

CHAPTER NINE:

OBLIGATION TO SUPPLY MAINTENANCE

Rationale behind the Obligation

- Obligation is a legal relation, which consists in the duty of one person (called the debtor) to perform or not to perform something towards another person (named the creditor).
- Obligation emanates from two **sources-contractual obligations** and **legal obligations**.
- The former is an obligation created by the agreement of the creditor and the debtor while legal obligations, however, emanate from the **law** itself.
- The obligation to supply **maintenance** is a typical example of **legal obligation**.
- The rationale behind such obligation is **a moral duty** that exists among family members.
- When a member of a family becomes needy, no one is nearer than the family members to maintain such member.

Subject Matter of the Obligation

- According to Art.197 of the RFC, the person who is obliged to supply maintenance is bound to supply to his creditor things that are necessary for the livelihood of the creditor.
- The things that are necessary for the well-being of the creditor must be given to him based on the social conditions and local custom of the area in which the creditor lives.
- Generally, things that are necessary for the livelihood of the creditor are; the means to feed, lodge, and clothe, to care for his health and education, depending on conditions of the creditor.

Persons between Whom the Obligation Exists

- As provided in Art. 198 of the RFC, a person may be obliged to supply maintenance to his spouse, ascendants, and descendants, his brothers and sisters.
- Although it is not expressly provided in this article, a person is obliged to supply maintenance to his/her adoptee or adopter as the case may be.
- This is because Art.181 of the RFC clearly provides that (without prejudice to Art.182 of the same code) an adopted child for all purposes, be deemed to be the child of the adopter.
- No person may be obliged to supply maintenance to his uncles, aunts, nephews, nieces and other relatives.
- According to Art.201 of the RFC, the obligation to supply maintenance shall not exist unless the person who claims its fulfillment is in need and not in a state of earning his livelihood by his work.

- Generally, minors are in need of maintenance. Their parents are obliged to supply maintenance to them. Moreover, persons who have no sufficient means to take care of themselves as a result of poverty may be considered to be needy if they are unable to work and earn an income.
- Aged persons and those who are seriously sick are considered to be not in a state of earning their livelihood by their work.
- The obligation to supply maintenance shall, as a rule, be fulfilled by means of a maintenance allowance paid by the debtor to the creditor for maintenance.
- Maintenance may be reduced or increased proportionally, according to the reduction or increase of the necessities of the creditor and the resources or means of the debtor to furnish the same.

- As the maintenance allowance is believed to be extremely necessary for the survival of the creditor, it cannot be attached nor can it be assigned.
- As per Art 207 of the RFC, in fulfilling his obligation of maintenance allowance, the debtor may offer to discharge his obligation by taking the creditor for maintenance into his/her house.
- Where several persons are liable to supply maintenance, the creditor may claim maintenance from any one of such persons. Particularly, when all of the debtors have similar relationship with the creditor, the creditor may claim the payment of maintenance from anyone of such debtors (Art. 208)
- However, the debtor who has paid the allowance shall have recourse against those who have not paid their shares (Art. 209).

- That is when the obligation to supply maintenance falls upon two or more persons, the payment of the same shall be divided between them in proportion to the resources of each.
- However, in case of urgent need and special circumstances, only one of them may furnish the support **provisionally, without prejudice to his right** to claim from the other obligors the share due from them.
- The debtors for maintenance may validly agree, as regards their reciprocal relations, that maintenance shall be supplied to their common creditor by one of them.
- This agreement is beneficial to the creditor, because he can pursue only against one debtor instead of many debtors to get his maintenance allowance paid.
- In such conditions, the creditor may not make a claim against the other debtors to obtain maintenance unless he has a serious reason for not respecting such agreement (Art 211).

- The adopted child, his spouse and his descendants may claim maintenance from the family of origin of the adopted child when the adoptive family is not in a position to supply such maintenance.
- It is said that adopted child has two families. The family that has to take the prior obligation to supply maintenance is the adoptive family.
- It is only when the adoptive family is unable to supply maintenance that the family of origin is obliged to do so.
- The obligation of supply maintenance shall include the funeral expense of the creditor of the maintenance. For instance, if the neighbor of the creditor covers the funeral expense of the creditor, the person who is obliged to supply maintenance for the deceased has to pay back the funeral expense to the neighbor of the creditor (Art. 213 of the RFC).

Termination of the Obligation

- Although the Ethiopian Family laws have not fully incorporated the grounds of termination, we can validly maintain that the following can be taken as the grounds of termination of the obligation:

A. Agreement of the parties:- The debtor and the creditor may agree to terminate such relationship without affecting the mandatory provisions of the law.

- This is because under Art. 1975 of the Ethiopian Civil Code a contract is defined as an agreement whereby two or more persons as between themselves create, vary, or extinguish obligations of proprietary nature.

B. The ability of the creditor to earn his/her livelihood:- But when it is possible to show that the creditor is in a position to earn his livelihood or has acquired enough means to sustain his/her life, there is no reason that makes the obligation continue.

C. Inability of the debtor to discharge the obligation:- the relationship that exists between the debtor and the creditor does not suffice to entitle the creditor for maintenance allowance. Rather the debtor must be able to provide maintenance. Hence, although debtor-creditor relationship has been established between the parties, such relationship terminates when the debtor is unable to discharge his obligation for various reasons.

D. Condemnation of creditor (Art. 200 RFC):- The creditor loses his right of maintenance where the commits or attempts to commit a criminal act against the debtor.

- The creditor may also lose his right of maintenance where he has committed or attempted to commit a criminal act on the life or property of the spouse, ascendants or descendants of the debtor.

CHAPTER TEN: SETTLEMENT OF DISPUTES

- **Settlement of Disputes Arising out of Marriage and Irregular Union**
- There are a lot of causes for disputes that arise between a husband and a wife or between a man and a woman living together in an irregular union.
- In order to resolve these disputes between these persons effort is made by third parties. These third parties may include courts, arbitrators, conciliators, mediators etc.
- Although courts are the ideal institutions to adjudicate family disputes in almost all countries, using the alternative dispute settlement mechanisms such as arbitration, conciliation or mediation is a common practice all over the world.

- In Ethiopian family laws, a solution is sought for disagreements between spouses or partners to an irregular union either by adjudication or by using arbitration.
- The law has put in place both the substantive and procedural provisions in order to help the disputants resolve their problems by regular courts or arbitration.
- These are clearly incorporated under the RFC and Regional Family Laws.

A. Settlement of Disputes by Court

- Although Art. 118 of the RFC provides that any dispute arising out of marriage or irregular union is to be decided except for deciding divorce, by arbitrators chosen by the spouses, if reconciliation becomes difficult to arbitrators or if one of the parties or both of them feel that the way the arbitrators handle the arbitration process is wrong then they may appeal to a court having jurisdiction.
- In the case of marriage, even though the spouses petitioned for divorce, the court does not immediately give decision to divorce.
- As per Article 91 of RFC, when the spouses either conjointly or one of them petition for divorce, the court speaks to the spouses separately or jointly in order to make them renounce their intention to separate for good and Article 82(1) of the RFC can be referred for this. Where this effort is not successful, it will direct the parties to arbitrators to settle their disputes.

- A cooling period of up to three months is given to the disputants where they did not agree to settle their dispute through arbitration (Refer to article 82(3)).
- This time, after the court has exhausted all the means to bring the spouses into an agreement in order to renounce their petition for divorce, the court according to article 82(4) of the RFC shall pronounce divorce within one month from the receipt of the reports of arbitrators, or the end of the cooling period as the case may be (Arts. 81 and 82 of the RFC).
- However, under the Civil Code, failing the agreement between the parties, the family arbitrators would pronounce the divorce within one year from the petition for divorce having been made to them (see article 678(1) of the Civil Code).

- The departure of the RFC and regional family codes is that they have reduced the period from one year to three months, if divorce related disputes are not decided by the courts within short time, they will cause unnecessary suffering both to the parties themselves and to their children.
- The court is duty-bound to give an order regarding the matters to be settled after divorce, i.e., regarding maintenance of the spouses, the custody and maintenance of their children and the management of their property (Read Art. 81 and 82 of the RFC).

- In order to advance the best interest of children, Art 113 of the RFC gives direction to the courts to treat the custody of children very carefully.
- Prior to the pronouncement of divorce, it may encounter personal matters of the spouses that could not be displayed to the public.
- Therefore, according to Article 110 of RFC, the court sits **in camera** while consulting with the spouses either jointly or separately about these personal issues.

- **Problems reflected in the practice of courts**
- If the spouses petition the court for divorce, the RFC requires the courts to discuss with the parties patiently and give the parties a cooling period in order to calm down their anger.
- The court directs the parties to arbitrators of their own choice so that they will end up their dispute in reconciliation.
- Here you have to note taking the dispute to arbitrators is not compulsory; rather it is voluntary.
- But according to some sources what practically observed in courts is that the parties are not asked whether they are willing to take their case to arbitrators or not rather the courts direct them to arbitrators without doing what the law prescribes which is clearly against the spirit of the law.

- The problem, which was believed to be resolved by Article 82(5) of the RFC, is still without solution.
- According to this sub article, court shall give appropriate order regarding the maintenance of the spouses, the custody and maintenance of their children and the management of their property and it shall take into consideration the interest of children and the condition of the spouses who may be affected more by leaving their common abode.
- But after the file has been opened these matters take a considerable long period of time resulting in suffering of the parties particularly women.

- Among the issues that are to be regulated by courts, after the dissolution of the marriage by divorce or termination of irregular union is child custody.
- Article 681 of the 1960 Civil Code states that children under the age of five years are to be entrusted to their mother unless there is a serious condition to do otherwise.
- However, according to Article 113(1) of RFC, the court is expected to give an order as to which spouse shall have custody of the children, care of their education, health, maintenance and the rights of the parents and the children to visit each other.
- Most of the time, it is observed that spouses pray the court so that the decision would be in favor of one of them.
- In such conditions, practically courts render decisions without giving reasons as to why the custody of a child is entrusted to the father or the mother.

- This is a problem, which is practically observed while the court is entraining child custody issues.
- In most of the decided cases it, is shown that courts do not take into account the requirements listed under article 113(2) of the RFC (income, age, health and condition of living of the children) when deciding on child custody.
- The other practical problem observed in courts when they are adjudicating child custody issues is that, courts give decision only on the interests of the children.
- Even though the law demands the courts to consider the interests of the children, it does not suffice to give a decision only based on that, there must be additional conditions that are to be taken into account by the courts.

- The other issue is that of property liquidation decisions. Courts after pronouncing divorce close the file and there is another file to be opened for the partition of property of the spouses because the court considers this case anew. As a result of this, the parties will be in difficulty as they waste their time, energy and money
- Even if the petition for partition of property is brought by the parties to the court after the very moment of divorce pronouncement, still the case take a prolonged time to be completed. The grant of undue power to arbitrators is also another additional problem.

B. Settlement by Arbitration

- In certain part of Ethiopia, the persons with special qualities of personality and experience are those who are traditionally called *shimagiles* in order to save a marriage from falling apart and preserve the integrity of the family.
- Spouses whose marriage is in difficulty and as a result of this who seek for a divorce pronouncement, first present their case to a local judge who is traditionally known as “atbia dagna”.
- But prior to the ending up of the marriage in divorce the parties as well, as the local judges should try their best to cool down the anger and the disagreements created between the spouses.

- This was done through the process of reconciliation. If the judges fail to bring the parties into an agreement they, will grant a divorce in cases of non-serious cause of divorce.
- This method of settlement of family disputes out of court was retained by the 1960 Civil Code of Ethiopia since the Civil Code incorporated provisions on arbitration.
- Although family arbitration was criticized for not treating women in equal footing with men, the RFC and the regional family laws have retained this alternative dispute resolution method.

- Arbitration is one of the traditional ways of avoiding disputes between conflicting parties irrespective of the causes of disputes.
- It is one of dispute settling mechanisms most people choose because of its simplicity and since it brings a solution to the conflict in the shortest possible time.
- Arbitration is an out-of-court mechanism of settlement of disputes in which the parties (disputants) take their cases before a tribunal of their own choice.
- The parties have the freedom to limit the power of arbitrators and regulate how the tribunal performs throughout the process.

- In the RFC, and other regional family laws, arbitration could only serve as an alternative mechanism of dispute settlement and the reason for this is that if arbitration outs regular courts for matters of family disputes then the rights of women would be at stake.
- This is because arbitrators, it is believed, in Ethiopia may not be qualified enough to resolve all family disputes including pronouncement of divorce.
- As regards appointment, Art. 119 of the RFC confer the power upon the disputants to appoint the arbitrators and the number of the arbitrators is not limited under this same article.
- What it simply puts is that their number can be one or more than that.

- Although the arbitrators are appointed by the parties, arbitrators are under the control of the court.
- The court makes an uninterrupted follow upon the arbitrators and gives direction as to how they entertain case.
- According to Article 119(1), the parties are expected to submit the names of the arbitrators they have selected within fifteen days from the date they were told to do so.
- As it is clearly stated under Article 121(1) the same code, sole duty of the arbitrators is to make an exhaustive effort to reconcile the spouses. And article 119 orders the court to give the proper direction to the arbitrators as to how they help the spouses reach agreement.
- The result of the arbitration or attempt of reconciliation has to be submitted to the court within three months.

Settlement of Other Family Disputes

- There are two possible outcomes from the processes of dispute settlement be it by courts or by alternative dispute settlement mechanisms, i.e., either the spouses be brought to reconciliation or their contention end up in divorce.
- According to the law, the court has to give its decisions on three very important post-divorce issues; namely, child custody, maintenance allowance for the child and visitation rights of the child by the non-custodial parent.

1. Child Custody

- The choice of determining the custody of a child lies either on the parents themselves or on the court.
- The word custody pertains to whom the child is to live with, and which parent has the responsibility to make major decisions about the life of the child.
- Child custody may be understood as the right to retain a child at one's home which at the same time empowers the parent to control the child.

- As per Article 618 of the Civil Code, the governing principle regarding custody of children above the age of five was the best interest of the child and this makes it “sex neutral”.
- The “best-interest” standard was very wide and an indeterminate as it embraces so many things to be taken into account by the judges in order to grant a decision on child custody issues.
- Thus, this resulted in unlimited judicial authority. The movement from paternal custody to the application of best interest of the child doctrine, is movement from *“paternal patriarchy to judicial patriarchy” which shifted child custody issues from the unlimited paternal authority to unlimited judicial authority*
- “maternal preference” rule was reflected under article 681(2) of the 1960 Civil Code.

- As per Article 113(2) of the RFC, since the court has to take into consideration the income, age, health, and condition of living of the spouses as well as the age and interests of the children, it is felt unnecessary to retain the provision of the 1960 Civil Code (Art.681 (2)), which entrusts children below the age of five to their mother.
- The aim of Article 113(2) of the RFC, is to avoid material preference to child custody without a justified reason.

2. Maintenance Allowance

- According to Black's Law Dictionary... *maintenance is sustenance support assistance and the furnishing by one person to another, for his or her support of the means of living, or food, clothing, shelter, etc, particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child or husband and wife, the supplying of the necessity of life.*
- While the term similarly means food, clothing and shelter, it has also been held to include such items as reasonable and necessary transportation or automobile expenses, medical and drug expenses, and household expenses...

- Referring to Article 198 of the RFC, the person who is able to shoulder the responsibility of maintenance is obliged to supply maintenance only to his proximate relatives by consanguinity and affinity, and to his spouse.
- As per article 197 of the RFC, the obligation of the person who is ready to supply maintenance is limited only to things that are necessary for the livelihood of the creditor.
- The same article stipulates that the supply of maintenance be in decent manner having regard to social conditions and local custom of the area in which the creditor lives.
- In some jurisdictions, such rights of the creditor would extend even after he/she has attained his/her majority age and he is able to work and earn his income although this kind of rule is absent in our Revised Family Code and the regional family laws.

- As far as the maintenance of the children is concerned, once the marriage bond is dissolved by divorce of the spouses, the obligation to supply maintenance to the wife ceases and the execution proceedings taken after the divorce judgment would consequently have to be for maintenance of the children only.
- According to Article 202 of the RFC, the spouse (debtor) against whom the court passes its decision to maintain the children may fulfill the obligation to supply maintenance in kind or in cash.
- But this should fundamentally be based on both the needs of the person claiming it and the means of the person liable to pay maintenance.

- When the court is ready to decide on the payment of maintenance for the child it must take into account factors like for how long and how much does the non-custodial parent pays the maintenance to his child.
- Most of the time, the non-custodial parent is compelled to pay maintenance until his/her child attains majority age (18 years of age).
- But the parents may reach an agreement as to the additional time of payment of maintenance.
- As to the amount of the maintenance to be paid, the court will take into account the earning of both parents and the living condition of the family.

3. Visitation Right

- Visitation right is a right granted to non custodial parent.
- The other parent to whom the custody right of a child is given must permit the other non-custodial parent to visit the child.
- It is usually put in the decision of the court the manner and how often the non-custodian parent visits his child.
- However, the visitation right should not go against the best interests of the child.
- Courts put several restrictions on this right like frequency, length and location of visitation and whether someone else or third party besides the non-custodial parent must be present.

- According to Art. 113(2) of RFC, when the court provides its decision as to who would be the custodial parent of the child and other related matters like maintenance payment, and visitation right of the non- custodial parent, it has to take into account the income, age, health, and condition of living of the spouses as well as the age and interest of the children.
- But there are cases where by the court simply awards the child custody right and visitation right to either of the parents based on the mere joint agreement of the parents. This would go in contrary to what Article 113(2) puts as “the age and interests of the children.”