

MAINTENANCE CONTRACT – UPDATES IN THE NEW CIVIL CODE

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Abstract: *The paper herein submits the evolution in time of the maintenance contract, which is frequently clinched in our country. This type of contract is defined and analyzed from various perspectives, such as in terms of involved parties, juridical character, duration and termination. It is differentiated from other judicially similar contracts, such as the annuity contract, its distinct and independent character being emphasized.*

Key words: *Civil Code, maintenance contract, debtor.*

1. Introduction

The contract whereby the persons transmit various assets or their entire wealth, most often to a relative, under the obligation undertaken by the beneficiary to maintain and care for this one throughout their lives, is frequently encountered in our country.

This contract, creation of the parties, was characterized for the first time in Romania, during 1923, as *unnamed contract*, by the High Court of Cassation, in accordance with Professor Dimitrie Alexandresco's opinion – founder of the science of civil law in Romania – after, previously, the same Supreme Court had decided otherwise.

Subsequently to its jurisprudential enforcement, the maintenance contract found its first legislative enforcement in art. 1665 and the following of the Civil Code, in 1940, which regulation remained however without effect, as on the 31st of December 1940, its implementation was postponed *sine die*.

Once with the adoption by the Senate, on the 13th of September 2004, of the draft for the new Civil Code, the legislative enforcement of the maintenance contract entered a new stage, materialized in the implementation, on the 1st of October 2011, of the new Civil Code; this contract leaving therefore the category of unnamed contracts and becoming thus a *named contract*, stipulated and regulated as distinct type of contract in Title IX “Various Special Contracts”.

If, in the draft of the new Civil Code, this contract was called “*Lifetime Maintenance Contract*”, the Commission for Amending the 2004-Code Draft proposed for the name of this contract to be “*maintenance contract*”, the lifelong character pertaining only to the nature and not to the essence of the contract, the parties being able to agree on another term.

Once with its jurisprudential recognition as *unnamed contract*, the High Court of Cassation, in its decision no. 444, on the 4th of May 1923, likewise defined it this way: “*contract whereby a person disposes*

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of all his/her assets or of a determined asset in exchange for the obligation undertaken by the beneficiary of these assets to maintain and care for the disposer to the end of his/her life”.

The Civil Code Carol the II-nd, in art. 1665, defined this contract as: “*The lifelong maintenance contract is the one whereby one party undertakes to transmit the other an asset in exchange for the maintenance and care obligation throughout his/her life”.*

The current regulation validates the rules sprung from practice, doctrine and jurisprudence, the *legal definition* (art. 2254 par. 1 and 2 Civil Code) stipulating: “*By the maintenance contract one party undertakes to effectuate for the benefit of the other party or of a certain third party, the necessary provisions for maintenance and care along a certain time. If, by contract, the maintenance duration was not stipulated or only its lifelong character was stipulated, then the maintenance is due throughout the maintenance creditor’s life”*, which definition follows the structure of the annuity contract, the legislator’s option being to define the contract only from the perspective of the obligations incumbent on the debtor of the maintenance liability.

The legal definition allows for the maintenance to be a free contract and for the provision of the maintenance to be achieved on a fixed term, not necessarily with lifelong character.

The main feature of the contract is its very *object*, namely the *maintenance and care for a person*.

Therefore, para. (2) of art. 2257 Civil Code contains an *exhaustive* list of the main components of maintenance (and care). The debtor of the maintenance shall *especially* provide the creditor with food, clothing, footwear, housekeeping as well as the use of an appropriate dwelling, the maintenance also including the necessary

expenses in case of illness. Obviously, beside bodily necessities, the notion of maintenance broadly comprises the necessary means for satisfying the creditor’s spiritual needs, such as scientific, cultural, artistic and informational needs¹.

Assuming that the maintenance is for life or the creditor dies within the contract duration, according to para. (3) of art. 2257 Civil Code, the debtor shall bury him/her.

Mention should be made that, in order not to cause the maintained person’s enrichment at the expense of the debtor², para. (1) of the art. 2257 Civil Code stipulates that the debtor of the maintenance owes the creditor fairly set provisions, considering the *value of the capital* and the *creditor’s previous social condition*.

Although the contract is *usually* concluded for the creditor’s life, as stated above, the *lifelong character* pertains only to the *nature*, and not to the essence of the maintenance contract, the parties being able to agree on either fixed-term or indefinite-term maintenance.

In terms of terminology, the contracting parties are referred to in the doctrine as: *maintainer* and *maintained* (maintenance beneficiary), although the new Civil Code avoided to name them as such, preferring the syntagms: *maintenance debtor* and *maintenance creditor*, which situation is probably due to the long period wherein the maintenance contract was an unnamed contract assimilated by jurisprudence and doctrine to one or another legislated contract.

According to the *legal definition*, the maintenance can be stipulated in favour *either* of the maintained person *or* of

¹ See T.S., s. civ., dec. no. 482/1989, in „Dreptul” [Law] no. 1-2/1990, p. 124.

² T. Prescure, *Curs de contracte civile [Course of Civil Contracts]*, Bucharest: Hamangiu Publishing House, 2012, p. 230.

another person, namely a *third party-beneficiary*, who must accept the maintenance stipulated to his/her benefit by the maintenance settler, however the third party-beneficiary will not be able to ask, on behalf of the contract provider, the termination of the contract, only the execution of the liability contracted by the maintainer³.

Assuming that we have a *plurality* of debtors and/or creditors, according to para. (2) of art. 2256 Civil Code, in the absence of contrary stipulation, the *maintenance liability* is *indivisible*, not being likely of partial execution, as regards both debtors and creditors.

This way, on the one hand, in the event of a *plurality of debtors* of the maintenance liability, each will be *jointly and severally* required (for all) to perform the maintenance liability; in exchange, the maintenance provision by any of them is liberating for all, too. The indivisible character of the maintenance liability is kept inclusively in the event the unique debtor of the maintenance liability dies; consequently, the accepting heirs will be *jointly and severally* required to provide the maintenance owed by their author.

On the other hand, in the event of a *plurality of creditors* of the maintenance liability, it shall not be deemed fulfilled unless integrally executed to all creditors, namely if all creditors received the due maintenance, the extent and amount of the provisions depending on all creditors' necessities and lifespan.⁴

Another novelty is given by the revocable character of the maintenance contract. Thus, in line with art. 2260 Civil Code: "(1) *The maintenance contract is*

revocable for the benefit of the persons whom the creditor of the maintenance owes food under the law if, by the effect of the contract, (s)he was deprived of the necessary means for fulfilling the obligation to provide food. (2) The revocation may be asked even if there is no fraud from the maintenance debtor and regardless of the maintenance-contract clinching moment. (3) Instead of deciding the termination of the contract, the court may, even of its own motion, however only with the maintenance debtor's assent, compel the latter to provide with food the persons for whom the creditor has such legal liability, without diminishing thereby the provisions due to the maintenance creditor".

Thus, in certain circumstances, respectively when the *maintenance creditor* is withal the *debtor of a legal maintenance liability*, if as a result of concluding the contract, (s)he becomes himself/herself deprived of the necessary means for executing his/her legal maintenance liability, then the debtors of the legal maintenance liability may ask for the maintenance-contract termination, regardless of the contract clinching moment, and even if there is no fraud from the debtor of the legal maintenance liability.

However, with the assent obtained from the debtor of the conventional maintenance liability, the court may compel this one to provide with food the persons for whom the creditor of the conventional maintenance has such legal obligation, obviously, provided the benefits due to the creditor of the conventional maintenance should not be diminished.

Although para. (1) of art. 2256 Civil Code stipulates the list of provisions in the annuity contract that are applicable, for *identity of reason*, also to the maintenance contract, the new Civil Code, recognizing thereby the partial similitude of juridical

³ L. Stănculescu, *Curs de drept civil: contract [Course of Civil Law: Contract]*, Bucharest: Hamangiu Publishing House, 2012, 442, n. 1.

⁴ F. Deak, *Tratat de drept civil: contracte speciale [Treaty of Civil Law: Special Contracts]*, Bucharest: Universul Juridic Publishing House, 2001, p. 534.

regime between the two (in terms of constitution modes, of the constitution throughout several persons' life, of the constitution in favour of several persons, of the constitution in favour of a deceased person, of the constitution in favour of a person affected by a lethal disease, of the legal guarantee, of the contract termination in case of not constituting the payment guarantee for the annuity and the irrevocability of the contract), *the maintenance contract neither shall be confused with the annuity contract*, nor is a variety of the latter, being a *distinct and independent contract*, despite the mentioned similarity.

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