

THE MAINTENANCE CONTRACT BETWEEN THE PAST AND PRESENT, IN REGULATING THE CIVIL CODE IN FORCE

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Abstract: Until the entry into force of the new Civil Code, was an unnamed maintenance contract, it did not benefit from separate regulations nor the old civil code and by any other special law. It was, however often met in practice either by an agreement by themselves or through a clause inserted in a contract.

Given the legislative gaps which exist in relation maintenance contract and the need to regulate its Civil Code in force has solved this problem by regulating it in Title IX (Various special contracts), Chapter XVIII, in art. 2254-2263. The current regulation of the Civil Code addresses the complex and comprehensive maintenance contract, establishing distinguished criteria between this contract and other similar contracts and its legal regime. Although the doctrine is rich in the maintenance, the theme is far from being exhausted. The main objective of this paper is the treatment of theoretical and practical problems related to the maintenance of contract regulated in the New Civil Code.

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1. LEGAL DEFINITION AND CHARACTERS

In the old regulations, although often encountered in practice, the maintenance contract was a contract that didn't have a name, a legal regulation on its own nor in The Civil code from 1864, nor in any special law, being the creation of the judicial practice and doctrine. Thus, although it was accepted that resembles to the annuity contract, the maintenance contract was governed by the General rules applicable to contracts.

For the first time in our law, the legislature gave the New Civil Code a legal figure for the maintenance contract, covering contract at issue in art.2254-2263 in Chapter XVIII " About the maintenance contract" of Title IX "Various special contracts" Book V "About obligations".

The maintenance contract is defined in **art. 2254** as the type of contract whereby one party undertakes maintenance for a specified duration. If the contract was not provided for the duration of the maintenance or only its life contingency character, then the maintenance is due on lifetime maintenance for the creditor in benefit of the other party or of a third party in regards to the necessary maintenance and care benefits.

Maintenance claim may be *lodged* both against payment, stipulating for another (the contractual Figure is represented by the *stipulation for other* who benefits, as well as the contract for the maintenance of its own rules in the new civil code, in article 1284-1288. According to doctrine, the stipulation to another can be defined as a contract or a clause in a contract whereby one party, called *the one that*

promises, is required in relation to the other side, called *stipulant*, to perform a benefit in favor of another person, whether or not in relation to the third contract, called third-party beneficiary. It is a tripartite operation carried out with or without the participation of the third party to the contract. Most of the time, the stipulation to another consists of a clause in the contract, including the birth of a proprietary right of a third party directly in, has the effect of adding to the cost ratio between stipulant and the one who promises, a second report, between the one who promises and the third beneficiary), or simply the Convention concluded between the maintained and reciprocal provider, whereby first sends a good or an amount of money and the second is required instead to perform maintenance, but it can be made up and *free of charge*.

In the latter case, the maintenance claim can be provided in a maintenance contract or a will, which must comply with all conditions of substance and form required by law for legal figure has chosen.

As regards to the *legal characters of the maintenance contract*, as evidenced by the regulation given to The New civil code, it is a *synallagmatic obligation*, since the task was born to both parties. Maintenance contract can be *unilaterally* when maintenance is free of charge, because it creates obligations only in a single task. Moreover, as it follows from article 2254 Civ. code, in a suppletiv manner, the legislator intended that the rule in terms of maintenance contract to be unilaterally, defining the contract in question only from the perspective of the person's obligations that does maintenance.

Out of the character exhibited before, another character results for the maintenance contract, respectively *for a character*. Thus, as a rule, both sides have a proprietary interest, namely the the keeper who seeks to obtain the benefit of maintenance, and the maintainer wants to obtain capital. However, a maintenance contract is for consideration only by nature, not by his essence, whereas, as I predicted, it can be concluded as valid and free of charge.

The maintenance contract has a *randoml character*, as there are chances of gain or loss for each of the Contracting Parties, who depend on an uncertain future event and lifetime, respectively the person who is maintained, as well as her needs.

In relation to the randomness of the maintenance contract, the doctrine developed under The Old Civil code, rightly pointed out that it is the essence of the maintenance contract, being here more poignantly than the annuity, since the debtor's obligation depends not only on the duration of the maintenance creditor's life in limbo, but also "to the object of benefit, according to his daily needs or other factors that may influence the extent of the benefit (of the person health care, cost of living, etc.) ". When the item is missing, the contract is null. For example, the Court ruled that the termination of contract shortly after the death of the person who was cared for, can't reach a conclusion of the contract for invalidity of the Act or for unlawful or immoral cause, precisely because of the randomness of its character. In particular, the circumstance that at the date of conclusion of the contract the beneficiary's maintenance was ailing and hospitalized in hospital has no relevance, because a defendant could not have known the severity of the disease of the person who made the credit.

The maintenance contract is a *solemn*, authentic form being required by law to complete as valid. Thus, according to art. 2255 Civil code, the contract of maintenance ends in authentic form, under penalty of absolute nullity. The

authentic form imposed by the legislator *ad validitatem* is meant to alert the parties of the contract on the importance that it has met the obligations under the contract of maintenance for their auditing, securing freedom and certainty of consent, exercise control of the company through the organs of the State, with respect to civil legal act concluded, whose importance exceeds the framework of interests of the parties.

The maintenance contract is *displaced*, whereas the benefits due from the one who is taking care and is running instead of acquiring such property or capital of any kind.

The maintenance contract is a *intuitu personae* contract, in consideration of the person who is caring. For this type of contract, the mutual knowledge is appropriate, mutual trust and affection between the contracting parties-especially since, as a rule they must live together are fundamental requirements whose fulfillment shall ensure the achievement of finality often pursued by either side through the conclusion of the contract. From the *intuitu personae* character of the contract in question results also the unnoticed and divested character for maintenance. In this regard, article 2258 Civ.code states that "the rights of the creditor of maintenance may not be ceded or subject to prosecution."

Contractually agreed to grant maintenance implies the debtor in judicial practice were reported and were considered legitimate cases in which maintenance was performed by an agent or temporarily for reasons of force majeure to execute another person on behalf of obliged. Thus, the Court held that the consistent ensure care of the beneficiary can be accomplished through service from others as it's chosen by the accompanying expense of the beneficiary, unable to support that the benefit of maintenance and has lost its *intuitu personae* character.

2. THE CONDITIONS OF VALIDITY OF THE MAINTENANCE CONTRACT

Conditions of validity of the contract of maintenance are, as in the case of any other contract, as follows from article 1179 Civ. code, the ability to contract, consent of the parties, a determined and legitimate object, lawful and moral and of solemn form, the latter condition being imposed by article 2 para. 1179 Civ. code with regard to article 2255 Civ.code. Given the onerous nature and translativ property maintenance contract according to article 1651 Civ.code, of the rules shall apply to the contract of sale in respect of the obligations of the alienator.

At the same time, it is important to note that in article 2370 Civ.code, the legislature has provided for the application of the rules provided for in article annuity seen in art. 2243-2247, art. 2249, art. 2251 para. 1 and art. 2252 Civ. Code and maintenance contract.

Thus, in respect of the formation of modes of the maintenance obligation, the possibility of the establishment of maintenance obligation during the life of several people, the possibility of the establishment of the obligation in favor of several persons, the situation of the establishment maintenance during the life of a third party who was deceased at the time of conclusion of the contract, or for the duration of a person's life, which was marred by a fatal disease, introduction of a privilege or a mortgage in order to ensure payment of maintenance requirement the contract rescinded if the forming and irrevocability of maintenance contract, they are borrowed from the annuity contract.

In relation to the fact that the maintenance contract for pecuniary interest, the creditor shall conclude a maintenance provision act with respect to the property,

and the maintenance debtor shall assume an obligation to do, namely to provide maintenance, both sides should have the *full capacity to exercise*. In accordance with article 38, paragraph 1 Civ. code, "the full exercise capacity begins at the time when the person becomes an adult", and according to paragraphs 1 and 2 of the same article "the person is considered an adult at the age of 18 years." Having regard to the provisions of articles 39 Civ. Code, I appreciate that the minor who is married, and the minor who acquires full capacity of exercise, can conclude a maintenance contract, both as debtor and as creditor.

In terms of maintenance contract with a free of charge title, taking into account the lack of creditor performance, I appreciate that he should not have full capacity to exercise validly to conclude a maintenance contract, with the condition that there is a cause of incapacity specific for the donation contract²².

However, in respect of the maintenance debtor, I appreciate that he must always have full legal capacity because from his point of view the contract is for consideration.

As related to the *provided consent*, he must, on the one hand, meet the conditions of art.1204 Civil Code, that is to be serious, express freely and knowingly, and on the other hand, take the form of an authentic, under the penalty of nullity, as required by the provisions of the Civil Code art.2255 .

As regards the contract of maintenance, this is to ensure a certain maintenance for a limited time or for the entire life of the maintenance of the creditor by the debtor of such an obligation.

In literature, rightly it is shown that "to say about a particular legal act that covers legal operation means in reality, that you refer to the conduct of the parties²³.

In this sense, we can say that the object of the maintenance contract is to convey ownership of capital by the maintenance creditor, in exchange for the provision of maintenance by the maintenance debtor.

However, the same authors showed that the distinction between the object of juridical act and the obligation of importance regarding one of the requirements of validity, namely that the legal act should have a specific object, while the obligation is enough not only a specific object, but determinable at the time of conclusion.

At the same time, it was noted that the distinction between subject and object of the juridical act shows interest under the other requirements of validity in the sense that it would be possible for the legal operation as a whole to be illicit, although is the subject matter of each obligation, that is each benefit seen in isolation, might not have that character, as would be possible for the legal operation to be illicit, but some of the benefits or benefits to be infringing.

In addition to the *object of the contract* (a legal operation) and *object of the obligation* (benefits that bind the one who cares and the maintainer), it would be able to distinguish and benefit, that is the property covered by the benefit. Thus, with respect to the subject matter of the contract, if the contract is the beneficiary of care for consideration and, where it refers to an individual good, it must exist, be

²² In this regard, it is worth mentioning Article 36 of the Civil Code. the rights of children conceived and art.990 Civil Code provisions. Special matters concerning the incapacities liberalities.

²³ Gabriel Boroi, Carla Alexandra Anghelescu, Civil right course, General, 2nd Edition, Editura Hamangiu, București 2012, p.164;

lawful and must be possible to be in the civil circuit. If maintenance is done free of charge, the maintenance creditor does not assume any obligation. Furthermore, regardless of the title under which the contracts, it is forbidden to assume obligations regarding the provision of services²⁴.

Regarding to *the object of the earner benefit*, the same characters may be applicable and in addition, the condition of being a personal act of one who undertakes, the latter condition resulting from *intuitu personae* of the maintenance contract.

Regarding the condition of being a personal act of one who commits, I believe that this person does not require impose himself to the one he takes care of, generally, it he obliges to transmit a right and not committing a crime. However, the question is whether the benefit of the object of work for beneficiary could be an asset belonging to another person. Considering the provisions of the Civil Code art.1230., which provides that the rule is that the property can be alienated to a third party, but also the appearance that lends maintenance rules applicable to the contract of sale that the provisions of the Civil Code art.1683. regulate the conditions under which the sale of the property of another is valid, I believe that the person who is cared can transfer the property to a third party in exchange for the provision of maintenance by the borrower, provided the right of property by the debtor or by acquiring property, or by ratification of alienation by the owner, or by any other means, directly or indirectly procuring maintenance debtor ownership of the property.

With respect to the *maintenance contract cause*, this is the reason that urged each side to conclude the contract, that is immediate purpose. Thus, the aim pursued by the provider from mediated contract may be acquiring capital to give it a particular destination, while the goal of mediated by the maintained person is to obtain the benefits from the maintenance provider. The cause of the maintenance contract, as in any other contract, must be lawful and moral.

In judicial practice, was retained in a case that the immediate goal, as part of the legal act is represented at random contracts, as the maintenance one, the foreshadowing risk convention, as future and uncertain circumstances on which depends the chance of gain and, accordingly, the risk of loss for each party. Thus, for the debtor's maintenance there was no moment to risk losing as the serious health condition was known to the creditor maintenance and the imminent death, so the maintenance contract is null and void for lack of cause²⁵.

Regarding the test case, as required by the provisions of paragraph 1 art.1239 Civil Code, "the contract is valid even when the cause is not expressly provided for", while the provisions of paragraph 2 of the same article states that "the existence of a cause is presumed valid until proven otherwise. "therefore, invoking the absence or invalidity proceedings has the burden of proof under article 249 C.proc.civ., any evidence is admissible.

²⁴ Titus Prescure, *Curs de contracte civile*, editura hamngiu, București, 2012, p.231;

²⁵ C.A.Brașov, dec.nr.839/R din 14 decembrie 2005 în Luminița Cristina Stoica, *Contract of maintenance and annuity, Judicial Practice and regulation of the New Civil Code*, Hamangiu Publishing House, Bucharest, 2011, p.15;

If the object of obligation of maintenance of beneficiary may consist in sending a capital of any kind, in exchange the benefit of the one who provides care can only consist in providing in nature for maintenance. The provision through which the creditor that commits for services to the debtor or third parties is considered unwritten.

Basically, through the maintenance contract all the categories of goods and rights can convey, all that can make the object of the sale/purchase contract. Most of the times the benefit of the creditor maintenance feature is realized *uno actu*.

There may be situations where the practice of maintenance contract has several lenders and/or borrowers for obligation to offer maintenance. In such cases, the obligation of maintenance is indivisible, actively and passively, resulting unequivocally from article 2256 para.2 Civ. Code.

Thus, if there are several creditors of the maintenance obligation, this shall be deemed to be executed only if all lenders have received proper maintenance. Failure to perform in relation to one of the lenders can attract the entire contract rescinded. In case of plurality of debtors, either of them may be required to execute performance maintenance, but also the provision of any of its maintenance is for all others a discharge of liability.

In the case of a single debtor for maintenance obligation if he dies and there will be more accepted heirs, they will be ordered to provide maintenance jointly and severally owing to their author.

For example, maintenance was established in favor of the spouses. At the death of one of the spouses, maintenance will run further in favor of the surviving spouse and the maintenance obligation will cease only when this one dies.

To the maintenance contract is applied certain provisions from the contract of annuity. Thus, it is hit by absolute nullity which constitutes a maintenance contract for the duration of the life of a third party who was dead on the day of conclusion of the contract. It is also struck by the invalidity of the contract maintenance creditor's demise followed that was affected by a disease to moment of the maintenance contract within a period of 30 days from that date. It is necessary that the death may have occurred due to illness that the one who was cared for and not from other causes. This cause of invalidity shall not apply to maintenance provided free of charge.

3. THE EFFECTS OF MAINTENANCE CONTRACT

3. 1. Obligations of the parties

Where the contract maintenance is free of charge, in general, the maintenance creditor has no obligations in relation to the debtor, with the exception of the obligation of the provider, if it has the form of the donation as traditionally referred to as "gratitude".

The maintenance contract set up for consideration is a synallagmatic obligation, incurred in the task of both sides, both the one who needs care and the one that provides care.

A. The obligations of the creditor of maintenance (the one who is cared for)

Where a maintenance contract is a consideration, i.e. whether the one for who care is provided made an obligation towards its provider to transmit a certain good in exchange for maintenance, he has the same obligations as the seller in the contract of sale and purchase. However, unlike the buying-selling contract, where the rule is that the performance of the seller's obligations shall be concurrent with the execution of obligations by the buyer, and the part that does not fulfil an

obligation is not entitled to claim other correlative obligation to execute without an agreement to the contrary, in the case of a maintenance contract for pecuniary interest the maintenance creditor fulfils its obligations, as a rule, previous to the execution debtor provider.

The one who is cared for is obliged to transfer ownership of the property, to teach good, to preserve the good, to guarantee the provider of care for eviction and hidden defects of the property.

B. The obligations of the debtor(provider of care)

The debtor is required to ensure the provision of maintenance, which is an obligation to do what needs to be done daily, until the death of the beneficiary that requires maintenance.

The maintainer is required to ensure the provision of maintenance obligation to do what needs to be done on a daily basis, for the period determined in the contract, if it is for a fixed period, or for the lifetime of the maintenance creditor, if the contract was not provided for the duration of the maintenance or only its viager character.

The place of *supply of maintenance* is determined by the parties or, in absence of a contractual term shall be deemed to be the kept at home, so payment is portable and does not cher, due to its specific nature.

If the *content of the obligation* has not been determined by the parties, then its determination will be made traditionally by a broad interpretation of the term maintenance. Consequently, maintenance should be ensured in full, according to objective criteria of *the level of living of the beneficiary*, at the time of contracting. In the absence of an express contractual term, it shows no relevance the fact that the person who is beneficiating has enough material means. This is because conventional maintenance obligation is not to be confused with the legal obligation to maintenance when need of care depends on the state of the rightful person to receive it.

In the case of a plurality of creditors, the contents of the claim of maintenance must be established for each lender individually, their physical needs or their spiritual ones can be very different. However, by way of novelty line (1) of article 2257 Civ.code introduces another criterium image that must be taken into account when determining the extent of the obligation of maintenance. The value of the borrower's lender capital alienated in exchange for provision of maintenance. Newly introduced landmark may be withheld only in respect of the establishment of costly maintenance and we appreciate that you have taken into account only that which comes to refine the process of determining the quality of maintenance benefits determined in accordance with the social status of the creditor of the obligation of maintenance. More specifically, we appreciate that it is natural that the previous social status to be maintained (no one concludes such a contract to see diminished his/her living standards, and, if that happens, the details should be laid down explicitly), but the quality and quantity of benefits may be influenced by the amount higher or lower capital received by the one who provides care.

Moreover, although the text of paragraph (1) points out that any reporting between the content and the purpose of the obligation to the creditor maintenance, maintenance must be carried out in an equitable manner, should not be lost sight of that this *contract* remains one *random* circumstance which imposes upon the provider of care to execute it, regardless of how onerous it turns out to be for him.

Therefore, the provider of care will not be able to justify any non-performance or decrease of the value of care by the fact that the value of maintenance that is provided has exceeded the value of the law. The provider of care will not be able to free up that responsibility, even if he would be obliged to repay everything he has received under the contract, giving up to the reimbursed equivalent value of benefits he provided. Only the consent of the person who is cared for can free the debtor of the obligation of maintenance.

With regard to *the exact content of the maintenance obligation*, the parties may determine it, by limited listing procedures for performance of the obligation. Until the entry into force of the new rules, if the parties have not determined in any way the content of the obligation of maintenance, the doctrine and case law had established that it was to be interpreted in a sense as comprehensive. In this respect, in the context of the concept of genre of maintenance, their tutors was supposed to provide the means to enrich both the Cilento and the spiritual needs of the creditor.

Paragraph (2) of article 2257 Civ.code brings the details of the process for accurate interpretation of the will of the parties, the naming of the main landmarks of the sample content requirements of the provider of care: food, clothing, footwear, cleaning, use of an appropriate housing, care and necessary expenses in case of sickness. We consider that this list made by the legislator is not exhaustive and comprehensive. For practical reasons of the doctrine we appreciate that it is advisable that the maintenance contract to be provided for elements of the obligation of maintenance in order not to create confusion primarily for contractual parties. Thus, the parties will know with certainty what obligations are resulting from the contract and in this way, they can be avoid any disputes.

In view of the reference to ensure the living needs, the maintainer will have and take the obligation of the place of the person in care, or finding a living space by way of lease or payment of rent and maintenance costs of accommodation occupied by the maintained etc. .

With reference to the content of the obligation of maintenance, in a particular case²⁶ it was considered by the Court that the conditions under which, through maintenance contract, debtor was required to ensure that all required maintenance creditors with a decent living and medical assistance, to bury them according to the custom of the place, the aid given by the debtor in the household or at work has no meaning of execution of obligations.

In the same time, it is important that the matter to have been omitted from the lawgiver, the spiritual needs of one who provides care, which, as already noticed in the doctrine, and will do for the future, subject to the obligation of maintenance, even more so as paragraph 2 of article 2257 Civ.code whatsoever the nature and not restrictive.

Considering that the provisions of paragraph (2) of article 2257 Civ. Code have a character device, the contracting parties are free to shape as they appreciate the content of maintenance obligation by extending or restricting it, this is a valid conclusion for para.(3) that establishes the obligation for the funeral of the person maintained in the case of viager maintenance or death occurred during the performance of the contract.

²⁶ C.A.Târgu Mureş, S.civ., Dec.nr.712/A din 15 septembrie 2004;

In terms of quality of maintenance, the doctrine held that the way of life of the creditor's maintenance contract at a later date, even if you don't know an improvement, must be at least even in the previous contract.

Burial will be made in compliance with religious rituals that the person who received care wanted or prescribed by the cult to which he belongs.

Regarding the personal character of the obligations assumed by the contract maintenance, in case it was noted that the maintenance was thought to both parties, and the person, about the maintenance obligation therefore is essentially personal, non-transferable, except if the parties have agreed that this agreement may be enforced by the trustee. A defendant in the case in question did not fulfill their obligations properly, them being gone for about eight months abroad, during which they mandated a third party to perform the maintenance creditor, although allegations were bound by convention to pursue personal, and it needs special attention, being deaf and blind, and moves as the 1st degree disability²⁷.

At the same time, the maintenance obligation is an obligation *to make, successive* and presents *a character for food, which is why*, in the event of default, the debitot is in arrears.

With reference to the nature of the obligation and the succession of daily maintenance, in practice it has been noted that the nature of the obligation of maintenance assumes its fulfillment in good faith, more so as the mode of enforcement is left to the discretion of the debtor, not fixed in the contract, by the way, thanks to the character of the daily execution of the contract, neither one could predict what it will need in the future for food, clothing, medicines, etc. the beneficiary or other care will require in the event of sickness or old age. By definition, the maintenance obligation is with successive execution, so the benefits will be made at intervals so as to correspond to the current needs of the beneficiary's rate (even in the presence of the debtor's domicile daily for ensuring these needs)²⁸.

From the provisions of art. 2261 para. Civ.code, shows that the maintenance requirement is *causa mortis transmissible but not entitled to maintenance*. However, it is only the unfulfilled obligation is transmissible at time of death of the person cared for.

Instead, considering the character of *intuitu personae* of maintenance, art. 2258 Civ. code prohibits the assignment of the claim, it may not operate neither total nor partial, in connection only with some of its components.

Whether maintenance is provided free of charge, the benefit due can be put under prosecution by the creditors of the person who received care, these can just revoke the contract or introduce *the oblique action*, pursuant to article 2259 Civ. code.

Thus, creditors of the person who was cared for, must be protected, when this diminishes the heritage through the disposal of a property/instead of receiving maintenance that cannot be subject to execution or prosecution. At the same time, lenders must be protected when assuming an obligation of maintenance free of charge or under conditions likely to create or increase a state of insolvency. Under

²⁷ C.A.Timișoara, s.civ., dec nr.2922 din 31 octombrie 2001, în Luminița Cristina Stoica, op.cit., p.72;

²⁸ C.A.Ploiești, s.civ. și pt.cauze cu minori și de fam., dec nr.676 din 7 octombrie 2008

these conditions, both categories of creditors may bring legal action to set aside, obtaining its specific effects.

In addition, the personal creditors of the one who receives care, may require the oblique action (art. 1560-1561 Civil Code) to maintenance execution by relieving the debtor's assets breadwinner for their daily living expenses necessary of course to the extent that a default occurs the breadwinner.

It is reported that the provisions of art. 2259 Civil Code. were derogatory to the rule of common law, which does not allow creditors to exercise the rights and actions that are closely connected to the person of the debtor.

In case of death of the person who receives care, his heirs can not demand further execution nor the amount of maintenance benefits due, but unexecuted during the life of the person who receives care, to run in their favor, because of the maintenance contract *intuitu personae*.

In this regard, in judicial practice, under the old regulations, it was noted that the conclusion of the maintenance is done in consideration of people who undertake obligations, which makes only them denounce the unexecution of the obligations that were assumed. Failure of maintenance of the person who was cared, can not be invoked by heirs in heritage which can not be transmitted, by way of succession, an extinguished debt. The heirs are only able to continue their action initiated by the author, this is just a transmission of the juridical way, not a claim.

However, in such cases, if the debtor of the obligation of maintenance has not fulfilled all obligations, the successors will be able to request and receive appropriate compensation in the form of compensatory damages.

Although the obligation of maintenance must be carried out in nature, in the course of the contract, may appear situations when the addict or the independent will of the parties, the nature of the obligation is no longer possible.

As stated in the legal literature²⁹, causes that can lead to this situation can be various: change of domicile of one of the parties, with the consequence of its reassignment to another commune, disputes between the Contracting Parties, the refusal of the creditor to receive maintenance, etc.

In this respect, para. (1) art. 2261 Civil Code mentions the death of person who received care as a transformation of maintenance money. As noted in the literature, the statement is welcome, primarily because ends the historical dilemma of transmission *causa mortis* of that obligation and, secondly, because it saves them the heirs of the person who was cared for of the performance of an obligation entered into *intuitu personae* to which they may be lacking skills / conditions for continuing execution in nature.

In such situations, it may proceed with the replacement obligation, meaning that it will not provide maintenance in nature, but by regular payment of sums of money. As assumed or not by the court intervention, transforming the maintenance can be judicial or extrajudicial. Regarding the *judicial transformation of maintenance*, the court can be invested with a request for conversion into cash maintenance or obligation maintenance by either the care provider or the one who received care. If the plaintiff is the person who received care, the court will accept the request if, on

²⁹ Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, Noul Cod civil, Comentariu pe articole, Editura C.H.Beck, București, 2012, op.cit., p.1717;

the basis of contradictory evidence adduced in that execution in kind is no longer possible due to the attitude of the debtor guilt. If the court finds guilt of the applicant-creditor request will be rejected.

Thus, in the Court's practice it was considered that the refusal to receive proper maintenance without a good reason constitutes an abuse of the client, he may not get to the annulment of the contract, availing himself of own fault.

On the other hand, it was appreciated and that the refusal to receive maintenance should not be characterized to be fault of the person who receives care, whether through his conduct, dealings with the creditor, the debtor was manifested, created a real sense of stress, uncertainty, fear for life and health. If the person who receives care is the one who refers the matter to the Court with an application for conversion of the maintenance obligation, then its admission is subject to proof by the plaintiff that, culpably, without grounds, refuses to accept the maintenance creditor.

However, considering that art. 2261 para. (1) Civ.code refers to "objective reasons", which widens the field of application admissibility replacement beyond finding fault of one party to any cause that attracts the impossibility of objective of enforcement in kind of maintenance, the Court will be sovereign in appreciation.

As a result of the acceptance of the request for conversion into money of the obligation of maintenance, the relations between the parties shall be governed by the rules applicable to the contract of annuity, and the borrower will be required to pay, in the form of periodic benefits, a sum of money, by way of production. In terms of the amount of the sum to be paid periodically, this is established, on the basis of samples, depending on the actual level of maintenance required by the lender.

Considering, on the one hand, that the maintenance needs of the debtor may not be the same throughout the execution of the contract, but also, on the other hand, there will be changes in the cost of living, the amount of money determined by the Court may be amended, upon request of the party concerned, in accordance with paragraph (2) of article 2261 Civ. Code

With regard to the *processing of out of court*, on the basis of the principle of autonomy of the will, the parties are free, through their agreement, to amend the maintenance requirement, replacing it with an obligation for periodic payment of a sum of money.

4. TERMINATION AND RESCISSION OF CONTRACT MAINTENANCE

As regards the cessation of maintenance, you need to distinguish the maintenance contract concluded for a fixed or indeterminate time or a viager character.

In the first case, in accordance with article 2263 para. 1 of the Civil code. maintenance contract concluded for fixed-term contracts shall cease upon expiry of this duration, except in the case where the maintenance creditor dies earlier when the contract is terminated at the latter date.

In the second case, if the term of the contract was not provided or has been provided for the maintenance of the viager character, then the contract will be terminated on the date of the death of person who received care, as resulting from article 2254 para. 2 Civil code.

In the event that maintenance was provided during the life of many people, under conditions of art. 2256 paragraph 1 Civil code related to the art. 2244 Civil Code, maintenance contract will cease, in the absence of contrary stipulation, from the

date on which the last of these people will die.

Termination of maintenance can occur as a result of the agreement and will of both parties (*mutuus disensus*), without obligation for the parties to show the cause for wanting that the maintenance would no longer have effect for the future.

In addition to these cases, art. 2263 Civ. code provides two cases of the maintenance contract, due either to the behaviour of one of the parties that make it impossible to execute contract under conditions conforming morality, or non execution of obligation without justification.

For these two reasons, the person concerned and which is not at fault, may require delivery of the judicial court resolution. The annulment of the contract can be declared only by the Court of Justice, unless the parties should be able to insert a contractual clause that draws unilateral cancelation maintenance where one of the two hypotheses would become exposed during the incident on execution of the contract. If however the parties inserted such a clause, then this will be considered as unwritten, the written notification of the debtor being devoid of any legal effect.

At the same time, assuming that the Court was vested with an action for the annulment of the contract based on the provisions of art. 2263 para.2 and 3 Civ.code, the defendant will not be able to prevent the admission of the action through an offer of maintenance done after entering the action.

The legal basis of resolution is the interdependence and reciprocity of obligations of the Contracting Parties by *sinalagmatic* contract. Despite the fact that this contract is of successive execution obligations from the execution perspective of the provider of care, the legislature has chosen to regulate its applicability in the case of resolution, and not the termination.

Concerning the abolition of the contract by rescinding or terminating because of the other party, which makes impossible the performance of the contract under conditions conforming morality, in juridical literature were justifiably remarked that the sending of the legislator to the criterium "morality", although surprising at first glance, it is entirely natural by reference to the subject-matter of the contract obligations, and the nature and specifics of the maintenance activity that involves personal connections and contacts very close between the contracting parties.

As regards the meaning of the term morality, juridical literature showed that "it is aimed at those behaviours, qualified social relations as positive morals of society to sanction conduct culpable of one party. The dynamic nature of this and various phrases appears as obvious, and, for the success of the action, the plaintiff is required to prove, by whatever means, that the defendant has a behavior that does not allow the execution of the obligation of maintenance under normal conditions, the society's moral standards compliant. Action in annulment of the contract will be promoted in this first hypothesis, either by the creditor or the debtor of maintenance."

Regarding the second reason for rescinding or terminating the contract of maintenance consisting of failure to perform or execute maintenance, is important to note that these need not be caused by the conduct of the person who receives care.

In this sense, in practice, the maintenance contract rescinded promoted by the maintained person was dismissed as unfounded when, on the basis of evidence, the Court established that the one who offer care have fulfilled the obligation properly until the date on which, under the influence of relatives, the person required care has refused maintenance. The departure of the complainant from

home, made the recurents unable to execute their obligations of the maintenance contract, more so with how these duties consisted, intrinsically, for food and nature of benefits, on succession that the person refused, without real justification.

Despite the fact that the regulation of art. 2263 Civ.code would arise that the maintenance contract rescinded could be pronounced only in respect of those two reasons referred to above, and in fact referred to the doctrine⁹, does not share this opinion. The resolution will be rescinded by the Court and where, for example, the transmission of the property provider at a later date, is evicted from the whole good or part of it, in case of lack of not contracting the person to care for. If the Court finds that the conditions of substance and form to the admissibility of the action exist, shall order the disbanding of rescinding or *terminating the contract*.

However, there may be the rescission of the contract as maintenance obligations by inserting the unfulfillment of the termination clause governed by the Civil Code art.1553.

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