

# ESTABLISHMENT OF THE ALIMENTARY FUND IN THE FEDERATION OF BOSNIA AND HERZEGOVINA

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**Abstract:** *The Alimentary Fund in the Federation of Bosnia and Herzegovina is a topic that has drawn the attention of the public for the last five years in the Federation of Bosnia and Herzegovina. During the 100<sup>th</sup> session of the Federal Government, more precisely on the 19<sup>th</sup> February, 2014, the Federal Ministry of Finance, in cooperation with the Federal Ministry of Justice and the Federal Ministry of Labour and Social Policy, has been assigned the role of considering the possibilities for establishing an alimony fund and submitting a proposal to the Government for the solution of this problem. The problem itself arises from Article 237 of the Family Law of Federation of Bosnia and Herzegovina, which is characterized as insufficiently clear, resulting in the need to construct a sub-legal act that will deal in more detail with the issue of how to secure funds from the Federation of Bosnia and Herzegovina Budget intended to support a child, with the aim of clarifying determination of jurisdiction. The Family Law of Federation of Bosnia and Herzegovina in Section V, concerning support, elaborated in detail all aspects of support, including the maintenance of a child assigned to one parent for care and upbringing. As the non-payment of alimony has been established as a criminal offense, the question arises as to why there is a need for the so-called „alimentation fund” at the federal level? Will this fund be used by parents who are unable to pay for alimony or by single parents? Will the legislator take over the obligation to prosecute individuals who do not pay alimony, and weather will the collection of obligations, according to the enforceable document, be by the means of seizure of real estate in a procedure of forced collection?*

**Keywords:** *Alimentary fund, Family Law, Alimony, Support, Social welfare centre.*

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## 1. INTRODUCTION

The very term and concept of alimony embodied in our spoken language comes from the English word *alimony*, which indicates the term of financial support of one spouse after the divorce in which the underage children were acquired. However, our legislator is not familiar with the term alimony, but rather the term of support. The Family Law of the Federation of Bosnia and Herzegovina in Article 213 states that „Mutual support of marital and common-law partners, parents and children and other relatives is their duty and right which is provided in this Act”. Additionally, it is stated that „*in cases where the mutual support of the persons referred to in paragraph 1 of this Article cannot be fully or partially realized, the social community shall, under the conditions laid down by law, provide uninsured members of the family with the necessary means of subsistence.*” (Article 214 of the Family Law, hereinafter: The Law). This paper deal with the issue of the Alimentary Fund, which should have been established five years ago. At the 100<sup>th</sup> session of the Federal Government, more precisely on 19 February 2014, the Federal Ministry of Finance, in cooperating with the Federal Ministry of Justice and the Federal Ministry of Labor and Social Policy, were tasked to consider the possibilities for the formation of the child support or Alimentary Fund and to submit a proposal for a solution to the formation of the Alimentary Fund found within the territory of the Federation to the high Government. This

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position of the Government derives from the inability to interpret Article 237 of the Family Law of the FBiH (Federation of Bosnia and Herzegovina), which reads: „*In cases when a court finds that parents and other persons obliged to provide support are unable to meet the child's support needs, they will inform the guardianship authority, which is obliged to provide the means to support the child from the budget of the Federation*”.

The paper deals with whether such a Fund should indeed be in the territory of the Federation of Bosnia and Herzegovina and whether the legal solutions provided by the Family Law are adequate.

## 2. PARENTAL CARE

Sustenance of the child is the responsibility of every parent. This obligation ceases when the child reaches the lawful age of adulthood or the maximum to 26 years if the child is an attendant in regular education. When it comes to child support, it is primarily about the obligations arising from the concept of parental care. The lawmaker has defined parental care in Chapter C. subsection 2 of the Family Act in Article 129. „Parental care is a set of responsibilities, duties and rights of parents with the aim of protecting personal and property rights and interests.” From the legal definition it can be recognized that the contents of parental care are rights and duties that relate to: the personality of the child, child representation and the property of the child. Parents' rights and duties according to the child's personality are a significant part of parental care. It consists of the following rights and duties towards children: designation of a personal name, custody and raising of a child, education of a child, child support and representation of a child. Sorted into categories, only the part relating to the designation of a personal name falls in the second category where it is legally defined conditions for the personal name of the child, while the other categories are in part related to the care of the child.

The act of parental care is performed by parents who work together and agree when they lead a common life, but also when they do not lead a common life if they conclude an agreement on joint parental care and if the court finds that the agreement is in the best interest of the child. The very concept of „common guardianship” or joint parenting is a newer date, and it implies understanding and arranging parents about those issues that are related to children. Parents here physically share all the daily routines and activities they have with their children, such as taking children to school or dormitory, sports, shopping, music school etc. To make this concept the best way for a child, it is necessary for parents to have a good relationship with each other and that their work is coordinated so that they can agree about taking over and respect each other.

What happens when one parent does not behave in coordination to parental care? In that case parental care is retracted. The deprivation of parental care is the toughest family-legal sanction imposed on parents to protect the personality, rights and interests of the child. In our legislation there are two basic reasons for the total deprivation of parental care (Article 154 of the Act). It primarily refers to the abuse of rights and the gross neglect of duties from the contents of parental care. That is why the deprivation of parental care has the same legal and moral consequences. Abuse of parental care means such damaging behavior of a parent when parent's actions contradict the interests of the child to the extent that his physical, emotional, moral and intellectual development is seriously compromised. The legal definition of abuse of parental care reads: „Abuse of rights exists especially in cases of bodily and mental violence against a child, sexual exploitation of a child, referring a child to socially unacceptable behavior, and gross violations

of the child's rights in another way." It does not leave any doubt that legislator has set as a priority when it comes to abusing parental care. In the legal definition, the parent will, in addition to the confinement of parental care, also be held guilty of criminal sanction. The gross neglect of parenting duties (Article 154, paragraph 3 of the Act) exists when the parent does not care about the child at all, nor does it meet his basic living needs in terms of nutrition, treatment, hygiene, etc. The legislator was more concerned with other causes: „*There is a gross neglect of duty especially in cases where a parent does not fulfill the obligation to support the child for more than three months, does not abide by earlier measures to protect the child's rights and interests, does not prevent the child, younger than 16 from enjoying alcoholic beverages, drugs or other illicit on late night outings.*” So, from the same provision should it be said whether parental care will be taken away from a parent who has not paid child support or alimony? Yes, of course it should, because the act of not paying child support and alimony is a criminal offense. In addition, for parents who exercised parental rights it will facilitate exemption in the representation of a minor child, especially in the preparation of travel documents for the child, because there would not be a need for the consent of parents deprived of parental care.

### 3. DIVORCE AND DETERMINATION OF MAINTANANCE

Under the Family Law, the marriage is divorced if marital relations are difficult and permanently disrupted (Article 41 of the Law). Before starting a divorce proceeding, a spouse or both spouses who have children over whom they have parental care are obliged to apply for mediation to a legal and legal entity authorized to mediate. During the mediation process, a person authorized to be a mediator will try to match his / her partner. If the spouses are not in the process of mediation, the authorized person will endeavor to agree on who will live with their child or child over whom they are entitled to parental care after the age of majority, about their personal relationship with the parent they will not live with, his maintenance and other contents of parental care (Article 50 of the Act). In the event that the spouses do not agree with whom the child will live, the guardianship authority will decide on the child's place of residence and determine the monthly amount of the allowance until the court finishes the proceedings. The importance of support for young children gained in marriage is apparent from the provision that the waiver of the right and duty of maintenance has no legal effect (Article 213, paragraph 3 of the Act). It is also necessary to note that a parent who does not exercise parental care, or who is confined or confined to parental care, does not relieve the duty of child support (Article 218 of the Act). In court proceedings, the court will determine the total amount of funds required for maintenance. When determining the needs of a person in need of maintenance (in the particular case of a parent with whom children are living), the court will take into account their property status, ability to work, employment opportunities, health status and other circumstances on which the assessment of their needs depends and when determining the ability of a person who is required to provide support, the court will take into account all its benefits and real opportunities to earn increased earnings, as well as its own needs and legal obligations to support. Since the court in the case of child custody in most cases is fond of mothers of children, it follows that it takes into account the number of children in the community with the mother, whether the mother is employed, the property of the mother (whether she owns a house, flat, ), the age of the children, whether the children go to kindergarten or school etc. One of the provisions of the Family Law provided for by Article 284 (2) is that „the guardianship authority shall, at the request of the court, collect and examine information on the personal and family circumstances of the child and the parties in the proceedings and the property of the parties, and in particular, real state”. From all of the above, it can be concluded that the Law is well-regulated as the procedure of divorce, as well as the procedure for determining the maintenance.

#### 4. REJECTION OF PAYMENT OF MAINTENANCE

When the notion of the payment of support (alimony) is brought up, the public is of the opinion that most of the former spouses do not pay for support. Such claims are corroborated by numerous Internet sources, newspaper articles and the like. According to the Women's Network portal, „No one has so far dealt with this issue seriously, and it seems that single-parent families are growing in proportion to the number of parents who do not pay for child support or are not regular in paying alimony.” But is that all so? Do the perpetrators use all legal possibilities?

In the Federation of Bosnia and Herzegovina, a number of regulations regulate the area of support, including its own payments. The first regulation regulates the way of exercising the right to support, which is the FBiH Family Law. For the sake of sensitive matter and clarification, and easier handling of a variety of regulations governing maintenance, Chapter IX of the Family Law refers to Execution and Maintenance Procedures for Support. Article 372 of the Law states that: „If a parent who, on the basis of a final court decision or settlement made before the guardianship authority, is obliged to contribute to the maintenance of a child, fails to fulfill his obligations for more than three months, the guardianship authority shall, at the proposal of the other parent or the official if deemed to have endangered child support, take measures to secure the means of temporary support until the parent, the taxpayer begins to carry out his duties again.“ The basis for this is found in the Law on the Basis of Social Protection for the Protection of Civilian Victims of War and Protection of the Family with Children (Official Gazette of FBiH, No. 36/99, 54/04, 39/06, 14 / 09,45 / 16), according to which persons and families have the right to permanent financial and other material assistance, if they meet the conditions: they are incapable of work, i.e. they are prevented from exercising the right to work, that they do not have sufficient income for maintenance, that there are no family members who are legally obligated to support them or if they have them, that those persons are unable to carry out the obligation to support them (Article 22). In the sense of this Law, a child who is not capable of work or is prevented from exercising the right to work is considered a child up to the age of 15 years, and if at the regular schooling up to 27 years of age are completed (Article 23).

The second regulation is the Law on Execution of the FBiH (Official Gazette of FBiH, no. 32/2003, 52/2003 - exp., 33/2006, 39/2006 - correction, 39/2009, 35/2012 and 46/2016 and „Official Gazette of FBiH”, No. 42/2018 - decision of the Constitutional Court). In order to be able to enforce the enforcement procedure regarding maintenance, it is necessary to have an executive document. The executive document is a procedural and legal basis for the initiation of enforcement, i.e. an executive document is a document containing a legal act that determines the existence of a claim. The property of the executive document has only those documents that recognize this property status (Čalića B., 2000). In the concrete case, it is a judgment on the divorce that specifies the amount of money for the maintenance of a minor child. In the literature, in view of the legal nature of the enforcement claim, two basic types of enforceability are distinguished: execution for the purpose of exercising monetary receivables and enforcement in order to make non-cash receivables. Enforcement for monetary claims is divided according to the subject of execution for execution on movable property, execution on monetary claims, execution on claims for surrender or delivery of movable property or transfer of immovable property, execution of real estate and execution on public funds (Čalića B., 2000). The most common type of execution in maintenance is execution on the debtor's salary. When it comes to money claim, that is, the debtor's salary, according to Article 138, execution can be carried out on: salaries, compensations instead of salary, compensation for part-time work and compensation for salary



and pension deduction, compensation based on physical impairment under the regulations on invalidity insurance, income from social assistance, income from temporary unemployment, income from child allowance, scholarship and student benefits, and remuneration for the work of convicts can be carried out up to the amount of one half. Regardless of a change in workplace, or an increase in remuneration, or the introduction of a new right of the executor, the obligation of the former employer to inform the new employer of the enforcement on the salary of the perpetrator. According to the abovementioned enforcement requestant, it may propose that the court in the enforcement procedure order the employer to pay him all the installments he has failed to suspend and pay according to the enforcement order (Article 163). According to unofficial statistics from the Internet sources, it is stated that as many as 80 percent of cases the parent avoids paying alimony. „A work that is hard to prove and punished, which makes one-parent families difficult to live.” The question arises as to whether all remedies have been exhausted to make this claim irrelevant.

When there is no possibility of forcible execution of funds, i.e., an administrative ban or a court ban, then the execution procedure on movable and immovable things is initiated. The legislator explicitly stated that the subject of execution could be any debtor's or property right. In the event that the parent requesting enforcement is not able to initiate the procedure itself (which is very often in the Federation of BiH), the procedure should be initiated by the Center for Social Welfare, the guardianship authority ex officio, and as determined by Article 155 of the Family Law, where it is stated that everything can be done by the guardianship authority. „*The guardianship authority may at any time require parents to take into account the management of the child's property and the income generated for the child's needs. The guardianship authority may, in order to protect the child's property interests, decide that the parents have the status of guardians with regard to the management of the child's property. The guardianship authority may, in order to protect the child's property interests, require the court in the out-of-court procedure to determine the security measures on the property of the parent*”. In addition, Article 239 of the same Act obliges the guardianship authority, on behalf of a minor child, to initiate and conduct a procedure for awarding or increasing the maintenance, if the parent with whom the child lives without justified reasons does not exercise this right, and if the parent does not request execution of the decision on the maintenance, as referred to in paragraph 2. In the same Article, the guardianship authority shall, on behalf of a minor child, file a motion for enforcement with the court. The guardianship authority keeps records of decisions and agreements on the maintenance of children and parents in accordance with the instructions prescribed by the Federal Minister of Labor and Social Policy, and checks the fulfillment of the obligation to support the child and, in order to protect the interests of the child, take measures from the Law if it determines that this obligation is not fulfilled or not fulfilled wholly. According to all of the above, it is evident that the guardianship authority plays the most important role in recording and controlling the maintenance of a minor child.

In the Criminal Code of the Federation of BiH, in chapter twenty, criminal offenses against marriage, family and youth, Article 221 determines the violation of family obligations to leave someone in a gross violation of their legal family obligations in a difficult position of a family member who is not able to take care of himself, shall be punished by imprisonment for a term of three months to three years. Furthermore, Article 223 of the Law, designated as avoidance of maintenance, reads as follows: it is determined that the person who avoids the provision of support for a person who is obliged to support, based on an executive court decision or executive order made before another competent authority, shall be punished by imprisonment for a

term not exceeding three years. The lawyer did not leave a dilemma. In case of non-payment of support, imprisonment was impounded, but he also left the possibility of imposing a suspended sentence on conditional conviction at the moment of settlement of the due obligations (Article 223, Paragraph 2 and 3 of the Criminal Code of FBiH).

As the UN Convention on the Rights of the Child is directly applicable in Bosnia and Herzegovina, in accordance with the Constitution of Bosnia and Herzegovina, in the segment of child support, Article 27, paragraph 4 of the Convention stipulates the obligation of States Parties to take all appropriate measures to ensure that the child obtains support from parents or other persons who have financial responsibility for the child, both in the State party and abroad. If a person with financial responsibility for a child lives in a country other than the country where the child is living, States Parties shall encourage access to international agreements or the conclusion of such agreements, as well as the conclusion of other appropriate arrangements.

## 5. THE ESTABLISHMENT OF AN ALIMENTARY FUND

„With the establishment of the Alimentary Fund, the state takes on the obligation to pay for alimony, and thus enables a safer and more stable life and development of the children of divorced parents” (eu-monitoring.ba, 2019), is just one of the numerous titles from the Internet portal dealing with the topic. Not even five years after the initiative adopted at the 100<sup>th</sup> session of the Federal Government, no proposal was made on how to find funds for the payment of alimony. And representative questions that were sent on January 25, 2019. The Government of the Federation of BiH, as well as the ministries that the Government charged in February 2014, which refers to the amendment to Article 237 of the Family Law of the Federation of BiH („Official Gazette of the Federation of BiH”, no. 35/05, No. : 31/14), whose regulation would be a step towards establishing an Alimentary Fund, remained unanswered. This parliamentary question asked the Government of the Federation of Bosnia and Herzegovina to provide information whether any solution to the issue was reached and in which phase it was the drafting of secondary legislation that should regulate in more detail the manner of financing the Alimentary Fund. Also, it was required to provide information on whether the Ministries in charge of considering the amendment of Article 237 of the Law took into account the ombudsman’s recommendations, whether the possibility of comprehensive research and the database and needs of single-parent families and single parents, as well as the possibility of increasing the number of social centers, given that the Federation of BiH submits 1,000 requests for divorce monthly (eu-monitoring.ba, 2019). An agent in the House of Representatives of the Parliament of the Federation of BiH, who asked the question, should have known that the Centers for Social Welfare were obliged to keep records in accordance with Article 242 of the Law, and that the Federation of BiH currently has 59 Centers for Social Welfare, 22 Social Welfare Services with 803 persons are employed and 32,574 users are endangered by a family situation classified by categories (children without parents 471 children of unknown parents 34 children abandoned from parents 500 children of parents prevented from performing parental duties 518 children of parents deprived of parental rights 72 children of parents who do not have enough income for maintenance / maintenance 22,423; children whose parents ignore or abuse 1,441; children whose development is impeded by family / family circumstances 4,803; children negatively neglected and neglected 2,312) (Federal Bureau of Statistics - Bulletin 2018). When looking at the countries in the region, the solution of the Alimentary Fund was most appropriately resolved by the Republic of Croatia by adopting the Law on Provisional Maintenance. The novelty enacted in the Act is that grandparents are obliged to pay temporary support if they are listed in an executive document. Such at-

titude and opinion of the Lawyer is entirely justified on the grounds that they are grandchildren in the second hereditary order, or even the first one in the case of the death of one of the parents or indecencies and wastefulness of the successor in the first order.

The Law on the Basis of Social Protection, Protection of Civilian Victims of War and Protection of the Family with Children, in Chapter VI, stipulates in article 98 paragraph 1 that a fine of 500 to 1,000 KM shall be punished for misdemeanor of the institution if the user, contrary to the provisions of this of the law, denies or restricts the rights to which it belongs, and „for the offense referred to in paragraph 1 of this Article, a responsible person in the institution shall be punished with a fine of 100 to 400 KM”.

## 6. CONCLUSION

After a detailed analysis of the Family Law of FBiH, the Law on the Basics of Social Protection, Protection of Civil Victims of War and Family Protection with Children, FBiH Law on Executive Procedure and FBiH Criminal Code, it can be concluded that the Alimentary Fund on the territory of the Federation is not necessary or purposeful. The legislator has determined in detail and precisely the competencies, and the guardianship authority has appointed to implement the procedure for collecting support in case the parent who is the legal representative of the child does not initiate the enforcement procedure. It can be concluded that the cause of all problems in non-payment of maintenance is exclusively the Social Welfare Center, which does not perform the work within its jurisdiction. It is made clear that initiatives launch for the creation of the Alimentary Fund is appealing to parents who are in situations that cannot collect child support, and trust in the help of the Federation. Unfortunately, the associations that are formed do not know enough legal regulations. Bosnia and Herzegovina is obliged, through its services, to ensure that the child receives support from parents or mothers who have financial responsibility towards the child. By imposing a fine for a misdemeanor of the institution and a responsible person in the same who deprives or restricts his rights with his nerd, the level of responsibility of the Center for Social Welfare has been clearly established in the Federation of BiH in case of violation of the right to exercise child support.

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