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NEW STATUTORY ARRANGEMENT OF MAINTENANCE IN THE REPUBLIC OF SLOVENIA

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The recent changes in the Slovenian family law legislation provide an important framework for contractual freedom. The new precise legal provisions not only bring more opportunities for maintenance agreements between spouses but also encourage parents to achieve an agreement on maintenance for their children. The general principle of making more space for contractual freedom will in the future also be followed in the provisions of the new Slovenian Family Code. This will abrogate the compulsory legal regulation of property relations between spouses and provide further possibilities for freedom of settlement of one's own (legal) relationships.

Key words: family law, autonomy of parties, maintenance, protection of children, equality of spouses

1. INTRODUCTION

The amending[1] Marriage and Family Relations Act (Official Gazette of the Republic of Slovenia (Ur. l. RS), no. 69/04 - consolidated text - hereinafter the Act) entered into force relatively recently, on 1 May 2004, and reorganised the entire matter of maintenance.[2]

A change in maintenance relations was urgently required, since the substantive legal provisions on maintenance in the Act had remained practically

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[1] The amending act was published in Ur. l. RS, no. 16/04.

[2] A new legal arrangement of contacts and exercising parental rights has also applied in Slovenia since 1 May 2004, which will not be presented in this contribution because of the breadth and complexity of the question.

unchanged since 1977. In more than twenty years of its application, case law had highlighted numerous deficiencies and legal gaps. Some questions had been raised with the development of legal theory, others by changes in the social environment following the independence of the Republic of Slovenia (for example the question of whether parties can arrange their own alimony relations by agreement in the form of a notarial protocol).

Case law and the practice of social security bodies attempted to resolve matters of alimony law to which the law provided no answer by the analogous use of individual principles and rules of family law. In some cases they even created new rules. These unwritten rules reduced the transparency of the alimony arrangement and thus citizen's legal security. Such a legal arrangement of the right to alimony, which is a right of an existential nature, was no longer satisfactory. A field which can have a fatal effect on the lives of both the person entitled to alimony and the person required to pay therefore urgently needed to be newly regulated as soon as possible.[3]

2. NEW LEGAL ARRANGEMENT OF MAINTENANCE

a) Maintenance between marital and extramarital partners

A spouse who does not have the resources for subsistence and, through no personal fault, is unemployed may enforce this even during the marriage. Disputes concerning the existence of the right to maintenance and the associated need for a court decision usually occur at the time of divorce, so provisions on maintenance are gathered in the chapter entitled "Relations between divorced spouses after divorce". Rules that apply for maintenance after divorce are *mutatis mutandis* used for maintenance relations between spouses during the course of a marriage, as well as for arranging maintenance relations between spouses whose life union has ceased, but neither has demanded a divorce (Article 50.a of the Act). Since the legal consequences of annulment are the same as with divorce, the rules for maintenance after divorce also apply for arranging maintenance relations between spouses after the annulment of a marriage (Article 43 of the Act).[4]

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3 See Novak B. in: Zupančič K., Novak B., Predpisi o zakonski zvezi in družinskih razmerjih s pojasnili. Uradni list RS, Ljubljana, 2005 (first reprint), p. 80.

4 Zupančič K., Družinsko pravo. Uradni list RS, Ljubljana, 1999, p. 65.

A maintenance suit may be filed during the course of a marriage (if a spouse does not want to support his or her unsupported partner) or at the time of divorce: during the divorce proceedings or by individual suit within one year of the divorce becoming final, provided the conditions for maintenance already existed at the time of the divorce and also exist at the time of the divorcee claiming maintenance (first paragraph of Article 81.a of the Act). The *mutatis mutandis* use of this provision for maintenance relations during the course of a marriage has the result that a spouse whose life community has terminated must file suit for maintenance within a year of the ending of the life community - either filing an independent maintenance suit within one year or claiming maintenance together with divorce. Judgment follows established case law, according to which maintenance does not apply between spouses who have not lived together for an extended time and are not materially dependent on each other. The longer economic independence of the spouses in such cases proves their capacity for independent existence.[5]

Maintenance is decided in relation to the needs of the claimant and the capacity of the person liable, in a monthly amount in advance, and is claimed from the moment when the maintenance suit was filed.[6] Exceptionally, maintenance may be determined as a single amount, or in another way such as with the cession of real estate in ownership, if this is justified for particular reasons and if the parties to the maintenance relations would not be placed in an excessively difficult position by the method of payment of maintenance: maintenance so determined may not essentially worsen the position of the person entitled to maintenance, which she or he would have had if she or he received maintenance as a monthly payment in advance, nor may it cause an excessive burden to the person liable to pay maintenance (Article 82.b of the Act).

A court may reject a maintenance claim, if payment of maintenance to the person entitled, in view of the causes of breakdown of the marriage would be unfair to the person liable to pay or if the entitled person at any time before or after the divorce has committed a criminal offence against the liable person or anyone close to him: children or parents of the liable person (Article 81a

[5] Judgment of the Supreme Court RS, no. II Ips 15/93 of 11Feb.1993 -Stairs database. See also Zupančič K., 1999, p. 69.

[6] This rule already applied in case law. See Rupel S., Pregled sodne prakse in literature, Družinsko pravo. Univerzum, Ljubljana, 1984, pp. 23, 31, 84. See also Zupančič, 1999, p. 163.

of the Act). Prior to the 2004 amending act, a court had to take into account only the causes of the breakdown of the marriage (previously valid Article 81 of the Act). This prevented a court from rejecting a maintenance claim by a spouse who seriously beat or did something similar to the other partner, after the causes of the divorce were already finally set (for instance during the divorce procedure). The provisions did not therefore achieve the pursued purpose of justice, so it needed to be corrected.

The spouse liable to pay maintenance can also enforce a criminal offence which the entitled person has committed after maintenance has already been determined, by means of a suit to change relations (Article 82.b of the Act).

A spouse is not obliged to support the other spouse if his or her own subsistence or the subsistence of underage persons he or she is bound to support by law would thereby be threatened (Article 82.c of the Act). Maintenance of underage persons in such a case has precedence over maintenance of spouses or full age children because of the special constitutional protection of children. Maintenance of a spouse and full age children, when the liable person has insufficient resources for maintenance of all persons legally entitled to maintenance, has priority over maintenance of the spouses' parents (Article 131.b of the Act).[7]

Spouses may also agree between themselves about maintenance in the event of divorce. With an agreement, especially with an agreement on the renunciation of the right to maintenance, the spouses may not put at risk the benefit of a child; the spouse who renounces maintenance must have sufficient means for her or his subsistence and that of an underage child (Article 81.b of the Act). The 2004 amending act transferred competence for concluding maintenance agreements from social security bodies (social work centres) to notaries. The task of the body that cooperates in concluding an agreement is not just to record the agreement but above all to avoid an agreement that conflicts with constitutional principles and other compulsory regulations.[8] Familiarity with the legal arrangement is required for such supervision, which is difficult to expect from social work centres, in which lawyers are rarely employed.[9]

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[7] Similar theory and case law - see Zupančič K., 1999, p. 69!

[8] In composing a notarial protocol a notary must respect the Constitution and other compulsory regulations and may not compose a protocol which would be in conflict with these regulations or may not compose a public document in relation to business which is impermissible by law - see Article 5 of the Notary Act.

[9] Tomič Z., Vojnovič M., A professional meeting on child rights in the light of family law, p. 13 in the material: Promotion and advocacy of child rights, which was published un-

An agreement on maintenance is concluded before a notary in the form of an enforceable notarial protocol (Article 81.b of the Act). The rules enable spouses to arrange the question of maintenance together with other classical property law questions (for example together with an agreement on the division of property at the time of divorce),[10] for which a notary is generally competent under the Notary Act (Ur. l. RS, no. 2/07 - consolidated text).[11]

The provision of the first paragraph of Article 81.b of the Act must be understood in such a way that spouses may conclude an agreement on maintenance in the event of divorce at the time of concluding the marriage, during the marriage or at the time of divorce.[12] Spouses may also, in a similar way, renounce maintenance, but only when the existence of conditions for maintenance at the time of divorce cannot with certainty be anticipated. If the spouses at the time of concluding an agreement knew with certainty that one of the spouses would need maintenance in the event of divorce and because of renouncing the right to maintenance would have to seek social assistance, such an agreement would be null.[13] So the conclusion of an agreement on the renunciation of the right

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der the auspices of the Slovene council for UNICEF on the occasion of the professional meeting "Enforcing child rights in the light of family law" in Novo mesto between 24 and 26 September 1997.

10 Because of the compulsory rule by which property the couple has obtained by work during the period of the marriage is considered common property (second paragraph of Article 51 of the Act), under applicable law practically all agreements on an assets regime between spouses are excluded. However, agreement is possible that by concluding the marriage or from a particular day after conclusion of the marriage all individual assets of the spouses shall become common property. Because there is no economic benefit, such agreements between spouses are in practice rare. Reform of the entire family legislation, which is currently being prepared, will remove the cogent regime of common property of spouses and give freedom of agreement between spouses (and thus a marriage contract) greater importance than it has in the current system of family law. Spouses will then be able to arrange the question of maintenance in a legal document, in which they will simultaneously also extensively arrange property relations during the course of the marriage or property relations in the event of an ending of the marriage. See Žnidaršič Skubic V. in: Zupančič K., Novak B., Žnidaršič Skubic V., Končina Peternel M., Reforma družinskega prava - Predlog novih predpisov s komentarjem. Uradni list RS, Ljubljana, 2005, p. 29.

11 Thus Article 47 of the Notary Act.

12 Novak B. in: Zupančič K., Novak B., 2005 (first reprint), p. 91.

13 Novak B., Preživninski dogovori med zakonci, Zbornik znanstvenih razprav Pravne fakultete v Ljubljani, 2002, p. 239, see also judgment of the German Federal Supreme

to maintenance will only enter into consideration before concluding or during the marriage, since at the time of divorce it will already be known whether a spouse will remain without the means of subsistence after the divorce.

The arrangement for concluding agreements renouncing maintenance, or an agreement in which the amount of maintenance is determined at an exceptionally low level in relation to the capacities of the person liable, which a person would need during the course of a marriage, is different. During the course of a marriage and the life union connected with it, namely, there is a general obligation for spouses to contribute to the needs of the family applies and to contribute to the support of a spouse without their own provision.[14] This principle derives from the very essence of a marriage as a life union of partners committed to solidarity, and thus it cannot be excluded by agreement.[15] The provision which regulates a maintenance agreement between spouses in the case of divorce must therefore be understood during the time of the marriage not as a general ban on concluding maintenance agreements but as a ban on concluding a maintenance agreement which is less favourable for the unsupported partner than is lawful. This means in practice that, in relation to maintenance during the period of the marriage, agreements on a complete renunciation of the right to maintenance and agreements in which maintenance is specified at an exceptional low amount in relation to the capacities of the one liable to pay will mainly be excluded.

The amending act, because of the still significant level of inflation, retains the institution of adjusting maintenance to the cost-of-living index in the Republic of Slovenia. Maintenance is adjusted annually (in March) on the basis of a quotient specified by the state. Spouses can also agree a different method of adjusting maintenance. In compliance with the provision that spouses may renounce the right to maintenance (second paragraph of Article 81.b of the Act), it may also be less favourable than the method of adjusting maintenance specified by law.[16]

The right to maintenance ceases if the divorced spouse who received it obtains assets or his or her own income by which he or she can subsist, if he or

Court, no. XII ZR 16/90 (OLG Köln) of 28 Nov.1990 in: FamRZ 3/91, pp. 306-307 and NJW 14/91, pp. 913-915.

[14] Similar also in German law § 1585c BGB.

[15] Schwab D., Familienrecht. Beck, München, 2001, pp. 76, 182. Compare also Schwab D., Familienrecht. Beck, München, 2003, p. 184.

[16] On the permitted content of an agreement prior to application of the amending act see Zupančič K., 1999, p. 162.

she concludes a marriage, as well as if he or she lives in an extramarital union (Article 83 of the Act). Since the law that regulates same-sex unions took effect (Same-Sex Civil Partnership Act, Ur. l. RS, no. 65/05), the right to maintenance would also be lost if a same-sex union is registered.[17]

In family law, a durable life community of a man and a woman who are not married (extramarital union) has the same consequences between the partners as marriage (first paragraph of Article 12 of the Act).[18] This means that the provisions that regulate maintenance between spouses are used for arranging maintenance relations between extramarital partners.

b) Maintenance between parents and children and between children and other persons

Parents have an obligation to support their children, normally until full age (first paragraph of Article 123 of the Act). Their ability to provide maintenance is judged by their material and productive capacities (Article 129 of the Act).[19]

Maintenance must be sufficiently high to guarantee the child's benefit. This means that it must be adequate for the successful overall development of the child. It is not enough that it covers only the most basic funds for a child's subsistence, but must in addition to physical development also ensure successful mental development. In other words, it must cover the costs of the entire physical and mental needs of the child, and especially the costs of accommodation, food, clothing, footwear, care, education, upbringing, recreation, entertainment and other needs of the child (Article 129.a of the Act). The child's benefit requires that maintenance is calculated in relation to the needs of the child that requires supporting and not, e.g., in relation to some average expenditure of a child of a particular age. This argues against the introduction

[17] See also Novak B., Description of Slovene family law. Jusletter (Bern), 2007, p. 5 - URL: www.weblaw.ch/de/content_edition/jusletter/jusletter.asp.

[18] For an extramarital union to be valid, there cannot be reasons because of which marriage between the extramarital partners would be invalid.

[19] Novak B., Neue Regelung des Unterhaltsrechts in der Republik Slowenien. FamRZ 19/05, p. 1639.

of a firmly defined amount of maintenance for children of individual ages, as recognised by some foreign legislation.[20]

Parents are responsible for supporting children of full age only if they are in full-time education. The formal status of the child in education is not decisive for the duty of support. The time to which an individual with the support of parents has the right to full-time education is restricted by law to the age of 26 years (second paragraph of Article 123 of the Act).

Parents must maintain an underage or full age child who has concluded a marriage, or lives in an extramarital union, only if the spouse or extramarital partner cannot support them[21] (so-called subsidiary duty of maintenance of parents).[22] Even in this case, parents are obliged to support their full age children only under general conditions of support (if they are in full-time education and have not yet completed 26 years).

The maintenance duty of parents to children who, because of a serious physical or mental impediment are incapable of an independent life has until now been limited in time and supplemented by state aid (previously valid second paragraph of Article 123 of the Act). This assistance was generally inadequate and often forced parents to strive to the very limit of their capacities.[23] The amending act, therefore, in line with the principle of a social state, relieves parents of the burden of maintaining children of full age with impaired physical or mental development who are no longer in full-time education. From now on, the state will have to provide adequate funds for these unsupported children. Parents of children with impaired physical or mental development will thus no longer be in an unequal position to parents of healthy children in terms of duty of maintenance. Just as healthy children, they will only support them after full age if they are in full-time education and have not yet completed 26 years. In view of the fact that maintenance derives from parenthood (Article 54 of the Constitution RS, Ur. l. RS, no. 33/91-I, 42/97, 66/00, 24/03, 69/04, 68/06), from the parent-child relationship, and not from parental rights, the state must provide funds for living for full-age children with impaired development, independently of possible extension of parental rights beyond full age.

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[20] See also Novak B., Description of Slovene family law. Jusletter (Bern), 2007, pp. 9 - URL: www.weblaw.ch/de/content_edition/jusletter/jusletter.asp.

[21] Third paragraph of Article 123 of the Act.

[22] See Zupančič K., 1999, p. 160; also § 1608 BGB.

[23] Zupančič K., 1999, p. 159.

Similarly, because the right to independent existence is an independent right from parental rights, the general principle applies that parents whose parental rights have been revoked are not excused the duty of maintenance (Article 125 of the Act).

Parents support their young children in their own household unless this is against the child's benefit (Article 131 of the Act). A child's benefit could, for example, require a different method of support when the child attends a distant secondary school. It will not then be to the child's benefit to travel each day to school and back and thus be exhausted and lose valuable time. Similarly, it will be necessary to find another method of support than in the household of the child's parents when, because of a threat to the child on the part of its parents, the state must intervene in the execution of parental care and place the child with a guardian, or in a foster home or institute.

Although supporting full age children within the framework of the parental household is the cheapest for parents in Slovenia and a very comfortable method of existence for full age children, it is possible for parents to choose another method of supporting full age children (Article 131.a of the Act) or for children to demand for significant reasons (for example because of education in a distant place) maintenance in pecuniary form. Monetary maintenance in the relation between parents and children is determined as a monthly amount in advance (Article 131.c of the Act).

Even before the amending act, a spouse was obliged to support underage children of his or her marital partner if the child did not have a parent able to support them. The amending act on the one hand restricted this obligation to underage children of a spouse living with the married couple and, on the other, extended the duty to support the children of their partner to extramarital partners. The guide in shaping these provisions was the principle of the special protection of children. This only relates to underage children, so the duty of maintenance of a spouse or extramarital partner is narrower than the maintenance duty of parents to their children and covers only underage children.

An additional argument for extramarital partners also to be obliged to support the underage children of their partner was the fact that ever more children live in extramarital unions, which their parents have planned with a new partner and that children in such life communities, especially in contrast to children who live in the marital union of their father or mother with a new marital partner, were not adequately protected against need.

A spouse or extramarital partner also has a duty under the new arrangement to support the underage children of their partner only if the child has no par-

ent able to support it (because neither of them has the means to support the child). The duty of a spouse or extramarital partner to support the children of their partner ceases with the termination of their marriage or extramarital union with the child's mother or father, unless the marriage ceased because of the death of the child's mother or father. The spouse or extramarital partner has then the duty to support the child of her or his deceased spouse or extramarital partner only if the spouse or extramarital partner lived with the child at the time of death (Article 127 of the Act).

I personally believe that the provisions of Article 127 of the Act may be dubious from the point of view of the modern development of maintenance law. In all modern European countries, namely, this tends towards a narrower circle of persons liable to pay maintenance. The duty of maintenance in modern legal systems is therefore restricted mainly to the circle of persons such as spouses, parents and children.[24] Modern legal theory, in grounding the duty of maintenance refers to biological bonds, blood ties between relatives and to family solidarity. Because no blood tie exists between a spouse and the children of the other spouse or between an extramarital partner and the children of the other extramarital partner[25] and because Slovene legal theory does not consider communities of a spouse with the children of the other spouse (and communities of extramarital partners and children of the other partner) to be family within the terms of family law[26] (among the enumerated persons, family law does not envisage other family law rights and duties which parents have to their children: such as the right of care and upbringing of their partner's children), the present mutual duty of maintenance between a spouse and the children of the other spouse should be removed, and not extended to the relation of an extramarital partner to the children of their partner. Institutionalisation of a

[24] Modern states attempt in this to remove the mutuality of maintenance between parents and children and to restrict the duty of maintenance between parents and children only to the duty of parents to support their own underage children. Realisation of this idea requires suitable material prosperity so for the moment only Sweden has realised this idea, which is a country with a high standard of living. Agell A. in: Schwab D., Henrich D. (Hrsg.), Familiäre Solidarität. Gieseking, Bielefeld, 1997, p. 164.

[25] In the German literature see Fuchs M., Empfiehlt es sich, die rechtliche Ordnung finanzieller Solidarität zwischen Verwandten im Unterhalts-, Pflichtteils-, Sozialhilfe- und Sozialversicherungsrecht neu zu gestalten?, JZ 17/02, p. 790.

[26] Stepfather or stepmother and stepchild are not considered family - in: Zupančič K., 1999, p. 44.

duty of maintenance between a spouse and the children of the other spouse (or between an extramarital partner and the children of another partner) is that it means replacement of family solidarity with general solidarity, problematic also from the point of view of the principle of a social state (Article 2 of the Constitution RS).[27]

In addition, protection of the child's benefit in the manner referred to in Article 127 of the Act is a sword that cuts all ways - not necessarily only towards the child's benefit. It could happen that the new solution, with its pronounced material burden, will be a deterrent to entering into partnership with a "single parent" who, because of social aspects, already has difficulties finding an extramarital or marital partner. In this sense, the solution could well be largely counterproductive in family and socio-political terms, not least also because of protecting the benefit of the child, since the legal support of the duty of maintenance risks deterring those partners who would otherwise be prepared actually to care for a child.

The amending act forces parents of underage children to try to achieve agreement themselves or with the assistance of a social security body, before turning to the courts for solution of any question in dispute in relation to children. When parents have reached agreement on maintenance (or care and upbringing and on contacts with children) they can turn to the courts, which issue a decision on this in a non-litigious procedure. The court rejects a proposal for the issue of a decision if it finds that the agreement is not to the benefit of the child. The court has no jurisdiction for issuing such a decision when divorce proceedings are being conducted.

Parents who wish to achieve an agreed divorce, in addition to agreements on mutual relations after the divorce,[28] must submit with the proposal for an agreed divorce, only in written form[29]: 1. an agreement on care and upbring-

[27] Ibid.

[28] These agreements (1. agreement on the share of common property, which includes the couple's personal residence purchased with shared assets, 2. agreement on which of the spouses that lived in rented accommodation will remain in it, when both spouses are stated in the rental contract as tenants, or become the tenant of the accommodation when only one of the spouses is stated in the rental contract as tenant and the other as a person who will use the accommodation with the tenant, and 3. agreement on the support of a spouse who does not have the means of subsistence and through no personal fault is unemployed) must be concluded on the form of enforceable notarial protocol.

[29] And not in the form of enforceable notarial protocol. Zupančič K. in: Zupančič K., Novak B., 2005 (first reprint), p. 34.

ing of children, 2. an agreement on maintenance of their joint children, 3. an agreement on their contacts with children. When a court finds that the agreements relating to a child are to the child's benefit and that they meet all other conditions for an agreed divorce, it annuls the marriage by judgment and inserts in the judgment the agreements of the spouses on relations to shared children (second paragraph of Article 421 of the Civil Procedure Act).

If the court considers that any of the agreements in relation to the child are not to the child's benefit, it does not replace it with its own decision, since a court does not decide during an agreed divorce, but calls on the parents to change the agreement, otherwise it rejects the proposal for an agreed divorce.[30] If a new agreement is not possible - either of them may request a divorce by suit.

When a court grants a divorce on the basis of a divorce suit, it must *ex officio* decide on the care, upbringing and support of shared children and on their contact with the parents. During divorce proceedings by suit, the spouses can propose an agreed solution of all or some questions in relation to children. The court respects their agreement if it is to the child's benefit, otherwise it decides differently.[31]

The amending act introduces nothing new in connection with the duty of full-age children to support their parents if these do not have sufficient funds for subsistence and cannot obtain them. Since the new Slovene constitutional arrangement of 1991 this duty is no longer constitutionally protected, but Slovenia would not succeed in covering expenditures in the state budget by ending it, since the Slovene population is old and the birth rate is low. Full-age children still therefore have a duty to support their unsupported parents.

Since the amending act, full-age children are no longer obliged to support a spouse (or extramarital partner) of their parent who has cared for and supported them for an extended period. The legislator clearly judged that the duty of maintenance of persons who are not relatives of the liable person, in a case in which the grounds of this duty (such as in the provision of Article 127 of the Act) do not dictate special protection of an underage person, dispropor-

[30] Zupančič K. in: Zupančič K., Novak B., 2005 (first reprint), p. 33.

[31] A divorce judgment in a divorce proceeding by suit does not arrange the division of shared property of spouses. The spouses must agree on this in the form of a executable notarial protocol (analogous to the first paragraph of Article 64 of the Act) or a court decides on the division on the initiative of one of the spouses.

tionately encroaches on the rights of the individual and on the principle of a social state.

The person entitled to receive and the person liable to pay maintenance may conclude an agreement on maintenance that a full-age child must pay a parent, in the form of an enforceable notarial protocol (Article 130.a of the Act). Parents may not renounce the right to maintenance, since the law prohibits renunciation of the right to maintenance in maintenance relations between parents and children (Article 128 of the Act).

The amending act does not specify competences for an agreement on maintenance of full-age children by their parents, although the draft of the act envisaged that all agreements for children should be concluded before the courts.[32] The deletion of this proposal from the draft amending act and the fact that all agreements between adults may be concluded before a notary lead to the conclusion that a maintenance agreement for a full-age child must also be concluded in the form of an enforceable notarial protocol. It would be sensible in the future *mutatis mutandis* to enshrine this rule in law for the sake of legal protection.

Because of the relatively high level of inflation, the institution of adjustment of maintenance has also been retained in the duty of maintenance between parents and children and with the duty of maintenance of a spouse or extra-marital partner to support the children of his partner.

3. CONCLUSION

The amending act established an important framework for individual autonomy in family law. In comparison with the previous arrangement, in particular with a more specific and precise arrangement, it significantly opened possibilities for concluding agreements in the entire sphere of maintenance. These amending acts will be followed in the future by a new family code, which will remove the cogent property regime and thus allow spouses to make free agreement on mutual property relations. I hope that in this way Slovenia will obtain a modern legal framework for shaping family relations. From the point

[32] See Article 123.č of the proposed changes in: Zupančič K., Novak B., Zakon o zakonski zvezi in družinskih razmerjih s predlogom sprememb in pojasnili. 7th amended edition, Uradni list RS, Ljubljana, 2003, p. 89.

of view of a modern arrangement, hesitation is caused only by the fact that the amending act of 2004 understood the conclusion of maintenance agreements in relation to children mainly as an unconditional parental duty, rather than an opportunity for realising parental ideas on the care and upbringing of children on the basis of constitutional parental rights and it prescribed a compulsory procedure of agreement before a social security body before enforcing judicial remedy. However, parents cannot effectively be forced into suitable and loving exercise of their care for children if they do not want to do this themselves. The adopted arrangement therefore, in cases in which parents are not willing to have dialogue in front of social security bodies, only defers protection of the child's benefit. It does not contribute to greater protection of the child's benefit or to unburdening the courts.

Sažetak

Barbara Novak[*]

NOVA ZAKONSKA REGULACIJA UZDRŽAVANJA U REPUBLICI SLOVENIJI

Najnovije izmjene slovenskog zakonodavstva o obiteljskom pravu bile su prijeko potrebne, budući da su praktički iste materijalnopravne odredbe o uzdržavanju iz Zakona o braku i porodičnim odnosima bile na snazi od 1977. godine. U preko dvadeset godina njihove primjene sudska praksa je učinila vidljivim brojne nedostatke i zakonske praznine. Razvoj pravne teorije s jedne strane i promjene u društvenom okruženju nakon osamostaljenja Republike Slovenije s druge nametnule su nova pitanja (npr. smiju li stranke sklopiti vlastiti sporazum o uzdržavanju u obliku javnobilježničkog zapisnika).

Kazuistički kao i djelovanjem socijalnih službi u praksi nastojalo se predmete uzdržavanja o kojima je zakon šutio riješiti analognom primjenom individualnih načela i pravila obiteljskog prava. Takva nepisana pravila umanjivala su transparentnost regulacije uzdržavanja i time pravnu sigurnost građana. U pojedinim slučajevima tako su čak nastala nova pravila. Takvo pravno uređenje prava na uzdržavanje, koje je egzistencijalno pravo, nije više bilo prihvatljivo, te je to područje koje može imati teške posljedice za život kako ovlaštenika tako i obveznika uzdržavanja trebalo što prije iznova urediti. Stoga je izmijenjena pravna regulacija uzdržavanja, kao i odnos između roditelja i djece.

Bračni drug koji ne raspolaže potrebnim sredstvima za život te je nezaposlen bez vlastite krivnje i nadalje zadržava pravo na uzdržavanje od strane drugog bračnog druga i nakon razvoda. Takav zahtjev može istaknuti bilo tijekom brakorazvodnog postupka bilo u zasebnom postupku u roku jedne godine od pravomoćnosti presude. Uzdržavanje se priznaje ovisno o potrebama podnositelja zahtjeva i sposobnosti obveznika uzdržavanja kao mjesečni predujam. U iznimnim slučajevima uzdržavanje se može dodijeliti kao jednokratna isplata ili na drugi način, ako to ne predstavlja nepravedno opterećenje za uzdržavanog i uzdržavatelja. Bračni drugovi mogu se tijekom brakorazvodnog postupka međusobno dogovoriti o uzdržavanju. Takav dogovor sklapa se u obliku ovršnog bilježničkog zapisnika kod javnog bilježnika.

Obveza uzdržavanja između djeteta i roditelja i nadalje je uzajamna. Roditelji su dužni uzdržavati svoju djecu, a punoljetna djeca dužna su uzdržavati svoje roditelje ako nemaju dovoljno sredstava za život niti ih mogu namaknuti.

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Roditelji su dužni uzdržavati svoju djecu u pravilu do punoljetnosti. Njihova se sposobnost uzdržavanja ocjenjuje prema materijalnim i proizvodnim mogućnostima. Iznos uzdržavanja mora biti dovoljan da jamči dobrobit djeteta. To znači da mora biti primjeren uspješnom cjelokupnom razvoju djeteta. Punoljetno dijete roditelji moraju uzdržavati samo onda ako se redovito školuje. Formalna pozicija djeteta u izobrazbi nije mjerodavna za obvezu uzdržavanja. Razdoblje do kada osoba koju uzdržavaju roditelji ima pravo na uzdržavanje sada je ograničeno na 26 godina. I uzdržavanje djeteta može se riješiti sporazumno. Roditelji mogu pred sudom sklopiti sporazum o uzdržavanju maloljetne djece. Sporazumi o uzdržavanju punoljetne djece sklapaju se pred javnim bilježnikom u obliku ovršnog bilježničkog zapisnika, što vrijedi i za sporazume o uzdržavanju između punoljetnih osoba, npr. sporazum o uzdržavanju između bračnih drugova ili neuzdržavanih roditelja.

Ključne riječi: obiteljsko pravo, autonomija stranaka, uzdržavanje, zaštita djece, ravnopravnost bračnih drugova

Zusammenfassung

Barbara Novak**

DIE NEUE GESETZLICHE UNTERHALTSREGELUNG IN DER REPUBLIK SLOWENIEN

Die jüngsten Änderungen in der slowenischen Gesetzgebung zum Familienrecht waren dringend erforderlich, da die materiellrechtlichen Bestimmungen zum Unterhalt im Gesetz über Ehe und Familienbeziehungen praktisch unverändert seit 1977 in Kraft waren. In den über zwanzig Jahren ihrer Anwendung hat das Fallrecht zahlreiche Mängel und Gesetzeslücken ans Licht gebracht. Einerseits durch die Entwicklung der Rechstheorie, andererseits infolge der Veränderungen im sozialen Umfeld nach der Unabhängigkeit der Republik Slowenien kamen neue Fragen auf (z. B. die Frage, ob Parteien eine eigene Unterhaltsvereinbarung in Form eines notariellen Protokolls treffen dürfen).

Im Fallrecht wie in der Praxis der Sozialbehörden versuchte man, Unterhaltsangelegenheiten, zu denen das Gesetz schwieg, durch analoge Anwendung individueller Prinzipien und Regeln des Familienrechts zu lösen. Solche ungeschriebenen Regeln beeinträchtigten die Transparenz von Unterhaltsregelungen und damit die Rechtssicherheit der Bürger. Vereinzelt begründeten sie sogar neue Regeln. Eine solche rechtliche Regelung des Unterhaltsrechts, das ein existentielles Recht darstellt, war nicht mehr zufrieden stellend. Daher musste dieser Bereich, der schwerwiegende Folgen für das Leben des Unterhaltsberechtigten wie auch das des Unterhaltsverpflichteten haben kann, so bald wie möglich neu geregelt werden. Sowohl die rechtliche Regelung des Unterhalts als auch die der Eltern-Kind--Beziehungen wurde deshalb geändert.

Ein Gatte, der nicht die erforderlichen Mittel zum Leben hat und ohne eigenes Verschulden arbeitslos ist, behält auch weiterhin den Anspruch, vom anderen Gatten selbst nach der Scheidung Unterhalt zu bekommen,. Er oder sie kann dies entweder im Scheidungsverfahren beantragen oder in einem individuellen Verfahren innerhalb eines Jahres nach der rechtskräftigen Scheidung. Der Unterhalt wird nach den Bedürfnissen des Beantragenden und der Leistungsfähigkeit des Verpflichteten als monatliche Vorauszahlung zugesprochen. Ausnahmsweise kann Unterhalt als einmalige Zahlung oder in anderer Weise angeordnet werden, sofern den Unterhaltsbetroffenen dadurch keine unbillige Härte widerfahren würde. Ehegatten können im Zuge der Scheidung den

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Unterhalt auch untereinander vereinbaren. Eine solche Vereinbarung wird in Form eines vollstreckbaren notariellen Protokolls beim Notar getroffen.

Die Unterhaltsverpflichtung zwischen Kindern und Eltern ist auch weiterhin gegenseitig: Eltern sind verpflichtet, ihre Kinder zu unterhalten, und volljährige Kinder sind verpflichtet, ihre Eltern zu unterstützen, falls diese nicht ausreichende Mittel zum Leben haben und nicht beschaffen können.

Eltern sind verpflichtet, ihre Kinder gewöhnlich bis zur Volljährigkeit zu unterhalten. Ihre Fähigkeit zur Unterhaltsleistung wird nach ihren materiellen und produktiven Möglichkeiten beurteilt. Der Unterhalt muss hoch genug sein, um das Wohl des Kindes zu garantieren. Dies bedeutet, dass er für eine erfolgreiche Gesamtentwicklung des Kindes angemessen sein muss. Volljährige Kinder müssen von ihren Eltern nur dann unterhalten werden, wenn sie eine Vollzeitausbildung machen. Die formale Position des Kindes in der Ausbildung ist nicht entscheidend für die Unterhaltspflicht. Heute ist der Zeitraum, bis wann eine von ihren Eltern unterhaltene Person Anspruch auf Vollzeitausbildung hat, gesetzlich auf 26 Jahre beschränkt. Auch zum Kindesunterhalt ist eine Vereinbarung möglich. Eltern können vor Gericht eine Unterhaltsvereinbarung für minderjährige Kinder schließen. Unterhaltsvereinbarungen für volljährige Kinder werden als vollstreckbares notarielles Protokoll getroffen wie auch andere Unterhaltsvereinbarungen zwischen volljährigen Personen, etwa eine Unterhaltsvereinbarung zwischen Ehegatten oder nichtunterhaltenen Eltern.

Schlüsselwörter: Familienrecht, Autonomie der Parteien, Unterhalt, Kinderschutz, Gleichheit der Ehegatten