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The recovery of alimony for the maintenance of minor children in Kazakhstan: problems of enforcement of judicial acts

The article deals with the problems related to non-performance of executive documents on recovery of alimony for the maintenance of minor children and legal measures of compulsory execution applied by bailiffs for recovering alimony. The author carried out a comparative and legal analysis of laws regulating the maintenance obligations of parents in Kazakhstan and foreign countries and the review of foreign experience on recovering alimony aimed at improving the legal mechanism on the effect on maintenance non-payers in Kazakhstan is given. As a result of the study, the author found out the reasons for the non-enforcement of judicial acts on alimony recovery for the maintenance of minor children in Kazakhstan. The effective legal measures on improving the mechanism for the recovery of alimony in order to protect the child's right to get maintenance from his parents were proposed as well.

Keywords: children of minority age, maintenance, maintenance obligations of parents, alimony recovery, judicial acts on alimony recovery, enforcement of judicial acts.

After the court decision enters into legal force within three working days or the return of the case from the higher court, the trial jurisdiction writes out the writ of execution and, on its own initiative, sends the executive document for execution to the competent justice agency on territoriality no later than the next working day from the date of its extract (Article 241 of the Civil Procedure Code of the Republic of Kazakhstan). Also, if the debtor doesn't plead at fixed time, the judge issues to the recoverer a sealed court order to be presented to the competent justice agency at the debtor's place of residence (Article 143 of the Civil Procedure Code of the Republic of Kazakhstan).

The procedure for the recovery of alimony is regulated by the Law of the Republic of Kazakhstan «On Enforcement Proceedings and the Status of Court Bailiffs in the Republic of Kazakhstan» of April 2, 2010 № 261-IV as well as by the Order of the Minister of Justice of the Republic of Kazakhstan «On approval of the list of types of wages and (or) other income from which the alimony for the maintenance of minor children is withheld» of December 24, 2014 № 372.

In accordance with the Law of the Republic of Kazakhstan «On Enforcement Proceedings and the Status of Court Bailiffs in the Republic of Kazakhstan», the recovery of alimony is classified as «socially significant» (paragraph 9-1 of Article 1) because children, mothers, disabled parents and spouses need financial support.

The executive documents issued on the basis of decisions on the recovery of alimony «are in force all the time for which payments are made» (Part 3 of Article 11).

Today the relevance of the research work is of great importance in society, since, according to official data, more than 350,000 children in Kazakhstan need child support. Debts on alimony are 1.8 billion tenge. For last three years, more than 13000 debtors were denied the right to leave the country and drive automobiles. 25000 people are persistent non-payers of alimony [1].

In Kazakhstan, for the last five years, an extensive state policy has been implemented to protect the rights of children who need financial support from their parents. The Departments for the implementation of judicial acts carried out various activities in each region aimed at the effective recovery of alimony: the actions are aimed at persuading non-payers to manifest in them a sense of conscience to pay their debts. The General Prosecutor Office of the Republic of Kazakhstan has created an Internet service «They are being sought by children», where there are names and faces of people who evade paying the maintenance of their children. The Committee for the Enforcement of Judicial Acts created the Single Register of Debtors, i.e. information about debtors is posted on the official Internet resource of the Ministry of Justice.

In accordance with Article 34 of the Law «On Enforcement Proceedings and the Status of Court Bailiffs in the Republic of Kazakhstan», if a debtor fails to perform the enforcement document on recovery of alimony without a clear reason, then the bailiff, in case of debt, directs to the court the idea of a temporary prohibition to grant licenses, permits and special rights to the debtor, as well as the suspension of the granted licens-

es, permits and special rights given earlier to the debtor. For example, the validity of driver's licenses of debtors is suspended.

According to Article 33 of the Law, the bailiff decides on a temporary restriction on debtor's departure from the country for failure to perform the enforcement documents on the recovery of periodic payments more than three months.

Despite taken organizational measures, the improvement of the work of state bailiffs and the introduction of private enforcement's institution and the problem of non-receipt of alimony remains very urgent and requires constant attention.

The General Prosecutor's Office of the Republic of Kazakhstan said: «There are three categories of alimony non-payers».

The first category consists of people those who want to pay alimony, but can not. They are so-called «honest» debtors. They do not pay for objective reasons: they can not find a job.

The second category consists of people who can pay alimony, but they don't want to do it. They reduce incomes and do the falsification of documents.

The third category of people evading the payment of alimony consists of those people who do not want and can not pay. They are so-called «bad» debtors. As a rule, they keep an immoral way of life. They are drug addicts, alcoholics, homeless people [2].

The main problem of non-enforcement of judicial acts on the recovery of alimony is a lack of debtor's property including money, securities or income, which can be levied, and all measures provided by the judicial executor to identify his property or income are unsuccessful. Debtors make their property to other people and as a result, the court bailiffs have nothing to recover from them. Having got the court's decision on the enforcement of maintenance obligations, the debtor refuses to support the child, arguing it with his difficult financial situation, illness or having children in his next marriage. In such cases, according to Part 3 of Article 169 of the Code «On Marriage and Family», if the person, obliged to pay maintenance for the period during which the recovery of alimony was not performed, did not work or didn't present documents confirming his earnings and other income, then the maintenance debt is determined on the basis of the average monthly wage in the Republic of Kazakhstan at the time of debt recovery.

If there are the maintenance arrears as a result of debtor's evasion from his payment, then a penalty is charged for the amount of debts in accordance with Article 353 of the Civil Code of the Republic of Kazakhstan. According to Article 171 of the Code of the Republic of Kazakhstan «On marriage and family», a debtor is obliged to pay a penalty to the recipient of alimony in the amount of one tenth of a percent of unpaid maintenance for each day of delay under a court decision.

According to the information of the Ministry of Justice of the Republic of Kazakhstan, 213 000 court decisions on recovery of alimony are on execution of judicial executors in 2016. «Approximately 50 000 executive documents on recovery of alimony are paid by the debtors themselves, nearly 40 000 executive documents or 20% are problematic as the debt isn't paid for more than three months and more than 14 000 of alimony are not paid at all» [3].

An effective mechanism for affecting on alimony non-payers was the strengthening of the liability of debtors on maintenance payments. In order to improve the mechanism for recovering alimony, the Law of the Republic of Kazakhstan «On introducing amendments and additions to certain Legislative Acts of the Republic of Kazakhstan on improving enforcement proceedings», of January 15, 2014, was adopted. Article 136 of the Criminal Code (currently inoperative) excluded the subjective concept «malignance» of committed acts for failure to fulfill obligations in paying for the maintenance of children or disabled parents and the sanction was amended, i. e. imprisonment for up to two years was issued.

Also, the sanction of Article 524 of the Code on administrative violations (which has now become invalid) was upgraded, which provided a penalty for individuals in the amount of ten to twenty monthly calculation indices, or administrative arrest from five to ten days for non-compliance with the requirements of judicial acts.

The current Criminal Code of the Republic of Kazakhstan of July 3, 2014, in article 139 allows the bailiffs to bring a debtor to criminal liability by restricting freedom for up to two years or by imprisonment for the same term for alimony non-payment for more than three months.

This measure is quite effective. 61 alimony non-payers were convicted in 2015. Due to measures taken, the number of documents for which alimony is not paid at all, was reduced from 15 thousand to 3.5 thousand [4].

For failure to comply with a court decision, the Code on administrative violations provides for liability in the form of a fine for individuals in the amount of ten monthly calculated indices or administrative arrest up to five days (Article 669). Only in Almaty city in 2016, 96 debtors were brought to an administrative responsibility and more than 20 people were subjected to an administrative arrest [5]. In Astana city in 2016, 288 debtors on child support were brought to administrative responsibility, 214 debtors were fined and 72 debtors were brought to responsibility by administrative arrest up to five days [6].

Also, one of the problems in this area is the recovery of alimony from debtors deprived of parental rights to support children who live in state institutions. Failure to enforce judicial acts is related to the following reasons: debtors do not work, misuse alcohol and do not have any money to support children. These children, whose parents are deprived of parental rights, do not have the opportunity to receive funds from the state compared with orphans and invalids who receive monthly benefits. Having no money, children suffer with living parents. The way out of this situation could be the development of a Republican alimony fund for children living in orphanages. The state would pay benefits to children from the fund, and later, debtors who are deprived of parental rights, would be recovered debts in favor of the state in recourse. Thus, on reaching the age of majority, orphanage children would have the initial material base necessary for entering the educational institutions, buying a house, etc. [7].

«Having got a court decision on the performance of maintenance obligations, the debtor refuses to support the child, giving reasons for his difficult financial situation, illness or children in another marriage», Yu. Pushkaryov says, who is the head of the regional chamber of private bailiffs of the Karaganda region. Until today, there is no real legal mechanism for identifying a true income of the debtor. The legislation does not provide for the establishment of hidden income and property of maintenance payers.

Now the main reasons for non-performance of the documents in this category are:

- debtors do not have a permanent place of work;
- debtors hide incomes artificially making them low, including official documents of the employer;
- it is difficult to find the debtor's residence, etc.

«1551 proceedings on the recovery of alimony were registered in 2015 in Karaganda region. For today, the number of proceedings on the recovery of alimony which are executed by bailiffs is 7834. The enforcement documents of this category are increasing daily, that is, the number of enforcement documents has risen to 6283 proceedings in comparison with the same period» [8].

Based on international experience, the need to create the Republican Aliment Fund was discussed for many years and was proposed to the Government. However, last year the Government refused to create an alimony fund because of the economic crisis in the country [6].

The next way out of this situation prosecutors see in assisting in debtors' employment who are in arrears on alimony. Such a measure is practiced by the prosecutor's office of the Kazybek bi district of Karaganda city. In order to employ debtors, the district prosecutor's office together with the Karaganda job center and bailiffs conducted an action of vacancies for citizens who are debtors according to enforcement proceedings on recovery of alimony. 25 debtors applied for a job and they were given referrals for permanent employment in a city organization [8].

Also, the Prosecutor's Office of Astana city plans to employ more than 400 maintenance debtors into construction companies [9].

Today, in accordance with Article 139 of the Code «On Marriage and Family» of December 26, 2011, the amount of alimony collected monthly for the maintenance of underage children is: one child is one quarter, two children is one third, three and more children is half of earnings and (or) other parents' income. If the parent's monthly earnings are minimal, the amount of alimony will be only 6000-7000 tenge per month. This sum does not allow ensuring fully the material needs of the child, especially under the current economic conditions in the country. In this regard, it is proposed to change the system of alimony payment «by determining their minimum fixed amount as well as introducing ways of payment giving by goods and different services (clothing, vouchers, etc.)» [10]. In accordance with Article 181 of the Family Code of Ukraine, alimony is paid in the proportion of a percent of parents' income or in a fixed amount of money. «The percent of earnings (income) of a mother, a father, which will be recovered as child support, is decided by the court. If child support is collected for two or more children, the court determines a single percent of mother's (father's) earnings (income) for their maintenance, which will be collected until the older child reaches the age of majority». At the same time, the Code establishes a minimum amount of alimony per child «not less than 30 percent of the subsistence minimum for a child of the same age» [11].

Exacerbating the problem is that it is difficult to recover alimony from debtors who have moved to a permanent place of residence in countries far abroad. Kazakhstan ratified the Convention on the international procedure for the collection of children support and other forms of family maintenance and the Protocol on the law applicable to maintenance obligations, done in the Hague on November 23, 2007 [12]. If agreements on legal assistance with foreign countries are not concluded, the situation is escalated and it will be difficult to collect arrears on alimony. In such cases, we should pay attention to the legislative practice of foreign countries. For example, in Ukraine «if a debtor leaves for permanent residence in a state with which Ukraine does not have an agreement on legal assistance after the entry of the court decision into legal force, according to which alimony is collected from one of the parents, he may be collected child support for the whole period until the child reaches the age of majority by the court decision before his departure from the territory of Ukraine» (paragraph 6 of Article 181 of the Family Code) [11].

Unlike the Kazakh legislation, maintenance obligations in foreign countries (the United States of America, Italy, Germany, France, etc.) do not end with the death of an obligated person, they are inherited and burden the property of the debtor's heirs on alimony. Heirs are obliged to pay maintenance from the amount of inherited property.

We believe that it is also necessary to pay attention to the foreign experience on the effective mechanism for recovering alimony. For example, in foreign countries there are gradations of the child's age for reconsidering the amount of alimony as his needs grow. This method of calculating the amount of alimony is considered more appropriate if compared with our legislation. You know, the child's needs do not meet the amounts of alimony for today when, for example, buying school uniform and school supplies.

In foreign countries, parents have to provide financial support to their children ensuring them with a living wage and a normal average standard of living if financial resources are available. If this obligation is not fulfilled, a third person has the right to buy the necessary clothes for a child and give them to his parents recovering the cost of the things from them. The third person should buy clothes at a retail price, based on a current situation taking into account the possibilities of the child's parents [13; 22]. Also, in many American states, for example, medical expenses must be included in childcare costs and in some American states parents must pay for college fees [14; 71].

In Germany, the amount of alimony depends on the income of alimony payer, i.e. the parent. The higher his income is, the higher the amount of alimony is, which is calculated according to a special table. The income of a parent with whom the child lives is not taken into account.

The amount of alimony must correspond to the standard of living in the place of residence. If the standard of living is comparable with the standard of living in the receiving country, then alimony will be paid fully on the basis of the Dusseldorf table. If it is lower, then the amount of alimony will be reduced accordingly [15].

Under Italian law, parents must maintain their child based on their abilities, professional skills and housekeeping skills. «If parents are not able to support their children, the obligations are performed by their ascendants. Moral and emotional harm, suffered by the child from the scarcity of the maintenance, may be recovered from a dishonest parent» [15].

In Hungary, when determining the amount of alimony, the following factors are taken into account: the actual needs of the child, income and property status of each parent [16; 81].

In some foreign countries, if a parent evades from the obligation to pay alimony, the state assumes this obligation by creating an alimony fund and paying the benefit from the state budget. For example, an alimony fund has been created in Poland and its funds are formed at the expense of amounts collected from persons obliged to pay alimony, grants from the budget, voluntary funds and other sources. The Social Insurance Office disposes the resources of the fund. Payments are made to children who have been awarded alimony by the court decision, but its execution is difficult [15].

If a parent evades his obligation to pay alimony, the state assumes the obligation to maintain the child in some foreign countries. For example, in European countries and in the United States it pays benefits to parents who do not get alimony for a certain period of time. Thus, when a parent avoids paying maintenance, the state assists a parent to support a child. For example, according to clause 8 of Article 181 of the Family Code of Ukraine «if the place of residence or the location of parents is unknown, or they avoid paying maintenance or are unable to support a child, the child is granted a temporary state allowance, taking into account the financial situation of the family in which the child is brought up. The payment of the temporary state allowance is carried out at the expense of the State Budget of Ukraine. The amount of the temporary

state allowance granted to the child is subject to recovery from the payer of alimony to the State Budget of Ukraine judicially» [11].

In Russia, the issue of introducing a state minimum standard for alimony is being discussed, which is proposed to be calculated as a percentage of the official subsistence minimum. The amount of the minimum standard of alimony is determined in each territorial entity of the Russian Federation on the basis of the child's subsistence minimum in a region. When assigning the amount of alimony, the children's needs and parent's ability should be taken into account. There should be an individual approach to each case, taking into account all circumstances contributing to the payment of alimony [17, 18].

Analyzing current problems of the enforcement of judicial acts on recovery of alimony for the maintenance of underage children in Kazakhstan, we come to the following conclusions:

1. The current legislation of the Republic of Kazakhstan nowadays has upgraded the debtor's liability (administrative, criminal) for payment of alimony, but it does not encourage parents to fulfill maintenance obligations for supporting children. Facts of non-enforcement of judicial acts prove this according to the information of the General Prosecutor's Office of the Republic of Kazakhstan, the Ministry of Justice of the Republic of Kazakhstan. Priority of the child's interests requires the use of strict measures towards the parent, who avoids paying alimony for the maintenance of his minor child.

2. It is necessary to develop the measures on recovering the alimony. As such measures, it is proposed the banks to deny a loan to the debtors of the alimony on supporting the child.

3. Bringing the debtors to administrative and criminal responsibility is a reasonably effective mechanism for influencing on non-payers of alimony. The statistics showed that after receiving the news about sending the case papers to initiate a criminal case, malicious defaulters pay their debts. However, there is no real use from the imposition of sanctions (fine, arrest, restriction of freedom, imprisonment) to the former family, especially to the child. It would be better to impose a sanction by correctional labor (or work with a probationary period) and to recover the income from this work not in favor of the state, but in favor of the child.

4. If it is impossible to find the location of the person obliged to pay alimony, so he is put on the wanted list by the court. The same situation is when a debtor has no income and there is no possibility to execute a judicial act on recovering the alimony for children's maintenance as a debtor has no property which can be levied execution upon. In such cases, the recovery of alimony is not carried out, and thus, the interests of the child are not protected. In this case, the child needs support from the state. The way out of this situation can be the creation of the State Alimony Fund. It is necessary to pay benefits to children living below the poverty line, one of whose parents does not pay alimony. Thus, a monthly allowance will be paid, instead of uncollected alimony. It is proposed to enact the minimum amount of the allowance for non-payment of alimony in the amount of the child's living wage, based on his needs, into the Law.

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Г.А. Илиясова

Қазақстанда кәмелетке толмаған балаларды асырауға алименттерді өндіру: сот актілерін орындау мәселелері

Мақалада кәмелетке толмаған балаларды асырауға алименттерді өндіру туралы атқарушылық құжаттардың орындалмауымен байланысты және алименттерді өндіру бойынша сот орындаушыларымен қолданылатын мәжбүрлі орындаудың құқықтық шаралары туралы мәселелер қарастырылды. Автор Қазақстанда және шетелдерде ата-аналардың алименттік міндеттемелерін реттейтін құқықтық нормаларға салыстырмалы-құқықтық талдау жүргізген, Қазақстанда алиментті төлемейтін ата-аналарға әсер етудің құқықтық тетігін жетілдіру мақсатында алименттерді өндіру бойынша шетел тәжірибесіне шолу жүргізілді. Зерттеулердің нәтижесінде автормен Қазақстанда кәмелетке толмаған балаларды асырауға алименттерді өндіру туралы сот актілерінің орындалмау себептері айқындалды. Баланың өз ата-аналарынан асырауға материалдық көмек алу құқығын қорғау мақсатында алименттерді өндірудің құқықтық тетіктерін жетілдіру бойынша тиімді құқықтық шаралар ұсынылды.

Кілт сөздер: кәмелетке толмаған балалар, ата-аналардың алименттік міндеттері, алименттерді өндіру, алименттерді өндіру туралы сот актілері, сот актілерін орындау.

Г.А. Ильясова

Взыскание алиментов на содержание несовершеннолетних детей в Казахстане: проблемы исполнения судебных актов

В статье рассматриваются проблемы, связанные с неисполнением исполнительных документов о взыскании алиментов на содержание несовершеннолетних детей, и правовые меры принудительного исполнения, применяемые судебными исполнителями по взысканию алиментов. Проведён сравнительно-правовой анализ правовых норм, регламентирующих алиментные обязательства родителей в Казахстане и зарубежных странах. Дается обзор зарубежного опыта взыскания алиментов с целью совершенствования правового механизма по воздействию на неплательщиков алиментов в РК. В результате проведенного исследования выявлены причины неисполнения судебных актов о взыскании алиментов на содержание несовершеннолетних детей в Казахстане. Предложены эффективные правовые меры по совершенствованию правового механизма взыскания алиментов с целью защиты права ребенка на получение содержания от своих родителей.

Ключевые слова: несовершеннолетние дети, алименты, алиментные обязательства родителей, взыскание алиментов, судебные акты о взыскании алиментов, исполнение судебных актов.

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