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EARLY DISCHARGE OF SUPPORT

1. Introduction

This study deals with the possibility of extinguishing the support obligation of the potential support obligor, in face of his future and certain support obligee who practiced evidenced unworthy acts against the payer, before or during the support determination.

Indeed, the legal recognition of unworthy acts practiced will be sought, and therefore the statement by judicial decision, of the extinction of the right to receive support by the one who acted unworthily against the support obligor before the start of the receipt of any support payment, as set forth in the sole paragraph of article 1708 of the Brazilian Civil Code, while the support was in effect.¹

Thus, this instrument attempts to expose, without impoverishing the matter at issue, since the legal and lawful possibility in the Brazilian legal system is incipient, the support obligor's early discharge from the support obligation, or the consideration of such unworthy act as a reduction factor of the support *quantum*, when the support is determined for the offender support obligee.

1.1. Nomenclature: "early discharge"

It is relevant to explain, briefly, the denomination in the title of this work, which is: "early discharge", since as set forth in the sole paragraph of Article 1708 of the Brazilian Civil Code, it aims to resort to the ground, or cause (unworthy acts) as well as to the effect set forth therein, so as to "discharge" the right to support, but before the course of the support obligation.

Prima facie, it may seem wrong to use the term "discharge" to refer to an obligation that is not in effect, however, what is meant in the context, is that the discharge from the support obligation will be anticipated, exonerating the right to support.

This is because, with the breakup of the bonds of the matrimony, that spouse or unmarried partner (cohabitation) that, based on solidarity and under articles 1702 and 1704 of the Civil Code, requires support from the other, raises as potential support obligee, even if the obligation has its formal and procedural commencement only with the notification / summons of the obligor person.

¹ Art. 1.708, sole paragraph: "As to the support obligee, the right to support is also extinguished, if he/she performs na unworthy act against the support obligor."

In that capacity and exhibiting potential right, it is suggested that the applicant for the support, as occurs with the one who calls himself support obligee, under the civil legislation, shall behave in a manner at least civilized towards the support obligor, in compliance with good faith and good morals, under penalty of incurring in extreme penalty of the loss of his/her right.

The thesis herein defended, for the sake of truth, seeks to suppress the real and dangerous gap in the Brazilian legal system in which, depending on the time of the practice of unworthy acts, there would or would not exist a penalty to the offender of legal or moral rules against the one who pays support or is in the imminence of such obligation.

So that, in some cases the support obligor has the obligation to pay support, even in face of severe injury and harm to his dignity by the support obligee, since in the Brazilian legal system, only when the support is in effect the legal provision regarding the discharge of the support obligation due to unworthy acts is set forth².

The affirmative finds support in two distinct marks established by the Civil Code, which require a different repercussion for acts which may even be confounded at times.

The first of the two marks mentioned is the disruption of the matrimony bond by separation or divorce.

Unworthy behaviors occurred before the end of the matrimony, which may or may not be confused with infringement of conjugal duties, are under the legal remedy provided for in article 1704 of the Civil Code, which protects the spouse, even if guilty, granting him/her the right to support in minimal and indispensable value to his/her survival.³

At this point, it is worth to point out that the fault is not dealt with as presuppose for the separation / divorce⁴, but solely in regard of its possible reflexes on the support obligation.⁵

² In this sense Francisco José Cahail's doctrine: "the contumacious adulterous during the marriage, but within that exceptional situation of need, can claim support for her survival; in turn, this same woman, when continuing intimate relationships with third parties, already exempted from the obligation of fidelity after the legal separation, may be excluded from the support previously granted, if considered living in common law marriage or just adopting unworthy procedure "(in *Direito de Família e o novo Código Civil*, 2005. p. 201)

³ Article 1.704 of the Brazilian Civil Code provides: "If one of the spouses legally separated requires support in the future, the other shall provide it upon support to be settled by the judge, if such spouse was not declared guilty in the action of legal separation. Sole paragraph. If the spouse found guilty requires support in the future, and has no relatives able to provide it, nor aptitude for work, the other spouse shall provide the support, and the judge shall settle the indispensable value for survival.

⁴ In Brazil the legal decree of separation and divorce, or further, of the divorce directly are still possible . Although the separation action is falling in disuse, and the divorce decree is used when the matrimony bond is disrupted, the civil legislation allows to opt.

⁵ In Brazil, until recently it was discussed previously which spouse was guilty for the end of the matrimony bond, and such matter still causes controversy in minority of the specialized doctrine, but less and less the debate is taken to the Courts, or treated by them for assumption of request, or grant of the divorce. As to setting support based on guilt, Flávio Tartuce asserts the existence of three currents in the Brazilian doctrine on the subject, thus: "The first current holds the utter impossibility of

The same Civil Code even provides a small support for those who have caused their own state of need, under § 2 of article 1694⁶, but nothing deals with the hypotheses regarding the future obligee who makes an attempt to harm his supportobligor's dignity.

The second mark legally defined is the provision itself or the formalization of the support. It is understood as a second mark, since, as in the previous situation, the legislation provides an express solution for the unworthy behavior of the support obligee, namely, the discharge of the support. And by giving the treatment of support obligee in his article 1708, sole paragraph, the Civil Code presupposed the existence of the obligation in effect

Thus, the acts regarded as unworthy performed after the breakup of the matrimony bond, which often arise from the application for divorce by one of the spouses, before the obligation was determined, when the support obligee cannot be mentioned yet but only the future support obligee can be mentioned, have not been provided for.

The lack of provisions on such matter, however, can lead to undesirable legal uncertainty, with disastrous consequences to the urbanity of the parties, not to mention the serious sense of impunity, which plagues any contemporary civil society.

Moreover, the delay required by the processes in this area makes the consideration of unworthy acts even more necessary, in order to prevent the perpetuation of a scenario of injustice for the support obligor.

Some argue that such acts could be the purpose of civil redress for property and moral damages, however, in face of the identity of the circumstances in the other two hypotheses herein mentioned, and including the temporal proximity that normally separates them, it seems right to punish with the loss of the right to receive support the one who willfully attempts against the physical or mental dignity of his future support obligor, or of people around him, when he is the clear target of the acts, performed by the future support obligee.

discussion of fault for the dissolution of marriage, including the matter of support, being arts. 1.702 and 1.704, caput, of the CC. tacitly revoked. Similarly, the legal relevance of arts. 1.694, § 2 and 1.704, sole paragraph, of the CC disappears, and the support shall be settled according to the support binomial or trinomial. This current is led by Paulo Lôbo (...). Rodrigo da Cunha Pereira, Maria Berenice Dias, Rolf Madaleno, Pablo Stolze Gagliano and Rodolfo Pamplona Filho understand likewise. (...) For the second current, there is no possibility of discussing the fault for the dissolution of marriage in divorce action. However, the fault can be debated in a special support action, and the support may be settled in accordance with arts. 1.694, § 2 and 1.704, caput and sole paragraph, of the Civil Code. Thus, such legal provisions would not be revoked. This is José Fernando Simão's understanding. (...) Finally, the third current claims that in some more severe situations, the fault can be debated in the divorce action, including for the analysis of the settling of the support needed. Note that such support may also be pleaded in an autonomous action, which depends on the applicants' procedural choice. There remains a dual system, with or without fault, which may be mitigated in some situations. This is Flávio Tartuça's opinion. (cf. *Direito Civil: direito de família*. v. 5. 9 ed. São Paulo GEN/Método. 2014. p. 511/512).

⁶ Art. 1.694. (...) § 2 The support shall be just the indispensable for subsistence, when the situation of necessity has arisen from fault of the one who claims.

Likewise, when in that moment the hypothesis of obstacle to the right to support is verified, the legal principles of economy and procedural speed, with the increase of the probability of complying with the constitutional guarantee under item LXXVIII of article 5 of the Brazilian Federal Constitution⁷, which settles a reasonable time for the processing of lawsuits, which thus would prevent the filing of autonomous action to verify possible damage, which throughout this new process may even lose the context and important evidences of the time when the facts happened.

The leading of the case to unify the analysis and decision, certainly produces the incidence of preservation of good faith and reasonableness in family law relationships, making the intervention of the State become effective in private relationships in a positive not only in a mandatory way.

As stated, surely in practice, it appears prudent not to relegate these acts of impunity, recommending the aggrieved party, as soon as possible, to request discharge by virtue of unworthy behavior, and the judge shall with due caution and attentive to factual circumstances, grant the immediate discharge or further for a systematic interpretation of the Civil Code, determine a minimum value indispensable for survival to the obligation.

The judges are responsible for the difficult task, especially in the preliminary determination of the support, of verifying the truth of the support obligor's claims, since, when the acknowledgment of the unworthy behavior occurs only at the end of the claim, the debtor may not regain the amount paid by reason of the support unrepeatable character.

This is therefore innovation to the discharge of the right to the support obligation *ab initio*, as it is common in the course of the support obligation to seek by way of action for review, when unworthy acts performed by the support obligee against the support obligor are evidenced, the discharge of the support set forth⁸.

2. Characteristics of the application

As well known by the operators of law, working in Family Law and Succession, the acts that threaten the physical and psychological integrity of those who are involved in actions for divorce, support, and many others that involve Family Law are common. Not to mention pecuniary loss and damage.

Among the obvious emotional reasons that encourage the actual cases and the individuals involved, there is still the feeling of impunity for "emotional" reactions in such cases, even if they cause, as is well known, lasting losses.

Thus, the possibility of "early exoneration of the support obligation" or penalizing the future unworthy support obligee with the loss of the right to support is

⁷ CF, Art. 5 LXXVIII: "all persons, in the judicial and administrative ambits, are ensured of reasonable duration of the process and the means which guaranties the speed of the procedure of the case."

⁸ On the matter at issue, see CAHALI, Yussef Said. *Dos Alimentos*. 8 ed. São Paulo : Revista dos Tribunais, 2013. p. 308 and following.

a wise, prudent measure that strengthens not only the Judiciary Branch, but may be the reason for empowerment of litigants and further, it is believed, in many cases, the interruption of reprehensible and harmful attitudes to the former partner, or parent-support obligor, or, at least, the mitigation of the undue practices.

The exceptional measure proposed herein is of relevant pedagogical character, which, used with due caution, would print a new perspective in the conduction of the tortuous period after the end of conjugal relationships, not to mention that it may lead to the extinction of the right to support, as described herein, but rather, it may be the hypothesis for the reduction of the amount thereof, depending on the circumstances of the concrete case.

Therefore it is extremely important the increasing, enhancement of the divulging and insertion in the legal practice of family law, this form of discharge of the right to support if the support obligee is unworthy, especially towards the one who provides him the support, but without losing the perspective of the exceptionality of the measure, which is hard and only applicable to atypical and serious cases⁹.

It is also worth mentioning, that in case of the support due in character of kinship¹⁰ in general, the thesis herein exposed may be applied, however, in the practice it is difficult to do so, as it faces, most often the minority of the child, for example, which is the excuse of responsibilities of any unworthy act, since it is represented by the parent or other guardian, still, such character attitude could be possibly discussed when the offspring becomes an adolescent, further thinning out the chances of applicability of the provisions herein exposed.

However the incidence analysis when faced with cases provided for in Art.1694, 1696 and 1697 of the Brazilian Civil Code, is not ruled out¹¹.

⁹ Recent decision of the Distinguished Appellate Court of the State of São Paulo, in preliminary injunction, dismissed the fixing of support obligation for the ex-wife who had unworthy procedure on the verge of fixing the alimony after the breakup of the marriage partnership: Interlocutory Appeal No. 2086584-51.2014.8.26.000, of the Third Chamber of Private Law of the Appellate Court of São Paulo.

¹⁰ MADALENO, Rolf *Family Law Course* 4th ed. Rio de Janeiro: GEN/Forense 2011. p. 977: "The current legislation is far away from the unbreakable duty of joint support obligation due to consanguineous kinship, which has never took into consideration the behavior of the applicant for support obligation, as seen before, a parent or a child who never took care of his relative, who never tried to provide the material or spiritual support, and in this line decided the court of the State of Rio Grande do Sul to deny support to the parent who never fulfilled the family duties inherent to family power [TJRS- 7th Civil Chamber Civil Appeal No. 70,013,502,331. Rep. Court judge Maria Berenice Dias. j. 02.15.2006], there is no need of any pre-existence of a lawsuit proving the material abandonment in the past, just a complaint or extrajudicial unjustified negative attitude of giving support to a child that the father abandoned or ascendant the son ignored, not exempting the unworthy fact that a third party has provided support aid in his place Actually these are the causes which give rise to prevent the **birth of the support obligation right**, and it has no sense to terminate a support right previously agreed upon or legally decreed (...)", we highlight.

¹¹ **Article 1694.** The relatives, spouses or partners may request each other the support obligation they need to live in a manner consistent with their social condition, even to meet the requirements of their education. § 2 The support shall only be the necessary to subsistence, when the situation of necessity results from the fault of those claiming such support.

Article 1696. The right to the support provision is reciprocal between parents and children, and extended to all ascendants, falling the obligation in the near in kinship, one replacing the absence of the other.

In this sense, it highlights the rule already set forth regarding this issue, in the sole paragraph of Article 1708 of the Civil Code, although such rule provides the possibility of exoneration in the course of payment and the rule set forth in Article 1814, of the same Code¹², however, the latter provides for issues of the succession law.

On this matter, the doctrine is convergent as asserts Rosa Maria de Andrade Nery¹³ "The principles of proportionality and solidarity that inspire the determination of parameters for the acknowledgement of the support obligation, give way to the principle of loyalty and good faith, to acknowledge the right to discharge the support obligation between relatives. In no event the provision disproportion shall be tolerated, neither to guide the establishment of the provision, nor to authorize the discharge of the obligation, or its revision. "¹⁴

Indeed, it is understood, albeit briefly exposed herein the just, consistent and possible "early discharge" of the right to support to those who perform unworthy acts against of the future support obligor, removing, from that moment on, the support obligation, however, due to the indignity verified and practiced by the potential support obligee.

Finally, it is relevant to provide, that if it is essential the maintenance of the support obligation to that unworthy creditor, in this case at least, the thesis will remain to provide the reduction of the amount of the support obligation¹⁵,

Article 1697. In the absence of ascendants the duty of the obligation falls on the descendants, in the order of succession and, lacking these, to the brothers.

Article 1698. If the relative, who first owe support, is unable to bear the burden, then the relative of immediate grade shall be called; several people are obliged to provide support, and everyone shall contribute in proportion to their respective resources, and if a suit is filled against one of them, the others shall be called to join the lawsuit.

¹² Accordingly Statement No. 264 of III Meeting of Civil Law "In the interpretation of what is the unworthy procedure of the support obligor, able to terminate the support right, the hypothesis of items I and II of Article 1814 of the Civil Code is applied, by analogy."

¹³ *In Civil Law Manual: family* São Paulo : Revista dos Tribunais, 2013, Revista dos Tribunais, 2013, p. 382.

¹⁴ In the same direction "regarding the unworthy procedure - as cause to give rise to the termination of support obligation - even though it has not been defined by the Civil Code, there is no doubt the broad concept grants to the magistrate the task to verify case to case, if the conduct called unworthy has such qualification or not. Thus, for example, it may be glimpsed unworthy behavior procedure of the support obligee that attacks physically or morally the debtor (eg bodily injury of any nature, attempted murder, defamation of any order), as well as the one that practices, against the person of his support obligor, crime of any nature (eg .: theft, robbery, forgery of signature) etc. (...) and, prior to the enactment of the new Civil Code [in force since 2003], the court has admitted the exemption from support duty when there was, by the support obligee, misconduct, disorderly or dissolute life, use of support to sustain another companion etc. (...) In this sense - it urges to acknowledge - that Article 1708, sole paragraph, represents nothing more than the stratification of the precedents that had already been solidified on the appropriateness of the dismissal of the obligor before the indignity of conduct assumed by the respective obligee, thus supplying the gap that resented the repealed Civil Code." FONSECA, Priscila M. P. Corrêa da. The dismissal of alimony due to the former spouse. Available at: <http://www.priscilafonseca.com.br/?id=59&artigo=20> Access on 04.10.2014).

¹⁵ Accordingly Statement No. 345 of IV Meeting of Civil Law "The 'unworthy procedure' of the creditor in relation to the debtor, provided for in the sole paragraph of Article 1708 of the Civil Code, may give rise to exoneration or just the reduction of the amount of support for the indispensable amount to the survival of the creditor." Remembering that this guidance aims ongoing support obligation and not the previous hypothesis presented in this paper.

indispensable to subsistence, based on the rule of paragraph 2 of Article 1.694, however, since the support obligation was determined, when the unworthy acts were performed prior to the start of support obligation.

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