Available online http://lumenpublishing.com/journals/index.php/jls

e-ISSN: 2067-8509; ISSN-L: 1841-6195

Jurnalul de Studii Juridice

Year XV, No. 1-2, June, 2020, pp. 137-146

ABANDONMENT OF FAMILY. ISSUES OF LEGAL PRACTICE

Mihaela Laura PAMFIL

DOI: https://doi.org/10.18662/jls/15.1-2/68

Covered in:
CEEOL, CrossRef, CrossCheck, Index Copernicus, Ideas RePeC, EconPapers, Socionet, HeinOnline

Presented at **BIENNIAL INTERNATIONAL CONFERENCE "FAMILY INSTITUTION.TRADITION, REFORM, STANDARDIZATION AND PERSPECTIVES"**
EDIȚIA I/ FIRST EDITION
Iasi, November 8, 2019
Coordinated by: Nadia-Cerasela ANIȚEI, Mihai LUPU, Frank S. RAVITCH

©2020 The Authors & LUMEN Publishing House

How to cite: Pamfil, M.L. (2020). Abandonment of Family. Issues of Legal Practice. *Jurnalul de Studii Juridice, XV* (1-2), 137-146. https://doi.org/10.18662/jls/15.1-2/68

ABANDONMENT OF FAMILY. ISSUES OF LEGAL PRACTICE

Mihaela Laura PAMFIL[1]

Abstract

The purpose of this paper is to analyse the crime of abandonment of family and the legal issues that this crime poses, starting from a concrete deed that represented the object of file no. 1637/333/2018 consecutively pending before Vaslui District Court, the Iaşi Court of Appeal and, again, the Vaslui District Court. The object of the case was represented by the most common form found in the judicial practice of the crime of abandonment of family, respectively the one provided by S.378 (1) (c) Criminal Code, according to which the failure to pay, in bad faith, for 3 months, of the child support established by court, by the person who has the legal obligation of support, to the one entitled to support, is punished by imprisonment from 6 months to 3 years or by a fine. In case of this form of the crime of abandonment of family, the factual element referring to the moment of committing the crime is vital as the existence of the crime is conditioned by the failure to pay the child support for 3 months. Moreover, in case of the crime of abandonment of family, the criminal action is initiated upon the prior complaint of the injured person, so that the establishment of the initial moment of the deed is important in terms of checking compliance with the condition of filing a prior complaint within the legal deadline.

Keywords

Abandonment of family; the moment of committing the crime; bad faith; child support; criminal liability.

[*]Associate Professor Ph. D.,Faculty of Law, Petre Andrei University of Iaşi; Deputy Attorney General of the Prosecutor's Office attached to the Iasi Court of Appel; michaela_laura@yahoo.com.

Circumstances of the case

By the criminal sentence no. 1586 of December 5, 2018 of Vaslui District Court, respondent P.C.M. was found guilty of committing the crime of abandonment of family, provided by S.378 (1) (c) Criminal Code. Taking into account the real circumstances of the deed and the personal circumstances of the respondent, the limits of punishment provided by law, reduced by one third as a result of the judgment of the case under the proceedings of admission of accusation, the court imposed on the respondent a sentence of 4 months of imprisonment and postponed the application of the imprisonment sentence established for a term of supervision of 2 years.

The court held that respondent P.C.M. failed to pay, in bad faith, starting with May 2014, the child support established by Civil Sentence no. 326/2013 of Vaslui District Court in favour of his minor children P.P.Ș. and P.G.A.

From the administered evidence it followed that by Civil Sentence no. 214/2012 of Vaslui District Court, the marriage concluded in 2005, between respondent P.C.M. and the said C.M.A. was declared dissolved by divorce. Minors P.P.Ș. (born on 13.04.2006) and P.G.A. (born on 12.08.2008) were entrusted to their mother, and the respondent had the obligation to pay a child support in the amount of 286 lei in favour of each of the two minors, starting with 18.08.2011 and until their coming of age. By the civil sentence no. 326/2013 of Vaslui District Court, the child support established to be paid by the respondent was reduced to the amount of 80.5 lei/month in favour of each of the two minors, starting with 02.07.2012 and until 28.02.2013, and to 94.3 lei/month starting with 01.03.2013 and until the coming of age of the minors.

From the moment of the ruling of these decisions, the respondent paid the child support which he was obliged to pay by court order until April 2014.

On July 15, 2015, the legal representative of the minor injured persons, the said C.M.A. filed a preliminary complaint informing the criminal investigation bodies that the respondent had not paid the child support due to the two minors resulting from their marriage since May 2014.

Following the notification of the criminal investigation bodies, the respondent paid various amounts of money, and stated that he did

not pay the child support to the two minors between May 2014 - August 2015 because between December 2014 and March 2015 he had no place of work and subsequently he was paid only the minimum wage on the economy, and that between July 2014 and July 2015 he had a cohabitation relationship with the said O.R., a relationship which resulted in the birth of child P.S.M., to whom he also has the obligation to pay a child support. The payments made by the respondent during the criminal investigation did not fully cover the outstanding child support.

Present before the court, at the hearing from 25.09.2018, respondent P.C.M. stated that he admitted the deed as described in the document instituting the court proceedings and that he wants the trial of the case to take place under the simplified procedure of admission of accusation, under the conditions of S.374 (4) of the Code of Criminal Procedure, a request that was admitted by the court.

During the court proceedings, the respondent paid in full the outstanding child support, the legal representative of the minors declaring during the debates on the merits of the case that all the amount due was paid.

The court held that, from all the existing evidence in the case file, it follows that the respondent, in bad faith, did not fulfil his obligation to pay the child support established in his charge, although he had possibilities in this regard, as he earned income and was fit for work. The court also held that the partial payment of the established child support is considered non-payment, and that the full thereof payment during the trial is not likely to exonerate the respondent from criminal liability.

The respondent filed an appeal against this decision, claiming that the non-payment of the child support was not due to bad faith, but to the fact that he did not have the necessary money to be able to fulfil his obligation to pay the child support, and that during the trial he borrowed the amount of 3,000 lei in order to pay the outstanding child support.

By Criminal Decision no. 294 of April 11, 2019, the Iași Court of Appeal admitted the appeal declared by respondent P.C.M. against Criminal Sentence no. 1586 from 05.12.2018 of Vaslui District Court, ruled in the criminal case no. 1637/333/2018, a sentence which they dissolve in its entirety, and sent the case for retrial to the same court, respectively to the Vaslui District Court.

On the occasion of the check of the sentence subject to judicial control from the perspective of describing the deed for which the solution of postponement of the application of sentence was ruled, the Court found that the trial court did not hold and did not indicate in clear terms the time period during which the respondent committed the crime of abandonment of family.

The Court emphasized that the factual element related to the moment of committing the crime is an essential one in order to be able to assess the existence of the deed, and in the case of the crime of abandonment of family assuming the failure to pay in bad faith of the child support, this element is vital as the existence of the crime is conditioned by the non-payment of the child support for 3 months. However, if the trial court did not indicate in the description of the deed the date when it was committed, the court of judicial supervision finds itself in the situation of not being able to check and establish whether the condition regarding the time interval of at least 3 months required by the accusation text is or is not fulfilled in the present case.

The judicious review of all the works that make up the file in order to establish the date of the committing crime for which respondent P.C.M. was charged, reveals a series of aspects that are likely to create a state of uncertainty in this regard. Thus, the Court found that by the complaint addressed to the criminal investigation bodies on 15.07.2015, the said C.M.A., as the legal representative of the minor injured persons P.P.Ș. and P.G.A., complained that respondent P.C.M. did not pay the child support established in favour of minors by the civil sentence no. 326/2013 of the Vaslui District Court, starting with May 2014. In fact, May 2014 is held by the document instituting the proceedings as the start of the criminal activity circumscribed to the content of the crime of abandonment of family. However, the Court would like to mention that in the case of the crime of abandonment of family, the criminal action is initiated upon the prior complaint of the injured person, a complaint which, according to the provisions of S.296 (1) of the Criminal Procedure Code, must be filed within 3 months from the day when the injured person found out about the commission of the crime. In this case, the legal representative of the minor injured persons filed the preliminary complaint on 15.07.2015 and claimed that the deed started to be committed consecutively, from May 2014 (namely, approximately one year and 2 months before). Obviously, the legal representative of the minor injured persons knew about, found out

about the commission of the alleged deed from the initial moment, namely from May 2014.

In view of this circumstance, taking into account the fact that the 3-month deadline established by the legislator for the filing of the preliminary complaint has the nature of a procedural limitation period, the Court considered that when investigating the deed of abandonment of family claimed by the said C.M.A., the 3-month period calculated regressively must be considered, starting from the moment of notifying the judicial bodies, namely from 15.07.2015. Calculating the 3-month term according to the provisions of S.269 of the Code of Criminal Procedure, the Court finds that the starting point of committing the deed of abandonment of family is represented by the date of 15.04.2015.

In conclusion, considering the aspects developed above, the Court holds that the start of the commission of crime of abandonment of family that represents the object of this court trial cannot be situated before 15.04.2015.

Starting from this conclusion regarding the moment when it can be held that the commission of the crime of abandonment of family started, considering the fact that during the criminal investigation, respondent P.C.M., repeatedly, at different time intervals, paid to the legal representative of the minor injured persons various sums of money by way of child support, noting, at the same time, that neither the criminal investigation bodies nor the court of first instance were concerned with determining the title by which those amounts were paid, namely as an outstanding child support or as child support for the current month, the Court has found it impossible to determine the period of time during which the commission of the deed of failure to pay the child support established by court decision can be held.

The Court also emphasized that the criminal law also provides in the matter of the crime of abandonment of family a case of impunity for the respondent who fulfils his obligations before the end of the criminal investigation. This case of impunity is an additional element in view of which the judicial body has the duty to clarify, on the one hand, the issue related to the "date of the commission of crime", namely the period of time in which the respondent failed to pay the child support in bad faith and on the other hand, the title under which the payments were made by the respondent during the criminal investigation in order to assess

whether the respondent has not fully fulfilled his obligations and thus could benefit from the special cause of impunity.

In view of all the above arguments, the Court considers that by the ruling delivered, the trial court did not resolve essential issues related to the merits of the case and failed to explain the decision in a manner capable of allowing the court of judicial supervision to check all factual aspects and of right that must be analysed in the perspective of the judicial resolution of the criminal action, a situation which requires for the case to be sent to the same court for a new trial in which to clarify the essential aspects related to the factual situation submitted before the court.

Comments on the interpretation and application of the law in the present case

The crime of abandonment of family in the form provided by S.378 (1) (c) Criminal Code, consists in the non-payment, in bad faith, for 3 months, of the child support established by court, by the person who has the legal obligation of support, to the one entitled to the support. The premise of the crime is the existence of a child support established by court, respectively by a civil court decision remaining under the authority of res judicata. It should be noted that the current criminalization of the crime of abandonment of family, in force since February 1, 2014, faithfully reproduces the text of S.305 (1) (c) of the previous Criminal Code (since 1968), limiting the deed of non-payment only to the child support established by court, although since 2011, the child support can be established, according to the Civil Code, by means of a notary public. This omission of the legislator cannot be covered, from my point of view, by the judicial bodies by means of an interpretation by analogy of the legal text, as such an interpretation contravenes the provisions of S.7 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which the criminal law should not be interpreted and applied extensively to the detriment of the accused by analogy. As a result, the commission of the crime of abandonment of family may be held, in the form provided by S.378 (1) (c) Criminal Code, only in the situation where the court established the obligation of the respondent to pay child support, and the respondent failed to fulfil his obligation to pay it. As the court

held, a partial payment of the child support is equivalent to a non-payment, exposing the perpetrator to criminal liability.

In order for the crime of abandonment of family to be held by the court, in the manner set out in the criminal case, it is also necessary that the non-payment of the child support was not made in bad faith. Bad faith assumes in the matter of abandonment of family that the author had the opportunity to pay the child support but that he failed to do this, either because he did not want to or because he prioritized other expenses over the child support. In the present case, the trial court held that the respondent obtained income during the period in which he did not pay the child support and was fit for work, concluding that these two aspects prove that the respondent acted in bad faith. Indeed, the fact that the respondent obtained income during the period in which the child support was not paid is a clear proof of bad faith. However, if there is a partial payment of the child support, the existence of bad faith must be carefully examined by the judiciary body in order to see to what extent there has been any possibility of payment. The mere fact that the respondent is fit for work, in the absence of an income, is not likely to prove bad faith in the situation of non-payment of the child support, as it cannot be considered that he fails to obtain an income with the purpose of not having the financial possibility to pay the child support which he had the obligation to pay by court order. Not even the fact that the respondent obtains income during the non-payment of the child support is enough to prove bad faith as long as he is concerned with providing the beneficiaries of the child support the things necessary for the living.

In order to meet the constitutive elements of the crime, it is required that the respondent has not paid the child support for 3 months, regardless of whether these months are consecutive or not.

By Decision no. 4 of March 20, 2017, ruled by the High Court of Cassation and Justice - The panel competent to judge the appeal in the interest of the law, it was ruled that, according to the unitary interpretation and application of the provisions of S.378 (1) (c) of the Criminal Code, the crime of abandonment of family, in this normative variant, represents a unique continuous crime, a legal classification that resides in the fact that the inaction materialized in the non-payment of the child support is extended in time, naturally, after the date when it is consumed until the cessation of the criminal activity, namely at the

moment of exhaustion. Thus, in accordance with the majority opinion, expressed by the doctrine and judicial practice, it was established that the crime of abandonment of family is consumed at the expiry of the period of three months, during which the perpetrator was placed in default, by failing to pay the child support established by court, and this state is exhausted at the time of resumption of payment by the debtor or upon his conviction, by court decision, date on which the criminal cycle ends and the activity carried out until that moment becomes autonomous.

The difficulty that has arisen in judicial practice and that has generated discussions is related to the inclusion of this crime in the category of crimes for which a prior complaint is required. Thus, according to S.378 (3) of the Criminal Code, the criminal action is initiated upon the prior complaint of the injured person. In order to produce the effects attributed by law, the preliminary complaint must be submitted, according to S.296 (1) and (2) of the Code of Criminal Procedure, within 3 months from the day the injured person found out about the commission of the crime or, when the injured person is a minor, from the date when his/her legal representative found out about the commission of the crime.

Therefore, when the third month of non-payment expired, the crime of abandonment of family in the form of non-payment of the child support was consumed, and from this moment, the period in which the preliminary complaint is submitted begins to run. If the non-payment continues even after the expiry of the three-month period required by the accusation text, the crime is not exhausted, so we cannot talk about a forfeiture of the term of filing the prior complaint, but the time of the commission of the deed will be calculated in relation to date on which the prior complaint was filed.

In the present case, the main reason which led the court of appeal to order the case to be subjected to a new trial was that in this case they failed to establish with certainty when the crime of abandonment of the family was committed. It is true that, from the evidence administered, it follows that starting with May 2014, the respondent stopped paying the child support established by the court, resuming the payment of the child support only after being notified by the criminal investigation bodies. However, the preliminary complaint was filed only on July 15, 2015, so that, correctly, the court of appeal found that the date of the crime that may be the subject of its analysis is not in May 2014, but in April 2015. On the other hand, it should be

noted that May 2014 could not have been considered as the time of the commission of the crime, because for the consumption of the crime it is necessary to accumulate three months of payment, so the consumption of the crime would have taken place possibly in July 2014.

In the analysed criminal case, the failure to establish the moment of committing the crime raised problems also in terms of the cause of impunity provided by law in favour of the one who pays the outstanding child support during the criminal investigation. In this respect, S.378 (4) of the Criminal Code stipulates that the deed is not punished if, before the end of the criminal investigation, the respondent fulfils his obligations. Therefore, if during the criminal investigation, the respondent pays sums of money in the account of child support, it is necessary to establish the title under which it was paid, namely whether it represents the outstanding pension or the current pension and to check whether, as compared to the time which can be taken into account as the moment of committing the deed, the amounts paid cover the obligations established in the charge of the respondent by court decision. As in this case under analysis, the respondent had paid, during the criminal investigation, monthly, sums of money exceeding the value of the child support, the criminal investigation bodies had the obligation to centralize these amounts, in order to check whether or not the cause of impunity had to be applied.

But even if the respondent failed to make payments during the criminal investigation, so that there is a possibility to claim the cause of impunity, it was important to establish the moment of committing the crime when analysing the bad faith claim, which must be examined in relation to the interval of time in which the court can analyse the commission of the crime.

In conclusion, the court of appeal correctly held that no essential issues in the case had been clarified in order to ensure a fair and thorough settlement of the criminal case and sent the case back to the trial court for re-judgment. The criminal liability of a person cannot be exercised without the full clarification of the case, without establishing as precisely as possible the time when the illegal activity took place and the circumstances subsequent to the commission of the deed which, by the effect of law, may influence criminal liability or the limits thereof.

In case of family relationships, given their specificity, the intervention of the criminal legislator is generally restricted. However,

there are also cases in which the gravity of the deeds committed or the danger posed by certain deeds have determined the legislator to intervene firmly and severely punish the conducts as mentioned by the law, as in the case of crimes committed against life, bodily integrity or health. However, the crime of abandonment of family is not part of serious crimes, as evidenced by the state's waiver of the criminal action in favour of the injured person or legal representative who can decide whether to incur the criminal liability of the person who fails to fulfil his/her support obligation. However, the cases that refer to this type of crime as well as other crimes in which family members are involved must also be carefully considered when investigating and resolving it.

References

Civil Code of 2009, Text republished in the Official Gazette, Part I no. 505 of July 15, 2011, effective October 1, 2011

Code of Criminal Procedure. Text published in the Official Gazette, Part I no. 486 of July 15, 2010, effective February 1, 2014

Penal Code. Text published in the Official Gazette no 510 of July 24, 2009