



Some Observations on the Execution of the Statutory Maintenance Obligation by Equivalent and the Conversion of the Conventional Maintenance Obligation into Annuity

Alina-Elena ILIESCU¹

Abstract: *The maintenance obligation, like any debt, must be performed, in principle, in kind. It is noted that, regardless of whether we are talking about such a legal obligation or one arising from the conclusion of a maintenance contract, the legislator imposed, in order to protect the debtor or other persons in his care, or to respect the principle of equity, certain limits of value. and, in certain situations, allows execution by equivalent. But the rules that set the rules for these situations are not out of the question, so in our study we want to show that more flexibility is needed in terms of the maximum legal maintenance ceiling, that what the law calls the advance payment does not lead to the loss of the successive nature of the maintenance and that this solution is not in all cases fair, that the conversion of conventional maintenance into a life annuity by the will of the parties is not performs this must meet all the substantive and formal conditions required for the validity of the maintenance modified or terminated in this way.*

Keywords: *maintenance; execution by equivalent; value of benefits; life annuity*

JEL Classification: K12; K36

I. The legal obligation of maintenance represents the duty imposed by law, between certain natural persons, established by law, to provide, if necessary, the means necessary for their living² based on existing or previous family relations, respectively those born from marriage, natural or civil kinship relations, affinity relations or those assimilated to family relations³.

¹ PhD in progress, Bucharest Academy of Economic Studies, Romania. Corresponding author: alissia_iliescu@yahoo.com. This article was presented at the International Conference "Exploration, Education and Progress in the Third Millennium", that took place in Galati, Romania, on the 12-13th May 2022.

² Bodoaşcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei*. Bucharest: Universul Juridic, p. 400; Lupaşcu, D., Crăciunescu, C.M. (2012). *Dreptul familiei/ Family law*. Bucharest: Universul Juridic, p. 432; Aniţei, N.C. (2012). *Dreptul familiei/Family Law*. Bucharest: Hamangiu, p. 200; Costache, M. (2017). Few Considerations on the Maintenance Obligation in the Romanian Civil Law. *Acta Universitatis Danubius. Juridica*, Vol 13, no 2, 140-141).

³ Bodoaşcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei*. Bucharest: Universul Juridic, pp. 398-399; Lupaşcu, D., Crăciunescu, C.M. (2012). *Dreptul familiei/ Family law*. Bucharest: Universul Juridic, p. 432; Avram, M. (2016). *Drept civil. Familia/ Civil law. The family*. Bucharest: Hamangiu, p. 510).

The content of the legal relationship of legal maintenance consists in the creditor's right to maintenance and in the debtor's obligation to provide the means necessary for living, the object of which is the services themselves¹.

Maintenance involves benefits which provide the creditor with those "necessary for living and, where appropriate, expenses for education, education and training" [art. 530 para. (1) Civil Code], but it is not possible, however, to determine in a general title, what is meant by this, but also the amount of these benefits, because the object of the maintenance obligation is variable, due to the specific needs of each creditor, determined by age, sex, state of health, vocational training needs, cultural needs, etc. but also because of the variations in the possibilities of the debtor.

The extent of the legal obligation to maintain, like its existence, is determined, firstly, by the state of need of the creditor and by the means he has of the debtor [art. 529 para. (1) Civil Code], states of affairs left to the sovereign discretion of the guardianship court, but also by the standard of living of the two, between which there must be a balance². Thus, by determining the amount of the statutory maintenance obligation, an advantage must not be created for the creditor to the detriment of the debtor, the former benefiting from a higher standard of living than the second, but also in the opposite direction, by creating an advantage for the creditor, to be obliged, although he has the means to pay a higher value obligation, to benefits which do not provide the creditor with the necessities of living³.

The law, on the other hand, establishes certain ceilings in order to protect the debtor and other dependants, such as:

- the amount of maintenance due by the parents may be set up to a maximum limit, depending on the number of children: "up to one quarter of his net monthly income for a child, one third for 2 children and one-half for 3 or more children", without, however, its cumulation with the maintenance due to other persons exceeding half of the net monthly income of the person obliged [art. 529 para. (2) and (3) Civil Code]. But it is up to the guardianship court to determine the specific value.

In determining the value of the legal obligation to support the parents, the principle of equality of the parents in the exercise of parental authority and the misogynies of each of them will be considered, without having relevance, however, whether they live together, or with their children, nor whether the children are from marriage, from outside marriage or from adoption⁴. That limit of half of the net monthly income of the person liable for payment is regarded as a general one, applicable in all situations⁵.

¹ Dogaru, I. (1978). *Întreținerea. Drept și obligație legală/Maintenance. Legal right and obligation*. Craiova: Scrisul Românesc, p. 85.

² Florian, E. (2018). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația/ Family law. The marriage. Matrimonial regimes. parentage*. Bucharest: C.H. Beck, p. 586.

³ Dogaru, I. (1978). *Întreținerea. Drept și obligație legală/Maintenance. Legal right and obligation*. Craiova: Scrisul Românesc, pp. 88-89.

⁴ *Idem*, p. 91.

⁵ Irimia C. (2012). In Baias, Fl.-A.; Chelaru, E.; Constantinovici, R. & Macovei I. (Ed.), *Noul Cod*

- according to art. 389 para. (3) Civil Code, the former spouse may receive maintenance, the amount of which may be "up to one quarter of the net income of the person liable to pay it, in relation to his means and the state of need of the creditor", without, however, exceeding, together with the maintenance due to the children, half of his net income;

- art. 729 Civil Procedure Code, in accordance with art. 529 para. (3) Civil Code, establishes the "limits of the tracking of monetary income", including with reference to the maintenance obligation. Thus, "salaries and other periodic income, social security pensions, as well as other sums which are paid periodically to the debtor and are intended to provide for his livelihood" - including the maintenance claim which is partially unnoticeable¹ - for the amounts due as maintenance obligation for children, up to half of the net monthly income can be traced, and for other debts (such as the maintenance obligation for other categories of persons) up to one third of the net monthly income, without exceeding half of the debtor's net monthly income when there are several prosecutions of the same amount. When these incomes "are lower than the amount of the net minimum wage in the economy, they can only be traced over the part that exceeds half of that amount." Likewise, certain amounts ("aid for temporary incapacity for work, compensation granted to employees in the event of termination of the individual employment contract on the basis of any legal provisions, as well as amounts due to the unemployed") may be pursued, up to a limit of half of their amount, only for the payment of certain obligations, such as maintenance, while others are declared unnoticeable by law ("State allowances and child benefits, aid for the care of the sick child, maternity benefits, those granted in the event of death, state scholarships, daily allowances and any other such special purpose allowances") regardless of the nature of the obligations.

I appreciate it, along with other authors², that it is necessary, *de lege ferenda*, to provide for the possibility of exceeding these maximum limits imposed by law, by the agreement of the parties, at the initiative of the debtor of the legal maintenance obligation, and the corresponding amendment of art. 534 Civil Code

Even if the law does not expressly provide, the determination of the concrete content and the amount of the obligation can also be made by agreement of the parties, as it results from the regulations in the field [art. 499 para. (4) Civil Code ("In case of misunderstanding, *Scope* the maintenance obligation, *Sorts* and *Ways* execution, and *Contribution* each of the parents shall be determined by the guardianship court ..."); art. 530 para. (2) Civil Code ("The maintenance obligation shall be executed in kind, by providing those necessary for living and, where appropriate, the expenses for education, teaching and professional training"); art. 533 para. (3) Civil Code ("... the

civil. Comentariu pe articole/ The new Civil Code. Comment on articles, Bucharest: C.H. Beck, p. 575.

¹ Florian, E. (2018). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația/ Family law. The marriage. Matrimonial regimes. parentage*. Bucharest: C.H. Beck, p. 577.

² Berindei, M.-G. (2015). Contractul de întreținere/Rental Contract, in M. Uliescu (Ed.), *Noul Cod civil. Studii și comentarii. Vol.III. Partea a II-a/ The new Civil Code. Studies and comments. Vol. III. Part II* (pp. 761-787). Bucharest: Universul Juridic, p. 38.

parties may agree or, if there are good reasons, the guardianship court may decide that maintenance shall be enforced by the advance payment of a lump sum ...")¹.

However, in certain situations, the court is obliged to rule, even ex officio, on the situation in which the dissolution of the parents' marriage takes place, art. 402 para. (1) Civil Code stating that, "by the decree of divorce, *Sets* the contribution of each parent to the costs of raising, educating, teaching and professional training of the children", an eventual understanding of the parties not being mandatory for the court. Also, the convention of the parties is excluded in the situation provided for in art. 525 para. (2) Civil Code, being necessary the consent of the guardianship court when the maintenance is ensured by the realisation of the minor's assets, at the request of the parents who, if they were to provide maintenance against him, would endanger their own existence.

Moreover, the existence of an agreement of the parties on the legal obligation to maintain, when the law allows it, does not exclude the possibility of modifying the concrete content, of the method of enforcement – in kind, maintenance pension [periodic benefits – fixed amounts or in a percentage share of the net monthly income of the person who owes maintenance, according to art. 530 para. (3) sentence I Civil Code - or the prepayment by means of a lump sum in accordance with art. 533 para. (3) Civil Code] or mixed² - and the amount thereof also by consent or recourse to the guardianship court, where the facts initially envisaged ('the means of the person providing maintenance and the need of the person receiving it') has changed [including by decreasing or increasing the number of persons entitled to maintenance from the same debtor³.

Regardless of whether the execution of the legal obligation of maintenance is carried out in kind, voluntarily or forcibly, or by equivalent, in the form of a maintenance allowance, the rule is that of successive benefits, starting from the purpose of its legal consecration, that of ensuring those necessary for living for the creditor, meaning that art. 533 para. (1) Civil Code establishes that "the maintenance allowance shall be paid in periodic instalments", depending on the "pace of the beneficiary's needs"⁴.

As we mentioned, by exception, para. (3) of art. 533 Civil Code establishes that "the advance payment of a lump sum covering the maintenance needs of the person entitled to maintenance for a longer period or for the entire period during which maintenance is due is permitted, in so far as the maintenance debtor has the means necessary to cover that obligation", for good reasons.

¹ Florian, E. (2018). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația/ Family law. The marriage. Matrimonial regimes. parentage*. Bucharest: C.H. Beck, p. 591.

² Each of these ways has both advantages and disadvantages. See, for example, Frențiu, 2012, p. 670.

³ Drăghici, A., Duminică, R. (2014). *Obligația legală de întreținere/ Legal maintenance obligation*, Bucharest: Universul Juridic, p. 112.

⁴ Florian, E. (2018). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația/ Family law. The marriage. Matrimonial regimes. parentage*. Bucharest: C.H. Beck, p. 579.

Based on that rule, we consider that the obligation does not lose its successive nature, but only the possibility of a prepayment is accepted. However, this prepayment solution does not seem entirely fair for the following reasons:

- the period for which legal maintenance is due cannot be precisely established, there being the possibility of many uncertain future events occurring as an achievement or certain as an achievement but at a time when it cannot be determined (uncertain time limit) leading to its extinguishment or modification, starting with the death of the creditor or debtor, the debtor's incapacity for work, termination of the creditor's state of need etc.;

- the pension established in the form of a fixed amount of the net monthly income of the person who owes maintenance "shall be indexed de jure, quarterly, according to the rate of inflation" [art. 530 para. (3) in conjunction with art. 531 para. (2) Civil Code], whereas the advance payment leads to the extinguishment of the obligation for the period envisaged by the parties or by the guardianship court and to the loss of the benefit of the indexations

In the absence of criteria for determining the good reasons, in legal literature¹ (Drăghici & Duminică, 2014, p. 30, note 2), it has been considered that urgent costly medical intervention or expenditure on urgent specialist studies constitutes such reasons. We cannot agree with this opinion because the law speaks of an advance payment and not of the elements considered when determining the state of need of the person entitled to maintenance, the existence of these situations determining the amount of maintenance, and not the method of execution. Thus, maintenance is determined in all situations considering periodic benefits, but payment will be anticipated, after the distinction between establishment and enforcement.

II. Art. 2254 Civil Code defines the maintenance contract: "In the maintenance contract, a party undertakes to perform for the benefit of the other party or of a certain third party the services necessary for the maintenance and care for a certain duration of time" [para. (2)], either provided for by the parties - in the form of a time-limit, or by specifying the life-saving nature of maintenance² - or, in the absence thereof, throughout the life of the maintenance creditor.

To this definition are added those formulated in the literature, of which we note the one according to which "By maintenance contract, one of the parties undertakes *provide the necessary services for maintenance and care* the other party, as a rule, *on the entire life of his life*, in exchange for a capital (an asset or a sum of money)"³.

The essential characteristic of the maintenance contract is the subject of the obligation: *maintenance and care of a person* (food, clothing, housing, medical assistance etc.), the parts of which are the creditor (maintained) and the maintenance

¹ Drăghici, A., Duminică, R. (2014). *Obligația legală de întreținere/ Legal maintenance obligation*, Bucharest: Universul Juridic, p. 30, note 2.

² Berindei, M.-G. (2019). *Izvorul contractual sau legal al obligației de întreținere/ The contractual or legal source of the maintenance obligation*. Bucharest: Hamangiu, p. 765.

³ Stănciulescu, L. (2017). *Dreptul contractelor civile. Doctrină și jurisprudență/ The law of civil contracts. Doctrine and jurisprudence*. Bucharest: Hamangiu, p. 518.

debtor (maintainer), with the particularity that maintenance may also be stipulated for the benefit of a third party¹.

Art. 2257 para. (2) and (3) Civil Code determine the benefits to which the person liable for maintenance is subject ('in particular') to the person liable for maintenance ('food, clothing, footwear, housekeeping, as well as the use of adequate housing', 'the care and expenses required in the event of illness', as well as the funeral costs if the maintenance is of a life-saving nature or the creditor 'dies during the duration of the contract'), but they are actually determined and their extent and quality shall be determined by the parties, by their will expressed in the terms of the contract², and the limits imposed by law are "the value of the capital" and the "previous social condition of the creditor" [art. 2257 para. (1) Civil Code].

Even if, as a rule, the conventional maintenance obligation is executed in kind, by way of exception, if the provision or receipt in kind of maintenance can no longer continue for objective reasons or if the maintenance debtor dies, the court may, even if only temporarily, replace maintenance in kind with an appropriate amount of money [art. 2261 para. (1) Civil Code]. When the provision or receipt in kind of maintenance can no longer continue due to the fault of one of the parties, the court will increase or reduce the amount of money replacing the maintenance service [art. 2261 para. (2) Civil Code], the initial amount of the annuity (including the damages claimed for non-culpable execution), established by the court at the request of the other party, which may be modified, during the execution, depending on the changes in the factual situation. The justification for recognising the possibility of those changes lies in disqualifications for non-performance in kind, but also in the fact that the benefits in kind, thus replaced, have a variable value³.

This is, in fact, what the doctrine calls "the transformation of the maintenance obligation into an annuity⁴", the realization of which is done by conventional or judicial means. Objective causes may be, for example, a change of residence of one of the parties, disagreements between the contracting parties, the creditor's refusal to receive maintenance etc.⁵, to which is added the death of the maintenance debtor – a distinctly provided cause – which puts an end to the discussions related to the possibility of transmission *mortis causa* of that obligation⁶, and exempts the heirs of the maintenance debtor from the performance of an obligation that are *intuitu personae* in the light of the person of their author⁷.

¹ *Idem*.

² *Ibidem*, p. 523.

³ Deak, Fr. (2001). *Tratat de drept civil. Contracte speciale/ Civil law treaty. Special contracts*. Bucharest: Universul Juridic, p. 545.

⁴ Macovei, C. Dobrilă, M.C. (2012). In Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (Ed.), *Noul Cod civil. Comentariu pe articole/ The new Civil Code. Comment on articles*, Bucharest: C.H. Beck, p. 2207.

⁵ Marcusohn, V. (2018). *Drept civil. Contracte speciale*. Bucharest: Universul Juridic, p. 447.

⁶ Macovei, C. (2006). *Contracte civile/Civil contracts*. Bucharest: Hamangiu, p. 447.

⁷ Macovei, C. Dobrilă, M.C. (2012). In Baias, Fl.-A.; Chelaru, E.; Constantinovici, R. & Macovei I. (Ed.), *Noul Cod civil. Comentariu pe articole/The new Civil Code. Comment on articles*, Bucharest: C.H. Beck, p. 2207.

Judicial conversion takes place when the court is invested with an application for the conversion of the maintenance obligation into money, either by the maintenance creditor or by the debtor. The action will be dismissed where the non-enforcement is due to the plaintiff's fault, such as the situation in which the maintenance creditor – the plaintiff – will plead the debtor's non-performance of the obligation, but this was due to the attitude of the applicant who unjustifiably refuses the payment offered¹.

The contracting parties may also, by their agreement, modify the maintenance obligation, replacing it with an obligation to pay a sum of money periodically, which constitutes a objective innovation² [art. 1609 para. (1) Civil Code], which has the effect of extinguishing the maintenance obligation and replacing it with the obligation to pay the amount of money, as well as the extinguishment of the guarantees and accessories accompanying the maintenance obligation, unless the parties expressly provide otherwise³, the maintenance being transformed into annuity⁴, when the replacement is permanent.

On the other hand, for the situations in which the conventional transformation is only temporary, we are not in the presence of an objective novation, since the legal maintenance relationship continues to exist, so that, in my view, this transaction, carried out by a contract, constitutes a payment (art. 1492 Civil Code), the maintenance debtor being released at the time of payment of the amounts as an annuity only for those services for which the creditor has consented replacement, the others having to be executed in their specific nature.

We consider that, both in the case of the agreement establishing this transformation and for those by which the value of the "temporary" annuity is modified, the conditions of validity imposed for the maintenance contract, including the solemn form (art. 1243 Civil Code), must be met, since the application of the rules on annuity, established by art. 2262 para. (1) Civil Code, concerns the moments following the convention on conversion ('in all cases where maintenance *has been replaced*'). In addition, it seems to me that the intervention of the court in altering the value of those sums is possible regardless of whether there is fault in the non-performance in kind, failing which the contract will, in all cases, be converted into one of life annuity. However, the legislator, in art. 2261 Civil Code, envisaged the replacement of "maintenance in kind with an appropriate amount of money", and this can be even if only temporary.

¹ Moțiu, Fl. (2017). *Contracte speciale/Special Contracts*. Bucharest: Universul Juridic, p. 358.

² Deak, Fr. (2001). *Tratat de drept civil. Contracte speciale/ Civil law treaty. Special contracts*. Bucharest: Universul Juridic, p. 545.

³ Macovei, C. Dobrilă, M.C. (2012). In Baias, Fl.-A.; Chelaru, E.; Constantinovici, R. & Macovei I. (Ed.), *Noul Cod civil. Comentariu pe articole/The new Civil Code. Comment on articles*, Bucharest: C.H. Beck, p. 2206.

⁴ Moțiu, Fl. (2017). *Contracte speciale/Special Contracts*. Bucharest: Universul Juridic, p. 358.

Bibliography

- Aniței, N.C. (2012). *Dreptul familiei/Family Law*. Bucharest: Hamangiu.
- Avram, M. (2016). *Drept civil. Familia/ Civil law. The family*. Bucharest: Hamangiu.
- Berindei, M.-G. (2015). Contractul de întreținere/Rental Contract, in M. Uliescu (Ed.), *Noul Cod civil. Studii și comentarii. Vol.III. Partea a II-a/ The new Civil Code. Studies and comments. Vol. III. Part II* (pp. 761-787). Bucharest: Universul Juridic.
- Berindei, M.-G. (2019). Izvorul contractual sau legal al obligației de întreținere/ The contractual or legal source of the maintenance obligation. Bucharest: Hamangiu.
- Bodoașcă, T., Drăghici, A. & Puie, I. (2012). *Dreptul familiei*. Bucharest: Universul Juridic.
- Borș, O.-L. (2019). Contractul de întreținere. Scurte considerații cu privire la caracterele obligației de întreținere/ The contractual or legal source of the maintenance obligation, available at <https://www.ujmag.ro/drept/diverse/conferinta-internationala-a-doctoranzilor-in-drept-studii-si-cercetari-juridice-europene/rasfoire/>, 15-25.
- Costache, M. (2017). Few Considerations on the Maintenance Obligation in the Romanian Civil Law. *Acta Universitatis Danubius. Juridica*, Vol 13, no 2, 136-146.
- Deak, Fr. (2001). *Tratat de drept civil. Contracte speciale/ Civil law treaty. Special contracts*. Bucharest: Universul Juridic.
- Dogaru, I. (1978). *Întreținerea. Drept și obligație legală/ Maintenance. Legal right and obligation*. Craiova: Scrisul Românesc.
- Drăghici, A., Duminică, R. (2014). *Obligația legală de întreținere/ Legal maintenance obligation*, Bucharest: Universul Juridic.
- Florian, E. (2018). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația/ Family law. The marriage. Matrimonial regimes. parentage*. Bucharest: C.H. Beck.
- Frențiu, G.C. (2012). *Comentariile Codului civil. Familia/ The comments of the Civil Code. The family*. Bucharest: Hamangiu.
- Irimia C. (2012). In Baiaș, Fl.-A.; Chelaru, E.; Constantinovici, R. & Macovei I. (Ed.), *Noul Cod civil. Comentariu pe articole/ The new Civil Code. Comment on articles*, Bucharest: C.H. Beck.
- Lupașcu, D., Crăciunescu, C.M. (2012). *Dreptul familiei/ Family law*. Bucharest: Universul Juridic.
- Macovei, C. (2006). *Contracte civile/Civil contracts*. Bucharest: Hamangiu.
- Macovei, C. Dobrilă, M.C. (2012). In Baiaș, Fl.-A.; Chelaru, E.; Constantinovici, R. & Macovei I. (Ed.), *Noul Cod civil. Comentariu pe articole/ The new Civil Code. Comment on articles*, Bucharest: C.H. Beck.
- Marcusohn, V. (2018). *Drept civil. Contracte speciale*. Bucharest: Universul Juridic.
- Moise, A.A. (2012). In Baiaș, Fl.-A.; Chelaru, E.; Constantinovici, R. & Macovei I. (Ed.), *Noul Cod civil. Comentariu pe articole/ The new Civil Code. Comment on articles*, Bucharest: C.H. Beck.
- Moțiu, Fl. (2017). *Contracte speciale/Special Contracts*. Bucharest: Universul Juridic.
- Stănculescu, L. (2017). *Dreptul contractelor civile. Doctrină și jurisprudență/ The law of civil contracts. Doctrine and jurisprudence*. Bucharest: Hamangiu.