

THE IMPORTANCE OF CONCLUSION OF THE CONTRACT ON PAYMENT OF CHILD SUPPORT FOR MINOR CHILDREN IN THE PROCEDURE OF DISSOLUTION OF MARRIAGE THROUGH NOTARIAL PROCEDURE

Antonela CRUDU⁴⁶

PhD Student

Summary: *The contract on payment of child support for minor children is a parental agreement established in the legislation of the Republic of Moldova, giving to the legislator a particular importance in view of respecting the rights of children. This manifestation of will, actually decides the destiny of children, who result from the marriage of the couple, who decided to dissolve their marriage through the notarial procedure.*

This legal instrument authenticated by a notary sets out the rights of children and the obligations of parents regarding the payment of child support, the establishment of the domicile and the manner in which parents participate in the upbringing of their children.

Key-words: *contract, child support, maintenance debtor, maintenance creditor, domicile, education, notary.*

1. Introduction. Following the legislative changes that occurred in March 2019 in the Family Code and the Law on Notarial Procedure No.246 of 15.11.2018, a new way of dissolving a marriage was legislated, namely the dissolution of marriage by notarial procedure, being involved in this procedure a new subject authorized with the right to dissolve marriages, namely the notary.

According to Art. 35 of the Family Code, the modalities for the dissolution of marriage are:

“In the cases referred to in Art. 36, paragraphs (1) and (2), the marriage is dissolved by the civil registrar, in the cases referred to in Art. 36, paragraphs (4) and (5) and Art. 37 – by a court of law, and in the cases referred to in Art. 41 and 42 of Law No. 246/2018 on Notarial Procedure – by a notary” [2].

The content of this article lists only the ways of dissolving a marriage, with a small specification, the legislator referring to which article and in which law each procedure is regulated. While in the case of the first two ways of dissolution of marriage, there are further explanations in the following articles of the Family Code, in the case of dissolution of marriage by a notary, there are no legal provisions in the Family Code that detail it, as they are provided for in the Law on Notarial Procedure. Given this state of facts, we consider that it is not enough just to include the notarial procedure in the modalities of dissolution of marriage, but it is necessary to regulate in details the notarial procedure of dissolution of marriage in a separate article, in order not to encounter difficulties in practice in the application of the provisions of Chapter 7 of the Family Code.

Being focused on the divorce performed before the notary, we must also analyse the rules included in the Law on Notarial Procedure, namely the provisions of Art. 41 of this normative act, which

⁴⁶ E-mail: antonela.crijanovschi@gmail.com, Doctoral School in Law, Political and Administrative Sciences
Constantin Stere University of European Political and Economic Studies

provides in para. (1) that: “*The request for the dissolution of marriage by agreement of the spouses may be submitted to any notary on the basis of the agreement of the spouses and in the presence of both spouses or in the presence of one of the spouses if the notary has previously been notified of the authentic agreement of the other spouse to dissolve the marriage and to examine the request in his absence*” [5]. Also, the para. (2) states that “*...The request and, if there is one, the notarized agreement referred to in para. (1) should relate, as the case may be, to the manner in which the parents are to participate in the upbringing, maintenance of the joint minor children, the establishment of their domicile, the payment of maintenance for the spouse or the division of the joint property acquired during the marriage. Accordingly, the parties shall declare to the notary on their own responsibility the existence of minor or conceived children, and if the spouses have minor children, at the same time as the marriage is dissolved, the agreement of the spouses on the establishment of the maintenance of minor children and the establishment of the domicile of minor children after the dissolution of the marriage shall be authenticated*” [5]. Basically, the legal rules set out the conditions necessary for a notary to initiate divorce proceedings.

Based on the above mentioned, the legislator establishes the following conditions for the notarial dissolution of marriage, namely:

- There must be an agreement between the spouses to dissolve the marriage;
- There must be an agreement on the payment of maintenance for the minor child;
- There must be an agreement on the domicile of the minor child;
- There must be an agreement on how the parents will participate in the upbringing of the minor child.

At the same time, the legislator also regulates a number of secondary conditions, the fulfilment of which is left to the discretion of the spouses, namely:

- There must be an agreement on the payment of maintenance to the former spouse;
- There must be an agreement on the division of the joint property.

2. Basic content. The compliance with the legal conditions for obtaining a divorce by notarial means is an essential condition because, couples who intend to divorce through a notary and have children resulting from their marriage, in addition to the fact that they must agree to all the actions resulting from the process of dissolution of the marriage, they must conclude a contract on the payment of maintenance for minor children resulting from the marriage, otherwise they will proceed to another way of dissolution of the marriage, namely the dissolution of the marriage by court.

The contract concerning the payment of maintenance for minor children is a complex legal act in which, in addition to the payment of maintenance, the notary, with the agreement of both parents, stipulates the child's domicile and the parents' participation in the upbringing of the minor child.

This agreement is important because, if no agreement can be reached on maintenance, residence and participation in the upbringing of the child, there will be no notarial dissolution of the marriage. In the case of a notarial dissolution of marriage, the notary is, essentially, just an arbitrator who implements the spouses' wish to dissolve the marriage, and in order to achieve this result it is necessary to conclude a contract through which the rights of the children must be respected, since they will be the final beneficiaries of this contract.

Art. 75 para. (1) of the Family Code sets the maximum ceiling for the receipt of maintenance from

the salary or income of the parent who is the "maintenance debtor", as follows: *“Maintenance for a minor child shall be paid from the parents' salary and/or other income in the amount of 1/4 - for one child, 1/3 - for 2 children and 1/2 - for 3 or more children”*. Meanwhile, the provisions of this Article do not limit the parent - the maintenance debtor - from contributing financially to the maintenance of the child in an amount higher than the amount specified by law.

In terms of the amount of maintenance, the legislator also provided for the hypothesis in which the parent who owes maintenance to his or her child has an irregular or fluctuating salary and/or other income, establishing the possibility of paying a fixed sum of money paid monthly or at a certain period cumulatively for the unpaid period, including the right to offer certain goods as payment on account of maintenance.

Analysing these provisions in the context of the new amendments to the aforementioned legislation, we note that the rules governing the determination of the received maintenance amount, state that the court *“may determine the amount of maintenance in the form of a fixed sum of money paid monthly or, at the same time, in the form of a fixed sum of money and in the form of a proportion of salary and/or other income according to Art. 75”*.

In this case, the following question may arise: "How will the notary assess the amount of maintenance for a minor child established by the parents in the contract?"

We consider that the answer to this question is provided by the provisions of Articles 92-96 of the Family Code, which stipulate that the parties may agree on the amount and method of payment of maintenance, but that it should not be less than the amount set out in Art. 75 of the Family Code. Thus, notaries, like the courts, will take into account the provisions of Articles 74-76 of the Family Code when analysing the amount of maintenance included in the contract concluded by the former spouses.

From the above-mentioned, we consider that there is an obvious need for the family law legislation to be revised and to adjust all the rules of the Family Code to the changes that occurred, so that besides the court, the notary is also authorized to apply the rules related to the determination of the amount of maintenance.

Another worth mentioning aspect is the minimum amount needed for the maintenance of a minor, values established annually by the National Bureau of Statistics, taking into account that the legislator in Art. 75 of the Family Code does not expressly refer to a minimum amount in lei that should be established by the court or by the spouses in the contract. Given the fact that the amount of salary varies from case to case and that a large proportion of citizens have irregular incomes, notaries will have to refer to the data established by the National Bureau of Statistics for the minimum consumption basket to check the correspondence of the amounts included in the contract for child maintenance.

In the table below we present the minimum subsistence level for children by age group for 2021-2023, established by the National Bureau of Statistics.

Table 1. Minimum subsistence level for children by age group, 2021-2023

		Total by country	Big cities	Small cities	Villages
		Annual average	Annual average	Annual average	Annual average
2021	Children-total	2 074,6	2 272,9	2 107,8	2 007,9
	... Children up to 1 year old	835,4	935,9	855,1	796,8

	... Children between 1-6 years old	1 803,2	2 021,8	1 845,8	1 714,1
	... Children between 7-17 years old	2 342,5	2 602,4	2 376,3	2 267,2
2022	Children-total	2 558,3	2 846,4	2 553,2	2 424,4
	... Children up to 1 year old	1 008,9	1 123,9	1 016,8	955,5
	... Children between 1-6 years old	2 197,3	2 471,4	2 232,2	2 059,3
	... Children between 7-17 years old	2 888,6	3 188,6	2 879,9	2 749,2
2023	Children-total	2 822,1	3 176,8	2 810,2	2 650,5
	... Children up to 1 year old	1 110,1	1 253,0	1 111,6	1 041,2
	... Children between 1-6 years old	2 403,1	2 736,1	2 427,4	2 232,3
	... Children between 7-17 years old	3 165,1	3 542,1	3 142,3	2 985,0

Source: https://statbank.statistica.md/PxWeb/pxweb/ro/30%20Statistica%20sociala/30%20Statistica%20sociala_04%20NIV_NIV050/NIV050090.px/table/tableViewLayout2/?rxid=cd9139c8-a3e3-410a-b617-5a26ae1f6fae

Analysing the statistical data presented above, we notice different values of the minimum subsistence minimum for children by age categories, it being clear that each age group has certain needs, and the standard of living is considered higher in urban than in rural areas. We observe that from year to year, the minimum consumption basket of minors regardless of age is increasing, due to several factors including, due to the annually increased prices and the needs that each family has. Thus, according to data provided by the National Bureau of Statistics, in 2022, the minimum consumption basket for a child in the country increased by 483.7 lei compared to the previous year, thus, from 2074.6 lei in 2021 it increased to 2558.3 lei in 2022, and in 2023 it increased by 263.8 lei, being 2822.1 lei [8].

We consider that the size of the minimum consumption basket is an indicator that sets the minimum ceiling for maintenance and, at the same time, is a barrier to the temptation to set a lower amount when the parties agree. In this case, since we do not have clarity from the provisions of Art. 75 of the Family Code regarding the minimum amount that can be attributed for the maintenance of minors, the notary must be guided by the data provided by the National Bureau of Statistics in order to avoid violating the rights of the minor.

Another important aspect is the inclusion in the contract of a clause providing for additional expenses that may arise during the upbringing of the child, such as those arising from health reasons, which require a doctor's examination and expensive treatment, and which will have to be covered by both parents equally.

At the same time, once the amount of child maintenance has been established, the date from which the child maintenance will start to be paid will also be determined, which usually corresponds to the date of signing and authentication of the contract. The contract will also state on what date monthly or at what period the maintenance will be paid and, of course, until when the maintenance will be paid, a period of time which may last until the minor child reaches the age of majority or becomes fully capable of exercising his or her rights under the age of 18.

The maintenance can also be paid after the child reaches the age of 18, under Art. 78 of the Family Code, if the child is unable to work or if he or she continues his or her studies and needs material support, and cannot be employed.

Another important provision concerns the child's domicile with one of the parents. Thus, a general practice of the courts is to establish the domicile with the mother, but the choice is up to both parties, a decision which must be included in the notarized contract. Regardless of the choice made, the parent who will reside with the child is not allowed to prevent the other parent from visiting the child.

If it concerns the establishment of the domicile of the minor abroad after the conclusion of the contract, this procedure can be carried out by an additional agreement or a notarized declaration of consent of the other parent to the change and establishment of residence abroad of the minor.

And, last but not least, the participation of both parents in the upbringing of their children, a family function which, ideally, should be carried out by both parents in equal measure, regardless of their separation after divorce, this being both a subjective right and a principle recognized worldwide by the provisions of Art. 18 para. (1) of the Convention on the Rights of the Child, according to which: *"both parents have joint responsibility for the upbringing and development of the child"* [3]. This principle has also been enshrined in the domestic legislation of the Republic of Moldova.

But, given that every right is necessarily accompanied by an obligation, Chapter 11 of the Family Code enshrines an interleaving of parental rights and obligations, which come to protect the minor through parental cooperation. This cooperation provides security for the child and concerns the right to education and the parents' obligation to accomplish this, by choosing the educational institution and the form of education, by being actively involved in the child's destiny regardless of whether the parents live separately or together, having regard to the best interests of the child, taking into account the child's views and interests.

Art. 62 para. (1) of the Family Code stipulates that: *"The rights of parents cannot be exercised contrary to the interests of their child. Parents cannot harm the physical and mental health of the child"* [2], and para. (2) states that: *"The methods of upbringing the child, chosen by the parents, must exclude abusive behaviour, insults and mistreatment of any kind, discrimination, mental and physical violence, corporal punishment, involvement in criminal acts, initiation into the consumption of alcoholic beverages, the use of narcotic and psychotropic substances, gambling, begging and other illicit acts"* [2].

3. Conclusions. Accordingly, we conclude that the legislation of the Republic of Moldova is aimed at protecting minors in case their parents decide to divorce, stipulating measures that would ensure the right to education of minors, the development of intellectual abilities, freedom of thought and conscience, the protection of their dignity and honour.

A very important aspect is the enforceability of the contract on the collection of maintenance for minor children, at the request of the parties, thus conferring the right to apply to the bailiff, bypassing the court, in order to collect maintenance from the maintenance debtor, who does not comply with his contractual obligations, by the maintenance creditor.

Enforceability is a way of holding the debtor liable and making the work of the court easier for the judges by its effect between the parties, as *res judicata*, giving the creditor the right to collect maintenance through the bailiff without suing the maintenance debtor.

Referring to the main idea, namely the importance of the Agreement on the payment of child support in the notarial procedure for the dissolution of marriage, we conclude that this agreement is particularly important in the case of couples who have children and intend to divorce by notarial procedure, being a manifestation of will that expressly stipulates parental rights and obligations, providing security for the minor's future, and from a procedural point of view it is one of the basic conditions required for the dissolution of the marriage before a notary, of major importance in terms of the time optimized by the parties in the maintenance collection procedure, because the needs of

minor children do not have time to wait, and the harmonious cooperation of both parents helps to maintain a stable psychological state of the child, when everything is solved quickly, peacefully and without depressive states.

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