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Temporary measures according to the family code - Albanian practice

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Abstract

Family law, as corpus of rights and obligations, also regulates relationships arising from marriage and not only. Marriage is one of the earliest institutions, which has served as the basis for the creation of the family and social relations. During the marital relationship, the mutual rights and obligations of the spouses towards each other and the family arise. The dissolution of the marriage ipso iure terminates these mutual rights and obligations, but on the other hand, it brings about a series of legal consequences of a personal and property nature.

Dissolving a marriage is a difficult process, both emotionally, psychologically and financially, and is often accompanied by tensions between spouses and children. In these circumstances, in order to protect certain fundamental rights, the law provides for certain temporary measures that can be taken by the court during the process to guarantee these rights.

This paper will analyze each of these measures, addressing their importance and necessity during the process of dissolution of marriage. Despite the fact that the law provides for these measures exhaustively in a single provision, what is noticeable is that in practice there are different positions regarding their implementation. In many cases, the courts treat them as a lawsuit in a separate process and in other cases their decision-making goes beyond what is provided for in Article 139 of the Family Code.

In order to have an easier and more effective process for the parties, it is important to have a consolidated judicial practice and a uniform application of the law, based on the principle of legality. As a result, the paper will be enriched and analyzed with practical cases and will identify the problems encountered in the adjudication and implementation of interim measures, which during their implementation in practice in many cases have lost the purpose provided for in the law.

Finally, the aim is to present the conclusions reached, based on the analysis and judicial practice.

Keywords: temporary measures, Family Code, maintenance obligation, housing.

1. Introduction

Temporary measures are emergency measures of a human nature, taken by the court during the divorce proceedings, with the aim of guaranteeing certain fundamental rights of the spouses or children.

Pursuant to Article 139 of the Family Code, temporary measures may have the following objectives:

- *Determining the obligation for the well-being of the child, which means that in the event of a dispute, parents can request the court to determine the parent that the child will have to stay with until the end of the trial, as well as request a temporary obligation for maintenance in order to guarantee the right to education and the well-being of the child;*
- *Determining the obligation to provide alimony for a spouse in need;*
- *For the provision of housing for the non-owner spouse in need and minor children, when applicable;*
- *For the administration and use of property acquired during the marriage.*

The interim measures provided for in Article 139 of the Family Code are included in the second part, the part that regulates the dissolution of marriage between spouses. Consequently, logic leads to the conclusion that this provision will be applied only during trials for the dissolution of marriage. At the request of one of the parties to the trial, mainly in cases when the trial is taking a long time, the court may take certain interim measures, which will have legal force until the conclusion of the trial for the dissolution of marriage. The purpose of taking these interim measures is to protect the best interests of children and the spouse in need, until the conclusion of the trial. As mentioned above, the dissolution of marriage brings legal consequences of a strictly personal nature and consequences of a property nature, referring to the relationship of the former spouses and the parent-child relationship. Among them, the obligation for the material contribution that the spouses have towards each other and the well-being of the family ends, with the exception of the obligation for maintenance that one of the former spouses has towards minor children. However, in certain cases, referring to the conditions provided for by the Family Code and the specific circumstances of the case, the court decides to continue these obligations, specifically material assistance to the spouse in need and minor children, during the dissolution of the marriage, until its completion through the application of temporary measures. These measures are extremely important to have a humane and social process for all parties participating in it. In this sense, these measures may be repealed or amended even during the trial of the marriage settlement, if a change in the circumstances on which the court based these measures is proven, or when the measures were taken based on inaccurate data.

A problem encountered in practice is the fact that interim measures are requested as a measure to secure the lawsuit, referring to the provisions of the Code of Civil Procedure.¹ In this case, it can be stated that we are not before the institution of “securing of the lawsuit”, but before another special procedural means, which is the

¹ Articles 202-212 of Law No. 8116, dated 29.3.1996 “Code of Civil Procedure of the Republic of Albania.

“interim measure”. Measures to secure the lawsuit have the effect of keeping the situation for which they are applied unchanged in order to remove the obstacle that the decision is not executed, or is executed with difficulty. While interim measures have precedence in terms of disputes that arise during the marriage settlement, since in such cases the *lex specialis* law, which is the Family Code, has priority. They also bring consequences during the judicial review, since they determine the position of the parties, until the final decision is given. Therefore, a clear distinction must be made between these two-procedural means, since they have a completely different cause, purpose, object and legal basis. The types of interim measures are not many, they are expressly defined in the Family Code and cannot be extended beyond the cases provided for therein.

1.1 *The obligation to provide maintenance to the spouse*

The obligation to provide maintenance is a legal and human obligation, based on which one or more family members who are unable to work and do not have sufficient means to live, have the right to be paid a maintenance obligation by the other family members ². This human obligation is raised to the level of law in those cases when family members are not volunteering on taking this obligation.

As a rule, the subject who has the right to request this obligation is the spouse in need, after the settlement of the marriage, but with the adjustments made by the Family Code, this obligation can also be granted as a temporary measure during its dissolution. He is the only subject legitimated for such a request, due to the strictly personal nature of the obligation for maintenance. The spouse who enjoys this right can be, without distinction, the husband or the wife. Referring to the emergency nature that this measure presents, its implementation will begin immediately, until the announcement of the decision on the merits and will continue until the latter becomes final. This position is held by the court in a judicial decision where it emphasizes that: “... *the temporary measure aims to realize a right that has not been realized voluntarily and if it is a periodic obligation, it has effect until a final decision is made by the court*”. ³

1.2 *Housing insurance*

Another temporary measure under Article 139 of the Family Code is the provision of housing. As the family home we refer to the home designated as such, by agreement of the parties, where the spouses live together with their children, for most of the year, or otherwise where family life takes place.

Referring to the logic and reasoning of the Supreme Court in one of its decisions, we understand that even the temporary measure for securing the apartment is a measure that will be taken only at the request of the interested party.⁴ This request can be submitted as a request together with the lawsuit for the settlement of the marriage or

² Article 198 the Family Code of the Republic of Albania.

³ Decision of the Court of First Instance of General Jurisdiction of Tirana, no. 10989, dated 05.04.2024.

⁴ Albanian Supreme Court Decision, No. 172, dated 26.03.2015.

with a separate request during the trial of the lawsuit if the need arises.

In another case⁵ the court has stated that: *"...the family's decision to have the plaintiff move out of the marital home forces the plaintiff to move out of the home where she has lived until now, putting her in difficulty in securing housing and in unequal conditions with the defendant. In light of the above, the court finds it reasonable to impose a temporary measure to secure housing for the plaintiff during the trial for the dissolution of the marriage, so that both parties are on equal terms during this process."*

Although not expressly provided for in Article 139 of the Family Code, the court has expressed its opinion on securing the apartment, when one spouse obtains a Protection Order against the other spouse, while they are still in the process of dissolving the marriage. The abused spouse requests from the court a protection order and at the same time the removal from the apartment of the abusive partner.⁶

1.3 Contribution to the well-being and education of the child

It is important to mention that the solution of marriage does not affect the rights and obligations that parents have towards their children, because the parent-child relationship is characterized by the fact that it arises from the legal fact of the child's birth or adoption, and not from the marriage bond. Among the financial consequences that come after the solution of marriage in parent-child relationships are the material contribution to the child's raising, development and education.

The term "support obligation" provided for in the Family Code, following the spirit of the law, does not only include the expenses needed for daily food, but also other expenses related to the health, education, raising, entertainment of the child, etc.⁷ In practice, the court reasons that: *"... the needs of the children are met by both parents and they are divided equally between them. The needs of the children include at a minimum the expenses for education as well as other expenses for their growth, taking into account the level and standard created so far by both parents."*⁸

In another decision, the court emphasizes the importance of fulfilling this obligation during the time the divorce proceedings have begun, and in case of voluntary non-fulfilment, it is imposed as a temporary measure, within the trial of the merits, after becoming the subject of judicial debate between the parties.⁹

One of the main principles that is taken into consideration throughout the process of divorce by the court is that it decides according to the best interest of the child.¹⁰ As stated by the Civil College of the Supreme Court,¹¹ the meaning of the content of the principle of "the best interest of the child" includes a very complex issue and must be analyzed very carefully by the courts. It further continues: *"The application of this principle does not mean that the court will achieve the ideal result for the child, but it has the*

⁵ Decision of the Court of First Instance of General Jurisdiction of Tirana, no. 16165, dated 29.03.2023.

⁶ Law no. 9669/2018 "On measures against violence in domestic relations", article 10/c.

⁷ Decision of the Court of First Instance of General Jurisdiction of Tirana, no. 510, dated 26.09.2024.

⁸ Decision of the Court of First Instance of General Jurisdiction of Tirana, no. 17910, dated 02.06.2022.

⁹ Decision No. 13648, dated 30.10.2024 of the Court of First Instance of General Jurisdiction of Tirana.

¹⁰ Article 2 of the Family Code of the Republic of Albania.

¹¹ Supreme Court Decision No. 188, dated 08.05.2014.

duty to respect the requirements of procedural and substantive law, and its conclusion must be a synthesis of an analysis of all elements and factors related to the growth, development, well-being, raising, education, and the specialist's assessment of the child's psychological state. In the decision, the court must explicitly argue every aspect of these considerations and, in order to realize the best interest of the child, choose the alternative that best suits the best interest of the child."

In order to implement precisely this fundamental principle, the legislator has ensured that even during the process of divorce, minor children are guaranteed certain fundamental rights that affect their development and education, in cases where the parents do not have an agreement between them.¹² Under these conditions, the Court must be very careful, investigate and assess any damage or any suffering of the child and prevent his physical, intellectual, sexual and emotional abuse throughout the process (Mandro-Balili, Mecaj, Zaka, Fullani, 2006). For this reason and being assessed on a case-by-case basis, the court may take temporary measures for the obligation to provide maintenance, raising and education of minor children at the request of one of the parents during the process of divorce. Thus, we bring to your attention the decision¹³ where the court states that: *"... both parents must cover the costs of dental and eye care for their child, even during the divorce proceedings, until the final decision is issued. This obligation is shared equally by both parents...., the interim measure aims to realize a right that has not been realized voluntarily and if it is a periodic obligation, it has effect until a final decision is made by the court.*

Referring to practice, the court, even in cases of taking temporary measures, investigates the income of the parties to the trial¹⁴ to determine the amount of the temporary alimony obligation until the final decision is issued, in such a way as to cover the expenses for the upbringing and education of minor children.¹⁵

1.3.1 Right to meet

In addition to respecting the best interests of the child, another temporary measure granted by the courts is the right of the child to meet with the parent, when the latter is deprived of the exercise of this right by the other spouse. This measure is not expressly provided for in Article 139, but arises from its purpose and in practice is applicable and is granted in cases where the divorce proceedings have begun and are ongoing, in cases where they have been suspended by the court or in cases where the spouse to whom the child has been left in custody has obtained a Protection Order against the requesting spouse.¹⁶ The main criterion in taking this measure by the court is the protection of the best interests of the child, and therefore it is applied in practice

¹² Article 6 of Law No. 18/2017 "On the Rights and Protection of the Child".

¹³ Decision no. 10989, dated 05.04.2024 of the Court of First Instance of General Jurisdiction of Tirana.

¹⁴ Article 162 of the Family Code of the Republic of Albania.

¹⁵ Decision no. 510, dated 26.09.2024 of the Court of First Instance of General Jurisdiction of Tirana.

¹⁶ Decision of the Court of First Instance of General Jurisdiction of Tirana, no. 712, dated 20.07.2022, which states that: *"...the court decides to take a temporary measure for the father to meet with the minor child, as the latter was deprived of the exercise of the right to meet, unfairly by the police; within the framework of the Protection Order that the wife had obtained."*

by the courts, according to the intended provisions of Article 139.¹⁷ In application of this principle, the court considers that the request for a temporary measure should be accepted, since up to this point it is assessed that it is in the best interest of the child, in order for the child not to lose the parent-child relationship with her father, as well as to ensure that the parent who is currently not allowed the right to visit and care for the child, can take care of him.¹⁸

The importance of maintaining parent-child relationships is also supported by Article 158 of the Family Code, which guarantees the right to visitation, except in cases where the interests of the child are harmed.¹⁹

Decision no. 13367, dated 31.01.2022 of the Court of First Instance of General Jurisdiction of Tirana considers that it would be in the best interest of the child to restore relations and meetings with the father because:

- *The child should have an interpersonal relationship with the father, as one of the child's fundamental rights;*
- *The role of each parent in a child's development is essential for the child to be psycho-emotionally calm;*
- *The father figure must be present in a child's life because it influences the formation of the child's personality in the future;*
- *The delicate age of the child necessarily requires the presence of a father figure in her life;*

In determining visitation rights, the court takes into account the needs of the child, the possibilities of the parties, and the relationship established so far between the non-resident parent and the child.

Meanwhile, in another practice, the court emphasizes the UN Convention "On the Rights of the Child", in which Article 3, paragraph 1, provides that: *"In all decisions concerning children, whether taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*²⁰

2. Tools for legal research

Interim measures are initiated at the request of the parties and cannot be taken

¹⁷ In decision no. 15297, the Tirana District Court states: *"In the context of this judgment, the Court, based on Article 139 of the Family Code as well as Article 6 and Article 155 of the Family Code, where the latter provides that before the court takes a temporary or final decision regarding the manner of exercising parental responsibility, the right of visitation or the custody of the child by a former spouse, must call a psychologist or social worker,to see his attachment, material and moral situation, the conditions in which he lives, taking into account the best interest of the child in relation to scheduling meetings with his father."*

¹⁸ Decision no. 992, dated 20.01.2023 of the Court of First Instance of General Jurisdiction of Tirana.

¹⁹ *"The right of visitation and residence, under the conditions determined by the court, may not be denied to the parent to whom the child has not been left, except for serious reasons that harm the interests of the child."*

²⁰ Decision no. 11019, dated 21.12.2020 of the Court of First Instance of General Jurisdiction of Tirana.

primarily by the court. The interested party during the trial for the dissolution of marriage may request the taking of these measures, which means that these measures are taken within the framework of a trial that has begun and cannot be requested by a separate lawsuit, independent of this trial. Under these conditions, these measures will be taken by the court only if there is a lawsuit for the dissolution of marriage and it is under trial. This position is not consolidated in judicial practice and the courts have different positions.

In a court decision, the court stated that: *"This provision first provides for temporary measures that may be imposed within the framework of a process initiated by lawsuit, in accordance with Article 132 of the Criminal Code, for the dissolution of marriage at the request of one spouse, and as such is related to the temporary regulation of the situation before the court which expresses and definitively regulates the consequences arising from the dissolution of the marriage and in this sense the issuance of authorization to one or the other parent to move abroad with the minor child is not a consequence of the dissolution of the marriage."*²¹

Meanwhile, there are also contrary practices, where the court has held the position that interim measures can also be requested by a separate lawsuit, in a trial independent of the one for the dissolution of marriage, and has expressed itself by accepting the lawsuit request, ensuring the right of the grandmother to meet with her minor granddaughter.²² This position is not supported by law since the provision itself, by the way it is formulated, provides that interim measures are requested during the trial for the dissolution of marriage and within the framework of those measures that the provision itself expressly provides. Consequently, all other requests that are requested by a separate lawsuit and requests beyond those provided for in Article 139, cannot be analyzed as such.

However, in the context of respecting the principle of the best interest of the minor, in reference to the law *"On the Rights and Protection of the Child,"* another legal path will have to be chosen, with a lawsuit that has as its object the right of the child to meet with the family members, such as the grandmother. This is due to the fact that temporary measures have a different purpose and nature, related to emergency measures taken in the context of regulating relations during the settlement of marriage and in the absence of such a judgment, the court cannot issue a measure in reference to Article 139.

These measures are temporary in nature and their duration depends on that of the divorce proceedings and when they are requested by lawsuit outside this process. The court cannot set a deadline for their implementation. We find it appropriate to emphasize that if the court suspends the trial of the lawsuit or suspends the announcement of the decision, the divorce proceedings are considered unfinished, therefore the temporary measures will continue to have consequences throughout this time interval.

In conclusion, it can be said that these measures are applied only during the process of solution of marriage and cannot be granted in the form of a measure of securing a lawsuit under the Civil Code in another process, or with a separate lawsuit. They are

²¹ Decision no. 12906 dated 15.07.2024 of the Court of First Instance of General Jurisdiction of Tirana.

²² Decision no. 70, dated 12.03.2024 of the Court of First Instance of General Jurisdiction of Durrës.

temporary in nature and remain in force until the decision of the foundation becomes final. This means that if the decision is appealed, the temporary measure will remain in force even during the time of consideration of the appeal in the Court of Appeal.

2.1 Authorization for the movement of the child to another country

Referring to judicial practice, another problem encountered in the implementation of Article 139 of the Family Code is the issuance of authorization for the movement of the child outside the Republic of Albania with one parent, during the process of dissolution of marriage. This is a practice that has recently been widely implemented by the courts and in our judgment, this practice is wrong and should not be accepted. In these cases, the court is invested by the requesting party in an independent process and is usually granted after the dissolution of marriage or at the end of the trial for dissolution of marriage. In practice, it is noted that even after the decision to dissolve the marriage has become final, the court has decided to grant authorization for the child to leave the territory of Albania, through a temporary measure.²³

The authorization is granted in cases where the court has decided to leave the child for upbringing and education to one of the parents and the other parent does not grant authorization for the child to be moved outside the territory of the Republic of Albania. Granting authorization for the child to be moved outside the territory of the Republic of Albania as a temporary measure without having as its purpose his education and development, may constitute a cause for prejudice of the case, for leaving the minor child for upbringing and education to one of the parents and denies the right of the other parent to be present in the life of the minor and in his development.

Court of Tirana has held different positions regarding the issuance of the authorization. In a decision,²⁴ which we consider fair, where the granting of the authorization was requested during the trial for solution of marriage, referring to Article 139, the court accepted the request, arguing that the authorization is not a temporary measure that is granted at that moment of the trial. In its argument, the court states that: *"... temporary measures are intended to temporarily regulate the situation until the court expresses its final opinion; and the authorization for the relocation of the child outside the territory of the Republic of Albania is not a consequence of the dissolution of the marriage. Furthermore, the court states that both spouses in the process of divorce exercise parental responsibility together and as a result have equal rights and obligations towards the child, and since the granting of custody of the child to one of them belongs to the examination of the merits of the lawsuit; the court cannot grant the authorization through a temporary measure."*

Thus, in a decision,²⁵ the court has granted authorization for the child to leave the country and initiate procedures to obtain a residence card of another country, together with the parent who has custody of the child. The court states that: *"... if it*

²³ Decision no. 8653, dated 31.05.2016 of the Court of First Instance of General Jurisdiction of Tirana.

²⁴ Decision No. 12906, dated 15.07.2024 of the Court of First Instance of General Jurisdiction of Tirana.

²⁵ Decision No. 9908, dated 12.03.2021 of the Court of First Instance of General Jurisdiction of Tirana.

were impossible to obtain these documents, solely due to the inability to obtain the father's consent to leave the country, the best interest of the child would be violated because:

- It would negatively affect the psycho-emotional side of the child, who is psychologically prepared to receive these documents or move abroad;
- It would violate the child's rights and freedoms to move freely;
- He would lose some rights (residency card) that the child has already acquired.

We find it appropriate to mention that in some cases the court emphasizes²⁶ the temporary nature of this measure, stating that: *"This temporary measure has a limited effect in time, until the final decision is made, and the defendant has the right to present his objections in the trial of the merits, whether or not the child's movement abroad is in the best interest of the child."* Under these conditions, the court justifies the issuance of the authorization with the temporary nature of this measure according to Article 139, but on the other hand does not analyze the importance of guaranteeing the right to visitation and the exercise of parental responsibility by the other parent. Practice has shown that in most such cases, minor children have definitively left Albania and the other parent has not been able to exercise his legitimate rights. Therefore, in our judgment, the courts in such cases should limit themselves to issuing authorizations for the relocation of children to another country only for reasons of education and upbringing.

3. Conclusion

As this paper concluded, the aim of this paper was to highlight some of the problems encountered in practice regarding the implementation of interim measures based on Article 139 of the Family Code. In Albanian judicial practice, Article 139 of the Family Code has been implemented in recent years as an important tool to ensure the protection of the spouse in need and the development of minor children during the process of divorce. Furthermore, the paper tried to highlight some of the main problems in the implementation of interim measures, referring to judicial practice and the provision of legal opinions. It concluded that in practice these measures are not always implemented according to legal provisions and exceed the purpose for which the legislator has foreseen them. Not every measure taken by the court during the process can be justified and accepted as an interim measure, since these measures are of a special type and the court must conduct a detailed investigation and issue a decision based on the law and evidence. There should be a unification of practices regarding the granting of interim measures and courts should adhere to legal provisions.

²⁶ Decision No. 13897, dated 15.07.2024 of the Court of First Instance of General Jurisdiction of Tirana.

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