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Delimitation of the Maintenance Contract from other Contracts with Similar Characteristics

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Abstract: If in the light of the old civil code, the maintenance contract was an unnamed one, its operation being based on the general rules applicable to contracts, the regulation in the New Civil Code, under article 2.254-2.263, of the contract in question, with specifying that, in this matter, some life annuity rules are applicable. But not only the annuity has similarities with the maintenance contract, but also the sale or donation. We consider that a correct approach to the maintenance contract must consider this delimitation compared to other contracts with similar characteristics. Thus, starting from the legal definition of this type of contract: *"Through the maintenance contract a party undertakes to perform for the benefit of the other party, or of a certain third party the services necessary for maintenance and care for a certain duration. If the contract did not provide for the duration of the maintenance or provided only its lifetime, then the maintenance is due for the entire life of the maintenance creditor. "*- we will continue with the presentation of its specific features in relation to the other contracts mentioned as object of analysis.

Keywords: maintenance contract; free contract; donation

1. Delimitation from the sales contract

In order to achieve a clear differentiation between the two types of contracts, we will focus on a brief presentation of the characteristic features of the sales contract, hence the similarities and differences from the maintenance contract. It is undeniable that when we refer to the contract of sale almost instantly we refer to the onerous and translational nature of its ownership, the onerous nature being the essence of the contract of sale. Thus, no situation can be imagined in which a convention loses its onerous character and yet can be called a sales agreement. As for the transfer of ownership in the case of the contract of sale, it is most often done instantly. In this sense, article 1.664 of the Civil Code states *that "the property is transferred by right to the buyer from the moment of concluding the contract, even if the good has not been handed over or the price has not been paid yet."*

I said that the transfer of ownership is usually made at the time of concluding the contract because the parties are free to postpone the time of this transfer. In addition to this situation, which depends on the freedom of will of the parties, it would be worth mentioning the situation of future assets, in which case the transfer of ownership operates only when they have been executed, realized. Also, when the sale concerns goods of the kind, including goods of a limited kind, the property is transferred to the buyer on the date of their individualization by delivery, counting, weighing, measuring or by any other means agreed or imposed by the nature of the good (according to article 1.678 Civil Code).

Likewise, the transfer of the property right takes place, in case the seller is not the owner of the work, from the moment of acquisition of the good by the latter (article 1.683 paragraph (3) Civil Code).

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Another exception to the rule of immediate transfer of ownership of the sold property is the situation of sale in installments, when the buyer acquires ownership at the date of payment of the last installment of the price, even if the work was handed over at the conclusion of the contract (article 1.684 and article 1.755 Civil Code). And with regard to the alienation of real rights over real estate included in the land book, the transfer of ownership takes place both between the parties and to third parties only at the time of registration in the land book (article 885 Civil Code). Thus, in the sale-purchase contract the tabulation marks only the moment of the transfer of the real estate property (not the transfer itself, which takes place through the agreement of will (Boroi & Stănciulescu, 2012, p. 370).

As regards the maintenance contract, both the onerous and the translational nature of the property are not of its essence. Thus, it is very easy to have a contract by which one party, called the maintenance party, wants to achieve a liberality towards another party, called the maintenance party, thereby even being able to irreversibly reduce its assets, and this is because maintenance can also involve expenses. (with the purchase of medicines, food, clothing, etc.). In this case where the maintenance contract is in the form of a liberality, the maintenance is not obliged to a consideration, as is the case with any sales contract in which both the seller and the buyer are simultaneously creditors and debtors of a mutual obligation, and interdependent. On the same line of ideas, the hypothesis presented above shows us that a maintenance contract can take place without the transfer of ownership inherent in the sale agreement.

However, the need to make a distinction between the two types of contracts proves to be all the more stringent when the maintenance contract is based on a transfer of ownership from the dependent to the maintenance, when the agreement becomes both a transfer of ownership as well as onerous character.

In the latter situation, of the utmost importance in delimiting the two types of contracts, is the purpose pursued by the parties at the time of concluding the agreement and this purpose will be relevant by interpreting according to the concurring will of the parties and not by the literal meaning of the terms, the determination of the concordant will desire, inter alia, the purpose of the contract, the negotiations between the parties, the practices established between them and their conduct after the conclusion of the contract will be taken into account. (article 1.266 Civil Code)

Thus, since the ratio between the price in cash and the price in kind cannot be calculated, the value of the maintenance being random, in the absence of other criteria, the cash benefit should be related to the value of the good; the contract will be maintenance if the cash benefit represents less than half of the value of the alienated good and otherwise it will be for sale and purchase. If the main obligation of the acquirer is to provide maintenance, the contract will be for maintenance, even if the contract stipulated the price of the alienated property, this circumstance being irrelevant and not being able to change the legal nature of the contract.[1]

Finally, we must not omit the fact that in the case of the maintenance contract the law requires *ad validitatem* the authentic form, so the notary can help the parties in their approach to understand exactly the legal characteristics of this type of contract, so that they understand exactly whether this is the contract they need to meet all their requirements. With regard to the contract of sale, the legislator established a distinction as regards the formalities necessary for the valid conclusion of the contract according to the sold object. Thus, in principle, the sale is consensual with one exception resulting from the corroboration of the provisions of articles 885, 888 and article 1.244 of the Civil Code, which results in the rule according to which the sale of land (with or without constructions) must be concluded in authentic form.

[1] Bucharest Tribune, s. a III-a civ., dec. no. 370R of 11 February 2011, unpublished, in L. C. Stoica, op. cit., p. 1-2.

2. Delimitation from the Life Annuity Contract

The delimitation of the two types of contracts must be based on the fact that, in the case of the life annuity contract, we are talking about an obligation *to give* that concerns fungible goods, in this case money, during which the maintenance contract is based on a much more complex obligation *to make*, the content of which can vary greatly being dictated by the needs of the maintenance creditor, from the provision of medicines, food, clothes, to psychological elements, such as creating a stress-free atmosphere in which the maintenance to be able to live a quiet life.

Regarding the similarities that can be identified between the two types of contracts, we can start by saying that both can be built on the basis of the stipulation for another without their validity being affected; both involve periodic benefits, although the maintenance contract may be concluded for a specified period, during which the life annuity contract extends for the life of the creditor, unless it has been established during the life of the debtor or a specific third party (art. 2242, paragraph (2) Civil Code).

With regard to the methods of incorporation, the civil law refers in the case of the maintenance contract, to the annuity contract so that both can be constituted for a fee, in exchange for a capital of any kind, or free of charge and are subject to the own rules of the legal act of incorporation (article 2.243 paragraph (1) Civil Code). In the same way, both contracts can be concluded in favor of several persons, the obligations remaining indivisible from them. Also as a similarity, the creditor of the two types of obligations in the two maintenance and annuity contracts benefits, in the case of onerous establishment, from a legal guarantee in accordance with article 2,249 paragraph (1) Civil Code compared to 1.723 Civil Code, according to which "in order to guarantee the obligation to guarantee the price, in the cases provided by law, the seller benefits from a privilege, or as the case may be, from a legal mortgage on the sold thing."

To the same extent, both the creditor of a life annuity and that of a maintenance obligation incurred for consideration may request the termination of the contract if their debtor does not provide the promised security for the performance of his obligation or diminishes it, during which the latter (the debtor) cannot be released from the payment of the annuity or from the obligation to provide maintenance by offering a refund of the capital and waiving the refund of the installments paid or the value of the provided care. Moreover, he is required to pay the annuity or to provide maintenance until the death of the person during whom the annuity was established, or the maintenance obligation or, in the case of the maintenance contract, for the period for which it was concluded, all of which no matter how burdensome the debtor's benefits may become.

One of the major differences between the two types of contracts is that of the form required *ad validitatem*. Thus, if in the case of the maintenance contract the authentic form is needed, in the case of the life annuity contract the legislator did not derogate from the principle of power sharing.

The similarity between the two types of contracts is also underlined by the fact that, according to article 2.261 Civil Code "*if the maintenance or receipt of maintenance in kind can no longer continue for objective reasons or if the maintenance debtor dies and no agreement is reached between the parties, the court may replace, at the request of either party, even temporarily, maintenance in kind with an appropriate sum of money. When the provision or receipt of maintenance in kind can no longer continue through the fault of a party, the court will increase or, as the case may be, reduce the amount of money that replaces the maintenance benefit*".

Regarding the termination of the contract, we can see that, in the case of annuity, the obligation being one to give, the debtor may appeal to the delay of the creditor in accordance with articles 1.510-1.515 Civil Code. During this time, when the conduct of the other party makes it impossible to perform the contract in accordance with the morals of the maintenance contract, the person concerned may request the termination. Thus, when the dependent party refuses to receive maintenance or commits acts of opposition, the debtor of this obligation may, under the conditions of article 2.263 paragraph (2) of the Civil Code, request the resolution, which can be done only through the court.

As a last difference between the life annuity contract and the maintenance contract, we specify that only the free annuity can be declared imperceptible by contract, even in this case the stipulation having its effects only within the value of the annuity that is necessary for the creditor to ensure maintenance (article 2.253 Civil Code) during which according to article 2.258 Civil Code, the rights of the maintenance creditor cannot be prosecuted being thus imperceptible.

3. Delimitation from the Donation Contract

According to article 985 of the Civil Code, "*the donation is the contract by which, with the intention of gratifying, a party named donor irrevocably disposes of an asset in favor of the other party called grantee*." Thus, the donation is the contract by which a free and irrevocable transfer real right or claim from the donor to the grantee, which determines a decrease of the donor's patrimony, without the latter seeking to receive a consideration. For this reason, we can include the donation contract in the category of liberalities.

As regards the legal characteristics of the donation contract, it is a free contract, a situation from which there is a partial exception which consists in the possibility of affecting with burdens a donation which thus becomes, in part, onerous (within the limits of the value of the burden). Another legal character closely related to the previous one is the unilateral one, according to which, the grantee does not assume obligations towards the donor, despite the general recognition of the obligation of gratitude towards the donor. About this obligation we can say that it is a moral one so that, normally, its non-observance cannot directly draw legal consequences.

However, when the lack of gratitude takes the form of ingratitude, the legal sanction is, according to article 1023 of the Civil Code, that of the revocability of the donation. As an argument for the connection between the two characters, we must say that the aforementioned donations with tasks are, within the limits of the task, true bilateral contracts so that neither free nor unilateral character are unattainable elements in the physiognomy of the donation contract.

Given these elements, we must specify, in our attempt to delimit the two types of contracts, that the real need for differentiation exists in the case of the free maintenance contract which may in fact represent a direct donation with the only specification that no transfer of real or debt law is made, so there is no obligation to give, but there is an obligation to do which may consist as we have seen in: the purchase of medicines, food, clothing of the dependent.

However, the obligation to do so ultimately leads to a reduction in the maintenance of the maintenance of the maintenance and this is due to the fact that the maintenance benefits are equivalent to the use of financial resources and not only. In the same way, maintenance can be an indirect donation when, through the stipulation for another, maintenance is provided to him.

Thus, we can imagine that, liberally, A, stipulating, concludes an agreement with B, promising, by means of which the latter undertakes towards A to provide for C, third beneficiary, maintenance either

for a determined duration or for its lifespan. Most likely, the Romanian legislator imposed the condition ad validitatem for the maintenance contract and due to the above specifications.

Thus, in the case of liberalities, the effect of concluding a maintenance contract on the assets of the person undertaking to provide maintenance may be particularly significant without the need for consideration. It is known that donations are concluded by an authentic deed (article 1011 of the Civil Code), except for indirect donations, disguised donations and manual gifts. Of course, when we talk about donations, as we have shown, its nature is the translation of property so that by concluding the contract the property right is transferred from donor to grantee. However, the object of the donation contract may also be represented by claims.

Another important aspect, with regard to the two contracts, is related to the means of protecting the creditor's rights. Thus, according to article 1.558 of the Civil Code, "the creditor may take all necessary or useful measures for the preservation of his rights, such as securing evidence, fulfilling publicity and information on the debtor, exercising the obligatory action or taking precautionary measures."

As we have seen, this list is an exemplifying one, since a very energetic and very important action, namely the revocatory or Paulian one, is not mentioned. It is this revocatory action that brings us to an important distinction, as we shall see. Thus, according to article 1.562 paragraph (1) of the Civil Code, 'if there is evidence of damage, the creditor may claim to be declared unenforceable against him those legal acts concluded by the debtor in fraud of his rights such as those by which the debtor creates or increases a state of insolvency."

The important distinction for our argument is that made by the second paragraph of the same article, according to which "a contract for consideration or a payment made in performance of such a contract can be declared unenforceable only when the third-party contractor or the payee knew that the debtor creates or increases his state of insolvency."

As stated in the specialty literature (Stătescu & Bîrsan, 2008, p. 358), in this case the condition of bad faith of the co-contractor must be fulfilled. On the other hand, in the case of a free contract, this condition is no longer required since the creditor infringed on his rights is trying to avoid a loss, during which time the debtor co-contractor who is trying to create or increase his state of insolvency, in fact, he tries to keep a profit. Thus, if we are talking about a maintenance contract constituted with free title, then the conditions for admitting a possible revocation action are easier.

However, an apparent problem arises as a result of the personal nature of the maintenance obligation, but this problem is resolved through the provisions of article 2.259 of the Civil Code, according to which "the personal character of the maintenance contract cannot be invoked by the parties for to oppose the action for revocation of the contract or the oblique action brought for its performance". Moreover, the legislator comes to the aid of persons to whom the maintenance creditor owes alimony under the law, by establishing in article 2.260 paragraph (1) Civil Code, the revocability of the maintenance contract for the situation in which the latter lacked the means necessary to fulfill the obligation to provide food.

Paragraph 2 of the same article shows us that revocation can be requested even if there is no fraud on the part of the maintenance debtor and regardless of the time of conclusion of the maintenance contract. In this situation, instead of ordering the revocation of the contract, the court may, even ex officio, but only with the consent of the maintenance debtor, oblige him to provide food to the persons to whom the creditor has such a legal obligation, without in this way to reduce the benefits due to the maintenance creditor.

Due to the fact that, through a maintenance contract, a “donation” can be made to the dependent, either directly or through the stipulation for another, we can talk about this issue of the liberalities that violate the succession reserve. It is known that a natural person can dispose, during his life, freely and unrestricted of his fortune. Thus, it can, by inter vivos deeds, alienate all its wealth since no one is obliged to leave an inheritance. However, the person's freedom cannot be unlimited. Thus, in the presence of the reservists, a person can dispose by liberalities only of a part of his inheritance called available quota.

Consequently, when there are reserved heirs and the deceased disposed of his assets through donations and/or will, the estate is divided between two parts: the estate and the available quota (Boroi & Stănciulescu, 2012, p. 609). However, we could specify that the above enumeration, namely donations and / or will can be easily completed with the notion of maintenance contract. Thus, we can imagine a situation in which de cuius during his life, in order to reduce the share that would return from the inheritance to some reservists, alienates to a third party a real estate his property, fact after which he assumes the obligation to provide maintenance either to one of the heirs whom de cuius wished to benefit to the detriment of the others, violating their succession reserve, or even to a foreign person of inheritance.

Thus, the problem arises of making the report of donations or revoking donations made beyond the available quota, even if a maintenance contract of the type above does not represent a donation in the true power of the word.

Conclusions

Analyzing the maintenance contract, we will conclude that this type of contract can cause some of the most delicate situations. Either it is a disguised donation made by the parents to one of the children, in order to violate the succession reserve of the other descendants, or it is a maintenance obligation assumed towards two creditors, one of whom dies and the other under the influence of relatives with succession vocation, demands the termination of the contract, whether it is simply an improper fulfillment of the obligations of the maintainer, the path to uncertainty, insecurity, conflict, is still kept.

Despite the fact that it will never be able to compete, in terms of impact, with a contract such as the sale contract, for example, the maintenance contract remains indisputably important. Although it does not address or better not only meet the needs of the elderly, the maintenance contract is most often addressed to the elderly and this fact is not difficult to understand, if we consider that after a certain age, progressively, we begin not to we are still self-sufficient, during which time we need assistance and care from other people. The maintenance contract is only a response to these needs, and knowledge of the specific features of this type of contract compared to other similar contracts is an advantage when concluding such a contract.

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