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Enforcement of maintenance benefits

INTRODUCTION

The procedure for the enforcement of maintenance and periodic support payments is a special type of procedure governing the recovery of financial claims¹. It is regulated, on a stand-alone basis, in Section V, Title III, Part Three of the Code of Civil Procedure (CCP). These rules override the standard rules of Title II (“Enforcement of financial claims”). The special rules governing the enforcement of maintenance benefits are not distinguished by the type of a debtor’s assets subject to enforcement. Instead, they are singled out because of the nature of claims being enforced, namely the fact that such claims have priority for social reasons. There is another factor justifying such a distinction – special situation of persons recovering maintenance who are economically underprivileged and morally injured². For the above reasons, the provisions of Section V, Title III, Part Three do not constitute an comprehensive legal regulation of the enforcement of maintenance benefits, which, pursuant to Article 1088 of the Code of Civil Procedure, is also governed by the provisions of Title II on separate measures for the recovery of financial claims as well as the general provisions applicable to civil enforcement proceedings (Articles 758–843 CCP)³.

E. Wengerek notes that Section V comprises special provisions that simplify the enforcement of maintenance claims⁴. The procedure governing the enforcement of maintenance benefits manifests a number of characteristics that differentiate this procedure from the “general” procedure for the enforcement of financial claims. These differences appear, in particular, in the scope of rights assumed by a person entitled to receive maintenance (“the maintenance creditor”) and in the fact that additional obligations are placed on enforcement authorities with respect for searching for information on the assets of a debtor. In accordance with Art. 1081 § 1 CCP, a “maintenance benefit” means maintenance (*alimenty*) or a periodic

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¹ A. Marciniak, *Egzekucja świadczeń alimentacyjnych*, „Nowe Prawo” 1976/7–8, vol. 1064.

² Cf. J. Kruszewska, *Współdziałanie zakładów pracy w egzekwowaniu obowiązku alimentacyjnego*, „Praca i Zabezpieczenie Społeczne” 1961/7, p. 43; J. Cieślak [in:] J. Jankowski (ed.), *Kodeks postępowania cywilnego. Komentarz*, vol. 2., Warszawa 2015, a note to Arts. 730–1217, p. 1451.

³ As in J. Cieślak [in:] J. Jankowski (ed.), *Kodeks...*, p. 1451.

⁴ Cf. E. Wengerek, *Postępowanie zabezpieczające i egzekucyjne. Komentarz do części drugiej Kodeksu postępowania cywilnego*, Warszawa 1998, p. 700.

support payment (*renta mająca charakter alimentów*)⁵. The maintenance obligation may be performed through the payment of financial claims and/or non-financial claims (e.g. through the provision of physical means required for upbringing and subsistence). The scholarship presents the position that, as a rule, the provisions governing the enforcement of maintenance benefits (Arts. 1081–1088 CCP) apply to the maintenance benefits of a financial nature. Non-financial maintenance benefits should be enforced pursuant to the provisions that govern the recovery of non-financial claims, such as claims for the possession delivery of movable or immovable property⁶.

Recourse claims asserted by persons who, in lieu of an obligor, provided means of subsistence or upbringing to a person entitled to receive maintenance (Art. 140 FGC) are not considered maintenance claims. Such financial claims are enforced in accordance with the general rules of enforcement proceedings and no provisions on the enforcement of alimony are applied thereto (Art. 1081 et seq. CCP)⁷.

A “periodic maintenance payment” is a financial or in-kind benefit provided by fulfilling one’s duty to deliver the necessary means of subsistence and upbringing. This duty may be established by a statute or contract and can apply to relationships other than those existing between direct relatives, siblings, spouses or the father and mother of a child born outside marriage.⁸ The provisions of Section V, Title III, Part Three of the CCP apply to the enforcement of the following types of periodic support payments: loss-of-support payments available on account of a breadwinner’s death or loss of income-earning capacity (Arts. 445 § 2 and 446 § 2 of the Civil Code – “CC”); payments received under a private annuity contract (Art. 903 CC); or payments received resulting from the exchange of benefits receivable under a home reversion contract for private annuity payments (Art. 913 § 2 CC)⁹.

Provisions of Section V also apply to the benefits that a person obliged to provide maintenance (“the maintenance debtor”) is obliged to return to the President of the Social Insurance Institution acting as the liquidator of the Maintenance Fund, which were awarded as maintenance benefits under the (now revoked) Maintenance Fund Act of 18 July 1974¹⁰; benefits paid under the Act on proceedings against maintenance debtors and maintenance advance payments of 22 April 2005 (also now revoked)¹¹; and benefits paid from the Maintenance Fund under the Act on the assistance for persons eligible to receive maintenance of 7 September 2007¹².

⁵ Maintenance is a benefit that must be delivered as part of the duty to provide the necessary means of subsistence or upbringing. This duty is legally imposed on direct relatives and siblings and may be placed on other persons by a statute (Arts. 128, 133 § 2, 135 § 2 of the Family and Guardianship Code – “FGC”). The maintenance obligation is set out in the following provisions: provisions on the rights and duties of spouses before and after a divorce (Arts. 23–30 and Arts. 60–61 FGC, respectively); provisions on spousal rights and duties after the termination of adoption (Art. 125 § 1 FGC); provisions on parental duties (Art. 133 § 1, Art. 135 § 2 FGC); provisions governing the mutual duties of family members (Arts. 128–132 FGC); and provisions on the claims that a mother of a child born outside marriage may assert against the child’s father (Arts. 141 and 142 FGC).

⁶ As in S. Cieślak [in:] J. Jankowski (ed.), *Kodeks...*, p. 1455; M. Romańska [in:] J. Ignaczewski (ed.), M. Romańska, W. Maciejko, M. Karcz, *Alimenty*, Warszawa 2011, s. 334; A. Adamczuk [in:] M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz*, vol. 2, Art. 506–1217, Warszawa 2011, p. 847.

⁷ Cf. S. Cieślak [in:] J. Jankowski (ed.), *Kodeks...*, p. 1455.

⁸ Cf. M. Romańska [in:] *Alimenty...*, p. 360.

⁹ Cf. A. Adamczuk [in:] M. Manowska (ed.), *Kodeks...*, p. 848.

¹⁰ Journal of Laws (JL) of 1991 No. 45, item 200 as amended.

¹¹ JL No. 86, item 732 as amended.

¹² JL of 2009 No. 1, item 7 as amended. Cf. A. Adamczuk [in:] M. Manowska (ed.), *Kodeks...*, p. 848.

Upon the entry into force of the Family Benefits Act of 28 November 2003¹³, the Maintenance Fund went into liquidation. The President of the Social Insurance Institution became the Fund's liquidator, responsible for the management of matters involving the Funds' benefits awarded before the effective date of the Family Benefits Act. Pursuant to Art. 67 of the FBA, claims for the recovery of benefits paid by the Fund are asserted irrespective of the Fund's liquidation until they are recovered in full. An enforcement authority transfers to the liquidator amounts recovered from persons obliged to provide maintenance, minus monies paid as maintenance, as well as advance maintenance payments recovered from liable individuals.

I. DISTINCTIVE FEATURES OF THE PROCEDURE FOR THE ENFORCEMENT OF MAINTENANCE BENEFITS

Several exemptions from the general rules of the enforcement of financial claims have been introduced into Section V in order to ensure that eligible claimants receive means of subsistence more easily¹⁴.

1. The warrant of execution

Pursuant to Art. 1082 CCP, a court, acting *ex-officio*, appends the enforcement clause to an enforcement title awarding maintenance. Then, a warrant of execution is automatically delivered to the creditor. The above provision establishes an exemption to the general rule of Art. 782 CCP, which provides that, as a rule, a court appends an enforcement clause at a creditor's request. The enforcement title awarding maintenance is a judgment that is final or immediately enforceable because in accordance with Art. 333 § 1 (1) CCP, the court, acting *ex officio*, orders a judgement awarding maintenance to be immediately enforceable in respect of maintenance payments payable after the date a divorce action is filed. The immediate enforcement of payments due prior to the filing of the divorce action may be ordered for a maximum duration of three months. Other types of warrants of execution awarding maintenance are as follows: interim relief orders (Art. 753 § 1 CCP) issued in, e.g., divorce matters; proceedings for the annulment of marriage; judicial separation proceedings; proceedings for the establishment of paternity; and also: a court settlement or a settlement concluded before a mediator and approved by a court (Art. 183¹⁴ § 1 CCP); together with a notarial deed in which a debtor submits himself/herself to fast-track enforcement procedures (Art. 777 § 1 (4)-(5) CCP).

If a judgment appoints a person authorised to receive maintenance awarded to a minor, maintenance benefits are paid directly to this person. Any change of a person authorised to receive maintenance on behalf of a minor must be effected through the appropriate decision of a guardianship court. If there are any doubts as to the manner in which a minor is represented, an enforcement authority or an authority obliged

¹³ JL No. 228, item 2255.

¹⁴ A. Marciniak, *Egzekucja świadczeń...*, p. 1064.

to pay out benefits must ask a guardianship court for clarification. The above concept, originally expressed in a resolution of the Supreme Court from 16 April 1977¹⁵, remains valid to this date¹⁶. As the Supreme Court clarified in the explanatory part of the resolution in the course of the enforcement of maintenance, another person may become a child's statutory representative or a statutory representative's status may expire. This happens most often when a creditor comes of age but retains eligibility to claim maintenance; or in the event of the deprivation, limitation or suspension of the parental authority of the parent named in a judgment as a child's statutory representative; in the case of a change of carer or official guardian; or as a consequence of a child being placed at a foster family or a care and educational care facility. In such situations, the wording of the warrant of execution contravenes the actual legal status of maintenance claims. According to the Supreme Court, the exclusion of a bailiff's obligation to make inquiries as to whether an obligation established in a warrant of execution is reasonable and recoverable, which results from Art. 804 CCP, should include an assessment as to whether a child's statutory representative named in a warrant of execution as the person authorised to receive maintenance still has such authorisation. Since the power to make such inquiries lie within the purview of courts, then, as the general rules and nature of a bailiff's executive function suggest that a bailiff has no authority to investigate the justifiability of this part of a warrant of execution. Only in the situation where an eligible person has both reached the age of maturity and retained their entitlement to receive maintenance the benefits must be paid to this person directly. This occurrence does not have to be ascertained by a decision of a guardianship court, therefore a person can prove their eligibility to personally receive their benefits by producing relevant documents from a registry office.

M. Sychowicz has expressed a critical assessment of the above conclusion, arguing that an enforcement authority is by default obliged to ensure that a minor is properly represented in enforcement proceedings and authorised to independently evaluate this question in the event that any uncertainty arises in this respect¹⁷.

2. The territorial jurisdiction of an enforcement authority

Rules on the territorial jurisdiction of bailiffs differ depending on the manner in which claims are enforced. In cases that involve enforcement of claims from movable or immovable property or sea-going vessels, territorial jurisdiction is determined based on the location of such items of property (Art. 844 § 1, Art. 921 § 1 and Art. 1015 CCP). In cases concerning enforcement of claims from salaries, bank accounts or other financial receivables and interest, a bailiff's jurisdiction is determined on the basis of a debtor's residence or registered business address (Art. 880, Art. 889, Art. 895, Art. 910 CCP read in conjunction with Arts. 27 and 30 CCP). The provisions on territorial jurisdiction are modified by Art. 8 (5) of the Bailiffs and Enforcement Act of 29 August 1997¹⁸, which authorises a creditor to select

¹⁵ [Case no.] III CZP 14/77, [published in] OSNC 1977/7/106.

¹⁶ S. Cieślak [in:] J. Jankowski (ed.), *Kodeks...*, p. 145.

¹⁷ M. Sychowicz, *Głosa do uchwały Sądu Najwyższego z 16 kwietnia 1977 r., III CZP 14/77*, „Nowe Prawo” 1978/7–8 (1210–1211).

¹⁸ Consolidated text, JL of 2016, item 1138 as amended.

a bailiff of their choosing in all cases apart from cases involving enforcement from immovable property and cases governed by the provisions on enforcement from immovable property applied *mutatis mutandis*. Pursuant to Art. 921 CCP, in the case of immovable property, enforcement proceedings are conducted by a bailiff established at the court having jurisdiction over the district where the property is located. As far as the enforcement of maintenance benefits is concerned, Art. 1081 § 1 CCP extends the scope of a bailiff's territorial jurisdiction: an application for the launch of enforcement proceedings can also be submitted to a bailiff of the court local to a creditor's place of residence. The above means that a person eligible to claim maintenance can file an application for the launch of enforcement proceedings with a bailiff who has general jurisdiction over either the debtor's or creditor's place of residence. A creditor cannot exercise their right to choose a bailiff only under art 1081 § 1 CCP in a situation where they seek to enforce their claims from immovable property which is subject to the exclusive jurisdiction of a bailiff local to the property's address.

In accordance with Art. 1081 § 2 CCP, a bailiff is obliged to notify the court that has general jurisdiction over the debtor about the commencement of enforcement proceedings. The notified bailiff will request that the proceedings (together with any amounts whose collection is to be enforced) be transferred to their office if any additional attachment performed as part of all enforcement proceedings result in a sum being obtained that does not suffice to satisfy the claims of all creditors. If a salary or receivables have been subject to attachment, a bailiff, while transferring the case, notifies the employer, and debtor (or creditor) of the attached monies that further payments should be made to the bailiff to whom the proceedings have been transferred. The purpose of the above provision is to assign the enforcement proceedings to a single bailiff whenever enforcement of claims from a salary or receivables is conducted by a bailiff with the court that has general jurisdiction over the debtor. The bailiff should determine that any additional attachment made as part of all enforcement proceedings result in a sum being obtained that does not suffice to satisfy the claims of all creditors, the bailiff should also request for the transfer of the case and proceed pursuant to Art. 1029 CCP¹⁹.

3. The simplified enforcement procedure

Pursuant to Art. 1081 § 3 CCP, if a debtor is serving a prison sentence, a creditor may submit a warrant directly to the prison governor, who is then obliged to pay to the creditor the debtor's earnings or money deposited at the prison, within the limits set out in Art. 125 of the Criminal Enforcement Code. The simplified enforcement procedure cannot be conducted if a debtor's earnings are subject to attachment procedures carried out for other creditors enforcing their maintenance benefits directly at the debtor's workplace, or if a debtor is subject to attachment of earnings made as part of judicial or administrative enforcement proceedings.

A simplified procedure for the enforcement of maintenance benefits from earnings is also laid down in Art. 88 § 1 of the Labour Code ("LC"). In this procedure,

¹⁹ Cf. E. Wengerek, *Postępowanie zabezpieczające...*, p. 701.

a creditor does not need to take the route of judicial enforcement. It is a debtor's employer who deducts payments for maintenance benefits from a debtor's earnings (subject to certain rules set out in Art. 87 LC). However, this particular mode of enforcement of maintenance claims does not apply to the following situations:

- 1) Payments for maintenance benefits are to be deducted by several creditors and the total amount to be deducted does not suffice to cover all maintenance claims;
- 2) Debtor's earnings have been a subject of judicial or administrative attachment.

In accordance with Art. 88 § 2 LC, deductions from the earnings of a debtor are made by their employer at the request of a creditor, on the basis of a warrant of execution produced by the creditor. The scholarship notes that an employer is obliged to make deductions subject to the circumstances described in Art. 88 § 1 (1)-(2) LC²⁰.

4. The limitation of the privileged status of certain types of enforceable assets

The Article 1083 CCP seeks to limit the privileged status granted by special provisions of law to certain benefits and receivables that have become a subject of enforcement proceedings. Such a limitation is designed as a means to facilitate the recovery of maintenance by eligible claimants. The revenues listed in Art. 831 § 1 (2) CCP are subject to enforcement proceedings conducted to satisfy maintenance claims to an amount less than or equal to the three-fifths of their value (Art. 1083 § 1 CCP). Such revenues include special-purpose monetary awards from the State Treasury (in particular, scholarships or support allowances) unless the claim being recovered as a consequence of attaining a purpose of such an award or consequence of the maintenance obligation. On the other hand, pursuant to Art. 1083 § 2 CCP, there is no limit to the amount of monies in bank accounts that can be subject to enforcement procedures for the purpose of satisfying claims. Here, the law excludes the application of Art. 54 (1) of the Banking Law Act of 29 August 1997,²¹ according to which monies kept in current accounts, savings accounts or accounts of fixed-term deposits belonging to a single person, irrespective of the number of agreements for banking services concluded by this person, cannot be the subject of attachment made in any given month (during which the attachment order is effective on the basis of a judicial or administrative warrant of execution) up to the amount of 75% of the minimum statutory pay, as laid down in the Act on the minimum monthly statutory pay available to workers employed full time of 10 October 2002 (JL of 2015, item 2008 and JL of 2016, item 1265). The above exclusion also applies to accounts kept by cooperative credit unions²².

As regards the enforcement of maintenance, the law places lesser restrictions on the enforcement of claims from earnings, disability allowance and old-age pensions.

²⁰ As in M. Skapski [in:] K.W. Baran (ed.), *Kodeks pracy. Komentarz*, Warszawa 2016 (Lex/el., Commentary to Art. 88 LC).

²¹ Consolidated text, JL of 2016, item 1988 as amended.

²² As in A. Adamczuk, *Kodeks...*, p. 850.

In the case of earnings, Art. 87 § 3 (1) LC provides that deductions can be made to the maximum amount of three-fifths of earnings, which is an exception from the rule applying to the enforcement of other types of claims, which sets a limit of 50% of the value of earnings (Art. 87 § 3 (2) LC). Pursuant to Art. 87 § 5 LC, there are no limits placed on the enforcement of maintenance claims from incentive bonuses payable from a work establishment incentive fund, additional annual bonuses or workers' claims under profit sharing schemes.

In accordance with Art. 833 § 2 CCP, the provisions of the Labour Code that apply to the enforcement of claims from earnings should be applied, *mutatis mutandis*, to the earnings of Members of the lower or upper houses of Polish parliament (*Sejm and Senat*), earnings received by members of farming manufacturing cooperatives and their cohabitants on account of their work for a cooperative, earnings of members of workers' cooperatives and also to all recurring payments received as means of subsistence (in other words, fees under civil law contracts for services).

If maintenance benefits are collected from a disability allowance or an old-age pension, then, in accordance with Art. 140 (1)(1) of the Act on pensions and disability allowances payable from the Social Insurance Fund of 17 December 1998²³, deductions made for enforcement purposes may not exceed 60% of a monthly pension or allowance.

5. The ex-officio launch of enforcement proceedings

By way of an exception from the principle of disposition in enforcement proceedings, the law accepts the possibility of launching the enforcement of maintenance procedure *ex officio*, at the request of the first-instance court that hears the case (Art. 1085 CCP). This is also an exception from the rule expressed in Art. 796 § 2 CCP, according to which enforcement proceedings may be launched *ex officio* at the request of the first-instance court but only in matters in which fact-finding proceedings may also be initiated *ex officio*. Matters involving maintenance claims or claims for periodic support payments are heard at trial, and the fact-finding proceedings conducted during the trial cannot be imitated *ex officio*²⁴.

The literature explains that the legislator has not made the possibility of launching enforcement proceedings *ex-officio* conditional on the appearance of any additional prerequisites, which means that, as a rule, the proceedings may be so launched in every case. However, in practice courts should apply this measure provided that a creditor made their request prior to the conclusion of the proceedings in which the enforcement title was issued. Moreover, also in the event that a creditor is vulnerable and it becomes apparent from the course of the proceedings in which maintenance was awarded that maintenance payments are not paid on time and, considering the past record of a debtor, it is highly probable that the debtor will not perform their maintenance obligation voluntarily²⁵.

²³ Consolidated text, JL of 2016, item 887 as amended.

²⁴ As in M. Romańska, *Alimenty...*, p. 388.

²⁵ Cf. A. Adamczuk, *Kodeks...*, p. 85; W. Tomalak, *Status ustrojowy i procesowy komornika sądowego*, Warszawa 2014, p. 544 and M. Romańska, *Alimenty...*, p. 388.

Court of First Instance order to launch enforcement proceedings that should satisfy the requirements of Art. 797 § 1 CCP. The above Article, in its wording effective as from 8 September 2016²⁶, does not require the court to indicate the specific manner of enforcement, only the benefit that is to be enforced. The order must be accompanied by a warrant of execution. The scholarship accepts that if the order to launch enforcement proceedings does not comply with the formal requirements under Art. 797 § 1 CCP (or is not accompanied by a warrant of execution), remedial proceedings under Art. 130 § 1 CCP must be initiated and, should the procedural defects not be remedied, the order to launch enforcement proceedings must be returned²⁷.

The discontinuation of enforcement proceedings initiated at the request of the first-instance court requires the approval of the body that applied for the launch of the proceedings (Art. 825 (1) CCP).

6. Application for the launch of enforcement proceedings

The amendment of 10 July 2015²⁸ revoked the rule of Art. 1081 § 1 CCP which required that an application for the launch of the enforcement of maintenance claims indicate the manner in which the claims should be enforced. This rule was itself an exception from another, more general rule established in Art. 797 § 1 CCP, pursuant to which a creditor must indicate the manner in which claims should be enforced. The above-mentioned amendment waived a creditor's obligation to indicate the manner in which their claims should be enforced in an application for the launch of the enforcement of maintenance claims, which effectively made the exception under Art. 1081 § 1 CCP redundant. In accordance with the amended wording of Art. 799 § 1 CCP, which also applies to the enforcement of maintenance claims, an application for the launch of enforcement proceedings or a request for an *ex officio* launch of enforcement proceedings may serve as the basis for the conducting of the enforcement of claims in all legally available ways, with the sole exception of the enforcement of claims from immovable property. A debtor's immovable property or other assets to which the provisions on the enforcement of claims from immovable property apply *mutatis mutandis* may become subject of enforcement proceedings only based on a creditor's application. A creditor may indicate the mode(s) for enforcing their claims. An enforcement authority applies the mode of enforcement that is least cumbersome for the debtor.

7. Suspension of enforcement proceedings

Due to the periodical nature of maintenance benefits provided in order to satisfy day-to-day needs of eligible recipients, enforcement of such benefits is a lengthy process. This begs the question as to whether it is acceptable to temporarily suspend enforcement proceedings in a situation where a bailiff has obtained an

²⁶ Article 797 CCP was amended by the Act on the amendment to the Civil Code, Code of Civil Procedure and certain other acts of 10 July 2015 (JL of 2015, item 1311).

²⁷ As in M. Romańska, *Alimenty...*, p. 390.

²⁸ Consolidated text, JL of 2015, item 1311.

“overpayment” of a debtor’s dues, until such overpaid sums are depleted. In a decision of 14 September 1965, the Supreme Court²⁹ held that a bailiff could suspend the enforcement of then-current maintenance claims until the overpaid amounts of maintenance obligations paid by a debtor were depleted. In his commentary on this decision, E. Wengerek provided additional arguments to the Supreme Court’s reasoning presented in the decision’s justification, indicating that the solution proposed in the decision is fully in line with the principles of the enforcement procedure. Among these principles, Wengerek noted the guiding principle, expressed in Art. 799 § 1 CCP, that obliges a creditor to employ the least cumbersome means of enforcement, the requirement to suspend enforcement proceedings in the situation where enforcement proceedings conducted against a part of a debtor’s property suffice to satisfy creditor’s claims (Art. 799 § 2 CCP). Moreover, the obligation to suspend enforcement proceedings in the event that a debtor has provided security, which, according to a court ruling, is necessary for the enforcement proceedings instituted against the debtor to be waived. Wengerek explained that a bailiff’s decision to suspend enforcement proceedings *ex officio* taken in the case where an overpayment is determined, should be considered permissible under Art. 822 CCP. The above conclusion was justified as follows: if a bailiff may suspend enforcement proceedings at a debtor’s request substantiated by evidence provided by the debtor, a bailiff will be all the more able to do so in the event that the bailiff themselves determines that a surplus amount has been recovered from the debtor. However, the suspension of enforcement proceedings is not an absolute measure. If, despite a debtor’s overpayment, a creditor having been asked by a bailiff to express their position on the suspension of the proceedings requests the resumption of enforcement proceedings, the bailiff must adhere to such a request. In such an event, a debtor’s only defence would be to file an action for the annulment of the enforceability clause appended to the warrant of execution based on the argument that a claim has been satisfied (Art. 840 CCP)³⁰. The above reasoning remains a valid position in the legal scholarship³¹.

As Art. 1088 CCP provides that the enforcement of maintenance benefits should be governed by the provisions of Section Two, if maintenance claims are to be enforced from earnings, a debtor’s overpayment results in the filing of a debtor’s request to discontinue enforcement proceedings. This is because, in accordance with Art. 883 § 2 CCP, a debtor may request that enforcement proceedings be discontinued in respect of claims recoverable in future provided that the debtor satisfies all outstanding claims and pays, into a deposit account kept by the Minister of Finance. That sum to be equal to the amount of periodical payments for a period of six months, authorising a bailiff to make appropriate withdrawals from the deposit account. The bailiff should exercise this authorisation if they determine that the debtor has defaulted on the payment of any outstanding amounts; the bailiff will then launch enforcement proceeding *ex officio*.

²⁹ III CR 162/65, OSPiKA 1967, 3(60).

³⁰ E. Wengerek, *Glosa do postanowienia SN z 14 września 1965 r., III CR 162/85, OSPiKA 1967/3*, pp. 110–112.

³¹ As in S. Cieślak [in:] J. Jankowski (ed.), *Kodeks...*, p. 1451; E. Marciniak, *Egzekucja świadczeń ...*, p. 1078; W. Kowalski, *Egzekucja świadczeń alimentacyjnych*, Sopot 2006, p. 44.

8. Bailiff's obligation to investigate

Pursuant to Art. 1086 § 1 CCP, a bailiff is obliged to conduct an ex officio inquiry into a debtor's earnings, financial status and place of residence. If a bailiff's inquiry proves unsuccessful, the bailiff may ask the police to determine the debtor's place of residence and workplace. The inquiry mentioned in Art. 1086 § 1 comprises a bailiff's actions which are necessary for the effective conduct of enforcement of maintenance claims as well as the exercise of the enforcement authority's powers related to obtaining information that is required for the enforcement of claims to be performed. The scholarship accepts that a bailiff has the duty to carry out an inquiry into a debtor's earnings, financial status and also place of residence, if the latter is unknown to the creditor or court requesting the launch of enforcement proceedings and the application or request for the launch of the proceedings designates the last known place of a debtor's residence. While performing such an inquiry, a bailiff should cooperate with the competent bodies of the debtor and creditor as referred to in the Act on the assistance for persons eligible to receive maintenance³². If a bailiff's inquiry fails to uncover information about a debtor's assets and place of residence, the bailiff should ask the police to launch procedures that aim at determining the debtor's place of residence and workplace³³.

A bailiff may request that third parties, who are not participants in the enforcement proceedings, and also banks, housing cooperatives, homeowners' associations and other institutions provide information necessary for the conduct of enforcement proceedings (Art. 761 CCP). A person who unreasonably refuses to provide an enforcement authority with explanations or the information mentioned in Art. 761 CCP or provides false explanations or information is subject to a fine of up to PLN 2,000, levied by the enforcement authority at the request of a creditor or ex officio (Art. 762 § 1 CCP). Pursuant to Art. 2 (5) of the Bailiffs and Enforcement Act of 29 August 1997³⁴, public administration bodies, tax offices, the pension authorities referred to in Art. 476 § 4 of the Code of Civil Procedure of 17 November 1964 (JL of 2014, item 101 as amended), banks, cooperative credit unions, stock brokerage firms, governing bodies of housing cooperatives, boards of housing cooperatives, other entities involved in the management of residential or commercial premises, and other institutions are obliged to provide a bailiff, at the bailiff's written request, with information which is necessary for the proper conduct of enforcement proceedings, the execution of an interim relief order or the performance of a bailiff's other statutory tasks, in particular any information about the financial status of a debtor or information enabling the identification of a debtor's assets. Article 762 of the Code of Civil Procedure applies *mutatis mutandis* to the above. As part of their inquiry, a bailiff may obtain information on vehicles registered in a debtor's name (from the Central Register of Vehicles)³⁵,

³² Consolidated text, JL of 2016, item 169 as amended.

³³ Cf. A. Adamczuk, *Kodeks...*, p. 852.

³⁴ Consolidated text, JL of 2016, item 1138.

³⁵ § 4 (2) of the Regulation of the Minister of the Interior from 18 June 2014 on the Central Register of Vehicles (JL item 816) read in conjunction with Art. 80b (1)-(1a) of the Traffic Law Act of 20 June 1997 (consolidated text, JL pf 2012, item 1137 as amended).

information on a debtor's properties (from the Register of Land and Buildings)³⁶ or information on a debtor's bank accounts (from records kept by tax authorities)³⁷.

Pursuant to Art. 801 CCP, as effective of 8 September 2016³⁸, if a creditor, a court ordering the enforcement of claims *ex officio* or a competent authority requesting the enforcement of claims does not indicate assets that may be used to satisfy a creditor's claims, a bailiff will ask the debtor to submit an inventory of assets or other explanations necessary for the conduct of enforcement proceedings. The above Article gives bailiffs the right to receive a debtor's inventory of assets in the course of enforcement proceedings, which, under the law effective before 8 September 2016, remained the exclusive power of district courts. A debtor submits an inventory of assets to a bailiff under the penalty of perjury. In the notice requesting the submission of an inventory of assets, a bailiff informs a debtor about the penalty for perjury and advises the debtor that a creditor may instruct the bailiff to search for the debtor's assets should the debtor fail to submit the inventory (Art. 801¹ CCP).

The procedure for the disclosure of a debtor's assets to a bailiff is governed by the provisions on the disclosure of assets in judicial proceedings applied *mutatis mutandis*. Article 801¹ § 2 CCP provides that Art. 913 § 1, Art. 916, Art. 917, Art. 918¹, Art. 919 and Art. 1053 § 2 CCP should be applied *mutatis mutandis*, subject to the proviso that it is a bailiff who imposes a fine on a debtor, while a debtor's forced appearance before a court or detention for a period of no longer than one month may be ordered by a court. The above measures can also be applied in proceedings for the enforcement of maintenance claims, with the exception of a creditor's right to instruct a bailiff to search for a debtor's assets (for a fee) under Art. 801² CCP, which would otherwise be exercisable if the procedures described in Art. 801 CCP fail to determine assets from which maintenance claims could be enforced. Since an enforcement authority is obliged to periodically perform an inquiry into the earnings and financial status of a debtor (every six months, according to Art. 1086 § 2 CCP), Art. 801² CCP cannot be applied to the enforcement of maintenance benefits or periodic support payments.

9. Application for an entry onto the Register of Insolvent Debtors

In accordance with Art. 1086 § 4 CCP, if a debtor defaults on their obligations for a period of longer than 6 months, a bailiff, acting *ex officio*, submits an application to the National Court Register for the debtor's entry onto the Register of Insolvent Debtors. The bailiff's application is exempted from court fees. The prospect of being entered onto the Register of Insolvent Debtors is supposed to discipline debtors dodging their maintenance obligations³⁹. Pursuant to Art. 55 (3) and (5) of the

³⁶ § 44 (4) read in conjunction with § 52 of the Regulation of the Minister of Regional Development and Construction of 29 March 2001 on the Register of Land and Buildings (consolidated text, JL of 2016, item 1034 as amended).

³⁷ Cf. *in extenso*, W. Tomalak, *Status ustrojowy*..., p. 549.

³⁸ 8 September is the effective date of the Act on the amendment to the Civil Code, Code of Civil Procedure and certain other acts of 10 July 2015 (JL of 2015, item 1311).

³⁹ Cf. H. Ciepła [in:] H. Dolecki, T. Wiśniewski (eds.), *Kodeks postępowania cywilnego. Komentarz*, vol. 4, *Artykuły 730–1088*, Warszawa 2011, p. 757.

National Court Register Act (NCRA)⁴⁰, debtors who have been obliged to disclose their assets are also entered ex officio onto the Register. In their application, a bailiff designates a warrant of execution, a creditor and the value of claims (maintenance benefits) that have not been enforced from the debtor (Art. 57 NCRA).

10. Ineffective enforcement

Another exemption from the general rules of enforcement proceedings is the exclusion of the possibility to discontinue ineffective enforcement proceedings (Art. 1086 § 5 CCP). Article 824 § 1 (4) CCP does not apply to the enforcement of maintenance benefits. The principle of state assistance for persons eligible to receive maintenance under warrants of execution that are applicable in the event that enforcement proceedings are ineffective are set out in the Act on the assistance for persons eligible to receive maintenance of 7 September 2007 (Assistance Act)⁴¹. Within the meaning of Art. 2 (2) of the Assistance Act, enforcement proceedings are deemed “ineffective” if they do not result in the collection of the full amount of past and current maintenance obligations over the period of two months immediately preceding the confirmation of ineffectiveness. Enforcement proceedings are also deemed “ineffective” if it is not possible to launch or conduct such proceedings against a maintenance debtor residing outside Poland, in particular for the following reasons: (a) There is no legal basis for initiating procedures designed to enforce a warrant of execution at a debtor’s place of residence; or (b) An eligible person is unable to designate a maintenance debtor’s place of residence abroad. In such a case, a creditor may apply to the head of a local authority – commune head or mayor (*wójt, burmistrz* or *prezydent miasta*) – to take action against a maintenance debtor (Art. 3 of the Assistance Act). The application should be accompanied by a certificate, issued by the bailiff conducting the enforcement proceedings, containing information on the status of proceedings, the reasons for their ineffectiveness and the measures implemented in order to enforce the awarded maintenance (Art. 3 (2) of the Assistance Act). Pursuant to Art. 4 of the Assistance Act, a local authority carries out a maintenance audit for the purpose of establishing a maintenance debtor’s family and vocational situation as well as earning capacity. The audit should also determine the debtor’s health and reasons for their non-performance of a maintenance obligation. The authority performing the audit receives a declaration of property from the debtor and notifies the debtor that, should they default for a period of longer than 6 months, a notice of their obligations under the titles described in Art. 28 (1)(1)-(2) will be passed on to the Economic Information Bureau. A local authority is obliged to collaborate with the bailiff conducting the enforcement proceedings by way of providing the bailiff with information that affects the effectiveness of the proceedings being conducted, and, in particular, information from the maintenance audit or debtor’s property declaration (Art. 5 (1) of the Assistance Act). The authority is also authorised to impose certain obligations on the debtor, for example, the obligation to register as an unemployed person or, if the debtor is unable to register as an unemployed person, as a jobseeker (Art. 5 (2)

⁴⁰ The National Court Register Act of 20 August 1997, consolidated text, JL of 2016, item 687 as amended.

⁴¹ Consolidated text, JL of 2016, item 169 as amended.

(1) of the Assistance Act). The scholarship notes that the authority competent to act in a maintenance debtor's case should first assess whether or not the debtor's poor financial condition is caused by factors outside the debtor's reasonable control, in particular by involuntary unemployment. If this is the case, the authority is obliged to have the local employment office undertake actions that aim at the vocational activation of the debtor. Disciplinary actions may be taken against a debtor only if it is established that the debtor fails to perform their maintenance obligations through their own fault⁴². In the event that a maintenance debtor prevents the performance of a maintenance audit or refuse to submit a property declaration, register at a local employment office as an unemployed person or jobseeker, or unreasonably refuses to accept an employment proposal, a local authority initiates proceedings in order to determine that the maintenance debtor has defaulted in their performance of maintenance obligations. These proceedings result in the issuance of a decision confirming that the debtor has defaulted in their performance of maintenance obligations. As this decision becomes final, it provides the basis for the filing of a criminal complaint under Art. 209 § 1 of the Criminal Code ("CrC") and, if the records of the Central Register of Drivers reveal that the maintenance debtor holds a licence to operate a vehicle, an application for the confiscation of the debtor's driving licence may be filed with a district administrator (Art. 5 (2) and (3b) of the Assistance Act). Article 9 of the Assistance Act describes the grounds that a person eligible to receive a maintenance benefit must satisfy in order to obtain a benefit from the Maintenance Fund.

11. Extended enforceability of attachment of earnings orders

Pursuant to Art. 1087 CCP, if a debtor is employed by a family member or a loved one, the employer may not oppose an attachment of earnings order issued in an attempt to enforce maintenance claims by relying on the following defences: the defence that the debtor has been paid in advance; the defence that the debtor works for free or receives pay lower than the average pay; or the defence that the employer has their own claim against the debtor which may be deducted from any entitled payment for work. The literature explains that the above provision extends the scope of enforceability of an attachment of earnings order imposed on a debtor employed by a family member or a loved one. Article 1087 is an exception from Art. 882 (3) CCP and, in respect of defences available to a debtor entitled to a claim recovered as part of enforcement proceedings, also from Art. 887 § 2 CCP⁴³. The purpose of this exception is to prevent collusion between a debtor entitled to the enforced claim and a maintenance debtor named in an attachment order, the aim of which would be to prevent the enforcement of maintenance benefits. The defence, available to a debtor entitled to the enforced claim, that a maintenance debtor has been paid in advance as well as the defence that the debtor works for free or the debtor's defence of deduction – raised in a statement made under Art. 882 (3) CCP – are ineffective⁴⁴.

⁴² W. Maciejko [in:] J. Ignaczewski (ed.), *Alimenty*, Warszawa 2014, p. 203.

⁴³ E. Wengerek, *Postępowanie zabezpieczające...*, p. 704.

⁴⁴ Cf. E. Wengerek, *Postępowanie zabezpieczające...*, p. 705; A. Marciniak, *Egzekucja świadczeń...*, p. 1075.

A bailiff should notify an employer who is a debtor's family member or loved one about the consequences of an employer's failure to comply with this regulation. An employer who fails to comply with this notice is liable for the loss sustained by a creditor because of this failure. A debtor is also liable for such a loss. An employer and debtor may also be held criminally responsible (Art. 886 CCP)⁴⁵.

12. Maintenance claims in a schedule for the allocation of amounts collected in enforcement proceedings

Pursuant to Art. 1025 § 1 (2) CCP, maintenance claims have the priority of satisfaction during the allocation of the amounts collected in enforcement proceedings included in the second category of collected amounts (i.e. the amounts remaining after the reimbursement of costs of enforcement proceedings). This category includes past overdue claims as well as claims payable as of the date a schedule for allocation is made, together with any interest charged before that date. If a creditor has submitted a warrant of execution ordering a debtor to pay maintenance before the decision on the judicial transfer of ownership (Art. 1036 CCP) becomes final, a maintenance claim notified in this way is recoverable as a second category claim (in accordance with Art. 1025 § 1 (2) CCP)⁴⁶. In this case, it is irrelevant that the notifying person does not have the status of an enforcing creditor who has been participating in proceedings from the outset⁴⁷.

II. PROTECTION OF MAINTENANCE CLAIMS AGAINST THIRD-PARTY ENFORCEMENT PROCEEDINGS

1. Enforcement of claims from bank accounts

Pursuant to Art. 833 § 6 CCP, maintenance benefits and financial benefits payable in the event of the ineffectiveness of enforcement of maintenance claims are exempt from enforcement proceedings. Because of the popularity of non-cash transactions, maintenance payments are often made to bank accounts of eligible recipients or their statutory representatives. Before 8 September 2016, the law provided for no measures that would protect maintenance monies kept in bank accounts from enforcement proceedings. This was because the asset recoverable in proceedings for the enforcement of funds kept in a bank account is the account holder's claim towards the bank, irrespective of the source of monies deposited on the account. The contract of bank account, regulated in Arts. 725–733 CC, obliges a bank to receive and keep monies of the account holder and perform financial transactions according to the holder's instructions. A bank may use (and make profit from) any monies kept in an account, which are available at any given time, subject to the obligation to return such monies (or a part thereof) to the account,

⁴⁵ Cf. A. Adamczuk, *Kodeks...*, p. 853.

⁴⁶ As in the resolution of the Supreme Court from 26 November 2009 issued in case III CZP 104/09, OSNC 2010, 5(76).

⁴⁷ Cf. the justification of the resolution of the Supreme Court from 26 November 2009, III CZP 104/09, OSNC 2010, 5(76).

generally at every request of an account holder (Art. 726 CC). An account holder has, for their part, a specific claim to the monies kept in their account expressed in abstract currency units⁴⁸. According to this approach to the object of enforcement proceedings targeting a bank account, any benefit whose enforceability was exempted by virtue of law (under Art. 833 § 6 CCP) would lose its privileged status upon being transferred to an account and could be seized and recovered in enforcement proceedings⁴⁹. The Act on the amendment to the Family and Guardianship Code and certain other acts of 10 June 2016⁵⁰ added Art. 54a to the Banking Law Act of 29 August 1997⁵¹. The new Article provided that any monies kept in current accounts, savings accounts or accounts of fixed-term deposits whose sources are benefits or allowances referred to in Art. 833 § 6 of the Code of Civil Procedure of 17 November 1964, and any benefits, allowances or other amounts referred to in Art. 31 (1), Art. 80 (1) and (1a), Art. 81, Art. 83 (1) and (4), Art. 84 (2) and (3) and Art. 140 (1) (1) of the Family Support and Foster Care Act of 9 June 2011⁵², and any monies allocated to the maintenance of a residential unit in a multi-family building or a single-family house, which are referred to in Art. 83 (2) and Art. 84 (1) of the Family Support and Foster Care Act, are exempt from attachment procedures conducted on the basis of a judicial or administrative warrant of execution, as far as such monies are apportioned to children placed in a foster family or foster home or persons who have attained the age of majority while staying in foster care.

The same amendment introduced “family accounts” kept in the name of natural persons eligible to receive benefits exempt from enforcement proceedings (Art. 49 (4) of the Banking Act). Pursuant to Art. 52a (2) of the Banking Act, only the monies obtained from benefits exempt from enforcement proceedings can be paid into family accounts. Such payments may originate exclusively from bank accounts of institutions that pay benefits exempt from enforcement proceedings.

The above provisions oblige the debtor of a claim subject to an enforcement order (a bank) to review the sources of monies transferred to a bank account subject of an attachment order. Benefits that are exempt from enforcement proceedings under the laws in force cannot be deducted as a consequence of a seizure of a bank account under a judicial warrant of execution. The above changes remedy the practical problems associated with the enforcement of claims from bank accounts that, in the past, could result in the collection of monies from privileged sources and led to debtors being deprived of effective remedies to challenge such collections.

2. Fraudulent conveyance action vs. maintenance claims

In a resolution of 11 October 1980⁵³, the Supreme Court held that if the enforcement of invalid maintenance claims prevents the satisfaction of claims of another

⁴⁸ As in the judgment of the Court of Appeal in Katowice from 27 September 2007, V ACa 359/07, Biul.SAKa 2008(1) item. 23.

⁴⁹ Cf. the judgment of the Court of Appeal in Katowice from 16 April 2014, VI ACa 67/14, LEX No. 1466678, Legalis 992951.

⁵⁰ Journal of Laws, item 1177.

⁵¹ Consolidated text, JL of 2016, item 1988 as amended.

⁵² JL of 2016 r. items 575 and 1583.

⁵³ III CZP 37/80, OSNC 1981/4, item 48.

creditor, this creditor may, in an action brought against the person entitled to receive the maintenance claims recovered in enforcement proceedings, request determination that – in view of the fact that the maintenance obligation has ceased – the creditor is entitled to recover their claims with priority over the maintenance claims (Art. 527 et seq. CC). In the justification to this resolution, the Supreme Court considered the remedies a creditor has in the situation where a debtor assumes a passive stance towards enforcement proceedings conducted against them despite the fact that an eligible person has no valid claim for maintenance. The Supreme Court rejected the creditor's petition for the determination that the maintenance obligation did not exist (Art. 189 CCP), ruling that allowing such a petition would constitute a blatantly unreasonable interference in the sphere of family financial relations between the eligible person and the maintenance debtor. The Court also refused to allow for a procedural substitution under Art. 887 CCP and the institution of an action under Art. 138 FGC by the creditor seeking recovery of claims. However, the procedural substitution remedy would be useful for a creditor who has already started enforcement of their claims but only in the event that a debtor subject to the creditor's enforcement proceedings remains inactive in recovering their own claims against their debtor (the debtor of a claim subject to an attachment order). A substitution action may be brought only against a debtor of a claim subject to an attachment order. Procedural substitution cannot be used in the discussed framework of personal relations because a person whose property is subject to enforcement proceedings related to a maintenance relationship is also a debtor.

The Supreme Court explained that a maintenance debtor, who is subject to proceedings for the enforcement of maintenance and who does not bring a reasonably effective action under Art. 138 FGC against a person obtaining a financial benefit from such enforcement proceedings, depletes their property and by doing so willingly acts to the detriment of the other creditor who is unable to satisfy their claims due to the former's inaction. In this way, the purported "maintenance creditor" actually receives a bonus. In the event that a creditor, injured by such a conduct on the part of a debtor, becomes insolvent, the creditor may bring a fraudulent conveyance action (*Actio Pauliana*) under Art. 527 et seq. CC. An *Actio Pauliana* targets not only a debtor's "actions" in the strict sense of the word but also any omissions that result in the debtor's enforceable property (a collection of assets) being depleted or failing to increase in value – a situation which gives rise to the ineffectiveness of enforcement proceedings conducted against this property. In a commentary criticising the resolution⁵⁴, J. Jodłowski argued that the Supreme Court's reasoning was contrary to the wording of Art. 527 CC, which refers to "a debtor's act in law performed to the detriment of a creditor", rather than "an inaction" of a debtor. According to Jodłowski, the proper remedy for a creditor who is unable to recover their claims because of the enforcement of unjustified maintenance is procedural substitution under Art. 887 CCP read in conjunction with Art. 902 CCP. In applying this remedy, the creditor may exercise any rights afforded to a debtor, including the right to bring an action for the determination that the

⁵⁴ J. Jodłowski, *Głosa do uchwały Sądu Najwyższego z 11 października 1980 r., III CZP 37/80*, „Palestra” 1983/3–4, p. 134.

debtor's maintenance obligation towards a third party has expired (Art. 138 FGC) or an action for the annulment of an enforceability clause appended to a warrant of execution (Art. 840 CCP).

On the other hand, S. Dalka⁵⁵ and M. Bączyk⁵⁶ approved the position taken by the Supreme Court in the resolution from 11 October 1980.

On the balance of the arguments presented above, I concur with the reasoning of the Supreme Court that the fraudulent conveyance action (*Actio Pauliana*) is the only remedy available to a creditor whose claims are incapable of being recovered due to the enforcement of unjust maintenance. The remedy of procedural substitution under Art. 887 CCP cannot be applied in this case because a creditor who attempts to enforce a claim could institute an action under Art. 138 FGC in lieu of a debtor but only against a person claiming unjust maintenance. The latter, however, is not a debtor of a claim subject to an attachment order within the meaning of Art. 887 CCP. In the above legal relation, this person is a creditor.

Keywords: maintenance, child's pension, enforcement proceedings, maintenance obligations enforcement

Streszczenie

Dagmara Olczak-Dąbrowska, Egzekucja świadczeń alimentacyjnych

Przedmiotem artykułu jest analiza stanu prawnego odnośnie do egzekucji alimentów i rent o charakterze alimentacyjnym, która jest szczególnym rodzajem egzekucji świadczeń pieniężnych, jako zasługujących na uprzywilejowanie ze względów społecznych. W artykule omówiono odrębności w egzekucji świadczeń alimentacyjnych.

Autorka doszła do przekonania, że analiza stanu prawnego nie nasuwa potrzeby zmian legislacyjnych w tym obszarze. Ograniczenie zasady dyspozycyjności na rzecz działania organu egzekucyjnego z urzędu w zakresie wyboru sposobu egzekucji oraz obowiązku prowadzenia przez komornika okresowych dochodzeń w celu ustalenia miejsca zamieszkania dłużnika i jego sytuacji majątkowej, wyłączenie możliwości umorzenia postępowania z powodu bezskuteczności egzekucji, a także zniesienie lub ograniczenie przywilejów egzekucyjnych w ramach poszczególnych sposobów egzekucji należą do rozwiązań służących wzmocnieniu sytuacji wierzyciela alimentacyjnego w postępowaniu egzekucyjnym. Pozytywnie należy ocenić zmiany w prawie bankowym wprowadzone w 2016 r., dzięki którym środki pochodzące ze świadczeń niepodlegających egzekucji są chronione od zajęcia, jeżeli zostały przelane na rachunek bankowy. Przerzucenie na banki ciężaru weryfikacji źródła pochodzenia środków wpływających na rachunki bankowe oraz wprowadzenie rachunków rodzinnych do wpłat środków niepodlegających egzekucji przyczyni się do usprawnienia egzekucji i zwiększenia ochrony uprawnionych do świadczeń alimentacyjnych.

Słowa kluczowe: alimenty, renta alimentacyjna, postępowanie egzekucyjne, egzekucja świadczeń alimentacyjnych

⁵⁵ S. Dalka, *Glosa do uchwały Sądu Najwyższego z 11 października 1980 r.*, III CZP 37/80, „Palestra” 1983/3–4, p. 127.

⁵⁶ M. Bączyk, *Glosa do uchwały Sądu Najwyższego z 11 października 1980 r.*, III CZP 37/80, „Nowe Prawo” 1982/9–10, p. 172.