12, M10, O29

INTRODUCTION

According to the child maintenance agreement, one of the parents undertakes to pay alimony and (or) participate in maintenance in kind or pay additional expenses for the child. The proposed contractual structure covers all types of child maintenance provided for by the Civil Code of Ukraine, including payment of alimony (money that provides the basic needs of a child), additional expenses (money, the need for which is due to special circumstances), and maintenance in kind. The Civil Code of Ukraine provides separate provisions only regarding the legal consequences of the delay in the execution of the contract on the payment of alimony. The article offers a comprehensive approach to determining the legal consequences of violating the contractual obligation to maintain a child.

LITERATURE REVIEW

The analysis of the legal literature shows that scientists devote a lot of attention to the study of problems related to the violation of the obligation to pay alimony. Such scientists as Z.V. Romovska [8, p. 16], I.V. Zhilinkova [21, p. 613], L.V. Krasnytska [5, p. 543] studied the issue of alimony arrears collection and penalties (penalties) for late payment

of alimony. In particular, various approaches were analyzed regarding the procedure for calculating the amount of a penalty (penalty) for late payment of alimony, the issue of applying the statute of limitations to demands for the collection of a penalty (penalty) for late payment of alimony, the issue of determining the moment from which the time of late payment of alimony should be calculated, etc. The subject of research is O.V. Mykhailiuk became problematic issues regarding exemption from payment of alimony arrears [9, p. 117]. Dispersal of O.V. Mykhailiuk emphasized the peculiarities of responsibility in the case of concluding an agreement on the payment of alimony for a child, an agreement on the participation of one of the parents for the children in additional expenses [2, p. 62]. The legal nature of the forced collection of child support became the subject of a scientific study by M.I. Bayrachnoi [20, p. 138]. O.S. Prostibozhenko carried out a comparative analysis of the collection of alimony for a child in court and on the basis of an alimony contract, studied the benefits provided by national legislation for the collection of alimony based on a court decision, and coercive measures imposed on the payer of alimony for non-compliance with a court decision, as well as analyzed the legal consequences of violation alimony payer of the agreement on their payment [1, p. 45-46]. Regarding the legal consequences of non-fulfillment of the obligation to pay additional expenses for the child and provide support in kind, they are poorly researched in the legal literature.

Cases on the collection of alimony are one of the most common categories in court practice. In particular, the subject of the study was court cases on the procedure for calculating fines [6, 7], taking into account guilt when collecting fines (fines) [10], grounds for reducing the amount of alimony [11, 12], forced fulfillment of the obligation in kind to pay alimony [18, 19], the question of the possibility of collecting alimony according to the executive inscription of a notary [27].

AIMS AND OBJECTIVES

The purpose of the article is to study the legal consequences of improper execution of a child support agreement, taking into account the fact that a child support agreement is a family law and civil law institution. In order to achieve the goal, it is necessary to investigate the legal consequences of non-fulfillment of the obligation to pay alimony, additional expenses for the child and the obligation to maintain the child in kind, to determine the specifics of contractual liability, to determine the possibility of public legal consequences in case of violation of maintenance obligations child under contract.

METHODS

In the process of researching the legal consequences of the violation of the child maintenance agreement, a general scientific method of research was used - analysis, in particular, analysis of family and civil legislation, legal analysis of judicial practice regarding consideration of relevant disputes, legal analysis of scientific works on this issue. The methods of synthesis, inductive and deductive analysis, and critical analysis were used to combine various sources and data and create a new understanding of the topic.

RESULTS

According to Art. 8 of the Civil Code of Ukraine, «if personal non-property and property relations between spouses, parents, and children, other family members and relatives are not regulated by this Code, they are regulated by the relevant norms of the Civil Code of Ukraine, if this does not contradict the essence of family relations». General provisions on the legal consequences of breach of obligations are provided for in the Central Committee of Ukraine. In case of violation of the obligation, «the legal consequences established by the contract or the law occur, in particular: 1) termination of the obligation due to unilateral refusal of the obligation, if it is established by the contract or the law, or termination of the contract; 2) changing the terms of the obligation; 3) payment of penalty; 4) compensation for damages and moral damage» (Part 1 of Article 611 of the Civil Code of Ukraine) [28].

The need to terminate the child support agreement is due to the fact that this is a necessary condition for the exercise of the right to apply to the court with a statement or claim for the collection of alimony and additional expenses. As O.S. Prostibozhenko rightly points out, one of the biggest complications for the recipient of alimony related to the conclusion of an alimony payment agreement is limited opportunities for legal protection. As long as the alimony contract is not terminated or declared invalid, it is impossible to collect alimony in court, as there will be a double collection of alimony - according to the contract and according to the court decision. The debt collector is forced to go to court every time the payer of alimony violates his obligation or asks the court to terminate such an agreement in order to collect alimony in a general manner in the future [1, p. 45-46].

It is worth emphasizing the fact that the majority of family legal relations arise not on the basis of a contract, but on the basis of other legal facts provided for by the Civil Code of Ukraine (marriage, consanguinity, adoption, etc.). The family agreement regulating such relations is aimed exclusively at determining the procedure for fulfilling family obligations provided for by law ("legal obligation"). Violation of such an agreement is simultaneously a failure to fulfill a "legal obligation", the legal consequences of non-fulfillment or improper fulfillment of which are enshrined in the Criminal Code of Ukraine in the form of imperative norms. Contractual freedom in the choice of liability measures for non-fulfillment of such obligations is significantly limited. Measures of responsibility, established by the imperative provisions of family legislation, cannot be changed, limited, excluded, etc., but can be supplemented by the agreement of the parties [2, p. 62].

Therefore, the conclusion of an agreement on child maintenance is aimed at the voluntary fulfillment of the obligation to maintain a child, which is provided for by the Criminal Code of Ukraine. At the same time, in case of improper performance of the contract, more effective means of protection are to apply to the court with a demand for payment of alimony, and additional expenses for the child. Therefore, there is a need to determine additional grounds for terminating the child support agreement.

In Part 2 of Art. 651 of the Civil Code of Ukraine stipulates that the contract can be changed or terminated by a court decision at the request of one of the parties in the event of a significant breach of the contract by the other party and in other cases established by the contract or the law. Such a violation by a party of the contract is significant when as a result of the damage caused by this, the other party is largely deprived of what it was counting on when concluding the contract [28]. In the child support agreement, it is advisable to provide that the parties define the concept of "significant breach of the agreement", in particular, the delay in fulfilling obligations within a certain period of time.

Unilateral waiver of the obligation or unilateral change of its terms is not allowed unless otherwise established by the contract or law (Part 1 of Article 525 of the Civil Code of Ukraine). In the event of a violation of an obligation by one party, the other party has the right to partially or fully waive the obligation, if this is established by the contract or the law (Part 1, 2 of Article 615 of the Civil Code of Ukraine). The withdrawal from the contract is made in the same form as the contract (Part 1 of Article 654 of the Civil Code of Ukraine). Therefore, the refusal of the child support agreement is made in writing and is subject to notarization. The contract is considered terminated from the moment of receipt of the notice of refusal. At the same time, there is no need to go to court. In the SC of Ukraine, it is expedient to provide for the right to unilaterally waive obligations in the event of a delay in the fulfillment of an obligation under a child maintenance agreement.

An important way to protect children is to levy a penalty (penalty) for late payment of alimony. This method of protection is simultaneously a measure of family legal responsibility for the payer of alimony. The SC of Ukraine considers a penalty only in the form of a penalty, that is, a penalty calculated as a percentage of the sum of the untimely fulfilled monetary obligation for each day of delay in performance. The SC of Ukraine considers penalty and interest as synonymous terms. According to Part 1 of Art. 196 of the Civil Code of Ukraine, in the event of arrears arising from the fault of a person who is obliged to pay alimony by a court decision or by agreement between the parents, the recipient of alimony has the right to collect a penalty (penalty) in the amount of one percent of the amount of unpaid alimony for each day of delay from the day arrears in the payment of alimony until the day of their full repayment or until the day of the court's decision on the collection of a penalty, but not more than 100 percent of the arrears [28]. Therefore, according to this provision, the payer of alimony is obliged to pay a penalty based on the requirement of the law. Part 1 of Art. 196 of the Civil Code of Ukraine is set forth in this version in accordance with the Law "On Amendments to Certain Legislative Acts of Ukraine Regarding Strengthening the Protection of the Child's Right to Adequate Support by Improving the Procedure for Collecting Alimony"[3]. In the previous version, the obligation to pay a penalty arose only if the obligation to pay alimony arose as a result of a court decision. Accordingly, in judicial practice, the position was widespread if alimony is paid not by a court decision, but in accordance with the contract concluded between the parents, provided for in Art. 196 of the Criminal Code of Ukraine, the sanction is applied if there is a direct indication of this in the contract [4].

The imperative wording of Part 1 of Art. 196 of the Criminal Code of Ukraine regarding the amount of the penalty (penalty). At the same time, it is not an obstacle to provide for a larger penalty in the contract. Part 2 of Article 151 of the Civil Code of Ukraine stipulates that the amount of the penalty established by law may be increased in the contract if such an increase is not prohibited by law. In order to improve the legal regulation, it is expedient to provide a condition for the application of the general rule for determining the penalty according to Part 1 of Art. 196 of the Criminal Code of Ukraine - unless otherwise stipulated by the contract. In the legal literature, there are also proposals for reducing the amount of the legal penalty, in particular, L.V. Krasyska proposes to reduce the penalty (penalty) for late payment of alimony to 0.5 percent of the amount of unpaid alimony for each day of delay [5, p. 543].

The Grand Chamber of the Supreme Court, in its ruling dated April 25, 2018, clarified the procedure for calculating the penalty and determined the formula for such calculation. In particular, when charging a penalty in the amount of 1 percent

of the amount of unpaid alimony for each day of delay, the total amount is calculated taking into account the number of days of delay. Since alimony is paid every month, the deadline for fulfilling the maintenance obligation will be different, accordingly, the number of days in arrears depends on the number of days in the month. The proposed formula provides for the summation of the arrears accrued for each month of arrears, and the monthly arrears are calculated taking into account the number of days of arrears in the corresponding month [6]. In the resolution of the Grand Chamber of the Supreme Court dated April 3, 2019, a clearer formula for calculating the monthly arrears was proposed [7]. In particular, the amount of the penalty for the monthly payment is calculated as follows: the arrears for the payment of alimony for a specific month (monthly payment) must be multiplied by the number of days of arrears, which are counted from the first day of the month following the month in which the alimony was supposed to be paid, but was not paid, until the day of their actual payment (at the same time, the day of fulfillment of the obligation is not included in the due date) and multiply by 1 percent. That is, the formula is as follows: arrears per month x number of days of arrears x 1%. According to this rule, interest is calculated for each overdue monthly payment. The total amount of the penalty is the sum of the amounts of the penalty calculated for each monthly (periodic) payment.

It should also be noted that, in contrast to the penalty in civil law, which is charged regardless of the fault of the payer, the Criminal Code of Ukraine provides that only in the event of arrears arising from the fault of the person who is obliged to pay alimony, the recipient of alimony has the right to collect a penalty (penalty) (Part 1 of Article 196 of the Criminal Code of Ukraine). On this occasion, Z.V. Romovska notes that the rule of part 1 of Art. 625 of the Civil Code of Ukraine that the defendant is not released from responsibility for non-fulfillment of a monetary obligation in case of impossibility of its fulfillment, does not apply to this case. At the same time, the presumption of guilt of the person who violated the obligation, which is provided for in Art. 614 of the Civil Code of Ukraine, should be applied strictly in this case. This means that the court can refuse a claim for the collection of a fine only when the payer himself proves his absence of guilt, in other words, proves the impossibility of fulfilling the court's decision. Failure of the defendant to provide adequate evidence will not be an obstacle to the operation of the presumption of his guilt [8, p. 16].

Mikhaliuk O.V. rightly notes that if the debt arose from circumstances beyond the control of the payer (illness, accountant's mistake, the actual impossibility of making payments due to other valid reasons), interest cannot be charged on it. At the same time, the form of the payer's fault (intention or carelessness) does not matter to the court [9, p. 117].

It is worth noting that the legal position of the Supreme Court has already been formed on this matter. Thus, on December 14, 2020, the Supreme Court as part of the Joint Chamber of the Civil Court of Cassation [10] rejected the cassation appeal, stating that if the payer of alimony proves that he has taken all the measures dependent on him to properly fulfill the obligation, he is innocent of the debt and there are no grounds for charging a penalty (penalty).

The penalty is not paid if the alimony payer is a minor (Part 3 of Article 196 of the Civil Code of Ukraine).

According to Part 2 of Art. 551 of the Civil Code of Ukraine, the parties may agree to reduce the amount of the fine established by the act of civil legislation, except for cases provided for by law. This norm is general and cannot be used in the presence of Art. 196 of the Criminal Code of Ukraine, which contains special provisions on the conditions for changing the penalty amount. In particular, in Part 2 of Art. 196 of the Criminal Code of Ukraine refers only to the fact that the amount of the penalty can be reduced by the court, taking into account the financial and family status of the payer of alimony. The analysis of this norm provides grounds for the conclusion that the grounds for changing the amount of alimony are both a change in material and a change in family status as an independent basis for reducing the amount of alimony. There are different positions in judicial practice: a change in marital status in connection with the birth of a child in a second marriage is the basis for changing the amount of alimony [11], the fact that the payer of alimony has a child in another marriage, without proper and admissible evidence of the deterioration of his material condition, is not an unconditional basis for reducing the amount of alimony [12]. It seems that the last position is justified since the maintenance involves financial support, therefore it is related to the financial condition of the payer.

The Civil Code of Ukraine also provides that, taking into account the financial and family status of the alimony payer, the court may postpone or postpone the payment of alimony debt (part 1 of Article 197 of the Civil Code of Ukraine). At the request of the payer of alimony, the court may fully or partially exempt him from paying alimony arrears, if it arose in connection with his serious illness or other circumstance of significant importance (Part 2 of Article 197 of the Civil Code of Ukraine).

One of the controversial issues in the practice of applying the provisions of Art. 196 of the Criminal Code of Ukraine, there is a question about the application of the statute of limitations to demands for the collection of a penalty (penalty) for late alimony payments. Romovska Z.V. notes that the statute of limitations for the demand for penalty collection in accordance with Art. 20 of the Criminal Code does not apply [13, p. 45]. This position is justified since the collection of a penalty for

late payment of alimony is a claim arising from family legal relations, which is not subject to the statute of limitations in accordance with Art. 20 SC of Ukraine.

It is worth noting that if alimony arrears arose before January 1, 2004, it is impossible to collect a penalty from the amount of such arrears, since the then-current Code of Laws on Marriage and Family did not provide for the possibility of applying such a sanction as the collection of a penalty in family law.

The principle of "the best interests of the child" determines the expediency of spreading the provisions of Part 1 of Art. 196 of the Criminal Code of Ukraine on a penalty (penalty) in cases of late payment of additional expenses for a child and a penalty (fine) for a delay in the fulfillment of the obligation to support in kind. Before making the appropriate additions to the SC of Ukraine, it is advisable to provide a penalty clause in the contract.

According to Part 2 of Art. 625 of the Civil Code of Ukraine [28], "the debtor who has overdue the payment of a monetary obligation, at the request of the creditor, is obliged to pay the amount of the debt, taking into account the established inflation index for the entire time of the overdue period, as well as three percent per annum of the overdue amount, unless another amount of interest is established by the contract" or by law. The effect of the provisions of Article 625 of the Civil Code of Ukraine applies to all monetary legal relations, which are obligations expressed in monetary units (Articles 524, 533-535, 625 of the Civil Code of Ukraine) [14]. The effect of Art. 626 of the Civil Code of Ukraine applies to cases of late fulfillment of obligations regarding the payment of alimony payments and additional expenses for the child.

According to Part 2 of Art. 184 of the Civil Code of Ukraine, the amount of alimony determined by the court or by agreement between the parents in a fixed monetary amount is subject to annual indexation in accordance with the law unless the payer and the recipient of alimony have agreed otherwise. At the request of the recipient of alimony, indexation can be carried out by the court for another period.

The charging of 3% per annum on the amount of the debt is a special measure of the debtor's responsibility for overdue monetary obligations as a way of protecting the monetary interest and consists of reimbursing the creditor's monetary losses from the devaluation of monetary funds as a result of inflation and received compensation for improper fulfillment of obligations [15]. 3% per annum are independent compensatory rather than penalty payments [16].

The SC of Ukraine provides provisions on the legal consequences of late payment of additional expenses for the child. In particular, in accordance with Part 4 of Art. 196 of the Civil Code of Ukraine, in the event of a delay "in the payment of additional expenses for a child due to the fault of the payer, such payer is obliged, at the request of the recipient of additional expenses, to pay the amount of debt for additional expenses, taking into account the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount" [28]. This provision is duplicated in Part 2 of Article 625 of the Civil Code of Ukraine.

The Criminal Code of Ukraine does not provide for the legal consequences of a delay in the fulfillment of the obligation to provide maintenance in kind. Art. 625 of the Civil Code of Ukraine does not apply to obligations that are subject to fulfillment in kind [17]. Therefore, it is important for the SC of Ukraine to provide a provision for the payment of a penalty (fine) in the event of a violation of the obligation to provide maintenance in kind.

Payment (handover) of the penalty does not release the debtor from fulfilling his obligation in kind and does not deprive the creditor of the right to compensation for damages caused by non-fulfillment or improper fulfillment of the obligation (parts 1, 2 of article 552 of the Civil Code of Ukraine).

Forced performance of an obligation in kind is used in binding legal relations in cases where a person is obliged to perform certain active actions towards the plaintiff but refuses or avoids the performance of this obligation [18]. This method applies to cases of non-fulfillment of the obligation to pay funds, in accordance with the terms of the contract [19]. The Supreme Court noted that in the case when a person, being in a binding legal relationship, is obliged to perform certain actions towards the plaintiff, but refuses to fulfill this duty or avoids it (as in disputed legal relations), the plaintiff's right is subject to protection by the court on the basis of Clause 5 Part 2 of Art. 16 of the Civil Code of Ukraine through forced performance of an obligation in kind. That is, if the terms of the contract provide for the obligation of one party to pay funds to the benefit of the other in connection with the occurrence of a certain event (legal fact), then failure to fulfill such an obligation by the debtor is grounds to apply to the court with a claim for compulsory collection of such funds in favor of the relevant creditor.

In legal doctrine, the question of attributing forced collection of alimony in court to measures of family responsibility remains problematic. One should agree with M. I. Bayrachna, who notes that the collection of alimony in a compulsory manner is not a responsibility but is the fulfillment of the main duty in a compulsory manner [20, p. 138]. Fulfilling the obligation to pay overdue alimony is not a measure of responsibility, as it is not an additional obligation for the debtor.

According to Part 1 of Art. 624 of the Civil Code of Ukraine, if a penalty is imposed for the violation of an obligation, it is subject to recovery in full, regardless of compensation for damages. Taking into account parts 2, and 3 of Art. 624 of the Civil Code of Ukraine, the child support agreement may establish the obligation to compensate for damages only to the extent that they are not covered by a penalty. Damages may arise as a result of the actions of the alimony recipient himself, which he is forced to do in order to provide for the child during the period of non-payment of alimony payments. The recipient of alimony can sell his property on unfavorable terms, and enter into a loan or credit agreement. Zhilinkova I.V. also notes that it is expedient to determine the forms of responsibility for its violation in the contract on the payment of alimony at its own discretion. At the same time, they must adhere to the principles of justice, good faith, and reasonableness (Part 9 of Article 7 of the Civil Code of Ukraine) [21, 613].

It is also important to analyze the issue of compensation for moral damages in the event of a delay in the child support agreement.

Moral damage consists of mental suffering, which an individual suffers in connection with illegal behavior towards himself, his family members, or close relatives (paragraph 2 part 2 of article 23 of the Civil Code of Ukraine) [28]. Avoiding the obligation to support a child should be considered illegal behavior.

Based on the provisions of Art. 16, 23 of the Civil Code of Ukraine and the content of the right to compensation for moral damage in general as a way of protecting subjective civil law, compensation for moral damage must occur in any case of its occurrence - the right to compensation for moral (non-property) damage arises as a result of a violation of a person's right regardless of from the presence of special norms of civil legislation. The panel of judges believes that compensation for moral damage for violation of a civil law contract can be collected on the basis of Art. 23 of the Civil Code of Ukraine even in those cases when the terms of the contract do not provide for the right to compensation for moral damage and do not contain such instructions of the norms of the Civil Code of Ukraine or other laws regulating the relevant type of contract [22].

In order to avoid disputes in the future, it is advisable to provide in the contract for an illegal action that can cause moral damage, in particular, a delay in fulfilling obligations to provide maintenance for a certain period of time or in a certain amount, as well as the amount of compensation for moral damage.

According to Part 2 of Art. 189 of the Civil Code of Ukraine, if one of the parents fails to fulfill his obligation under the contract, alimony may be collected from him on the basis of a notary's executive inscription. Collection under an executive writ is carried out in accordance with the procedure established by the Law "On Executive Proceedings" (Article 90 of the Law "On Notaries") [23]. An executive inscription can be presented for enforcement within three years from the moment of its execution (Article 91 of the Law on Notaries). Executive writings of notaries are an executive document (Part 1, Article 3 of the Law on Executive Proceedings). Part 2 of Art. 189 of the Civil Code of Ukraine, the procedure for collecting alimony according to the notary's executive inscription cannot be an obstacle to applying to the court for the protection of violated rights. According to Clause 4.16 of the Procedure for Notarial Acts by Notaries of Ukraine [24], when certifying an agreement on the payment of child support by a notary public, the content of Clause 2 of Art. 189 of the Civil Code of Ukraine with a simultaneous indication of this in the text of the contract in terms of the possibility of collecting alimony in an undisputed manner on the basis of an executive writ in the event that one of the parents fails to fulfill his obligation under the contract. At the same time, it seems that the absence of a condition in the contract about the possibility of collecting alimony on the basis of an executive order cannot be an obstacle to collecting alimony in this way. This right arises on the basis of the provisions of Part 2 of Art. 189 of the Criminal Code of Ukraine.

In Art. 87 of the Civil Code "On Notary" [25] it is determined that the notary executes executive inscriptions if the submitted documents confirm the indisputability of the debt or other liability of the debtor to the debt collector and on the condition that no more than three years have passed since the date of the right of claim (Article 88 of the Civil Code "About the notary"). The requirement of indisputability refers to the amount owed. It is worth following the formula for determining the amount of the penalty. It is also important to take into account the conditions of execution of the writ of execution. In accordance with item 1 of the List of documents for which debt collection is carried out in an undisputed manner on the basis of executive inscriptions of notaries [26], to obtain an executive inscription for notarized contracts that provide for the payment of sums of money, the transfer or return of property, as well as the right to apply for collection for the pledged property, the following shall be submitted: a) the original notarized contract(s), b) documents confirming the indisputability of the debtor's indebtedness and establishing the delay in the fulfillment of the obligation. The document that can confirm the indisputability of the debt is the notification sent to the debtor about the elimination of the violation (written notification about the execution of the writ of execution).

In judicial practice, it is also noted that if, at the time of execution of the writ of execution, there was a dispute in the courts regarding the amount of alimony arrears and the agreement between the parents on the residence, upbringing and financial support of children (alimony and additional expenses), on the basis of which the contested writ of execution was executed inscription, this indicates that the debtor's debt is not indisputable. By the decision of the district court, the claim for the recognition of the executive inscription of the notary executed on the contract concluded between the parents was refused. The decision of the court of first instance was annulled by the decision of the court of appeal. A new decision was made, which satisfied the claim. The decision is motivated by the fact that the writ of execution was made not only during the period of litigation between the parties regarding the amount of alimony, and alimony arrears but also a claim for termination of the contract itself, which was an obstacle to the notary performing a notarial act and the plaintiff's obligation to perform extrajudicially the terms of the contested deed. The CCS of the Supreme Court left the defendant's cassation appeal unsatisfied, and the decision of the appellate court remained unchanged [27].

The SC of Ukraine also provides for other legal consequences of the delay in fulfilling the contractual obligation to maintain a child:

1. Independent resolution of the issue of leaving Ukraine for parents who live with a child in the presence of child support arrears, the total amount of which exceeds the sum of the relevant payments for four months (Part 5 of Article 157 of the Civil Code of Ukraine).
2. Limitation of the right to manage the child's property, in particular, if the parent who lives separately from the child for at least six months does not take part in raising and supporting the child or if his place of residence is unknown, deeds regarding vehicles and immovable property of the minor of a child, can be committed without his consent (Part 6 of Article 177 of the Criminal Code of Ukraine).
3. Exemption of a daughter or son from the obligation to support the mother or father. The daughter and son are released by the court from the obligation to support the mother and father and from the obligation to participate in additional expenses if it is established that the mother and father did not pay alimony for the maintenance of the child, which led to the emergence of debts, the total amount of which exceeds the amount of the corresponding payments for three years, and such debt is unpaid at the time of the court's decision to determine the amount of alimony for parents (Part 1 of Article 204 of the Civil Code of Ukraine).

According to Part 5. Article 9 of the Law on Enforcement Proceedings, information about the debtor is entered into the Unified Register of debtors (except for information about debtors, which are state bodies, local self-government bodies, as well as debtors who do not have debts under an executive document on the collection of periodic payments for more than three months, and judgment debtors of a non-property nature) at the same time as issuing a resolution on the opening of executive proceedings.

In paragraph 9 of Art. 71 of the Administrative Law "On Enforcement Proceedings", it is specified that if there is arrears for the payment of alimony, the total amount of which exceeds the sum of the relevant payments for four months, the state executor shall issue reasoned resolutions: 1) on establishing a temporary restriction of the debtor's right to travel outside Ukraine - until repayment of alimony arrears in full; 2) on establishing a temporary restriction of the debtor's right to drive vehicles - until repayment of alimony arrears in full; 3) on the establishment of a temporary restriction of the debtor's right to use firearms, hunting, pneumatic and cooled weapons, devices of domestic production for firing cartridges, equipped with rubber or metal projectiles of similar properties of non-lethal action, - until the repayment of arrears for the payment of alimony in full (action of such the resolution is suspended for the period until the termination or cancellation of martial law in Ukraine in accordance with clause 102 of Chapter XIII "Final and Transitional Provisions" of the Law "On Executive Proceedings"; 4) on establishing a temporary restriction of the debtor's right to hunt - until repayment of alimony arrears in full volumes These resolutions are possible only if there is a court decision on the payment of alimony. Unfortunately, in case of violation of the child support agreement, these measures are not applied. The conditions for the application of these restrictions are an increase in the amount of debt, which is calculated from the date of presentation of the executive document to enforcement (Part 4 of Article 11 of the Law on Executive Proceedings).

In the case of the collection of alimony on the basis of an executive inscription on the alimony contract, these conditions cannot be observed. It is appropriate to supplement Part 4 of Article 11 of the Law on Enforcement Proceedings with the provision that in the case of a maintenance agreement, the condition for applying restrictions is the presence of debt under the child maintenance agreement, the total amount of which exceeds the sum of the corresponding payments for four months.

DISCUSSION

According to Art. 196 of the Civil Code of Ukraine, in case of indebtedness of a person who is obliged to pay alimony according to the agreement between the parents, the recipient of alimony has the right to collect a penalty (penalty). In case of delay in payment of additional expenses for the child, the payer is obliged to pay the amount of the debt, taking into account the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount. The Criminal Code of Ukraine does not contain special norms regarding responsibility in case of violation of the obligation to maintain a child in kind. This legislative approach is imperfect.

The conclusion of a child support agreement is one of the ways to fulfill the parents' obligation to support their child, namely to provide for their basic needs (by paying alimony or fulfilling the obligation in kind) and additional needs. Therefore, in order to implement the principle of "the best interests of the child", it is necessary to determine the general legal consequences of the violation of the obligation to pay alimony, the fulfillment of obligations in kind, and additional costs. The author substantiates the expediency of determining the following requirements for the debtor in case of delay in fulfilling the obligation under the child support agreement:

- pay overdue alimony payments, pay additional expenses for the child, provide maintenance in kind, in accordance with the child maintenance agreement;
- pay a penalty in the amount of one percent of the amount of unpaid alimony, additional expenses for the child, if a larger amount is not provided for in the contract, or a fine in case of delay in the obligation to maintain in kind;
- to reimburse inflationary costs and three percent per annum on the overdue amount, unless another amount is established by the contract (in accordance with Part 1 of Article 625 of the Civil Code of Ukraine);
- compensate for damages and moral damage. It is advisable in the contract to provide for the obligation to compensate non-pecuniary damage in the event of a delay in the maintenance obligation and the amount of non-pecuniary damage compensation.

In the legal literature, it is stated that, provided there is a contractual relationship regarding child maintenance, it is impossible to collect on the basis of a court decision. In case of violation of the child support agreement, the existence of a contractual relationship cannot be an obstacle to applying to the court with a corresponding claim to the court. Therefore, it is important for the SC of Ukraine to provide for the right to unilaterally withdraw from the contract in the event of a delay in the fulfillment of the obligation to support the child.

According to the current version of the Law "On Executive Proceedings", the application by the state executive of the restrictions provided for in clause 9 of Art. 71, is possible only if there is a court decision on the collection of alimony. It is appropriate to supplement Part 4 of Article 11 of the Law on Enforcement Proceedings with the provision that in the case of a maintenance agreement, the condition for applying restrictions is the presence of debt under the child maintenance agreement, the total amount of which exceeds the sum of the corresponding payments for four months.

CONCLUSIONS

For the effective use of a child support agreement, it is important to define the legal consequences of its non-fulfillment both at the legislative and contractual levels.

Implementation of the principle of "the best interests of the child" necessitates the need for general legal consequences of breaching the obligation to pay alimony, fulfillment of obligations in kind, and additional costs, which should be foreseen at the legislative level. The legal consequences of violating the child support agreement cannot be narrower in scope than the legal guarantees provided for in the event of a violation of a court decision on the collection of alimony and additional expenses for the child.

It is advisable to use contractual instruments, in particular the right to unilaterally withdraw from the contract, which will ensure the possibility of exercising the child's right to claim maintenance by a court decision.

It is promising for further studies of the problems of the legal consequences of the violation of the child maintenance agreement to develop proposals regarding additional conditions that the parties could provide for in the relevant agreements. It is also important to study the benefits of using mediation as an alternative way to resolve disputes related to the violation of a child support agreement.

REFERENCES

1. Prostybozhenko, O.S. (2020). Alimentnyi vykonavchyi napys notariusia idei shchodo udoskonalennia natsionalnogo zakonodavstva. *Chasopys tsyvilistyky*, 37, 42-47. <https://hdl.handle.net/11300/17794>
2. Rozhgon, O. V. (2018). Dohovory u simeinomu pravi Ukrainy. Monohrafiia. Kyiv. https://www.academia.edu/42185733/%D0%A0%D0%BE%D0%B7%D0%B3%D0%BE%D0%BD_%D0%9E_%D0%92_%D0%94%D0%BE%D0%B3%D0%BE%D0%B2%D0%BE%D1%80%D0%B8_%D1%83_%D1%81%D1%96%D0%BC%D0%B5%D0%B9%D0%BD%D0%BE%D0%BC%D1%83_%D0%BF%D1%80%D0%B0%D0%B2%D1%96_%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B8_%D0%BC%D0%BE%D0%BD%D0%BE%D0%B3%D1%80%D0%B0%D1%84%D1%96%D1%8F_%D0%9A_%D0%86%D0%BD_%D0%AE%D1%80%D0%B5_2018_301_%D1%81
3. Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo posylennia zakhystu prava dytyny na nalezhne utrymannia shliakhom vdoskonalennia poriadku stiahnennia alimentiv: Zakon Ukrainy vid 17.05.2017 № 2037-VIII. <https://zakon.rada.gov.ua/laws/show/2037-19#n37>
4. Pro zastosuvannia sudamy okremykh norm Simeinoho kodeksu Ukrainy pry rozghliadi sprav shchodo batkivstva, materynstva ta stiahnennia alimentiv: Postanova Plenumu Verkhovnoho Sudu Ukrainy vid 15 travnia 2006 roku. <https://zakon.rada.gov.ua/laws/show/v0003700-06#Text>
5. Krasyt'ska, L.V. (2016). Problemy zdiisnennia ta zakhystu osobystykh ta mainovykh prav batkiv i ditei. Monohrafiia. Kyiv. <http://dspace.univd.edu.ua/xmlui/handle/123456789/2763>
6. Postanova Velykoi Palaty Verkhovnoho sudu vid 25 kvitnia 2018 roku u spravi № 572/1762/15ts/. https://supreme.court.gov.ua/userfiles/media/Oglyad_alimentu.pdf
7. Postanova Velykoi palaty Verkhovnoho Sudu vid 3 kvitnia 2019 roku u spravi № 333/6020/16-ts. https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/2022_prezent/2022_05_20_prezent_Sakara.pdf
8. Romovska, Z. (2013). Snizhnyi kom shtrafiv. *Yurydychna praktyka*, 13, 16.
9. Mykhalniuk, O.V. (2023). Penia za nesplatu alimentiv za dohovorom batkiv pro utrymannia ditei. *Analitychno-porivnialne pravoznavstvo*, 5, 115-119. <https://app-journal.in.ua/wp-content/uploads/2023/05/21.pdf.s.11710>
10. Postanova Verkhovnoho Sudu u skladi Ob'ednanoi palaty Kasatsiinoho tsyvilnogo sudu vid 14 hrudnia 2020 roku u spravi № 661/905/19. https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/Oglyad_KSC_12_20.pdf
11. Postanova Verkhovnoho Sudu vid 14 hrudnia 2022 roku u spravi № 727/1599/22. https://verdictum.ligazakon.net/document/108059370?utm_source=jurliga.ligazakon.ua&utm_medium=news&utm_content=il03&_ga=2.175208930.1717636539.170980381714.00251110.1671357156#_gl=1*pru9lr*_gcl_au*MTY1MDk4NDI0OS4xNzA1OTUzNTA0
12. Postanova VS vid 28 travnia 2021 roku u spravi № 715/2073/20. https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/Oglyad_KTSS_2021.pdf
13. Romovska, Z.V. (2009). Simeinyi kodeks Ukrainy. Naukovo-praktychnyi komentar. Kyiv.
14. Postanova VP VS vid 11.04.2018 roku u spravi №758/1303/15. https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/Dajest_VP_10_2020.pdf
15. Postanova VP VS vid 19.06.2019 roku u spravi №703/2718/16. https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/PREZ_Simonenko.pdf
16. Postanova VP VS vid 27.11.2019 roku u spravi №340/385/17. <https://zakononline.com.ua/court-decisions/show/86241675>
17. Postanova KTSS VS vid 06.03.2019 roku u spravi №757/44680/15. https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/PREZ_Simonenko.pdf
18. Postanova Velykoi palaty Verkhovnoho Sudu vid 14 travnia 2019 roku u spravi № 910/16979/17. https://supreme.court.gov.ua/userfiles/media/dajdzhest_VP_za_2019.pdf
19. Postanova Verkhovnoho Sudu vid 19 travnia 2020 roku u spravi №910/9167/19. <https://reyestr.court.gov.ua/Review/8940223220>
20. Bairachna, M. I. (2020). Prava ta oboviazky podruzzhzia za Simeinym kodeksom Ukrainy: dys. na zdobuttia naukovoho stupenia doktora filosofii z spetsialnistiu 081 «Pravo» (08 - Pravo). Kharkiv.
21. Zhylinkovoi, I.V. et al. (2008). Simeinyi kodeks Ukrainy. Naukovo-praktychnyi komentar. Kharkiv.
22. Ukhvala KTSS VS vid 13 lystopada 2019 roku u spravi № 216/3521/16-ts. https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/Prezentatsiia_Krat_2021_11_26.pdf
23. Pro vykonavche provadzhennia: Zakon Ukrainy vid 02.06.2016 roku. <https://zakon.rada.gov.ua/laws/show/1404-19#Text>
24. Poriadok vchynennia notarialnykh dii notariusamy Ukrainy: Nakaz Ministerstva yustyt'sii Ukrainy vid 22.02.2012 roku №296/5/. <https://zakon.rada.gov.ua/laws/show/z0282-12#Text>
25. Pro notariat: Zakon Ukrainy vid 02.09.1993. <https://zakon.rada.gov.ua/laws/show/3425-12#Text>

26. Pro zatverdzhennia pereliku dokumentiv, za yakymy stiahnennia zaborhovanosti provadytsia u bezspirnomu poriadku na pidstavi vykonavchych napysiv notariusiv: Postanova KМУ vid 29 chervnia 1999 № 1172.
<https://zakon.rada.gov.ua/laws/show/1172-99-%D0%BF#Text>
27. Postanova KTS VS vid 11 chervnia 2018 roku u spravi № 756/8118/16-ts.
<https://reyestr.court.gov.ua/Review/74630237>
28. Tsyvilnyi Kodeks Ukrainy: Zakon Ukrainy 435-IV vid 16 sichnia 2003 roku (v red. vid 08.03.2024).
<https://zakon.rada.gov.ua/laws/show/435-15#Tex>

Верес І.

ПРАВОВІ НАСЛІДКИ ПОРУШЕННЯ ДОГОВОРУ ПРО УТРИМАННЯ ДИТИНИ

У статті запропонований комплексний підхід до визначення правових наслідків порушення виконання договору про утримання дитини. Необхідною умовою для реалізації права на звернення до суду із заявою або позовною заявою про стягнення аліментів, додаткових витрат є припинення договору. Тому доцільно в СК України передбачити право на односторонню відмову від договору в разі прострочення виконання зобов'язання, у договорі визначити зміст поняття «істотне порушення договору – прострочення протягом певного строку», яке може бути підставою для розірвання договору.

У СК України передбачене право на стягнення неустойки (пені) лише в разі виникнення заборгованості з вини особи, яка зобов'язана сплачувати аліменти. Принцип «найкращих інтересів дитини» зумовлює потребу поширення цих положень на випадки прострочення оплати додаткових витрат на дитину. Важливо також передбачити штраф за прострочення виконання зобов'язання щодо утримання в натуральній формі. До внесення відповідних доповнень до СК України положення про неустойку доцільно передбачати в договорі. З метою вдосконалення правового регулювання необхідно передбачити умову застосування загального правила визначення розміру пені згідно з ч. 1 ст. 196 СК України, якщо інше не передбачене договором.

У дитини може виникнути також право на відшкодування збитків та (або) моральної шкоди. З метою уникнення майбутніх спорів доцільно в договорі передбачити обов'язок відшкодувати моральну шкоду в разі прострочення зобов'язання щодо утримання та розмір відшкодування моральної шкоди.

Ключові слова: утримання, аліменти, додаткові витрати на дитину, договір про утримання дитини, неустойка, пеня, збитки, моральна шкода

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