

“Novation security of alimony”

ABSTRACT

The paper discusses the problem of novation security of alimony, regulated in the provisions of Art. 753 of CCP. This institution is particularly important for the alimony creditor. Its purpose is to provide the party entitled to alimony with financial means necessary for subsistence for the period of frequently long-lasting examination proceedings. The purpose of this work is an analysis of the subject-matter type of security, the effects of which are *de lege ferenda* postulates submitted.

Keywords: novation security, alimony, protection

1. Introduction

This publication describes a vitally important, from the practical point of view, issue of the security of alimony. On the grounds of the applicable legal regulations a party entitled to alimony may exercise two types of security of the claims due to the party: novation (regulated in the provisions of Art. 753 of CCP (Act of 17 November 1964 – the Code of Civil Procedure (here of 31 October 2016, Dz.U. 2016, item 1822 as amended)) or maintenance (regulated in Art. 747 of CCP). The latter is commonly used to secure financial claims. Whereas the former is of a specific nature, since it is exclusively assigned to secure claims indicated by the legislature. The subject of this publication is the novation model of securing alimony. It constitutes a temporary financial security of parties applying for alimony. The fact that a party may apply for the security of

alimony prior to the instigation of divorce or separation proceedings, in its course, and also during ongoing alimony proceedings is also relevant. This model is particularly important for the alimony creditor, due to the fact that the order of the Court concerning securing alimony constitutes an enforcement title, to which the writ of execution is assigned *ex officio*, thus allowing for the possibility to initiate enforcement.

The purpose of this work is an analysis of the subject-matter type of security, the effects of which are *de lege ferenda* postulates submitted.

2. General issue

At the beginning the definition of alimony should be explained, which is specified in Article 128 of FGC (Act of 25 February 1964 – the Family and Guardianship Code (here of 9 March 2017, Dz.U. 2017, item 682)), where it is stipulated that alimony is the duty to provide means of subsistence and if required means of education. The circle of people entitled to receive and obliged to pay alimony is quite wide, therefore a considerable significance is given to the provisions of Art. 129 and 130 of FGC which specify the order of parties obliged to pay alimony. The provision of Art. 130 of FGC sets the rule of the priority of a spouse to perform the alimentary duty for the benefit of the other spouse after the termination or annulment of marriage, and also after the ruling of separation. It supersedes the alimentary duty of the relatives of that spouse. Where the spouse is absent or insolvent, the provision of Art. 129 of FGC applies, which specifies the following order of the parties obliged to satisfy alimentary claims:

- 1) descendants,
- 2) ascendants,
- 3) siblings.

Close relatives are encumbered before distant relatives, while relatives of the same degree are encumbered in parts corresponding to their financial and earning capacities.

In ruling alimony, the Court should take into account the justified needs of the entitled party and the financial and earning capacity of the obliged party (§1 of Art. 135 of FGC).

Cases regarding alimony are heard by District Courts (Art. 16 in conjunction with Art. 17 Subsection 4 of CCP), having territorial jurisdiction over the place of residence of the respondent (Art. 27 of CCP) or the entitled party (Art. 32 of CCP).

There is also a possibility to seek alimentary claims in separation or divorce proceedings, where the competent court is the Regional Court.

It is worth mentioning that the legislation does not allow the possibility, in the course of pending divorce or separation proceedings, to instigate other proceedings to satisfy family needs or to seek alimony, regarding payment for the period beginning with the day the divorce or separation proceedings were instigated (Art. 445 §1 sentence 1 of CCP) (Cf. Z. Krzemiński, W. Żywicki, *Palestra* 1967, No. 4, p. 28 and subsequent; T. Żyznowski, *Komentarz do art. 445 k.p.c.*, 2016, Legalis). Such a claim or application for security of the claim is heard by the Court which hears the divorce case, pursuant to the provisions on the proceedings to secure claims (Art. 445 §1 sentence 2 of CCP). The Court of Appeal in Kraków indicated that the expression “to adjudicate on the basis of the provisions on the proceedings to secure claims” in conjunction with Art. 753 § 1 of CCP does not release the Court from examining the actual state of affairs as to “*the amount of the family maintenance costs arising out of the financial and earning capacity of the family*” (Order of the Court of Appeal in Kraków of 28 September 2010, I ACz 1039/10, Legalis no. 298079).

The alimony proceedings instigated prior filing a claim for divorce or separation are suspended at the time the claim for divorce or separation is filed, with regard to the payment for the period beginning with the day the claim was filed (Art. 445 §2 sentence 1 of CCP) (Resolution of the Supreme Court of 20 October 1966, III CZP 84/66, Legalis no. 12835). When suspending the proceedings the court should consider the application to secure the claim (Resolution of the Supreme Court of 14 July 1966, III CZP 52/66, Legalis no. 127460).

Issuance of an order to grant the security to perform the alimentary duty in a case for divorce or separation results in the suspension *ex lege* of the execution of non-final decisions to perform the duties of payment which were issued in a previous case, for the period beginning with the date the divorce or separation proceedings were instigated (Art. 445 § 2 sentence 2 of CCP).

3. Novation and maintenance security

Proceedings to secure claims are characterized by an accessory and supporting character towards examination and enforcement proceedings. The proceedings to secure claims is to ensure a temporary protection of the entitled party, which is manifested in securing the claim due to the entitled party. In principle, the proceedings to secure claims serve two important functions:

- they prevent the debtor from conducting activities which could preclude the satisfaction of the creditor,
- they create a possibility for a temporary regulation of relationships between the parties (T. Młynarski, *Monitor Ubezpieczeniowy* No. 49, June 2012, https://rf.gov.pl/publikacje/artykuly-pracownikow-i-wspolpracownikow/Tomasz_Mlynarski_Zabezpieczenie_nowacyjne_roszczen_odszkodow_awczych_o_rente_oraz_sume_potrzebna_na_koszty_leczenia_M_21020#_ftn1 [accessed: 17 May 2017]).

Due to these functions there are two types of securities: novation and maintenance. The former creates so to say a new situation between the parties. Whereas the latter consolidates the existing state of affairs (*Ibidem*). The purpose of the novation security is to ensure that the entitled party receives the means of support needed day-to-day subsistence. While the maintenance security is to safeguard future payments granted by a judgment in an alimony case. In the former case the security is granted solely on the basis of substantiation, and not on the proof of the existence of the claim (Art. 753 § 1 sentence 2 of CCP), which means that the entitled party is not required to show a legitimate interest in having the security granted (Art. 730¹ of CCP), while in the latter case the entitled party must show such an interest (M. Muliński, *Komentarz do art. 753 k.p.c.*, 2015, Side no. 8).

The novation security was regulated in the provisions of Art. 753 CCP. Its purpose is to provide the party entitled to alimony with financial means necessary for subsistence for the period of frequently long-lasting examination proceedings. The obliged party undertakes to pay the entitled party a specified amount of money, which can be paid as a lump-sum or in determined intervals (§ 1 of Art. 753 of CCP). The doctrine indicates that the alimentary security in the form of a lump-sum payment should

only be granted in exceptional, justified circumstances, for instance when the Court provides for an expeditious termination of the proceedings in a particular case (M. Muliński, *Komentarz do art. 753 k.p.c.*, 2015, Side no. 2). In my opinion, the possibility to take advantage of such an opportunity should depend not solely on the decision of the Court, but also on the intent of both parties. If both parties agree on the willingness to pay a lump-sum of the security by the obliged party, the court should uphold this position.

The jurisprudence indicates that due to the duration of alimony proceedings, it is justified that the amount of the security cover the entire means of support of the entitled party, since this model of security prevents from accumulating enforcement arrears and the defendant has a foreseeable procedural situation (Judgment of the Court of Appeal in Gdańsk of 14 December 1995, I ACr 850/95, Legalis no. 33880).

The provisions of Art. 753 § 1 of CCP constitute an exception to the rule specified in Art. 731 of CCP which states that interim orders may not lead to the satisfaction of claims (*Ibidem*). The departure from this rule is justified by the specific nature of claims for alimony, aimed at satisfying the current needs of the entitled party, and this is fulfilled by periodic payments of a specified amount of money for the benefit of the entitled party, made in order to secure the said claims (*Ibidem*). In the doctrine the novation security of claims, which results in a full or partial satisfaction of the claim, is referred to as anticipation security (J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, 2009, p. 527).

Note that the party seeking alimony may also exercise the maintenance security in order to safeguard their right. While exercising this type of security, it is relevant to take into account the contents of Art. 747 of CCP, where the admissible manners of securing financial claims are listed. Those are as follows:

- 1) *“forfeiture of movables, salary, receivables from a bank account or other receivables, or other property right;*
- 2) *encumbrance of a real estate of the obliged party with a compulsory mortgage;*
- 3) *imposing a prohibition to alienate or encumber a real estate for which no land and mortgage register is kept or which land and mortgage register has been lost or destroyed;*

- 4) *encumbrance of a ship or a ship in construction with a ship mortgage;*
- 5) *imposing a prohibition to alienate a housing cooperative member's right to premises;*
- 6) *establishment of a receivership over an enterprise or agricultural holding of the obliged party or over a facility belonging to the enterprise or over its part or over a part of the agricultural holding of the obliged party”* (Cf. M. Muliński, *Komentarz do art. 747 k.p.c.*, 2015; I. Gil, *Komentarz do art. 747 k.p.c.*, 2017; A. Zieliński, *Komentarz do art. 747 k.p.c.*, 2017; J. Jagieła, *Komentarz do art. 747 k.p.c.*, 2015 for more information about each manner of security).

This is a closed list, which means that should other than above-mentioned manners of security be given in an application to grant security, such an application shall be rejected (M. Muliński, *Komentarz do art. 747 k.p.c.*, 2015, Side no. 1).

Due to the framework of the work described in the introduction, the analysis of each indicated manner of security is deliberately omitted. It is worth noting that a party seeking alimony has the right to simultaneously exercise both manners of security: novation and maintenance.

4. Course of proceedings to secure claims

Security of alimony can be granted solely on application, and not *ex officio*. It seems that this is not an adequate solution from the point of view of an alimentary debtor, who due to their frequent helplessness in life or unawareness of the law, may not take advantage of the opportunity to exercise their right in this respect. For that reason I consider the previous legal arrangements – prior to the amendment of the provisions of the Code of Civil Procedure of 2 July 2004 (Dz.U. 2004, No 172, item 1804) – to have fulfilled the needs of the practice more efficiently than the current legal regulations. Therefore, returning to the previous arrangements seems reasonable (In such case, the contents of Art. 732 of CCP should be modified, which allow for the possibility to instigate proceedings to secure the claim *ex officio* exclusively in such cases which can be initiated *ex officio*), or alternatively, imposing a duty on a family court to notify the party entitled to alimony of a statutory possibility of securing the claim

due to the party. The nature of alimony which serves to satisfy the current needs of the entitled party undoubtedly supports this solution.

However, there are different opinions in the literature, which support the current arrangements. For instance, A. Zieliński claims that: “these regulations restore the principles of dispositiveness and contradictoriness to their proper position. It should be assumed that in the current state of the law the Court may, if it deems reasonable, instruct the entitled party on the possibly of filing an application to secure claims for alimony (Art. 5 of CCP)” (A. Zieliński, *Komentarz do art. 753 k.p.c.*, 2017, Side no. 1).

The application to secure the claim should be filed with the first instance Court having jurisdiction over the case. Where such jurisdiction cannot be determined, the Court competent to grant the security shall be the Court in the district of which the order to grant the security shall be executed. In the absence of this legal basis, the District Court for the capital city of Warsaw shall be the competent Court. Note that should such an application be filed in the course of alimony proceedings, it shall be adjudicated by the Court of the instance where the proceedings are pending (Art. 734 of CCP).

The formal requirements of the application to secure claims for alimony (Cf. A. Górski, MoP 2006, No. 1, p. 23 and subsequent for more information about the application) should correspond to the requirements provided for a pleading, and also contain the manner of the security together with stating the amount of the security in the case of financial claims and the substantiation of circumstances which justify the application (Art. 736 § 1 of CCP). Where the application has been filed prior to the instigation of the proceedings, the subject-matter of the case should additionally be described (Art. 736 § 2 of CCP). It should be noted, however, that while determining the amount of the security, it may not exceed the amount of the claim sought, together with interests and the costs of the execution of the security (Art. 736 § 3 of CCP).

In the light of the above legal provisions, the position of the Court of Appeal in Szczecin, according to which “the application to grant a novation security of claims for alimony is not required to contain the amount of security referred to in Art. 736 § 1 Subsection 1 of CCP” (Order of the Court of Appeal in Szczecin of 29 October 2010, I ACz 590/10, Legalis no. 340427. M. Muliński also indicated that the position of the

Court is arguable. There are no legal regulations which would release the entitled party from the duty to state the amount of the security – *idem*, *Komentarz do art. 753 k.p.c.*, 2015, Side no. 10) should be deemed wrong. Taking into consideration the literal interpretation of Art. 736 of CCP, stating the amount of security in the application is a necessary element of the contents of the filed application (The same in I. Gil, *Komentarz do art. 736 k.p.c.*, 2017, Side no. 3; similarly in A. Zieliński, *Komentarz do art. 736 k.p.c.*, 2017, Side no. 6). Stating the amount of the security was an optional element of the application prior to the amendment of the provisions of the Code of Civil Procedure by the Act of 2 July 2004 on the Amendment of the Act – the Code of Civil Procedure and Certain Other Acts (Dz.U. No. 172, item 1804).

However, it is indicated in the jurisprudence that not including the amount of the interests and the costs of the execution of the security in the amount of the security, should not result in the return of the application in full, since the intention of the legislation is not excessive formalism in this respect (Order of the Court of Appeal in Katowice – I Civil Division of 21 August 2012, IACz 786/12, *Legalis* no. 735488).

The application to secure the claim should be adjudicated forthwith, but not later than within a week of the date it was submitted, and where the application is to be adjudicated at a hearing, the hearing must be held within a month of the day the application was submitted (Art. 737 of CCP).

The ruling of the presiding judge of the first instance Court concerning the return of the application to grant security is subject to appeal (Resolution of the Supreme Court of 28 August 2008, III CZP 65/08, *Legalis* no. 104458).

The Court serves both parties with an official copy of the order concerning cases for alimony (Art. 753 § 2 of CCP). The security for claims for alimony can also take place at a closed hearing. In such case the Court serves both parties with the order together with its reasons (Art. 357 § 2 of CCP).

The execution of such an order takes place in an enforcement procedure, after the Court assigns it a writ of execution (Art. 743 § 1 of CCP). In principle, the enforcement is initiated on a motion which can be filed by the following entities: the creditor specified in the enforcement

title or an entitled authority, e.g. a prosecutor or a non-governmental organization (Art. 796 § 1 and 3 of CCP). However, there are doubts as to whether the Court has the right to initiate the enforcement *ex officio* in order to exercise the granted security. According to J. Jagieła “Since the execution of the order to grant the security, which is eligible for the execution by way of judicial enforcement, takes place on the basis of the provisions on enforcement proceedings applied accordingly, it should be assumed that the initiation of the enforcement concerning the execution of the order to secure alimony may also take place *ex officio* on the request of the Court which granted the security (Art. 1085 in conjunction with Art. 743 § 1)” (J. Jagieła, *Komentarz do art. 753 k.p.c.*, 2015, Side no. 8; idem, PPEgz 2004, No. 7–9, p. 27). This view is arguable, since according to § 2 of Art. 796 of CCP “in cases which may be opened *ex officio*, the enforcement may be initiated *ex officio* on the request of the first instance Court which heard the case and referred the request to the competent Court or bailiff”, taking into account the fact that the cases concerning the security of claims for alimony may not be executed *ex officio* by the Court. While it can be concluded from the literal interpretation of Art. 1085 of CCP that the possibility of initiating the enforcement *ex officio* refers solely to the cases where alimony has been awarded. There is no reference to cases concerning the security of alimony in the legislation. Obviously, representatives of the doctrine are right to indicate that J. Jagieła’s position fulfills the needs of the practice (P. Gil, *Komentarz do art. 1085 k.p.c.*, 2017, Side no. 3). However, in my opinion, in order to remove the doubts in this respect, the contents of the provision of Art. 1085 of CCP should be supplemented by adding the wording: “and cases where the security of alimony has been granted”.

The request to initiate enforcement should be submitted to the competent enforcement authority. The motion to initiate enforcement should correspond to the formal requirements of a pleading, which are specified in Art. 126 and subsequent and in conjunction with Art. 13 § 2 of CCP and indicate the benefit claimed. The enforcement title should be appended to the motion (Art. 797 § 1 of CCP). The fulfillment of these requirements constitute the grounds for initiating the enforcement procedure.

Note that to the party entitled to the security of alimony, the provisions of Art. 753² of CCP are relevant, which allow for the

possibility of issuing a judgment at a closed hearing, awarding a benefit satisfying the entitled party to a certain extent. Exercising such a type of right is admissible, should the obliged party acknowledge the claim. Some representatives of the doctrine indicate that this acknowledgment is binding to the court if it does not contradict the law and principles of community life, and it does not lead to the circumvention of the law (Art. 213 § 2 of CCP) (A. Zieliński, *Komentarz do art. 753² k.p.c.*, 2017, Side no. 2). Such an opinion does not seem to be justified, due to the fact that the provisions indicate the acknowledgment of the claim (in the substantive aspect, the so-called appropriate acknowledgment) and not the whole lawsuit – which supports the opinion that the court is bound by the acknowledgment (Cf. inter alia M. Muliński, *Komentarz do art. 753² k.p.c.*, 2015, Side no. 1. on the groundlessness of the examination of the acknowledgment of the claim with respect to its conformity with the law and principles of community life).

The groundlessness of the restriction of applying the provisions of Art. 753² of CCP exclusively to unsatisfied benefits is justifiably depicted in literature. It is accurate to indicate that “Provisions of CCP do not provide for a lawsuit to be left without adjudication, even in the event the defendant has voluntarily fulfilled the claim sought, and for the assumption, that the order to grant the security connected with the acknowledgment of the lawsuit and satisfaction of the claim within the scope of satisfying the entitled party, is equal to a final judgment” (J. Jagieła, *Komentarz do art. 753² k.p.c.*, 2015, Side no. 3 and cited literature).

In the light of the above, it seems justifiable to *de lege ferenda* modify the contents of Art. 753² of CCP in order to include the possibility of issuing at a closed hearing a judgment awarding the benefit within the scope of acknowledging the claim by the obliged party, both to the satisfied and unsatisfied part (Similarly *ibidem*). The acknowledgment of the claim in full should be relevant in this respect.

It is important for the obliged party that they may demand that the final order by which the security was granted be reversed or amended when the reason for the security has changed or disappeared (§ 1 of Art. 742 of CCP). The order concerning the reversal or limitation of the security may be issued solely after conducting a hearing (§ 2 of Art. 742 of CCP). The order reversing or amending the order concerning granting

the security is subject to appeal, lodging of which suspends the execution of the order (§ 3 of Art. 742 of CCP). The disappearance or change of the reason for the security take place, e.g. when after granting the security, the conditions for its granting became invalid, when the secured claim ceased to be credible, when the obliged party satisfied the secured claim, when the claim expired for other reasons, or when the solvency of the obliged party ceased to be endangered (Order of the Court of Appeal in Poznań – I Civil Division of 5 February 2014, IACz 133/14, Legalis no. 796864). The literal interpretation of Art. 742 § 1 of CCP supports the statement that the entity eligible to file a motion to reverse or amend the final order by which the security was granted is the obliged party. Nevertheless, it must be noted that the entitled party has the possibility to limit the scope of the security both when the proceedings are instigated and in the course of the proceedings, which seems to be justified by the fear of the entitled party being held liable for damages, as specified in Art. 746 of CCP (J. Turek, MoP 2010, No. 15, pp. 828-829).

5. The annulment of the security

At the end of this work several remarks will be made concerning the annulment of the security. The annulment of the security occurs when the previously issued order concerning the security loses effect.

The annulment *ex lege* takes place in the following instances: valid return or rejection of the lawsuit or application, dismissal of the lawsuit or application, or discontinuance of the proceedings (Art. 744 § 1 of CCP). The annulment of the security also occurs when the security had been granted before the instigation of the proceedings and the entitled party failed to file for the entirety of the claim in the proceedings, or filed for a claim other than the secured one (Art. 744 § 2 of CCP). The reason pertaining to the failure to file for the entirety of the claim, which may be e.g. fulfillment of a part of the claim by the obliged party, seems to be relevant in this respect (Similarly in J. Jagieła, *Komentarz do art. 744 k.p.c.*, 2015, Side no. 3), and the importance of which seems to be forgotten in the legislature. Taking into account the purpose and the nature of the proceedings to secure claims, I think that the assumption that in such a case only a part of the security is annulled would be reasonable (J. Jagieła

also writes about reservations of this kind, not allowing, however, for the possibility to accept partial annulment of the security. Instead, the author offers filing by the entitled party a subsequent application to secure the already sought claim – *idem*, *Komentarz do art. 744 k.p.c.*, 2015, Side no. 3), thus the order securing the remaining part of the unsatisfied claim should remain in effect.

It seems that the justification of my position may be supported by the order of the Court of Appeal in Łódź of 7 May 2015, where the possibility to acknowledge the annulment of the security exclusively in the part of the claim satisfied by the obliged party was allowed for (Order of the Court of Appeal in Łódź– I Civil Division of 7 May 2015, IACz 672/15, Legalis no. 1482016).

Furthermore, it was indicated that the Court eligible to issue an order to declare the annulment of the security should each time, depending on the actual state of affairs, assess whether the annulment of the security was due to the failure to file a lawsuit for the entirety of the claim (*Ibidem*). *De lege ferenda* the contents of Art. 744 § 2 of CCP should be modified.

A different opinion can be found in jurisprudence, stating that due to the fact that the annulment refers to the enforcement title, it cannot be assumed that the annulment of the security was only partial (Order of the Court of Appeal in Poznań of 27 April 2011, I ACz 535/11, Legalis no. 370226).

Other grounds for the annulment of the security have been specified in the provisions of Art. 754¹ of CCP. These grounds constitute the failure by the entitled party to file a motion to instigate enforcement proceedings within a month of the date the ruling granting the claim became valid.

The court, on the motion of the obliged party, issues an order declaring the annulment of the security. Due to the fact that the annulment occurs by the operation of the law, this order is of a declaratory nature.

Note that the annulment of the security does not result in the cancellation of the enforcement actions carried out by the operation of the law. To this end, filing of an appropriate motion to the competent enforcement authority is required (Order of the Supreme Court of 14 December 1987, I PZ 102/87, Legalis no. 26093).

6. Summary

In the summary of the presented work it is worth making several general and systemic remarks and conclusions.

Firstly, not all of the amended provisions within the scope of proceedings to secure claims deserve approval. I do not appreciate the withdrawal of the possibility to secure claims for alimony by the Court *ex officio*. The reason for this view is even not uncommon helplessness in life and unawareness of the law of people entitled to alimony.

Secondly, I think that it should be considered to impose on the Court a duty to notify such people of the admissibility to claim for the security of alimony due to them. It seems that by adopting such a solution not only the people entitled to alimony would benefit considerably, but it could also be positive for the State Treasury and local government units, since “alimentary unsatisfied” people frequently require the aid from the State or competent local government authorities.

Thirdly, I think that at the next amendment of the Code of Civil Procedure, the modification of the following provisions should be considered:

- Art. 753² of CCP in such a way as to allow for the possibility of issuing at a closed hearing a judgment awarding the benefit within the scope of acknowledging the claim by the obliged party, both to the satisfied and unsatisfied part,
- Art. 744 § 2 of CCP in such a way so that the annulment of the security does not occur each time the entitled party fails to file for the entirety of the claim due, in the course of the proceedings in the case for alimony.

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