



Maintenance Contract Versus Maintenance Donation in Romanian Legislation

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Abstract: The present research aims at the analysis and comparison of the maintenance contract with the donation contract with the task of maintenance in the Romanian legislative regulation. Starting from the definition of notions, we will identify and list the legal effects and the characters of each type of contract among those analyzed, we will delimit from other contracts. The need to compare the two contracts is of particular importance, because we bring up the issue of the legal mortgage of the maintenance creditor compared to the burden of maintenance in the donation contract which ultimately represents a modality of the legal act. As for the maintenance creditor, it is protected by the legislator with a real claim guaranteed by a mortgage right on the alienated property, while in the case of donations with the charge, this charge is noted in the land book having the effect of obedience to third parties, if the liberality has as object rights subject to publicity formalities, the task must comply with the same formalities. In the case of real estate, the task is subject to notation in the land book.

Keywords: maintenance contract; pregnancy donation; legal mortgage of the maintenance creditor; synallagmatic contract; unilateral contract; liberality; animus donned; maintained; maintenance; solemn contract; annuity

1. Maintenance Contract. Notion, Characteristics, Boundaries Against Other Contracts and the Legal Mortgage of the Maintenance Creditor

Incidental Legislation

Article 2.254 “Notion - (1) Through the maintenance contract a party undertakes to perform for the benefit of the other party or of a certain third party the necessary

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services for maintenance and care for a certain duration. (2) If the contract did not provide for the duration of the maintenance or provided only its lifelong character, then the maintenance is due for the entire life of the maintenance creditor. “

Article 2.255 “Form of the contract - The maintenance contract is concluded in authentic form, under the sanction of absolute nullity.”

Article 2.256 “Application of the rules on life annuity - (1) The provisions of the article 2.243-2.247 articles. 2.249, article 2.251 paragraphs (11) and article 2.252 shall apply accordingly to the maintenance contract. (2) In the absence of a contrary stipulation, the maintenance obligation is indivisible both in respect of the creditors and in respect of the debtors”.

1.1. Notion

A maintenance contract is a contract by which a party undertakes to perform for the benefit of the other party or a certain third party the services necessary for maintenance and care for a certain period (life or not).

The parties to this contract are the maintenance party - the person who submits a good in exchange for maintenance or the maintenance beneficiary or the maintenance creditor and the maintenance worker - the person who receives a good in exchange for maintenance or the maintenance debtor. If the contract did not provide for the duration of the maintenance or provided only its lifelong nature, then the maintenance sedates for the entire life of the maintenance creditor.

We appreciate that this contract generates an incessant and imperceptible claim, as well as an obligation to do, which can be judicially transformed into an obligation to give.

1.2. Legal Characteristics

The maintenance contract is:

- a) Contract appointed, governed by its own rules;
- b) In principle, a contract for a fee - both parties pursue a patrimonial benefit, but, as an exception, the maintenance contract can also be free of charge, in which case it represents a liberality.

Good Note! In our opinion, the maintenance contract seen as liberal, when it is free of charge, refers strictly to the establishment of the maintenance obligation in favor of a third party (yes). Thus, the obligatory relationship between the maintenance and the maintainer, as they were defined above, has a permanent onerous character, otherwise it would be nothing more than a donation affected by modalities, respectively with the burden of maintenance, in fact a disguised donation, and the obligatory relationship between the transmitter and the third beneficiary (the de facto creditor - in whose favor the maintenance was stipulated) will have the character of liberality, between them being concluded in fact a free deed.

- c) Solemn contract, which is validly concluded only in authentic form (under penalty of absolute nullity)
- d) Random contract - there are chances of winning and risks of loss for both parties, depending on the length of life of the maintenance, so the risk. The maintenance contract can also be concluded for a certain term, in which case it is no longer random;
- e) synallagmatic contract - both parties have reciprocal and interdependent obligations deriving from the contract, but contraire if the maintenance obligation is assumed free of charge, the contract is unilateral;

Good Note! Considering the synallagmatic character, as well as the translational one of the maintenance contract, being the essence of the contract the transmission of a good in exchange for a service consisting in the maintenance of the transmitter, we appreciate that in terms of it, it can only be a synallagmatic contract. We find the distinction in the legislative regulation, where the legislator had in view to define, classify and regulate differently, maintenance contract (synallagmatic contract) from donation contract (unilateral contract), the difference being made animus donned. Indeed, in practice we often encounter a mix of the two types of contracts, but from a doctrinal point of view the difference between the two is obvious.

f) Transfer of ownership contract - maintenance is provided in exchange for the acquisition of goods or a sum of money, the transfer effect occurring exactly as in the case of the sale contract;

g) Contract with successive execution regarding the obligation to provide maintenance - the obligation to provide maintenance must be performed permanently, daily

h) Irrevocable contract

i) contract concluded *intuitu personae* - is concluded taking into account the personal qualities of the parties, which shows that the execution of the contract is a specific and extremely sensitive, which requires special trust, which is why the maintenance obligation is an obligation to do, strictly personal and non-transferable. If in the contract there is a plurality of creditors or debtors, the maintenance obligation is indivisible, not being susceptible to partial execution.

In the case of the plurality of parts, the Civil Code, through article 2244 specifies that “*maintenance may be established during the life of several persons, following that, unless otherwise stipulated, the obligation of the maintainer to cease on the date of death of the last of these persons.*” And article 2245 “*the obligation to pay maintenance is indivisible with respect to the maintenance creditors, so that any of the debtors may be obliged to the full execution of the obligation.*”

1.3. Delimitation against other Contracts

Delimitation from Sale

- if the alienation of a good is done both in exchange for a good and the provision of maintenance, in order to delimit the maintenance contract from the sales contract, the main obligation must be established, the main purpose pursued by the parties at the conclusion of the contract.
- in the absence of other criteria, if the cash benefit represents less than half of the value of the alienated property, the contract is for maintenance, and otherwise, the contract is for sale.

Delimitation from Donation

- In order to delimit the donation maintenance contract, it is necessary to establish the intention of the parties, which results from the content of the contract and from

the factual circumstances (it will be established if the alienator concluded the *animus donandi* contract or only to ensure its maintenance)

- There is no donation, but a maintenance contract, if the parties have agreed in order to ensure mutual benefits.
- The fact that at the death of the maintenance person it is found that the value of the maintenance is lower than the value of the transmitted good does not turn the convention into a donation, since the maintenance contract is random.
- Reserved heirs cannot claim the reduction as the maintenance contract is a contract for consideration, although it is random.
- It is not to be confused with the donation with tasks, where the parties contract with the intention of making and receiving a liberality.

Delimitation from the Life Annuity Contract

- The life annuity contract gives rise to an obligation to give, and the maintenance contract to an obligation to do;
- The annuity is, in principle, traceable (only the free annuity can be declared imperceptible by contract), while the maintenance cannot be pursued by the creditors, being imperceptible;
- The life annuity is transferable, being able to form the object of an assignment, while the maintenance claim is personal and non-transferable.
- While in the case of the life annuity contract the indivisibility presumed by law is only active, in the case of the maintenance contract the indivisibility of the maintenance is also passive. In the absence of special rules, the rules of the life annuity contract are also applicable to the maintenance contract.

1.4. Legal Mortgage of the Maintenance Creditor

According to article 2386 of the Civil Code, *“Apart from other cases provided by law, the following benefit from a legal mortgage: The one who alienated a building in exchange for maintenance, on the alienated building, for the payment of the annuity in money corresponding to the unexecuted maintenance; the property right of the maintenance debtor will not be registered in the land book until together with this mortgage, the provisions of article 2.249 applying accordingly”*.

In order to ensure the legal protection of the maintenance creditor, the legislator granted him a legal mortgage for the situation in which the maintenance obligation was not executed and was transformed into an annuity, or when the annuity has an onerous character.

The legal mortgage constituted in the case of random contracts takes into account two premise situations, the first of the life annuity contract, and the second of the maintenance contract. In the case of the maintenance contract, the major difference from the case of the annuity contract is the object of the debtor's benefit. Specific to the annuity, the debtor undertakes to perform an obligation to "give" - periodic annuity, while in the case of maintenance the debtor's obligation is one to "do" - with complex and variable content, specific to the needs of the creditor. Also, article 2261 of the Civil Code, brings a remedy, in the sense that the parties have the possibility to request the court to transform the maintenance into rent. In conclusion, the legal mortgage for unexecuted maintenance will guarantee in this case, will guarantee the payment of the annuity in cash.

According to Law no. 7/1996 and the Order of the General Director of ANCPI no. 700/2014, the registration of the legal mortgage, in favor of the creditor, in the land book is done ex officio, at the moment of tabulation of the debtor's property right.

As there is the possibility of particular cases, we take into account that sometimes the maintenance claim or annuity can be established by stipulation for another, in which case the question arises whether the legal mortgage of the maintenance creditor will exist and if so, in whose favor register? As indicated in the doctrine, two options are considered, the one as the stipulating alien and the one as the third beneficiary. Regarding the first, the text of art. 2386 point 4, admits the possibility of registering such a mortgage, because the stipulator is the one who alienates the building, but he is not also the creditor of the maintenance claim, this being the third beneficiary, the registration of the mortgage in this case will be exceptional. With regard to the third party maintenance creditor, although he is undoubtedly the holder of the claim constituted by way of stipulation for another, he does not meet the condition provided in the text of the law, namely the mortgagee to be the one who alienated the property, or the third party does not alienate anything, could be the holder of such a mortgage. We consider, therefore, that the text provided for in Article 2386 pt. 4, in these particular cases, will also depend on *ratio legis*, so that the intention of the legislator in regulating such a guarantee was comminatory, trying to stop abusive practices by maintenance debtors, who shortly after concluding the contract, alienated the building to a third party, at the same time

stopping the execution of the maintenance contract. We consider auspicious, in such cases, the registration of the legal mortgage in favor of the third beneficiary, being diminished the risk of untimely loss of maintenance.

2. Donation - Notion, Effects of the Donation Contract between the Parties, Conditions of Form, Disabilities, Principle of Irrevocability, Revocation of Donation for Non-Performance of the Task

2.1. Notion

A donation is defined as the contract by which, with the intention of gratifying, a party called the donor irrevocably disposes of an asset in favor of the other party, called the donee. The gift contract is a liberality, i.e. the legal act by which a person disposes of his property free of charge, in whole or in part, in favor of another person. Liberalities can be made only by donation or bequest contained in the will.

2.2 Effects of the Gift Contract between the Parties

The translational effect of the contract

The main effect of the donation is that the right (real or created) which is the object of the contract is transferred free of charge from the donor's estate to the donee's estate. The donation may also have the effect of extinguishing a right and a correlative obligation (debt remission). The transfer of the right that forms the object of the donation contract takes place by right, at the moment of concluding the contract (the information provided by law, in principle, the authentic form), just like in the sales contract.

Details:

→ if the object of the donation is a right of claim, it constitutes a transfer of claim free of charge, being subject to the rules of this institution.

→ the manual gift is a real contract by which the property is transferred with the delivery of the good

→ article 885 Civil Code stipulates that, subject to contrary legal provisions, the real rights over the real estates included in the land book are acquired, both between the parties and towards third parties, only by their registration in the land book, based on the act or fact that justified the registration. It can be seen that in

the case of the donation to be subject to real estate advertising, the transfer of the right is postponed until registration in the land register, until now, the legal act may produce effects between the parties, but not in material transfer of real property rights, but in the matter.

Obligations of the Donor

The obligation to teach. After concluding the contract, the donor has the obligation to hand over the donated good according to the clauses established by the contract and to keep this good until delivery. The donor is liable to the donee, according to the general rules, for the loss or damage of the property through his fault, owing, if necessary, compensation. These problems do not arise in the case of the manual gift, as the delivery, in these cases, is done right at the time of concluding the contract.

Warranty obligation. According to article 1017 of the Civil Code, in the execution of the donation, the disposer is liable only for willful misconduct and gross negligence. Eviction guarantee: According to article 1018 of the Civil Code, the donor is not responsible for eviction unless: - he expressly promised the guarantee; - the eviction derives from his deed or from a circumstance that affects the transmitted right, which he knew and did not communicate to the donee at the conclusion of the contract. The donation is with tasks; in this case the donor is responsible for eviction like the seller, but only within the value of the tasks.

Guarantee against hidden defects: According to article 1019 Civil Code the donor is not responsible for the hidden defects of the donated good unless: - he knew the hidden defects and did not bring them to the notice of the donee at the conclusion of the contract, in such situations the donor is required to repair the damage caused to the donee by these defects; - the donation is with tasks, in this case the donor is responsible for the hidden defects as the seller, but only limits the value of the tasks.

It can be seen that, unlike the seller, in principle, the donor does not owe a guarantee for eviction or for any defects, because the contract is free. However, the donee can exercise against the donor's authors the guarantee action because the donor himself could have started it, because he transferred to the donee, together with the donated good, all the rights related to this good.

Duties of the Done

The rule is. When the donation is purely free, being a unilateral contract and free of charge, the donation contract, in principle, gives rise to obligations only on the part of the donor, the done having no obligation but only one of gratitude to the donor, which, in cases expressly provided by law, is sanctioned by revoking the donation for ingratitude.

Donation with tasks. However, the donation is synallagmatic and for a fee if it is with burdens (within the limits of the burdens). The task is an obligation imposed on the done, who, after accepting the donation, is required to perform it. The done is required to perform the task only within the value of the donated good, updated on the date when the task was to be performed. (Article 1028 Civil Code) Although the task resembles a resolute condition, they should not be confused, because their legal regime is different, at least under the following aspects:

→ in the case of the resolute condition, no obligation is created for the done, he being free to act as he wishes, without the risk of seeing his responsibility hired; instead, the task obliges the done, in case of non-execution, enforcement measures may be resorted to, the creditor having the right to the action in execution;

→ the condition operates by law, however the revocation of the donation for non-execution of the task does not operate by law, but must be required by justice (judicial revocation is not imperative, so the parties can stipulate in the contract an express commission agreement, providing for) Pregnancy must be possible, lawful and moral. It can be provided either in favor of the donor, or in favor of a third person (stipulation for another), or in favor of the done himself (only if the donor has any interest, at least morally, in carrying out the task, for example a study trip). In the case of the task stipulated in favor of the done himself, the donation is in fact purely free, but with the possibility of revocation for non-execution. Only in the case of a pregnancy stipulated in favor of the donor or a third party does the donation cease to be liberal as far as the pregnancy is concerned. Since the donation with tasks is, within the limits of the task, a synallagmatic contract (and for a fee), in case of non-execution, the specific effects of the synallagmatic contracts intervene, effects expressly enshrined in article 1027 of the Civil Code, according to which:

→ The donor or his successors in rights may request either the execution of the task or the revocation of the donation;

→ If the task has been stipulated in favor of a third party, he can only request the execution of the task (he cannot request the call of the donation).

→ The right to the action by which the execution of the task is requested or the revocation of the donation is prescribed within 3 years from the date on which the task was to be executed. In case of partial non-execution or late execution, the court is called to assess the gravity of the debtor's non-compliance and, depending on the circumstances, may order the termination of the contract, possibly with the granting of a grace period. When the donation is revoked for the non-fulfillment of the tasks, the good re-enters the patrimony of the donor free of any rights established in the meantime on him. If the property subject to restitution has been alienated, the restitution action may be exercised against the acquiring third party, subject to the rules of the land book or the effect of the bona fide acquisition of movable property or, as the case may be, the application of usufruct rules. These provisions shall also apply accordingly where real rights have been established over the property subject to restitution. For the admissibility of the action in the revocation of the donation contract for the non-execution of the task, it is necessary to meet the following cumulative conditions:

- the existence of a valid legal act concluded between the Contracting Parties;
 - failure of the done by the done;
 - the importability of the non-execution of the task and the delay of the done.
- Regarding the fault of the done, a relative presumption of guilt operates in his task, being, as such, necessary to prove an exonerating cause of civil liability, namely the fortuitous case, the force majeure or the fault of the donor.

2.3. Form Conditions of the Donation Contract

The Condition of the Authentic Form

According to article 1011 of the Civil Code, the donation is concluded by an authentic document, under the sanction of absolute nullity, which shows that the donation is a solemn contract, the authentic document being required as an essential element of contract validity and not as evidence.

Formal Conditions between those Present

The donation ends with an authentic document, under the sanction of absolute nullity. The authentic form is a measure of protection of the will of the donor,

which freely and irrevocably has a right in favor of another person, without that active element being replaced in his patrimony by an equivalent value. Given the legal requirement of compliance with the authentic form, proof of the existence of a donation cannot be made with witnesses, even if there is a beginning of written evidence. If the donation contract is not concluded in person by the parties, but is concluded through a trustee, the proxy of the trustee must be special and authentic. The nullity of the donation due to the lack of the authentic form can be invoked by the parties, the prosecutor, the court ex officio, as well as any other interested person (successors, creditors, etc.). It cannot be removed through confirmation or validation.

In order for the null donation for formal defects to produce legal effects, it must be completely restored, in compliance with the authentic form required by law. In judicial practice, it has been decided that the endowment of a child in order to conclude the marriage, having the character of a donation, can only be done by an authentic document. As an exception, the absolute nullity of the donation for formal defects may be covered after the death of the donor, by confirmation, by the universal or universal successors of the donor. They will be able to keep the donation valid or they can invoke its nullity, in order to inherit the goods donated by their author. Confirmation of liberality entails the waiver of the right to oppose formal defects or any other grounds for invalidity, provided that the rights of third parties are not prejudiced. (Article 1010 of the Civil Code) The explanation of this express legal possibility is that the absolutely null donation for formal defects leaves in the person of the successors an imperfect (natural) civil obligation which, being executed or confirmed voluntarily and with full knowledge of the facts, does not give rise to repetition. Confirmation or ratification as well as voluntary execution shall take effect only in respect of the successors who have consented.

The tasks or conditions of the donation must also be set out in authentic form. In order to inform the persons who justify the existence of a legitimate interest, the notary who authenticates a donation contract has the obligation to register this contract immediately in the National Notarial Register of evidence of liberalities.

The Conditions of Form between Absent

If the donation contract is concluded between the absentees, by separate offer and acceptance, it is necessary to meet special conditions:

a) Both the offer to give and the acceptance must be made in an authentic form; otherwise they will not produce effects, being absolutely null. This is because the

legal act of the donation includes both the offer to donate and its acceptance, and, if they are not included in the same document, they must be included in two separate documents, both concluded in authentic form. The offer of donation made to a person lacking the capacity to exercise is accepted by the legal representative. The donation offer made to a person with limited exercise capacity can be accepted by him, with the consent of the legal guardian.

b) For the validity of the donation accepted through a separate document, it is necessary for the acceptance to take place during the life of the donor. In case of death of the donor before acceptance, as well as in case of incapacity, the donation offer expires. (Article 1013 Civil Code) The done must also be alive at the time of acceptance, as the agreement of will is made at the time of acceptance of the offer. If the done dies before acceptance, his heirs cannot accept the donation because their author could not pass on any rights to them. Moreover, the creditors could not accept the donation (even during the life of the done) through the oblique action, nor could they attack the refusal to accept the donation through the Pauline action, because the done does not reduce his patrimony, but only loses the opportunity to enlarge it. However, the heirs and creditors of the recipient may communicate the acceptance made by him.

c) The donation offer can be revoked as long as the bidder has not been informed of the recipient's acceptance. The incapacity or death of the bidder results in the expiration of the acceptance. (art. 1013 paragraph (1) Civil Code) This means that the act of acceptance must be notified (communicated) to the donor, during his life and before he becomes incapable. The donation does not take effect until the day on which the act of acceptance will be communicated to the donor. The donor, until the moment of receiving the communication of the acceptance of the offer, may revoke the donation offer. Revocation may be express or implied. Thus, if before the communication of acceptance, the donor sold the property to be donated, this constitutes a tacit revocation.

Exceptions

Manual gifts, indirect donations and disguised donations are exceptions to the principle of solemnity of the donation. The manual gifts can have as object only corporal movable goods whose value cannot exceed 25,000 lei. The manual gift is a real contract; therefore, it is concluded by the material remission of the good. Indirect donations are made through a legal act, different from the donation contract (for example: debt remission and stipulation in favor of a third party). The disguised donation is that donation hidden under the appearance of a contract for

consideration, meant to hide from third parties the real legal operation between the parties. Disguised donations are, in principle, valid, as the simulation is generally not sanctioned with nullity.

If the object of the donation is a building, the formal requirements must be complied with in all cases. However, the right of pre-emption has no applicability in the case of donation. The contract must be concluded in compliance with the provisions on real estate advertising.

2.4 Inabilities to Dispose and Receive through the Donation Contract

Ability to Dispose of or Receive Liberalities

Anyone can make and receive liberalities, respecting the rules on capacity. As in the case of other contracts, in the matter of the donation contract, capacity is the rule and incapacity the exception. The condition of the capacity to dispose by liberalities must be fulfilled on the date on which the disposer expresses his consent, and the condition of the capacity to receive a donation must be fulfilled on the date on which the done accepts the donation. If, in principle, any person can donate and receive donations, the law provided for certain special incapacities to dispose of and receive through the donation contract, these incapacities being exceptions and being of strict interpretation. The capacity for use in matters of liberalities is regulated by article 987 Civil Codes.

Inability to Dispose

Since the donation contract for the donor is an act of disposition of the patrimony, in order to protect the patrimonial interests of certain persons, the law provided for certain incapacities to dispose.

- Minors and persons placed under judicial interdiction may not dispose by donation either personally with the approval of the legal guardian or through their legal representatives. In this sense, article 988 paragraph (1) Civil Code stipulates: the one without capacity to exercise or with limited capacity of exercise cannot dispose of his goods through liberalities, except for the cases provided by law. However, in practice, the validity of donations made in the form of regular gifts is recognized (for example, on the occasion of an anniversary), if they are appropriate to the possibilities of the giver.

- In favor of the guardian. According to article 988 paragraph (2) of the Civil Code, under the sanction of relative nullity, even after acquiring the capacity to exercise, the person may not dispose by liberalities for the benefit of the one who had the quality of representative or legal protector of his, before he has received from the court of guardianship download for its management. The exception is when the representative or protector is the ascendant of the disposer.

- The members of the associative forms in debauchery or indecision, according to article 28 paragraph (6) of Law no. 1/2000, cannot alienate their own shares to persons outside them, and article 28 paragraphs (7) prohibits the alienation of the lands of these associative forms. The ban applies to both paid and unpaid documents, including donations. The applicable sanction being the absolute nullity of the civil legal act.

Inability to Receive

- Foreign citizens and stateless persons can acquire the right of private ownership over land only under the conditions resulting from Romania's accession to the European Union and other international treaties to which Romania is a party, on the basis of reciprocity, under the conditions provided by organic law and inheritance legal (article 44 paragraphs 2 of the Romanian Constitution). The special regulation in this matter is brought by Law no. 312/2005. It provides for the acquisition of legal property over land by foreign nationals and stateless persons, as well as by foreign legal entities, through inters vivos legal acts, including donations.

At present, according to the law, the conditions for the acquisition by citizens of a Member State of the European Union or of the European Economic Area, of stateless persons domiciled in a Member State and of a legal person established in accordance with the law of a Member State property with respect to any category of land located on the territory of Romania, under the same conditions as those provided by law for Romanian citizens and for Romanian legal entities. The foreign national, the stateless person and the legal person belonging to the states that are not members of the European Union or of the European Economic Area may acquire the right of ownership over the lands, under the conditions regulated by international treaties, on the basis of reciprocity.

- Under the sanction of relative nullity, doctors, pharmacists or other persons (including persons practicing medicine illegally) during the period when, directly or indirectly, provided specialist care to the disposer for the disease that is the cause of death, may not receive donations made in their favor. (Article 990

paragraph (1) Civil Code) The incapacity is based on an absolute presumption of uptake and suggestion, so that the contrary evidence is not allowed, which would tend to prove the untainted nature of the donor's consent. From the interpretation of the legal provisions it results that in order to operate this interdiction it is necessary to fulfill three cumulative conditions:

1. the donation must have been made in the course of an illness from which the donor died;
2. the death was caused by the disease for which he was cared for;
3. The treatment has been repeated or continuous.

Thus, the ban does not apply to another doctor or pharmacist, who did not treat the donor during the last illness. The following are exempt from this prohibition:

→ The liberalities made to the husband, to the relatives in a straight line or to the privileged collaterals;

→ Liberalities made to other relatives up to the fourth degree, including, if at the date of liberality, the disposer has no husband or relatives in a direct line or privileged collaterals.

The same inability to receive donations is provided for priests or other persons providing religious assistance during the illness that is the cause of death. The conditions and provisions on exceptions, provided for doctors and pharmacists, are equally applicable to priests.

The Sanction of Incapacities

The non-observance of the incapacities regarding the foreign citizens, stateless persons and foreign legal persons attracts the sanction of absolute nullity, in this case the protected interest being a general one. Failure to comply with the other incapacities to dispose or receive is sanctioned with relative nullity. As regards the sanction applicable to doctors, pharmacists or priests, the new regulation put an end to the controversy in the legal literature and previous judicial practice, expressly providing for the sanction of relative nullity in the event of the existence of such incapacities.

Details:

- if the disposer has died due to the disease, the limitation period of the right to the action for annulment runs from the date on which the heirs became aware of the existence of liberality.

- if the disposer has been reinstated, the action for annulment of the donation may be brought within 3 years from the date on which the disposer has been reinstated.

The sanction of relative nullity for non-compliance with the incapacities regarding the person who had the quality of legal donor representative of the donor, doctors, pharmacists, priests or other assimilated persons, also applies to liberalities disguised in the form of a contract for consideration or made to an intermediary. The ascendants, descendants and husband of the person incapable of receiving liberalities, as well as the ascendants and descendants of the husband of this person, are presumed to the contrary to be proof to the contrary.

2.5. The Principle of Irrevocability of Donations**Notion and Regulation**

Donations, as liberalities between the living, are, by their essence, irrevocable. This irrevocability is expressly provided for in the legislation and is special, different from the common law on contracts. Thus, according to art. 1015 of the Civil Code, the donation is not valid when it contains clauses that allow the donor to revoke it by his will. In the matter of contracts, according to the principle *pacta sunt servanda*, once concluded, the contract has binding force between the contracting parties, and cannot be terminated or modified by the will of one of the parties (irrevocability of degree I). Irrevocability, in terms of donations, has a special character because it concerns not only the effects of the contract, but the very essence, being a condition of validity for the donation (irrevocability of degree II). So any clauses or conditions whose fulfillment depends on the will of the donor are incompatible with the essence of the donation, attracting its absolute nullity. The sanction of nullity affects the entire contract, and not only the clause incompatible with the principle of irrevocability.

Clauses Incompatible with the Irrevocability Principle

The irrevocability of the donation is determined by several interests: the protection of the donor and his family, the guarantee of the title deed acquired by the donee and the protection of third parties who enter into legal relations with the owner donor. Due to this fact, the parties cannot include in the donation contract clauses that would be contrary to the principle of irrevocability. These clauses, provided by article 1015 paragraph (2) Civil Code, are the following:

- a) Purely optional conditions. The donation is struck by absolute nullity when it is made under a purely optional condition, the realization of which depends exclusively on the donor's deed (for example: I donate if you want).
- b) Payment of undetermined future debts. The law declares null the donation that obliges the donor to pay the debts that the donee would contract in the future and whose maximum value was not specified by the donation deed. The reason of the legal text is to exclude the possibility that the donor can indirectly revoke his donation, by charging the donee with future debts, up to the value of the donated property.
- c) The right to dispose of the right donated. If the donor has reserved the right to dispose of the donated good, the donation is void in respect of that good or amount. Such a clause is in fact a purely optional resolute condition that circumvents the irrevocable nature of the donation. The donation is void, even if the donor dies without disposing of that property. Consequently, that good or amount will be transmitted to the donor's heirs, as long as they did not leave his patrimony. If the right to dispose covers only part of the donated goods, the nullity operates only in respect of that part, is the nullity is partial (provided that the goods are divisible, shareable).
- d) The right of unilateral termination of the contract (it is also null because it is a purely optional condition).

The following clauses are compatible with the principle of irrevocability:

- a) Causal and mixed conditions. The causal condition is the condition that depends exclusively on chance, and the mixed condition depends on the will of one party and the devotion of another person. Since these conditions do not depend only on the will of the donor, they do not contradict the principle of irrevocability of donations.

b) The term. The donation can be with a term, because the term, as a modality of the civil legal act, does not affect the validity of the transferred right, but only the exercise of this right.

c) Payment of present or future debts if they are specified in the deed of donation. Thus, the done will know his obligations from the conclusion of the contract; the donor will not have the possibility to indirectly revoke the donation by contracting some unspecified future debts.

d) The return clause of the donated goods if the done dies before the donor, even if he has descendants, or because of the death of the done and his descendants. If the object of the donation is goods subject to publicity formalities, both the right of the done and the right of return are subject to these formalities. (Article 1016 Civil Code) Such a stipulation is an express resolute causal condition which, in case of realization, produces retroactive effects.

e) the donation with the reservation of the usufruct or the right of habitation, in favor of the donor or of a third party, is allowed, the object of the donation contract being, in this case, the bare property, which is irrevocably donated. It is also allowed to donate the usufruct / right of habitation while maintaining the bare property.

f) The power of attorney clause. In the case of depositing a sum of money in a bank or other credit institution, in the name of another person, the depositor may insert in the bank contract a power of attorney clause on his behalf, without contravening the principle of irrevocability, because he acted on the basis of the clause of the bank account holder.

g) Inalienability clause. An inalienability clause, in so far as it is recognized as valid, i.e. if it is for a maximum period of 49 years and if there is a serious and legitimate interest, does not contravene the principle of irrevocability. (For example: the prohibition of the alienation of the property donated to the minor until his / her adulthood) The enumeration is exemplary.

Sanction. In all cases where a clause incompatible with the principle of irrevocability of the donation has been stipulated, among those provided by law, the donation is absolutely null. Absolute nullity can be invoked by anyone with an interest (parties to the legal act, advances of the parties, other persons who did not participate in the conclusion of the legal act, but who would justify their own interest, provided that the third party brings the action for absolute nullity against all contracting parties), ex officio court, prosecutor, as well as other bodies

provided by law; It can be invoked at any time, by way of action or exception, and is therefore time-barred; In principle, the abolished nullity cannot be covered by confirmation (neither express nor tacit) exception: according to article 1010 of the Civil Code, the confirmation of a liberality by the universal or universal heirs of the disposer entails the renunciation of the right to oppose the defects of form or any other reasons of nullity, without this renunciation prejudicing the rights of third parties.

2.6. Revocation of the Donation for Non-Performance of the Task

Extension of the Obligation to Perform the Task

When the donation is purely free, being a unilateral contract and free of charge, the donation contract, in principle, gives rise to obligations only on the part of the donor, the donee having no obligation but only one of gratitude to the donor, which, in cases expressly provided by law, is sanctioned with the revocation of the donation for ingratitude. Otherwise the question arises if the donation is pregnant. The task is an obligation imposed on the donee, which, after accepting the donation, is bound to perform it. If the donee has not fulfilled the tasks he has assumed, the donation may be revoked, because, within the limits of the stipulated tasks, the donation is a synallagmatic contract in which, if one of the parties does not perform its obligation, the other party may request either execution of the contract, or its revocation (resolution).

The task is an obligation imposed on the donee, which, after accepting the donation, is required to perform it. The donee is required to perform the task only within the value of the donated good, updated on the date when the task was to be performed. (Article 1028 Civil Code) Although the burden resembles a resolute condition, they should not be confused, as their legal regime is different, at least in the following respects:

→ in the case of the resolute condition, no obligation is created for the donee, he being free to act as he wishes, without the risk of seeing his responsibility hired; instead, the task obliges the donee, in case of non-execution, enforcement measures may be resorted to, the creditor having the right to the action in execution;

→ the condition operates by right, instead the revocation of the donation for non-execution of the task does not operate by law. The task must be possible, lawful and moral. It can be provided either in favor of the donor or in favor of a third

person (stipulation for another) or in favor of the done himself (only if the donor has any interest, at least morally, in performing the task, for example a study trip) In the case of the stipulated task in favor of the done himself, the donation is in fact purely free, but with the possibility of revocation for non-execution. Only in the case of the burden stipulated in favor of the donor or of a third party does the donation cease to be liberal in the extent of the burden.

Donor Rights

As the pregnancy donation is, within the limits of the pregnancy, a synallagmatic contract, in case of non-execution, the effects specific to the synallagmatic contracts occur. Thus, in case of non-execution of the task, the donor or his successors in rights (heirs, creditors) carry out its forced execution, i.e. fulfilling the service that is the object of the task, without the done being able to release the task, abandoning the donated goods. In the case of the task stipulated in favor of a third party, he will only be able to request the execution of the task and not the revocation of the donation, as he is only a simple creditor, not being a party to the contract of donation with the task. The right to the action by which the execution of the task is requested shall expire within 3 years from the date on which the task was to be executed.

Unilateral or Judicial Revocation of the Gift

In case of non-execution of the task, in addition to the possibility of requesting the forced execution, the revocation of the donation contract for non-execution of the task may also be requested. Revocation for non-performance of the task does not operate by law, but must be required by justice. Judicial revocation is not mandatory, so the parties may stipulate in the contract an express commission agreement, which could also provide for the revocation of the right in case of non-execution of the task:

- The commission pact takes effect if it expressly stipulates the obligations whose non-execution entails the legal revocation of the donation;
- The done must be delayed, unless it is agreed that it will result from the simple fact of non-execution;
- The delay is effective only if it expressly indicates the conditions under which the commissioner's agreement operates

The revocation of the contract may take place by written notification of the done when the parties have agreed so, when the done is rightly in arrears or when he has

not fulfilled the obligation within the time limit set by the delay. Thus, the declaration of revocation must be made within the limitation period provided by law for the action in revocation of the donation for non-execution of the task. In all cases, the declaration of revocation shall be entered in the land register or, as the case may be, in other public registers, in order to be opposable to third parties. The statement of resolution shall be irrevocable from the date of its communication to the debtor or, as the case may be, from the date of expiry of the time limit set by the delay. Hence the conclusion that it is possible that the donation contract provides that the donor waives the right to request the revocation of the donation for non-performance. Consequently, in such a situation, the donation must be considered revocable only for other causes provided by law. When the stipulated task has been fulfilled only partially, the judge has the right to assess whether the non-performance measure justifies the revocation of the contract.

Action for revocation

For the admissibility of the action in the revocation of the donation contract for the non-execution of the task, it is necessary the cumulative meeting of the following conditions:

- The existence of a valid legal act concluded between the contracting parties;
- Non-execution of the task by the done;
- Importability of non-execution of the task and delay of the done. (As for the guilt of the done, the task is a relative presumption of guilt, being, as such, necessary to prove an exonerating cause of civil liability, namely the fortuitous case, the force majeure or the fault of the donor.)

This action, having a patrimonial character, can be brought by the donor, by his heirs or by the creditors of the donor against the done or his heirs. The right of action requesting the revocation of the donation or the execution of the task shall expire within three years from the date on which the task was to be performed.

When the donation is revoked for the non-fulfillment of the tasks, the good re-enters the patrimony of the donor free of any rights constituted in the meantime on him (The contract is considered never to have been concluded; in this case, each party is required to return the benefits received to the other party). If the property subject to restitution has been alienated, the restitution action may also be exercised against the acquiring third party, subject to the rules of the land book or the effect of the acquisition in good faith of the movable property or, as the case

may be, the application of usufruct rules. These provisions shall also apply accordingly where real rights have been established over the property subject to restitution.

Conclusions

Although the two types of contracts analyzed have many similarities, most often, in practice, the end result is the same; respectively the maintenance and the donor transmit a real estate in exchange for which both benefit from the maintenance performed by the debtor, it is necessary to delimit the maintenance contract from the donation with tasks. First of all, it is necessary to establish the intention of the parties, which results from the content of the contract and from the facts. The analysis of the purpose pursued by the parties, as well as of their behavior at the conclusion of the civil legal act is very important in establishing whether the alienator concluded the animus donned contract or only to ensure its maintenance.

If the benefits are mutual, undoubtedly we can talk, of course, about a maintenance contract and not about a donation. The fact that at the death of the maintenance person it is found that the maintenance value is lower than the value of the transferred good does not turn the convention into a donation, since the maintenance contract is random. Reserved heirs cannot claim the reduction as the maintenance contract is a contract for consideration, although it is random. At first glance, the confusion of the donation with the maintenance task with the maintenance contract can be made very easily. In the end, we are talking in both cases about maintenance as a final result pursued by the parties, all the more so as the donation with the task turns from a free deed to a deed for consideration within the limit of the imposed burden, as we have shown above.

We are of the opinion, as it has been shown in the doctrine, that confusion between the maintenance contract and the maintenance donation is not possible, where, in the latter case, the party's contract with the intention of making and receiving a liberality. Another difference that we can notice is that, in the case of the maintenance contract, the transmitter of the real estate benefits from a legal mortgage right provided by art. 2386 point 4, on the alienated property, to guarantee the execution of the maintenance claim. Thus, the donor from the tasked donation does not benefit from the same remedy, as the text of the law states that only "the one who alienated a building in exchange for maintenance, on the alienated building, for the payment of the annuity in money corresponding to the

unexecuted maintenance; the property right of the maintenance debtor will not be registered in the land book only with this mortgage... “, or the donor alienated animus donned, not in exchange for the maintenance, the donation being affected only by one way of the legal articles.

As it is also called, the donation with the task is a contract affected by modalities, in this case the task as a modality of the legal act. Along with the term and condition, the pregnancy must be analyzed from this perspective. On the other hand, we also find the trust substitution in the case of liberalities, where art. 994 paragraph 1 of the Civil Code. “A liberality may be burdened by a task consisting in the obligation of the institution, done or legatee, to administer the goods that are the object of liberality and to transmit them, at his death, to the substitute appointed by the disposer” in conjunction with art. 995 paragraphs 3”*If the object of liberality is rights subject to publicity formalities, the task must respect the same formalities. In the case of real estate, the task is subject to notation in the land book.*”, From which we can easily conclude the delimitation made by the legislator, that the burden of the donation is noted in the land book, of the sender of the loan agreement, a legal mortgage which is in fact a mortgage that guarantees a claim, a real right.

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