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Assessments on the Conditions of Persons Who have the Legal Right to Caretaking

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Abstract: Caretaking legal obligation is one of the "well established" institutions in family law, in addition to the vast regulation, it also enjoys a multitude of opinions formulated by the doctrine and the courts, national and not only. However, it cannot be ignored that certain aspects are not fully clarified: the criteria for determining the state of need of the creditor of the Caretaking obligation, the delimitation between this and the state of strict necessity, the meaning of the phrase "continuing studies" by the child who has become an adult, the meaning of the notion of the creditor's assets from which he can support himself and, last but not least, the delimitation between the creditor's inability to support himself from his work and the existence of a state of need as a result of his fault. In our analysis, we started from the provisions of the current Civil Code, trying to suggest solutions for the issues raised, with the help of established doctrine and decisions and rulings from judicial practice, some even before the entry into force of the indicated normative act.

Keywords: state of need; inability to Caretaking; appropriate behavior

1. Introduction

Caretaking legal obligation is the duty imposed by the law between certain natural persons, indicated by the law, to ensure, in case of need, the means necessary for living (Bodoaşcă, Drăghici & Puie, 2012, p. 400; Lupaşcu & Crăciunescu, 2012, p. 432; Costache, 2017, pp. 140-141). Its importance occurs both from the vast regulation it enjoys – Title V (art. 513-534) from the Second Book ("On family") of the Civil Code, and also from special norms–, but, most of all, from the nature of the relations it is based upon – existing or previous family relations, those arising from marriage, natural or civil kinship, affinity relations or those associated to

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family (Bodoaşcă, Drăghici & Puie, 2012, p. 398-399; Lupaşcu & Crăciunescu, 2012, p. 432; Avram, 2016, p. 510).

According to the provisions of art. 524 Civil Code, 'only the person who is in need, not being able to support himself with his work or with his goods is entitled to caretaking'. Also, art. 526 par. (1) Civil Code establishes that. 'The person who is guilty, in relation to the obliged person, of serious deeds, against the law or public morals, cannot claim caretaking'.

We understand from these provisions that, in order to benefit from the right of legal caretaking, a person with vocation to it, must, based on the law, fulfill, at the same time, the following conditions: to be in a state of need; the state of need is caused by the inability to support himself with his work or with his goods; not to have committed, in relation to the person from which he claims caretaking, serious deeds, against the law or public morals (Bodoaşcă, Drăghici & Puie, 2012, p. 424).

Besides these general conditions, the creditor of the caretaking obligation must fulfill some special conditions, according to the specific aspects of the relations between him and the debtor. Thus: in the case of the caretaking obligation between former spouses whose marriage has been dissolved by divorce, the inability to work of the person claiming caretaking must have occurred either before the conclusion of the marriage, during the marriage or within a year from the dissolution of the marriage and must be due to circumstances related to the marriage (art. 389 Civil Code); in the case of putative marriage, the creditor must have been of good faith at its conclusion; the spouse that supported the child of the other spouse, may ask, caretaking from the latest only if they offered caretaking for at least ten years (Lupaşcu & Crăciunescu, 2012, p. 444).

2. The State of Need

The state of need must be judged, first, as a general condition, irrespective of the person claiming caretaking. Secondly, it is necessary to analyze the aspects of this condition for certain categories of persons.

The Civil Code offers few criteria concerning the definition of the state of need, but the first landmark can be discerned from the provisions of par. (2) of art. 526 Civil Code, establishing that, when the state of need is because one's own fault, the person may 'only ask for strict necessity caretaking. 'Thus, ensuring caretaking of a person entails more than strict necessity caretaking, and the state of need entails

more than the state determined by the inability of the person claiming it to ensure his own means of subsistence.

Being a state of things, occurring from the distinction above as being variable, it entails that a person cannot ensure, fully or partially, the necessary means for living in agreement with general needs, with his particular material and spiritual needs, but also in relation to a previous level in the period before and in relation to his current possibilities, but not in the sense that it is compulsory to maintina this state in its previous limits (Bodoaşcă, Drăghici & Puie, 2012, p. 426; Hageanu, 2012, p. 301).

Concerning general needs, the Law no. 174/2020[1] has changed and added to the Government's Emergency Ordinance no. 217/2000 concerning the approval of the monthly minimal consumption basket[2], establishing, in Appendix 1, the products and services that make up a 'minimal basket' that includes: food, clothing and shoes, housing and related expenses, home use and personal hygiene products, education, culture, health, recreation and vacation products and services and the economy funds of a family. The value of a 'minimal consumption basket for decent living is set each year by the National Institute for Statistics and is approved by the order of its president '(art. 1^1 of the emergency ordinance) and 'constitutes the main element for the basis of the country minimum guaranteed wage' (art. 3 of the emergency ordinance no. 217/2000), which is 2550 lei each month for the year 2022.

Although the above do not contribute to the establishment of some clear criteria nor for the establishment of the real value of general needs, the elements in the appendix may constitute a landmark for the judge when appreciating the state of need of the person claiming caretaking.

In any case, proof of the state of need, which is a matter of things, is in the burden of the person entitled to caretaking and can be made by any means of proof. (art. 528 Civil Code).

Certain conclusions have occurred in legal practice and in the doctrine. So, the state of need is also particularized in relation to the previous living conditions of the creditor (Lupaşcu & Crăciunescu, 2012, p. 442), this does not mean that the debtor is obliged, in all cases, to ensure the same level (Supreme Court, civil section, decision no. 859/1958), but also according to certain specific and real

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[2] Published in the Official Monitor, Part I, nr. 606 of 25 November 2000, added and changed.

elements, such as the creditor's health, allowing him or not to support himself (Bodoaşcă, Drăghici & Puie, 2012, p. 426), or the state of being under age which involves, in all cases, specific expenses for optimal raising and development (Filipescu & Filipescu, 2006, pp. 550-551; Lupaşcu & Crăciunescu, 2012, p. 443), or the existence of some expenses for professional training for the adults up to 26 years of age that is pursuing his studies without the necessity that the 'beneficiary of the pension being enrolled in a compulsory form of education' (High Court of Justice, civil section, decision no. 3799/2004).

Concerning the situation of the child that is no longer under age, art. 499 par. (3) Civil Code establishes that 'parents are obliged to support the child that is no longer under age if he is still pursuing his studies, until these are graduated, but not after the age of 26". Our conclusion, stemming from the opinions expressed by national courts (High Court of Justice, the court for clarifying some legal issues, decision no. 65/2018 regarding the interpretation of the expression 'pursuing of studies' included both in the provisions of art. 499 par. (3) of the Civil Code[1]), is that is refers to all forms of education – full time, part time or distance learning – whether in a public or a private institution, since the level of knowledge gained and the level of intellectual effort are the same in all these forms, the court must appreciate each situation concerning the state of need in relation to obtaining the first qualification that allows performing work or superior qualification.

Thus, even if the law does not distinguish, but taking into consideration the reason for the lawmaker to adopt such norms, we believe that the opinion according to which 'the parent no longer has the obligation to support the child while he is enrolled in Master degree studies, in doctoral studies or in the courses of a second graduate school, since the state of need ends, the child being able to support himself' is the most just. So, caretaking is due for the child who is pursuing studies until the age of 26, but only if his state of need is proven. We have to mention that this solution too must be nuanced, in the sense that the exercise of certain professions is conditioned by the graduation and obtaining of the diploma of university master or doctoral studies or by obtaining the quality of PhD student (for example, for university teaching staff).

In any case, the state of need of the adult who is pursuing his studies shall be appreciated by the court according to his specific needs, the necessary expenses for living and, in particular, the needs specific to pursuing studies, such as books,

[1] Published in the Official Monitor, Part I, nr. 963 of 14 November 2018.

courses and other materials used in the process of professional training (Maramureș Court, decision no. 425/A/2019), but only by fulfilment of the conditions imposed by the law, not only of special conditions (age and pursuit of studies), but also of general conditions, sense in which it was appreciated that 'the mere pursuit of studies does not automatically lead to parents' obligation to pay caretaking allowance" (Maramureș Court, decision no. 339/A/2019).

3. The Incapacity of the Creditor to Support Himself with His Own Work and Goods

According to art. 524 Civil Code, the state of need of the entitled person to caretaking must be determined by his incapacity of supporting himself with his own work and goods. Therefore, if the person can support himself with his own work, with his own works and goods, or only with his goods, the right to caretaking no longer has legal justification.

This incapacity may be total or partial, the necessary means for living being either inexistent or insufficient, a person „being entitled to caretaking even if he succeeds to cover part of his income from his own resources' (Iasi Court, section 1 civil, and decision no. 189/2015).

The incapacity of the creditor to support himself with his work may result from his incapacity to work or may be the consequence of not obtaining sufficient income to cover necessary living expenses (Bodoaşcă, Drăghici & Puie, 2012, p. 432). The incapacity to work usually involves the existence of a disease or of a medical state, or the wear of the body that does not allow for work – illness, pregnancy, old age (Lupaşcu & Crăciunescu, 2012, p. 443) – but may also be determined by 'satisfying certain social requirements' - such as the case of the adult pursuing his studies (Constitutional Court, decision no. 77/2010 regarding the rejection of the unconstitutionality exception of the provisions of art. 86 and art. 94 Family code)[1].

The incapacity to work can be total or partial, the right exists and the value of the allowance being proportional to the degree of incapacity (Filipescu & Filipescu, 2006, p. 553) and to the beneficiary's work potential. (Florian, 2018, p. 587). However, the incapacity to work does not include the case in which a person is able to work but does not work, the limits of caretaking are different, depending on the real situation, reaching the case of strict necessity caretaking when, according to

[1] Published in the Official Monitor, Part I, no. 128 of 25 February 2010.

art. 526 Civil Code, the state of need is determined by the creditor's fault. (Florian, 2018, p. 587).

Furthermore, reaching retirement age does not result in an absolution presumption of incapacity to work. In fact, the rule in the matter is that of proving the incapacity to work, so that the person reaching retirement age, in order to benefit from caretaking, must prove his incapacity to work, by a medical-legal document, reaching this age meaning that the person has the right to no longer work, but, in fact, there are numerous cases in which people that have reached retirement age continue to work (in some cases the law provides the terms in which they can do so) and a potential presumption of such incapacity cannot be extended as interpretation (Filipescu & Filipescu, 2006, pp. 553-554; Florian, 2018, p. 587).

Buy, by exception, for the minor under 15 it is absolutely presumed that he has no capacity to work, thus being in need due to the incapacity to work (Filipescu & Filipescu, 2006, p. 554). According to art. 49 par. (4) of the Romanian Constitution, the minimal age to be employed is 15, meaning that full work capacity, the ability to conclude an individual work contract is gained at age 16, between 15 and 16 this only being possible with the approval of parents or legal representatives and only for work, for activities that are adequate with the person's physical abilities and knowledge, if this does not jeopardize his health, development and professional development. (art. 13 par. (1) and (2) Work code).

The law allows the minor aged between 15 and 18 to conclude individual work contracts, having limited work capacity between 15 and 16 and full capacity between 16 and 18, but only for light work (art. 5 par. (2) and (3) of the Government Decision no. 600/2007 regarding protection of youngsters in the workplace[1]). Also, according to art. 2 let. d), art. 3, 4 and 8 par. (1) let.a) of the Government Ordinance no. 44/2008 regarding performance of economic activities by authorized natural persons, individual companies or family companies[2], 16 year old minors may perform economic activities as authorized natural persons or in an individual or family company, this age being set as minimal limit also for

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[2] Published in the Official Monitor of Romania, Part I, no. 328 of 25 April 2008, with all subsequent changes and additions.

apprenticeship contracts (art. 7 par. (1) let. b) of the Law no. 279/2005 regarding apprenticeship in the workplace[1]).

As resulting from art. 524 Civil Code, the state of need is not only related to a person's incapacity to support himself of his own work, the analysis is also focused on the impossibility of supporting himself with his own goods. Since the law uses the expression 'his own goods' we appreciate that it refers, firstly, to those goods whose owner is the specific person, but we do not exclude the existence of another main real right allowing the conclusion of onerous juridical acts, such as beneficial interest that may be given or of any other object that can be rented or leased in the terms set by art. 714 and 715 Civil Code.

Consequently, caretaking cannot be claimed by the person who detains goods that are not necessary to him and that can be onerously used or used in other ways, such as rental or if those goods are bearing benefits (Drăghici & Duminică, 2014, p. 57) – either natural or industrial – that are sufficient to ensure living.

Concerning those goods one must also take into consideration the types of property rights, either an exclusive property right or another one of its modalities. Mainly, we have analyzed the distinction between common goods and personal goods of spouses, being appreciated that when deciding upon the state of need, both categories will be taken into consideration (Filipescu & Filipescu, 2006, p. 549).

But the analysis must be extended at least to common property on quotas, that is to common co-property and forced co-property, when the goods are the main ones (in our opinion, excluding forced coproperty that has as object accessory goods, that have the same fate as main goods).

Concerning common co-property (that may exist in the case of spouses who have chosen the matrimonial regime of goods separation, according to art. 362 par. (1) Civil Code) we must emphasize that their use by administration or disposal acts is made in the terms of art. 641 Civil Code. Thus, for example, concluding lease contracts is made in compliance with the majority rule, only with the approval of co-owners that detain the majority of quotas (art.641 par. (1) Civil Code), while leases for longer than 3 years, which are assimilated to disposal acts, may only be concluded with the approval of all co-owners (art.641 par. (4) Civil Code). The only use act that may be concluded by a co-owner by himself is the alienation of his own quota of that right.

[1] Republished in the Official Monitor, Part I, no. 498 of 7 August 2013, with all subsequent changes and additions.

Concerning forces co-property, the goods that constitute its object are, generally, accessory goods of some main goods, being in the exclusive property of owners (Bîrsan, 2013, p. 217; Stoica, 2013, pp. 311-312), and, only by exception, main goods, such as the case of family memories and periodical property. If, in the case of family memories, these may be shared only voluntarily, if not they can be alienated, loaned or leased only with the 'unanimous approval of joint holders' (art. 1142 par. (4) Civil Code), regarding periodical property, each co-owner may solely conclude 'acts such as lease, sale (...) and others as such' only for the interval of time that he has (art. 689 par. (1) Civil Code).

In conclusion, the use as juridical act is limited, as a rule, by the necessity of obtaining the approval of others or of all co-owners, fact which, in our opinion, must be taken into consideration when appreciating the existence of the state of need.

In the case of spouses that own goods in joint property (hypothesis possible in the case of community matrimonial regimes, with the mention that in the case of conventional community it is possible that the parties decide upon 'restraining the community to (…) determined debts in the matrimonial convention', according to art. 368 let. b) Civil Code), the appreciation of the state of need is made also according to common goods, if applicable.

Our analysis must take into consideration receivables, rents and pensions, the goods are defined by art. 535 Civil Code as those things that are 'tangible or intangible that constitute the object of a patrimonial right',or, according to CEDO legal practice, are goods and receivable rights (Decision of the Commission for Human Rights of 27 Februaries 1995 in the case Dello Preite c. Italy; Decision Pressos Compania Naviera and others c. Belgium of 20 November 1995; Decision of the Commission for Human Rights of 9 September 1998 in the case Lenzing AG c. Great Britain), rents (Decision Mellacher c. Austria), but also the right to pension (Decision Muller v. Austria of 16 December 1974).

Concerning these, national courts have decided, for example, in the sense that:

- the person receiving an invalidity pension or retirement pension may claim caretaking pension, if the pension does not cover normal living needs (Bucharest Appeal Court, Section IV Civil, decision no. 2073/2000) and if, by cumulating the two, the amount necessary to ensure previous living conditions of the creditor is not surpassed (Filipescu & Filipescu, 2006, p. 550). The solution is also justified by the basis of the legislation regarding the system of social security, pension,

irrespective of its form, not being founded on the criteria of the state of need of that person (Florian, 2018, p. 587);

- the existence of a receivable right resulting from the judicial conversion of conventional caretaking in a monthly cash payment, does not exclude the right to benefit, in addition, to a caretaking pension (Hunedoara County court, civil decision no. 169/1980).

For the minor, the law (art. 525 par. (1) Civil Code) presumes the state of need when he cannot support himself with his own work (Galați court, civil decision no. 4590/2018), even if the has goods, if he claims caretaking from his parents (not from other persons, in relation to these general conditions apply). This presumption is limited from a double perspective (Florian, 2018, p. 588), and it only applies during the period in which the person is under age (not for the adult) and only for the caretaking claimed from his parents, but, if these, by ensuring this caretaking, would 'jeopardize their own existence', the guardianship court may decide that the caretaking is ensured by using the child's goods, with the exception of those that are of strict necessity (art. 525 par. (2) Civil Code).

4. Adequate Behavior

According to art. 526 C. civ., with the marginal name 'Inadequate behavior', 'the person who is guilty of serious deeds, against the law or public morals in relation to the person obliged to caretaking, cannot claim caretaking' and 'the person who is in a state of need of his own fault may only claim strict necessity caretaking'.

Thus, not fulfilling the condition of adequate behavior has the following effect:

- loss of the right to legal caretaking by the person who committed, of his own guilt, 'serious deeds' which are against the law or public morals, for example criminal activities but also other deeds such as those entailing succession indignity (art. 958 par. (1) și 959 par. (1) C. civ.).

According to art. 510 and 508 Civil Code, the parent's parental rights can be terminated if he 'jeopardizes the life, health and development of the child by ill treatments, by consumption of alcohol and narcotics, by abusive behavior, by severe negligence in fulfilling parental obligations or by severe breach of the child's superior interest', that not meaning that he is exempted from the obligation to grant the child caretaking. However, the deeds that have entailed termination of parental rights constitute serious deeds that may lead to the termination of the

parent's right to receive caretaking by his child. But, we appreciate that regaining the exercise of parental rights, in the terms of art. 512 Civil Code, may not lead to the 'reactivation' of the parent's vocation for caretaking from his child, since art. 526 Civil Code does not condition its application by any moment of committing those deeds;

- reducing the value of the right up to the limit of those strict necessity needs, if the state of need is his own fault. Even if it was constantly appreciated that the person able to work but does not have the means necessary for living, either by waste or by refusing to work, is not entitled to caretaking, his behavior being against social norms (Bodoaşcă, Drăghici & Puie, 2012, p. 438), the solution of the lawmaker is that he is entitled to minimal caretaking. However, the judge must appreciate if a certain behavior is guilty and if the person requesting caretaking is in a state of need.

We appreciate that it is necessary to agree art. 524 Civil Code with par. (2) of art. 526 Civil Code, since the line between 'the inability to support himself with his own work' and the existence of the state of need as a consequence of guilt cannot be clarified, so we suggest repealing art. 526 par. (2) Civil Code and changing ș art. 524 Civil Code in the following sense: 'Only the person who is in need, not being able to support himself, *for objective reasons,* with his own work or with his own goods, has the right to caretaking'.

This is necessary especially since alcohol, narcotics, gambling addictions or other 'vices' constitute medical conditions. Furthermore, refusal to work represents a guilty reason concerning the generation of the state of need, or the recognition of the right to caretaking even for minimal subsistence may constitute a reason for adopting such an attitude and thus creates imbalance between the creditor and the debtor of caretaking, who, according to art. 527 Civil Code, may be obliged to caretaking if he has the possibility to gain the means to pay for it.

Bibliography

Bîrsan, C. (2013). *Drept civil. Drepturile reale principale/ Civil law. The main real rights*. Bucharest: Hamangiu.

Bodoaşcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei/Family law*. Bucharest: Universul Juridic.

Hageanu, C.C. (2012). *Dreptul familiei şi actele de stare civilă/Family law and civil status documents.* Bucharest: Hamangiu.

Costache, M. (2017). Few Considerations on the Maintenance Obligation in the Romanian Civil Law. *Acta Universitatis Danubius. Juridica*, 2, pp. 136-146.

Drăghici, A. & Duminică, R. (2014). *Obligația legală de întreținere/ Legal caretaking obligation*. Bucharest: Universul Juridic

Filipescu, I.P. & Filipescu A. I. (2006). *Tratat de dreptul familiei/ Treaty on family law*. Bucharest: Universul Juridic.

Florian, E. (2018). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația/ Family law. The marriage. Matrimonial regimes. Parentage*. Bucharest: C.H. Beck.

Lupaşcu, D. & Crăciunescu, C.M. (2012). *Dreptul familiei/Family Law*. Bucharest: Universul Juridic.

Stoica, V. (2013). *Drept civil. Drepturile reale principale/ Civil law. The main real rights*. Bucharest: C.H. Beck.

***(1997). Hotărârea Mellacher c. Austriei, în *Jurisprudența Curții Europene a Drepturilor Omului/ The judgment of Mellacher v. Austria, in the Jurisprudence of the European Court of Human Rights,* by V. Berger, Bucharest: Editura Institutului Român pentru Drepturile Omului, pp. 499-501.

Hotărârea Muller v. Austria din 16 decembrie 1974/ The judgment of Mellacher v. Austria of 15 December, *Decisions et rapports de Commission europeenne des droits de l'homme/ Decisions and reports of the European Commission of Human Rights* nr. 1, Strasbourg, p. 46.

Hotărârea Pressos Compania Naviera şi alţii c. Belgiei din 20 noiembrie 1995/Judgment Pressos Compania Naviera and others v. Belgium of November 20, 1995, in *Publications de la Cour européenne des droits de l'homme. Série A. Arrêts et décisions*/ Publications of the European Court of Human Rights. Series A. Judgments and decisions, nr. 332, parag. 31.

Decizia Comisiei pentru Drepturile Omului din 27 februarie 1995 în cauza Dello Preite c. Italiei/ Decision of the Human Rights Commission of 27 February 1995 in the case of Dello Preite v. Italy, in Decisions et rapports de Commission europeenne des droits de l'homme nr. 80, Strasbourg, p. 14

Decizia Comisiei pentru Drepturile Omului din 9 septembrie 1998 în cauza Lenzing AG c. Marii Britanii/ Decision of the Commission on Human Rights of 9 September 1998 in the case of Lenzing AG v. Great Britain, Decisions et rapports de Commission europeenne des droits de l'homme nr. 81, Strasbourg/ Decisions and reports of the European Commission of Human Rights nr. 81, Strasbourg, p.123.

High Court of Cassation and Justice, civil section, decision no. 3799/2004, available at https://legeaz.net/spete-civil-iccj-2004/decizia-3799-2004.

The Supreme Court, civil section, decision no. 859/1958, în *Culegere de decizii ale Tribunalului Suprem pe anul 1958/ Collection of decisions of the Supreme Court for the year 1958*. (1959). Bucharest: Editura Științifică, p. 216.

Bucharest Court of Appeal, 4th civil section, decision no. 2073/2000, in D. Tiţian, A. Constantin, Cîrstea, M. (2008). *Codul familiei adnotat/ Annotated family code*, Bucharest: Hamangiu, p. 284.

Iași Court, civil section 1, decision no. 189/2015, available at https://www.avocatura.com/speta/25824/pensie-intretinere-tribunalul-iasi.html#ixzz6tz19De42.

Hunedoara County Court, civil decision no. 169/1980, in *Revista română de drept/Romanian Law Journal* nr. 9/1980, p. 59.

Maramureș Court, decision no. 339/A/2019, available at https://www.jurisprudenta.com/jurisprudenta/speta-15f6yj6m/.

Maramureș Court, decision no. 425/A/2019, available at https://www.jurisprudenta.com/jurisprudenta/speta-15n9kg7f/.

Galati Court, civil sentence no. 4590/2018, available at https://www.jurisprudenta.com/jurisprudenta/speta-165nb7xl/.

https://economie.hotnews.ro/stiri-finante_banci-24428459-cosul-minim-pentru-trai-decent-actualizat-pentru-anul-2020-cea-mai-mare-crestere-cheltuielilor-fost-capitolul-locuinta.htm.

https://insse.ro/cms/ro.