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ECOVIO

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Economic violence: opening pathways across an unexplored gender-based violence issue for guaranteeing the women and children's fundamental rights

Training materials for professionals in the legal field and authorities

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1

NON-PAYMENT OF CHILD SUPPORT:

1.1 INTRODUCTION

Non-payment of child support as required by a court decision in contested divorce proceedings or by mutual agreement has existed since ancient times.

Our Criminal Code, following the reforms carried out in recent years, has afforded greater protection against crimes against family members, increasing both the penalty and the fine.

Individuals who file a complaint for failure by their partner to pay child support as agreed upon in a court decision, in the form of non-payment of child maintenance, demonstrate situations of need resulting in serious problems for the subsistence of household members, for this support is often the family unit's sole income, especially in the case of single-parent families headed by separated or divorced women. Compensation of unpaid support by payment of other expenses receivable by the children (clothes, food, etc.) is not possible.

A civil claim against non-payment of child support may be filed in summary collection proceedings and criminally when deemed a crime.

Before examining the crime of non-payment of child support as regulated in article 227 of the Criminal Code (CrC), it is appropriate to clarify the concept of support as defined in article 142 of the Civil Code (CvC), which establishes that:

“Support is deemed to include all that which is essential for sustenance, housing, clothing and medical care. Child support also includes the education and training of the recipient while still a minor and subsequently when their education has not been completed due to causes beyond their control”

1.2 OFFENSE AND CHARACTERISTICS

Art. 227 of the Criminal Code provides for the criminal penalty of any person who fails to pay child support or alimony during TWO consecutive MONTHS or FOUR non-consecutive MONTHS for their children or spouse as determined by a judicial agreement or by a ruling in the event of separation, divorce, declaration of nullity of marriage, filiation or child support judgement.

The penalty for failure to pay child maintenance may extend from 3 months' to 1 year's IMPRISONMENT or a FINE of 6 to 24 months.

It is IMPORTANT to remember that for this crime to exist, there must have been a prior ruling or resolution establishing the obligation to pay child support. If this sentence has been appealed and therefore is not final, there ALSO exists an obligation to pay child maintenance, so the offense may still be committed.

The basic **characteristics** of this crime are:

- It is a crime of pure, permanent omission or continued non-performance, committed in the form of non-payment, as provided in article 227 CrC and which under no circumstance precludes any claim for unpaid support until the date of the trial, provided this conduct has remained unaltered until the

date of the hearing, while observing the right to defence. The Supreme Court has issued a similar opinion in repeated rulings (Supreme Court Rulings of March 3, 1987; January 21, 1990).

- One requirement for prosecution is a **complaint filed by the aggrieved person or his or her legal representative**. When the former is a minor, a person with a disability requiring special protection or a helpless person, the Public Prosecutor's Office may also file a complaint (article 228 Criminal Code), without any ratification thereof being necessary when the former reaches legal age or should recover their capacity.

Several **requisites** are necessary to qualify as an offense of this type: (ruling of the Supreme Court, 1st Panel, number 185, dated 13 February 2001):

- Firstly, the existence of a final court order (divorce, separation, annulment of marriage, filiation or child support) that establishes and obliges one of the parents to pay support for children in the custody of the other parent. It is the judicial instrument that serves as proof in the event of such non-compliance.
- The existence of an act of omission, and that such non-compliance should obtain for two consecutive months or four alternate months.
- That, despite being aware of the obligation to pay, there is a willingness on the part of the obligor to commit such a default, i.e. a willful failure to pay.

For criminal proceedings, no preceding civil proceedings are necessary: Article 114 of the Criminal Procedure Act.

1.3 WILLFUL INTENT: WILLFUL FAILURE TO PAY

The offence of failing to pay child support is one of intentional commission, and the Criminal Code does not envisage any inadmissible offence of non-payment of child support.

For the offense to be willfully committed requires awareness of the situation creating such a duty and also the financial capacity to bear it. It is essential the obligor be aware of the court decision and the exact amount of the allowance to be paid, that is, that there exist intentional non-payment.

1.4 PLAINTIFFS'/DEFENDANTS' STANDING.

In accordance with the typical description, the perpetrator may only be the person obligor for child support or a single benefit payment to the former, an allowance which must be the result of a judicial decision (court order or judgment) or court-approved private agreement in a process of separation, divorce, nullity, filiation or maintenance.

The fact that the legislator establishes special requirements to be an agent signifies that we are dealing with a special crime, as this type of crime restricts the circle of agents to those specially obliged. Solely the spouse or parent required by a court decision or court-approved agreement to pay the child support may be the perpetrator. Therefore, only the obligor of the aforementioned benefit may be the perpetrator, without

detriment to the existence of other parties who may be responsible as participants in the offense (accessory, abettor...).

As regards the victim, it is clear that this may only be the person appearing in the court decision as the beneficiary of the benefit: spouse, ex-spouse, in annulment, separation or divorce proceedings and children in the case of filiation or maintenance proceedings. We therefore are dealing with a special victim.

In order to examine the legal standing required of the plaintiffs, one example used is the ruling by the Provincial Criminal Court (SAP) of Murcia 291/2017, 2nd Panel, dated 11 July, which held that “it must be the elder daughter who is to adopt the actions afforded to her by the legal system and, as she has not complied with this requirement, there exists an impediment for any conviction and he must therefore be acquitted of the crime of abandonment of family of which he was accused”.

The provision of Article 228 CrC has given rise to different interpretations by the Provincial Courts with regard to the properties of the “victim”:

The Plenary of the Criminal Chamber of the Supreme Court has established as case law that, in crimes of abandonment of family in the form of a failure to pay child support, and when the children are of legal age, the custodial parent paying those expenses not covered by the unpaid maintenance, has standing to file a complaint and thus seek payment of same in criminal proceedings. The Chamber considers that a teleological and broad interpretation of this expression includes “both the holders or beneficiaries of the financial benefit owed, as well as the custodial parent of an adult child who pays those expenses not covered by the unpaid maintenance, and this is the case because, as has been repeatedly recognized by the Civil Chamber of the Supreme Court, they have a legitimate interest which is legally worthy of protection”.

The ruling, presented by Judge Susana Polo, states that “there is no doubt that the parent living with the support recipient is one of the persons who suffer the immediate consequences of the criminal activity committed by the other parent who fails to pay child support, and therefore must be considered a victim and thus has standing to file the necessary complaint and seek payment in criminal proceedings”.

1.5 CIVIL LIABILITY FOR THE CRIME

The sums outstanding constitute one of the elements of the civil liability arising from the offense, for despite the fact that many doctrinal sectors argued that they are the content of an obligation of a civil nature prior to the offending conduct and not a result of it, the new art. 227.3 clarified the matter by establishing that the reparation of the damage resulting from the crime shall always entail payment of the sums outstanding. This does not exclude possible compensation of other damages caused by the commission of the criminal offense (economic and even moral) that may be compensated in accordance with arts. 109 et seq. of the Criminal Code.

On the other hand, the civil liability derived from the crime is contingent upon the facts on which the examination of its nature is based, which does not allow inclusion of any period for which the willfulness of the defendant’s non-compliance has not been proven, although it may continue to constitute a civil debt, but

cannot be compensated for as civil liability derived from a criminal offense that requires such willful omission.

1.6 PRESCRIPTION

Once child support has been recognized in a judgment, there exists a 5-year prescription period within which to claim for any unpaid support, that is, claims for support for the 5 preceding years shall prescribe and are not liable for any claim (article 1966, civil code).

Pursuant to article 131.1 of the CrC and in accordance with the penalty sought, we will talk about a prescription period of five years, but we must relate this provision to Article 132 of the CrC for permanent crimes.

Payment of child support is a periodic payment fixed by a judge in family proceedings; precisely due to its periodic nature, failure to comply with the obligation to pay makes it a permanent crime, given that the payment is made on a monthly basis.

With respect to continuing and permanent offenses, article 131.1 establishes that the prescription terms shall be counted from the day on which the last offense occurred, from the time the illegal situation or the conduct ceased.

1.7 NON-PAYMENT OF CHILD SUPPORT AND ECONOMIC VIOLENCE

Ruling number 239/2021 of March 17 of the Criminal Chamber of the Supreme Court states that:

Failure to pay child support is considered economic violence, as determined by the Supreme Court, in a ruling dated March 17, 2021. Judge Magro Servet, who delivered the court's opinion, found that this crime "may be defined as a class of economic violence, since the breach of this obligation leaves the children themselves in a state of need in which, given their young age, and lack of self-sufficiency, they need the food support required of the obligor, firstly by a moral and natural obligation of the obligor and, if such is not forthcoming, a judicial requirement is necessary".



2

NON-PAYMENT OF ALIMONY

2.1 INTRODUCTION

Alimony is not for maintenance purposes but is of a compensatory nature, acting as a corrective factor in the economic imbalance arising between the spouses as an immediate result of the agreed separation, compensating or remedying the reduction such separation causes in the standard of living of one of the spouses in relation to that enjoyed by the other and in relation to that previously enjoyed during the marriage; it must be quantified taking into account the circumstances or parameters set forth in the aforementioned article. 97 CvC.

Alimony cannot be agreed ex officio by the judge, as we are dealing with a rule of dispositive law that does not affect marital expenses as it does not affect the children. For this reason, it should not be confused with provision of child maintenance, which is necessary and may be decreed ex officio by the judge, when the circumstances required by law are met.

Alimony is not extinguished by obligor's death in itself, but is transferable to their heirs, as provided by art. 101 CvC.

Non-payment of alimony may be filed as a civil suit for enforceable collection proceedings or criminally when deemed a crime.

Distinction between alimony and maintenance:

1. Alimony may be waived and transacted as may be inferred from art. 99 CvC, while child support may not. This is represented in the Decision of the Provincial Court of Guadalajara on November 13, 1997.
2. The causes for termination of both payments are different. Thus, child support is not extinguished by marriage of the spouse liable for the support, while alimony is, by virtue of the provisions of art. 101 CvC.
3. This maintenance obligation is imprescriptible, because the right to receive maintenance may be claimed for as long as the state of need obtains, while alimony is not, because it is an economic right exercised through a personal action that lasts fifteen years.
4. Alimony must necessarily be fixed in the judicial decision that decrees the separation or divorce, without any possibility of exercising it at a later date, while child support, in the event of separation, may be requested at any time.
5. Child support must take the form of a periodic payment, while alimony may be paid in different ways: a periodic payment; alimony in gross; by delivery of assets; etc.

2.2 TYPE OF CRIME

The **crime of non-payment of maintenance** is established in **article 227 of the Criminal Code**, which provides as follows:

“Any person who ceases payment of support for their children **or spouse** as determined by a court order approved or by a ruling in the event of separation, divorce, declaration of nullity of marriage, filiation or child support judgement during TWO consecutive MONTHS or FOUR non-consecutive MONTHS is liable to a criminal penalty.

The penalty for failure to pay maintenance may be from 3 months to 1 year IMPRISONMENT or a FINE of 6 to 24 months.”

The characteristics are the same as for failure to pay child support

2.3 PLAINTIFFS’/DEFENDANTS’ STANDING.

In accordance with the typical description, the perpetrator may only the person obliged to pay alimony to the spouse or former spouse, or a payment in gross to the former, allowance or benefit which must have been decreed by the court (an order or judgment) or a court-approved private agreement in a trial for separation, divorce, nullity, filiation or maintenance.

As regards the victim, it is evident that this may only be the person who appears in the court decision as the beneficiary of the benefit: spouse, ex-spouse, in annulment, separation or divorce proceedings and children in the case of filiation or maintenance proceedings.

2.4 CIVIL LIABILITY

The civil liability derived from the crime is contingent upon the facts on which it is based and also by the essential elements required, and therefore periods in which it has not been proven that the defendant’s non-compliance is voluntary may not be included. They may constitute a civil debt, but not a civil liability arising from the offense, as this requires the omission be voluntary.

The reform of article 227.3 of the Criminal Code put an end to the interpretation that had been previously given to the precept, as the courts considered that this crime did not entail any civil liability for the payment of the any sums outstanding, and it was therefore construed that these were the cause of the crime and not a consequence. Following the redrafting of this article, such controversy ceased. This does not preclude possible compensation for damages caused by the commission of the crime, which are compensable under **articles 109 et seq. of the Criminal Code.**

2.5 PRESCRIPTION

Once the child support has been recognized in a judgment, there is a 5-year prescription period within which to claim any unpaid child support, that is, any claims for support relating to the 5 years prior prescribe and cannot be claimed (article 1966 civil code).

Pursuant to article 131.1 of the CrC and in accordance with the penalty sought, we may speak of a prescription period of five years, but we must regard this precept in relation to article 132 of the Criminal Code for permanent crimes.



3

**NON-PAYMENT OF EXTRAORDINARY
EXPENSES**

3.1 INTRODUCTION

Extraordinary expenses are deemed to be those incurred during the life of a minor or economically dependent adult, which exceed any natural or common expenses and which, as they were unknown in advance or are difficult or impossible to foresee, were therefore not taken into consideration when establishing the amount of child support.

3.2 EXTRAORDINARY EXPENSES: CLASSIFICATION

Extraordinary expenses may be classified as follows:

- b.1 NECESSARY: those caused by diseases, medical treatments. Dental, payment of which is unavoidable, and also those payments that may arise as a result of necessary school or academic remedial classes.
- b.2 CONVENIENT: those which, depending on the economic level of the family and despite not being strictly essential, are appropriate, such as field trips, private tutoring.
- b.3 NON-NECESSARY: these are those expenses arising as a result of circumstances that may be dispensed with, such as summer camps, trips abroad to study languages.

3.3 LEGAL CONSIDERATIONS

Article 227 refers to “any type of economic benefit”, provided that the obligation to pay such is the result of a judicial process of divorce, separation, annulment, filiation or setting of child support. Therefore, there are various types of benefits that may be the object of the crime.

As far as extraordinary expenses are concerned, their possible subsumption under article 227 PC is also problematic. Let us remember that the economic benefit must have been fixed in a judicial decision or an approved agreement, yet experience tells us that, in practice, extraordinary expenses that appear in the agreements and judgments are highly generic in nature. In other words, it does not specify which expenses should be considered extraordinary.

Therefore, if one spouse should make a claim against the other for an expense which he or she considers an extraordinary expense, but such expense has not been expressly reflected in judgment or agreement, there may be doubts as to its nature and it is at least questionable whether or not the necessary willful intent to commit exists.

A spouse may reasonably consider that a particular expenditure does not qualify as extraordinary (necessity, unpredictability, non-periodicity, independence of the will of the parties...), and is **entitled to oppose payment of same**, without the same implying willful disobedience or a desire to infringe the duty to assist. If we do not accept this as a premise, the obligor would be subject to the will of the other spouse, who could then claim any amount as an extraordinary expense under threat of criminal penalty.

If one of the spouses wishes the other to pay his or her share of the extraordinary expenses, he or she should make use of the **declaratory incident** as provided for in article 776.4 Criminal Procedural Law before resorting to criminal proceedings. Thus, the obligor would know that the judge who heard the main proceeding considers that the expense in question is extraordinary, and as such considers it falls within the obligation to pay as established in the judgment or agreement at the time.

Exceptionally, the custodial parent may make the decision regarding the expense if it is to be made urgently to avoid further risk or harm (e.g., if the child's parents are not present). An emergency surgical procedure.)

Once this extraordinary nature is accepted, it would be difficult to argue that it does not violate the legal right as not being assistance, as extraordinary expenses are, by definition, necessary.

It should be clarified that, if a non-payment of extraordinary expenses is considered a crime, this would fall under the section two of article 227.2 of the Criminal Code, as they are not monthl



4

**NON-PAYMENT OF THE MORTGAGE
ON THE FAMILY DWELLING**

4.1 INTRODUCTION

The quiet enjoyment of the family dwelling and payment of the mortgage and other expenses relating to same is one of the points included in the judgments and regulatory agreements on separation, divorce, or filiation. Such enjoyment is usually awarded to minor or economically dependent children.

Payment of the mortgage, unless otherwise agreed upon by the parties, is generally required of the spouse who is the owner of the property, and if both spouses are, payment shall be made equally or in the proportion they hold in the title of the mortgage loan.

Non-payment of a mortgage instalment may be filed as a civil claim for enforceable collection proceedings and criminally when deemed a crime.

It is important to underline that, in practice, judgments regulating the effects of divorce do not always expressly establish the obligation to pay the mortgage installment by the parents/spouses, which would prevent a crime of abandonment of the family from being declared.

It is therefore recommended that the resolution always expressly request that such an obligation be established, because, despite the property being the habitual residence of the minors, the parents must be obliged to support the dwelling.

4.2 OFFENSE AND CHARACTERISTICS

Such conduct is punishable under article 227 of the Criminal Code. Point 2 of this article penalizes non-payment of any other benefit. Given the broadness of the term, various interpretations have arisen in case law. It shall include any benefit arising from any title not court approved, whose origin lies in Article 99 CvC or court approved as it constitutes a debt that originates from the subsequent liquidation of the community property.

By a resolution of the Board of Judges of the criminal panels of the Provincial Court of Madrid 9-1-2018, provisions relating to the payment of mortgage loans encumbering the family residence are benefits in favour of the children and spouse for the purposes of article of the Criminal Code 227.1. In other words, non-payment of the obligation may also constitute a crime of abandonment of family.

The underlying elements of the offense are:

- a) The existence of a final judicial decision or agreement approved by the competent judicial authority that establishes any type of economic benefit in favour of a spouse or the children of the marriage.
- b) An omissive conduct on the part of the obligor, consisting of repeated failure to pay the economic benefit as determined during the periods established in the precept, which are currently two consecutive months or four non-consecutive months.
- c) A subjective element consisting of the awareness of the judicial decision and the willful failure to comply with the obligation resulting from such decision.

However, *article 227 of the Criminal Code makes no distinction between child support and mortgage payments, or between debt of the community property and marital expenses. It refers to “any type of economic benefit in favour of the spouse or children, established in a judicially approved agreement or judicial resolution, in such cases as legal separation, divorce, declaration of nullity of marriage, filiation process, or child support”.*

According to the Dictionary of the Royal Spanish Academy, benefit means “any thing or service required by an authority or agreed upon” or, in its legal meaning, “thing or service that someone receives or should receive from another person by virtue of a contract or legal obligation”.

4.3 WILLFUL INTENT: WILLFUL FAILURE TO PAY

As we have explained regarding the non-payments mentioned above, willful intent, that is to say, willful failure to pay, is required for it to constitute a crime.

4.4 CIVIL LIABILITY

We reiterate what has been discussed in this respect in the preceding sections.

4.5 RECENT CASE LAW REGARDING THE CRIME OF ABANDONMENT OF FAMILY AND NON-PAYMENT OF MORTGAGE INSTALLMENTS ON THE FAMILY HOME

The Supreme Court in its recent Ruling number 348/2020 dated 05/25/2020.

While it is necessary to elaborate on its grounds to assess whether non-payment may be considered a crime of abandonment of the family, as defined in article 227 of the Criminal Code; after which it may be concluded that:

For a sentence to be imposed for the offense of abandonment of family, there must exist a judgment governing the effects of a divorce, separation or invalidity, expressly setting out the obligation to pay the mortgage (in the proportion that is due from each spouse or parent, according to their share of title).

Following a failure to pay, the interested party may enforce said judicial resolution with a view to obtaining due performance (in the event of the existence of sufficient funds) and, in addition, if the circumstances of the Criminal Code obtain, to seek conviction for the crime of abandonment of family.

The Supreme Court concludes that *mortgage payments must be deemed to constitute an economic benefit in the legal and grammatical sense, payable by both parents, regardless of their nature as a marital expense or debt of the community property. As such, it is part of the element of the offense as required by Article 227.1 of the Criminal Code. As a result, the sums outstanding in this respect form part of the damage resulting from the crime, which must be redressed in accordance with the provisions of paragraph 3 of the same precept. Such*

is the case, naturally without detriment to the result that the foreclosure pending on the property may produce in relation to the liquidation of the community property, which falls outside the scope of the criminal proceeding.

The Supreme Court states that mortgage instalments constitute an economic benefit in the legal and grammatical sense, by both parents, regardless of their nature as a burden of marriage or as a debt of the holding company, and as such integrates the element of the type required by article 227.1 of the Criminal Code, and therefore, any sums due in this respect constitute the damage caused and which must be repaired.



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ANNEXES

Annex A. Document history

Document history	
Versions	<p>V1. ECOVIO LOGO UPDATED</p> <p>V2. Revisión</p>
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Annex B: References

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<http://economic-genderviolence.eu/>

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