

## THE CONCLUSION OF THE CARETAKING CONTRACT. BETWEEN THEORY AND PRACTICE

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**Abstract:** *The caretaking contract is the judicial bilateral act by which one party, the debtor of the caretaking obligation, is obliged to provide and care for another party or for a third party, the creditor of the caretaking obligation, all the necessary acts in order to provide and care for a certain amount of time or for the rest of the creditor's life. The current article presents aspects regarding the conclusion of the caretaking contract, in regard to its validity conditions as well as the creditor's possibility to forgo the benefit of the legal mortgage. As it is frequently used in practice, the detailed conditions of this contract are extremely important in order to avoid litigation which might arise from the vice of this contract.*

**Key words:** caretaking, validity conditions, form, legal mortgage .

### 1. General aspects regarding the caretaking contract

The caretaking contract is the judicial bilateral act by which one party, the debtor of the caretaking obligation, is obliged to provide and care for another party or for a third party, the creditor of the caretaking obligation, for a certain amount of time.

While the former Civil Code did not contain legal provisions regarding the caretaking contract, the present Civil Code expressly regulates this type of contract in articles 2254-2263, stating the definitions phrased by doctrine and jurisprudence. By this regulation, the caretaking contract, seen as a contract especially designed for poor elderly people, satisfies the need for security on the one hand and the search for speculation on the other hand (Malaury Ph., Aynes L., §.a., 2007, p.541). This is why, the main characteristic of the caretaking contract is the random character, as it depends on hazard and the fact that it pertains to an alimentary obligation.

As it is a contract especially designed for a certain social category, that of poor elderly people, it is regulated as a contract in the former Soviet states, including in the Moldavian Republic, without having a specific regulation in the Western European laws. By exception, the French jurisprudence and doctrine acknowledges the so-called „*le bail à nourriture*”, a variety of the life annuity contract, which creates a contractual alimentary obligation (Benabent A., 2013, p. 661). In regard to its legal characteristics (Moțiu F., 2017, p. 350-352), the caretaking contract is characterized by the fact that: it represents a bilateral judicial act, resulting from an agreement of will, even if it creates obligations for just one of the parties; it is a named contract, as it has an express regulation in articles 2254-2264 of the Civil Code; it is a bilateral contract, by exception a

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unilateral contract when it is concluded for free and with no tasks, as donations are bilateral acts within the limits of the value of tasks; it is an onerous contract, or by exception, a free contract, as, in this case, it represents a donation which is subject to the validity conditions and the formal conditions stated by law; it is a contract which transfers property as it operates by force of law from the time the agreement of will is achieved, except for the case in which, the property right of an immobile good is transferred in exchange for the care obligation, in which case the provisions of the cadastral register apply, as well as is in the case the parties have postponed the transfer of the property right by suspensive condition, when the object is not determined, when the object is a future good or the beneficiary of the care obligation is not the owner of the good; it is a random contract by its essence, regardless of whether it is concluded for a certain amount of time or for the rest of the creditor's life, as the random character pertains not only to the uncertain duration of the creditor's life, but also the content of the debtor's performance, because it is impossible to predict the value of the beneficiary's needs, as they depend on the age, health and material status of the latter; it is a solemn contract, which, by exception from the consensus principle, is concluded *ad validitatem* in authentic form; it is a contract with successive execution, depending on the needs of the beneficiary; it is an irrevocable contract, based on the provisions of article 2256 of the Civil Code corroborated with article 2252 of the Civil Code, as the debtor of the care obligation is unable to free himself from his obligation by offering the restitution of the capital and the forgoing of the performed care.

It is an *intuituu personae* contract, connected to the person of the beneficiary who can't transfer his care obligation, but without excluding the possibility of concluding this type of contract by an especially empowered person who holds an authentic document of predetermined content.

Caretaking is an *intuituu persoane* act, as it is concluded in regard to the personal qualities of the parties who, on many occasions, have to live together and create family - like relations (Mureșan M., 1999, p. 272).

The parties of the caretaking contract are the creditor of the caretaking obligation and the debtor of the caretaking obligation. If the caretaking contract is concluded in the benefit of a third party, it represents an indirect donation achieved by third party stipulation, and the parties of the contract are: the constitutor (the person who makes the stipulation), the debtor of the care obligation (the person who makes the promise) and the creditor of the care obligation (the beneficiary third party).

In case the debtor of the care obligation is a person married under the regime of legal community, he will be obliged along with his spouse, thus both spouses will be debtors. In case the contract is of onerous character, namely if the creditor transfers a property right or another real right over a good in exchange for the care, then the debtor will acquire the good along with his spouse.

## 2. The validity conditions of the caretaking contract

The caretaking contract is an act of disposition, thus the parties must have full executive capacity. Foreign citizens and stateless citizens can acquire property right over immobile goods in Romania by concluding caretaking contracts only under the conditions of the adhesion to the European Union or based on international treaties, based on reciprocity conditions, according to the provisions of Law no 312/2005 regarding the acquiring of property right by foreign citizens or stateless citizens, as well as foreign companies. In all cases, foreign citizens must obtain a fiscal identification number. The breach of the provisions regarding capacity is sanctioned with absolute annulment or relative annulment, depending on the nature of the interest it protects.

The parties' consent must be expressed with the intent of causing legal effects, it must not be affected by vice and it must come from a person who has judgment.

As it is a random contract, lesion as a vice of consent, is not possible, thus the transfer of the property right over a good can't be annulled for rescission, as the traditional principle according to which hazard eliminates lesion (Malaurie Ph., et al. 2007, p. 545) fully applies.

In order to guarantee the express of valid content, Law no 17/2000 regarding social assistance of elderly people states that the elderly person, will be assisted, on request or by law, by a representative of the tutelary authority in order to conclude any act which transfers property with the purpose of securing his care. As opposed to the phrasing of the law, practice asked the question of whether the assistance of the elderly person will be ensured only based on express request or it is mandatory in all cases. Judicial practice concluded by stating that the imperative provision of the law states two cases in which assistance is mandatory, namely: 1) when the elderly person requests assistance and 2) when the notary public requests such a protection measure. The notary public performs a public activity regulated by law, thus he is the one who must demand such protection measures, in case the elderly person does not request assistance(Bucharest Court, fifth civil section, civil decision no 533R).

The National Union of Public Notaries stated that the notary public is not obliged to request assistance from the Tutelary Authority, but he is merely obliged to inform the elderly person about the legal provisions regarding the possibility of assistance(The National Union of Public Notaries, 2017, p. 152); subsequently, he must communicate to the same authority a duplicate of the act.

In conclusion, the provisions which regulate the possibility of assistance of the elderly have a disposition character, thus, the elderly person can only be assisted if he expressly requests assistance or if the notary public, in consideration of the personal circumstances of the party, appreciates that such assistance is necessary. *Per a contrario*, in case the notary public believes assistance is not necessary, as the judgment of the party is not affected by old age or disease, in lack of express request of the party, assistance is not mandatory.

The sanction for lack of assistance of the elderly person before the notary public, when assistance is mandatory, is relative annulment, as the legal provision does not protect a general interest, but a particular one.

The Civil Code does not provide an express definition of judgment, but we can find such a definition in article 5 letter k of Law no 487/2000 republished regarding mental health and the protection of people with mental disorders, according to which judgment is a component of mental capacity, which pertains to a certain fact and the person's possibility to appreciate the

content and consequences of that fact. The condition of judgment is more important in the matter of the caretaking contract because, as we have previously shown, it is a contract especially designed for elderly people. Lack of judgment is appreciated at the time the contract is concluded and is not equivalent to a vice of consent (Arrêt n° 1171 du 24 octobre 2012 (11-20.442) - Cour de cassation - Première chambre civile - ECLI:FR:CCASS:2012:C101171) as the person without consent does not have the possibility to form a representation of reality. Lack of judgment is sanctioned with relative annulment and must be proven by the person who invokes it. As it is a matter of fact, lack of judgment can be proven by any means available.

As it is a contract which must be concluded *ad validitatem* in authentic form, the doubt of the notary public regarding the judgment of the creditor of the caretaking obligation is a reason to reject the request for authentication of the act, based on article 86 of Law no 36/19954 of public notaries and notary activity. However, when the notary public is in doubt in regard to the judgment of the party, he will request a psychiatric certificate. This certificate is valid for 30 days from the time the person was examined by the commission.

The object of the debtor's performance is the caretaking. According to article 2257 of the Civil Code, the debtor is especially required to provide the creditor with food, clothing, shoes, housekeeping and the use of a suitable house. Caretaking also entails the necessary expenses and care in case of sickness. In case caretaking is of a temporary character or in case the debtor dies within the duration of the caretaking contract, the notary public is held to determine the content of the caretaking obligation, the means and place of execution of this obligation.

The content of the debtor's obligation, which is always executed in equivalent, is the fact that particularizes the caretaking contract as opposed to the temporary maintenance contract.

The value of the caretaking, on the other hand, differentiates the caretaking contract from the sale contract. Thus, according to the provisions of article 2257 first alignment of the Civil Code, the debtor of the caretaking obligation owes the creditor performances which are equitably established, by considering the value of the capital and the previous social condition of the creditor. Thus, when the value of the good which is transferred in exchange for the caretaking is significantly larger than the value of the caretaking, the caretaking is nothing more than means of payment, thus the contract is deprived of its random character, becoming a sale which is susceptible to annulment for lesion (Malaurie Ph., Aynes L., §.a., 2007, p. 545).

When the contract is of onerous character, the object of the creditor's performance is the transfer of the property right or another real right. The clause by which the creditor of the caretaking is forced to perform services is considered unwritten.

The cause is subject to common law rules, thus it must exist, and it must be licit and moral. The existence of a valid cause is presumed by law. By exception from this rule, articles 2246-2247 of the Civil Code, which are also applied to the caretaking contract as stated by article 2256 of the Civil Code, absolutely presume the lack of cause. Thus, we can observe that the lawmaker sanctions the caretaking contract which entails an obligation to care for a person which was deceased at the time the contract was concluded with absolute annulment; in the following article, by neglect or with intent, the lawmaker states that the contract by which an onerous caretaking contract was concluded for the duration of a person's life and that person suffered, at the time the contract was concluded, from an illness which caused his death within 30 days from the time the contract was concluded, is deprived of its effects; civil law does not expressly regulate such an ineffectiveness cause.

The 30 day term is counted from the time the contract is signed and authenticated. This provision is taken from French law (articles 1974-1975 of the French Civil Code, according to which „*Tout contrat de rente viagère, créé sur la tête d'une personne qui était morte au jour du contrat, ne produit aucun effet. Il en est de même du contrat par lequel la rente a été créée sur la tête d'une personne atteinte de la maladie dont elle est décédée dans les vingt jours de la date du contrat.*“), but we believe that the sanction should be annulment, considering the phrasing of the text, namely “it does not cause any effect either”. The reason for such a provision is rather simple: as the random element is of the essence of the caretaking contract, the lack of this element can only lead to absolute annulment, by rule of common law, as the win or lose chances for both parties are annulled.

However, we must emphasize that, in the hypothesis stated in article 2247 of the Civil Code, the caretaking contract will not cause effects because of the intervention of a circumstance which is subsequent to the conclusion of the contract, while annulment is the civil sanction which pertains to the act which disregards the validity conditions, as appreciated at the time it was concluded.

In both hypotheses stated by law, the sanction is the retroactive resolution of the act with the consequence of reinstating the parties in their previous situation. The good faith of the debtor is not relevant in regard to the consequences of the annulled act. By exception, in case there are several creditors, the contract is maintained as a consequence of active indivisibility, as the random element still exists.

Also in relation to the cause of the caretaking contract, based on article 9 of Law no 36/1995, the notary public is obliged to check if the act that the parties wish to conclude is not contrary to imperative regulations and their purpose is not to defraud imperative legal provisions, such as legal successor devolution.

We consider the provisions of article 1091 fourth alignment of the Civil Code, according to which, until proven otherwise, the onerous transfer of a property right to a descendent or privileged ascendant or the surviving spouse is presumed to be a donation if the transfer was achieved with a temporary caretaking clause or in exchange of a lifelong caretaking obligation.

This presumption operates only in favor of descendants, privileged ascendants and the surviving spouse of the defunct, if they did not consent to the transfer of right. For example, there are situations in which the parties, by the conclusion of a caretaking contract, wish to transfer the property right over a certain good to family members (ascendant, descendent or surviving spouse), thus, when the creditor of the caretaking obligation dies, that certain good does not become part of the successor mass. The purpose of the caretaking contract is the removal of the good from the successor mass, thus preventing the transfer of property right to all heirs of the creditor of the caretaking obligation, according to the rules of legal inheritance.

In these situations, the intervention of the notary public is extremely important, as his role is not only to draft the contract, but also to clarify the real relations between the parties and the purpose they aim to achieve, thus pointing their attention to the donation presumption stated in article 1091 fourth alignment of the Civil Code, a donation which is subject to reduction by request, namely it provides suspicion in regard to the usefulness of concluding such an act with the purpose of removing a good from the successor mass in order to prevent certain categories of heirs to inherit the property right over that good.

### **3. The formal conditions of the caretaking contract**

In regard to the form of the caretaking contract, by exception from the reciprocity principle regulated in the matter of civil acts, the caretaking contract must *ad valididatem* be concluded in solemn form. This is a means of protecting the consent of the person who is obliged, thus determining him to reflect on the act and its legal consequences before expressing his will.

The solemn form is not confused with the authentic form. According to article 257 of the new Civil Code, the authentic document is that document drafted by the public officer, the notary public or another competent officer within the limits and duties stated by law. Thus, in the light of the provisions of the new Civil Code, the authentic document is the one drafted by the person who holds the special quality required by law, is competent and performs the act by respecting the limits stated by law.

In case of the caretaking contract, there is an overlap between the solemn form and the authentic form, which is not seen in case of other legal acts, such as the will.

The competence to authenticate the act belongs to the Romanian notary public.

As it is subject to strict formalism, the disregard for the form required by law is sanctioned with absolute annulment, which follows the common law regime, thus it can be invoked by any interested party, at any time and it can't be confirmed.

The legal act concluded by the parties under private signature in the form of a caretaking contract has the nature of a bilateral sale promise which does not result in the transfer of the property right, as it merely generates a debt for the debtor of the caretaking performance („In order to have a court decision which replaces an authentic act, some conditions must be fulfilled in regard to the person who makes the sale: there has to be an unjustified refusal to draft de act, the person must not be at fault for failing to show up at the time the act was supposed to be signed, there is no objective circumstance which might prevent the seller from concluding the act and there is no possibility to unilaterally resolve the contract. Also, in accordance with the new Civil Code, certain special conditions must be met: the pre contract must respect the provisions of law 287/2009; the conditions of articles 3, 4 and 9 of law no 17/2014; the immobile good which is subject of the pre contract must be registered with financial authorities and the cadastral register, the pre contract must be concluded in authentic form. This latter condition is required by the provisions of article VII5 point 3 which modifies law 7/1996, by stating that: “the promise to conclude a contract regarding the property right over an immobile good or another real right in relation to this and the acts of unification or separation of immobile goods registered in the cadastral register are concluded in authentic form, under the sanction of absolute annulment” – see Dambovita Court civil decision no 537/R/28.11.2014 available at <https://idrept.ro/DocumentView.aspx?DocumentId=78742726> accessed 27.01.2018).

### **4. The caretaking contract and the right to legal mortgage**

In case, in exchange for the caretaking, the creditor transfers to the debtor the property right over an immobile good, the formalities of cadastral publicity are required, as real rights are acquired only by registration in the cadastral register. At the same time with the registration of the property right in the name of debtor, the legal mortgage of the creditor over the immobile which was sold for the payment for the performed care is registered; the property right of the

debtor of the caretaking will only be registered in the cadastral register along with this mortgage.

This is one of the cases of legal mortgage, thus if the creditor renounces the registration of the right to legal mortgage at the time the caretaking contract is concluded, the request to register the property right which was acquired will be rejected (Pop, L., et al., 2015, p. 613-614).

We ask the question if, as opposed to the phrasing of article 2386 first alignment point 4, it is possible to subsequently renounce the registration of the legal mortgage right in favor of the creditor of the caretaking obligation.

In expressing a point of view we must consider the reason for such a provision, namely that of protecting the interests of the creditor of the caretaking who, after the property right is transferred, finds himself in the situation of not being able to receive the owed care and is unable to execute the insolvable debtor.

On the other hand, it is not equitable for the good faith debtor, who performs the contractual obligation diligently, to be deprived of the right to freely own the good whose property he acquired by the conclusion of the caretaking contract. We consider the hypothesis of the debtor who, for example, can't borrow money from a bank because the immobile good used to guarantee the loan is mortgaged.

In phrasing a point of view, we must start from the premise that, by concluding the caretaking contract, the debtor of the caretaking obligation becomes the holder of the property right of the good. Property right is an absolute right, exclusive and permanent. As it is a real right, it provides its holder with the right to directly and solely exercise his right, without intervention from other people, along with all prerogatives over the good. The owner is free to perform all material and legal acts which are not expressly forbidden. The freedom of these acts is the rule and the restrictions are exceptions.

Only the lawmaker can limit the exercise of the prerogatives of the property right and when he does, he must ensure just equilibrium between the preservation of the owner's interests and the consideration of the general interest (Bârsan C., 2015, p. 48).

Since it is an absolute and exclusive right, the property right provides its holder with the freedom to perform any act in regard to the good. In order to limit the exercise of the property right of the debtor of the caretaking contract, two conditions must be fulfilled:

- there has to be a special provision in this regard;
- the restriction of the exercise of property law must ensure balance between the interests of the debtor and those of the creditor.

Article 37 point 6 of Law no 7/1996 regarding cadastre and immobile publicity states that, in all cases when the law grants immobile privilege or a legal mortgage in order to guarantee a right, these will be registered in the cadastral register by law, *except for the situation in which the parties expressly forgo this benefit*; the registration of this privilege or the legal mortgage is usually the document which proves property. Law no 7/1996 provides the creditor with the possibility to forgo the benefit of registration, without distinguishing between the cases of legal mortgage. As a consequence, there is no special legal provision which states the creditor is unable to forgo the benefit of registering the legal mortgage.

It would also be inequitable to limit the full exercise of the debtor's property right for a simple possibility of non execution of contractual obligation. Thus, in case the caretaking obligation is not performed diligently, nothing prevents the creditor from requesting the dissolution of the

contract, which results in the reacquisition of the property right which was transferred when the contract had been concluded.

We believe that a contrary solution would disregard contractual freedom which is a principle of legal acts and it entails not only the freedom to conclude or not conclude the legal act, but also the freedom to decide the faith of the legal act. Furthermore, we don't see what the sanction would be for the dissolution of the creditor's right to legal mortgage, if it is already registered in the cadastral register.

Considering all these aspects, we believe that the creditor's subsequent forgo of the registration of his right to legal mortgage is not possible, thus confirming the absolute and exclusive character of the debtor's property right of the good.

## 5. Conclusions

The conclusion of the caretaking contract entails the fulfillment of special validity conditions. As it is a contract for which the law requires the authentic form *ad validitatem*, the notary public is held to advise the parties in the most serious manner, by protecting their legitimate rights and interests, by pointing out all aspects of the matter and avoiding any reason for annulment as stated by law. As it is a contract frequently used in practice, the detailed presentation of the validity conditions of this contract is extremely important in order to avoid litigation arising from vices. Also, *de lege ferenda*, we believe the lawmaker's intervention would be useful in order to determine the faith of the legal mortgage after the registration of the caretaking contract and if there is a possibility to resolute the mortgage with the creditor's consent, without affecting the faith of the caretaking contract.

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