Kellerhals Carrard

In a nutshell

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New provisions in the Swiss Civil Code (family law) taking effect on 1 January 2017

Various new provisions in the Swiss Civil Code (CC) are to take effect on 1 January 2017. They are parts of the two revisions that were enacted on 20 March 2015 (child maintenance) [AS 2015 4299 and 5017] and 19 June 2015 (division of pension rights on divorce) [AS 2016 2313][1]. In connection with these, isolated provisions in other federal acts and ordinances are also being amended (these include the Code of Obligations, the Civil Procedure Code, the Federal Act on Private International Law, the Federal Act on the Official Old-Age and Survivors' Pension Scheme, the Federal Act on Occupational Pensions, the Federal Act on the Portability of Occupational Old-Age, Survivors' and Invalidity Pensions and the Federal Act on Competence to Provide Assistance). The new provisions are quoted in the following article as if they were already in force.

What is at stake? That is explained briefly in the following article, which is limited to the main aspects.

I. Child maintenance

A) General

It is the legislator's will that children should receive the same maintenance no matter whether their parents are (or were) married or not. The extent to which this concern can be achieved is only going to emerge in practice. The means for reaching that end is so-called «childcare maintenance»[2].

Other key aspects of the revision are: fundamental precedence accorded to maintenance for an under-age child ahead of all other maintenance claims; a right to make a retroactive claim for up to five years in the event of an extraordinary increase in the ability of the parent subject to the duty of maintenance to pay; isolated improvements in the enforcement of claims as regards both proceedings and assistance with collection. On the other hand, however, the federal legislator did not consider the problem of sharing maintenance deficits (on account of lack of legislative powers).

B) Particular matter of childcare maintenance

As a general rule, child maintenance is made up of maintenance contributions in cash and in kind. These categories are to continue to exist. The element of so-called childcare maintenance is being added to them. What is new is that care of the child «by the parents or third parties» is also to be explicitly guaranteed (Art. 285 para. 2 CC). The costs of care by third parties are considered to be part of maintenance contributions in cash, whereas costs occasioned by the care of one parent are «childcare maintenance» The right to childcare maintenance is a right accorded to the child. Its purpose, however, is to guarantee a livelihood for the parent bearing the brunt of looking after the child if that parent, on account of providing care, is not in the position to generate his or her own earned income and to finance his or her own cost of living. This hybrid arrangement (legally a right of the child's but economically one of the parent's providing the predominant care) is going to cause many a headache precisely when it comes to calculating maintenance contributions.

What are the changes?

Compared with the situation today, adding on childcare maintenance leads to an increase in the child maintenance contributions for the period of time during which children need looking after. For as long as the children and their married parents are together as parts of one «unit», this merely has the effect of redistributing the maintenance. Up until now, losses incurred by the parent providing the principal care on account of providing that care have fallen within the spousal or post-marital maintenance. Childcare maintenance is now being «separated» from that and redistributed to the child or children. If the losses occasioned by providing care come to an end, but if there is still a claim to post-marital maintenance on other grounds, then the post-marital maintenance contribution is to be topped up again by a corresponding amount at that point in time. There is little to no change in the total amount payable by the parent subject to the duty of maintenance in such situations. In the case of unmarried parents, on the other hand, it is to be assumed that there will be a considerable increase in the sums of maintenance contributions in cash compared with the situation today.

And what if childcare is shared reasonably equally?

If the parents share the task of looking after the child reasonably equally (but stressing that what is meant here is genuinely equal or comparable care, not just a «label» of equality concealing unequal amounts of childcare), then the impairment of the earnings capacity occasioned by the provision of care ought as a general rule to turn out to be lower than in cases in which one parent is the principal carer (which still constitute the most frequent cases). It is precisely when there are big differences in the parents' earnings that the question of a childcare maintenance contribution might arise here too.

Does the parent subject to the duty of maintenance in cash have to pay and for how long?

The biggest challenge here lies in assessing the amount of the childcare maintenance contribution. Some indications are to be found in the Federal Council's dispatch but not in the other materials. The dispatch describes various assessment approaches as inappropriate (including the method of opportunity costs or market/replacement costs). In the absence of a convincing approach to assessing care, the dispatch arrives at the conclusion that the carer's cost of living is to be taken as the starting point «to the extent that the carer is unable to finance it himself or herself because of providing care». That results in the monetary value of the childcare maintenance contribution being assessed in the light of the family situation: if the parent providing the principal care earns just enough to cover his or her own cost of living, then childcare maintenance lapses; if he or she earns nothing, then childcare maintenance includes the entire cost of living. Other approaches, such as, in particular, that of an «objectivised amount» are put forward for discussion and may also produce the desired result if certain pro-

1 Dispatch of 29 November 2013 on the Amendment to the Swiss Civil Code (Child Maintenance), Federal Gazette 2014 529 ff.; Dispatch of 29 May 2013 on the Amendment to the Swiss Civil Code (Division of Pension Rights on Divorce), Federal Gazette 2013 4887 ff.

2 This article generally uses the terminology of the Swiss federal administration (amin.ch) contained in English translations of federal acts, ordinances, etc. or in its «Termdat» database. However, only some items of Swiss legislation, etc. are translated into English and these are clearly labelled as «unofficial». Moreover, the English version is often only published considerably later than the texts in the national languages (which is the case here). We therefore urge readers to consider the original (German) version of this article to be the authentic one.

visos are borne in mind. By contrast with that, laying down maintenance contributions as percentages of the maintenance debtor's income (a widespread method at present) is incompatible with the new law.

Open questions
Quite apart from the question just touched on as regards the most appropriate computation method, there are many other issues that have not been clarified: What is the applicable cost of living? To what extent is the income of the parent providing the principal care to be included in the computation (or not)? How long do childcare maintenance contributions last? How are they to be distributed if there are several children (especially if deficits arise) and, if appropriate, how are they to be graduated? It may happen in particular, depending on circumstances, that even the preliminary question regarding the best possible care, which is the legislator's idealised starting point, will give rise to discussion – and that all the more so since the legislator states explicitly that the courts must examine the option of alternating custody should one parent or child call for it. There is sometimes a risk of forgetting that that already used to be the case, even without the corresponding provision being enacted, and that the ruling must continue to be guided by the child's welfare in connection with the fact that the legislation on this point has been «realigned» to make it more programmatic.

It is feasible that the guideline, which is also referred to at times as the «10/16» rule (which is based on the model of one parent looking after the children in person, as a function of their number, age, state of health and possibly certain other factors too), may be applied in a more differentiated way in future than is the case in the present-day practice of several courts (and it should be added that here again finer differentiations have already been possible up to the present and, depending on circumstances, have also made sense). If assessments of the interplay between the duty to provide care and engaging in gainful employment were to deviate fundamentally from assessments to date, that would, on the other hand, in no way do justice to the unchanged or only slowly changing general environment in Switzerland as regards reconciling professional and family life.

C) Granting precedence to maintenance for minors
Art. 276a para. 1 CC contains a new provision, whereby the duty to make maintenance contributions for an under-age child takes precedence over the other maintenance duties under family law. There is an exception to this, provided for expressly in para. 2, namely to avoid creating disadvantages for children who have attained the age of majority and are still entitled to maintenance contributions. In this respect, particular consideration is to be given to children who have attained the age of majority and are still undergoing education and living in the same home as an under-age sibling and who, «apart from their age», are not in any different position from the latter (and, for example, are about to take their «matura» or baccalaureate exam). The wording of para. 2 does, however, permit exceptions to benefit others with maintenance entitlements.

D) Miscellaneous provisions
If the parent subject to the duty of maintenance in cash (and possibly, with the amended law, also subject to the duty to make childcare maintenance contributions) is unable to meet his or her duty adequately, then a deficit will arise for the child and will be borne by the other parent, by his or her relatives subject to the duty of maintenance or, ultimately, by the state. If, in such situations, this latter parent is already contributing his or her share to the maintenance contribution, then the final upshot might be an inappropriate additional burden or even a double burden. In deliberating the amending bill, the legislator attempted to prevent, or at least to mitigate, effects of that nature in various constellations. Other adjustments are intended to bring about an improved protection of child maintenance, one example of which is the possibility, if certain preconditions are met, to prevent the payment of capital benefits within the second and third pillars to alimony debtors in arrears (Art. 40 along with Art. 49 para. 2 point 5a of the Federal Act on Occupational Pensions and Art. 24f^{bis} of the Federal Act on the Portability of Old-Age, Survivors' and Invalidity Pensions, whose date of entry into force is not yet known).

To make it easier, in particular, to make a claim after the event for a deficit that might have occurred in the past, the legislator is tightening up the duty to keep documentation in maintenance agreements and decisions (Art. 287a letter c CC, Art. 301a letter c of the Civil Procedure Code). My view is that, in addition to that, it is indispensable to document the breakdown of child maintenance contributions into maintenance in cash and childcare maintenance.

E) Transitional law
There is nothing to prevent adaptations to existing maintenance orders if they only concern child maintenance (Art. 13c Final Title CC). If the child maintenance was decided on at the same time as the spousal or post-marital maintenance, then the adaptation is only possible if the circumstances have changed considerably. What constitutes relevancy will have to be spelt out in jurisdiction. So, for many years to come, we are going to encounter maintenance amounts determined by applying differing systems, which is going to increase the number of practical questions thrown up by the new law – with the associated uncertainties, until they are clarified by a court (even going as far as the Federal Court).

II. Division of pension rights
The principle of the 50/50 division of pension entitlements accrued in the course of the marriage is being extended to current pension payments (Art. 124 and 124a CC). The trend is likely to be for computations to become more demanding.

The time covered by the division begins with the marriage and now already ends, according to the amended law, when divorce proceedings are instituted (inter alia Art. 122 CC). The effect of this is to cause a gap in the pension arrangements of the economically weaker spouse for the duration of the divorce proceedings, and it may be filled by attributing more than half the termination benefits (Art. 124b para. 3 CC) or alternatively through maintenance contributions to pension arrangements (where the latter may need to be called for as part of a separate procedure to decide on measures during the divorce).

New provisions now apply in Art. 22a para. 3 of the Federal Act on the Portability of Old-Age, Survivors' and Invalidity Pensions as regards dividing up benefits taken early for home ownership between the providential capital accumulated during the marriage and before the marriage.

The extension of the principle of 50/50 divisions contrasts with the increased possibility of deviating from it in an agreement (Art. 124b CC).

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Prof. Dr. iur. Annette Spycher, LL.M.
Attorney at Law
annette.spycher@kellerhals-carrard.ch