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SOME DISPUTABLE QUESTIONS RELATING TO ALEATORY NATURE OF THE LIFETIME MAINTENANCE AGREEMENT

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***Abstract:** The contract on lifetime maintenance agreement has a long legal tradition, and the issue of its legal nature and legal effects has occupied the attention of the legal doctrine since the moment of its creation until today. Its complexity arises from its specific legal nature being more contract of the law of obligation, but of the specific importance for inheritance law, due to its indirect hereditary legal effects. Its specificity to be of aleatory nature leaves the space for immoral and illegal conduct, and therefore possible abuse of the purpose of the contract in order to reach disproportionate material gain. In order to protect the interests of the recipients, the legislator proscribes the possibility of annulling this contract in case of lack of randomness. While the conditions for annulment in this case are not precisely defined by law, a huge problem of different interpretations of these rules arises in practice, which makes more opportunities for its abuses, leading simultaneously to the legal uncertainty.*

***Key words:** lifelong maintenance contract; legal nature; randomness, voidness.*

INTRODUCTION

The lifetime maintenance contract has a long legal tradition, and the question of its legal nature and legal effects has occupied the attention of the legal public from the moment of its creation until today. It is a contract

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that is usually concluded by elderly and single persons who, due to old age and/or illness, are unable to take care of themselves, and by concluding this contract, they ensure support and care that will be provided by the provider of maintenance. At the same time, the provider of maintenance acquires a certain material benefit in this way, which is also his motive for concluding the contract.

This contract is a complex legal institute which, according to its basic legal features, can be qualified as a contract of the law of obligation nature, of particular importance for inheritance law. Its complexity derives from the law of obligation nature of lifelong maintenance, which is personal, of a more permanent nature (extends during the life of the recipient) and includes various acts of giving and acting, which extent is determined by the moment of the death of the recipient of lifelong maintenance.

The fact of death is of great importance in the lifetime support contract, and it is precisely to this that the specifics of this contract are linked in relation to other, classic, obligation contracts. Although it does not represent the cause of this legal transaction, the fact of the death of the maintenance recipient as a delay period is linked to the actual legal effect of this contract. This leads to a number of other properties and consequences which, among other things, are reflected in the aleatory nature of the contract itself, because the economic effect of the contract is linked to the fact of the death of the maintenance recipient.

The aleatory nature of the lifetime support contract can leave room for immoral and unconscionable behavior, and abuse of the purpose of the contract in order to obtain disproportionate property benefits. In order to protect the interests of the maintenance recipient, the legislator provided for the possibility of annulment of this contract in the event of a lack of aleatory nature, whereby the conditions for annulment in this case are not precisely legally defined, and leave room for different interpretations and abuse of rights, which leads to legal uncertainty.

1. Randomness as a legal feature of a lifetime maintenance agreement

A lifetime maintenance contract is a contract by which the provider of maintenance undertakes the support to the recipient of maintenance until his death, and the latter is obliged, in return for this, to transfer to him ownership of a certain things or some other property right, with the fact that the acquisition of ownership (i.e. other right) postponed until the death

of the maintenance recipient.¹ By its legal nature, a lifetime maintenance contract is a recognized by the law, formal, causal, bilaterally binding, onerous legal transaction, with permanent execution of benefits, which is concluded with regard to the personal characteristics of the contracting parties (*intuitu perosnae*). Its important feature is randomness, given that the mutual economic effect is not known, i.e. what will be the relation of mutual benefits, because it depends on future uncertain circumstances, i.e. death of the recipient of maintenance. In this sense, according to the the Law on Obligations, the annulment of the contract cannot be requested due to the obvious disproportion of mutual benefits according to the rules on excessive damage, because the rule on the equivalence of mutual benefits that applies to bilateral onerous contracts does not apply here.²

At the time of the conclusion of the contract, economic value of the obligation of maintenance recipient's is known, which consists in the transfer of exactly certain things and rights to the maintenance provider, but the value of the provider's benefit is not known, since it is conditioned by the length of life of the maintenance recipient. In legal theory, conflicting understandings about the scope of randomness are represented, i.e. whether it is bilateral (exists for both contracting parties) or unilateral (exists only for the provider of maintenance).³

According to one point of view, mutual uncertainty regarding possible gain and loss is at the basis of randomness, so randomness is also bilateral in life support contracts, which means that uncertainty is necessary for both parties to the contract.⁴ According to others, randomness is one-sided, that is, uncertainty exists only in relation to the provider of maintenance, whose obligation extends over time, so that the amount of the provider's obligation depends on the length of life of the recipient of maintenance.⁵ In this sense, if one starts from the legal purpose of the lifetime maintenance contract, i.e., that the *causa* of the obligation of one party is the *causa* of

¹ Art. 194 (1) of the Law on Inheritance (Official Gazette of the RS", no. 46/95, 101/2003 - decision of the USSR and 6/2015) / ZON; D. Đurđević, Institutions of Inheritance Law, Belgrade, 2017, p. 250.

² Supreme Court of Republic of Serba, Rev. 638/86.

³ See J. Radišić, Law of Obligations, Belgrade, 2000. p. 128.

⁴ S. Svorcan, Commentary on the Serbian Inheritance Law, Kragujevac, 2004, p. 431.

⁵ Aleatority could be ruled out only if it could determine with certainty the day of death of the recipient of maintenance, and that is impossible, except if it committed the criminal act of murder or inducing suicide, M. Stevanov, "Further development of the maintenance agreement", Anals PFB 3-4/1966, 378; Antić, Z. Balinovac, Commentary on the Law on Inheritance, Belgrade, 1996, p. 501.

the obligation of the other party, it follows that the risk of concluding the contract in the sense that he will receive less than the investing in particular case, exists only on the side of the provider of maintenance (because his motive for concluding a contract of an economic nature), while the recipient of support is definitely supported for the rest of his life (which is the cause of his obligation), regardless of the value of the mutual benefits. Finally, if one starts from the legal formulation of the basis for annulment of a lifetime maintenance contract due to the lack of randomness (that is, the contract does not represent uncertainty for the provider of maintenance due to illness and old age), the interpretation leads to the conclusion that the randomness of the lifetime maintenance contract, as the assumption of its validity, is unilateral.

The aleatory nature of the contract to lifelong support as its important legal characteristic can be further specified with regard to the criterion on the basis of which it is determined: if it is determined in relation to the length of life of the recipient of support, then it is a so-called “subjective randomness”; if it is decided according to the scope of the subject of the contract, then it is about “objective randomness”.⁶ It could be concluded that the unilateral, subjective aleatory nature of the lifetime maintenance contract is primary (therefore, it must exist on the side of the maintenance give, and with regard to the length of life of the maintenance recipient). In this sense, the objective randomness as such would have a secondary importance for the survival of the lifetime maintenance contract, viewed in relation to the subjective randomness with which it is conditioned.

The aleatory nature of the life support contract should not be seen as its formal characteristic, but as a characteristic conditioned by specific circumstances. From the legal definition itself according to which the contract can be annulled “if due to illness or age the contract did not present any uncertainty for the provider of maintenance”, no objective criteria for determining the lack of randomness on the part of the provider of maintenance is settled, i.e. no criteria on the basis of which can be determined when age or illness of the recipient of maintenance represents uncertainty for the provider of maintenance (what are the age of the recipient of maintenance, as well as the types of diseases that indicate the absence of uncertainty regarding the length of life of the recipient of maintenance). Therefore, it is a legal standard that is assessed according to the relevant circumstances of each specific case.⁷

⁶ S. Panov, On Joint Property in Marriage, Annals of the Faculty of Law, no. 1-3/1998, p. 67, fn. 45.

⁷ Decision of the Supreme Court of Cassation, Rev 884/2015, 17.03.2016. год., <https://>

Also, in terms of determining the existence of randomness as a prerequisite for the validity of a contract of lifelong maintenance, in legal theory, the alternative determination of becoming ill or the age of the recipient of maintenance is critically observed as circumstances on the basis of which it can be concluded that there is no randomness. Since the length of a person's life cannot be determined with certainty due to the nature of the matter, it is considered that the age of the recipient of maintenance alone cannot be a reason for the annulment of this contract, and that the cumulative determination of these circumstances as relevant for determining the lack of randomness would make this base for annulment more grounded.⁸ It is certain that age as a criterion for determining the lack of randomness is quite uncertain, given that there are no precise criteria for its determination. However, although the age and illness of the maintenance recipient are in most cases conditional, because old people are often the recipients of maintenance and have health problems, this does not necessarily have to be the case (e.g. a younger person can also be the recipient)⁹ which speaks in favor of the justification of alternative determination of these randomness conditions.

Finally, the question of whether, due to illness and old age, the death of the recipient of maintenance was certain for the provider of maintenance is a factual question that must be answered in each specific case, based on the opinion of medical experts, taking into account all the circumstances of the specific case. In this sense, significant guidelines in the concretization of this standard have been provided by judicial practice. Finally, it should be borne in mind that the aleatory nature of the lifetime maintenance contract cannot be completely excluded, because it is related to the fact of death, which is itself uncertain, and the moment of its occurrence cannot be determined exactly, even when makes it close.¹⁰ Therefore, the lack of randomness should be relativized, and viewed as a well-founded expectation of the death of the maintenance recipient in a relatively short time from the moment of concluding the contract.

www.vk.sud.rs/sr, march., 2022.

⁸ M. Albijanić, Maintenance Agreement, Legal life 10/1996, p. 504.

⁹ „The concluded lifetime maintenance contract does not lose its aleatory character due to the fact that the recipient of maintenance is significantly younger than the provider of maintenance Verdict of the Municipal Court in Kraljevo No. 13/2006 од 05.05.2006, „Verdict of the Municipal Court in Kraljevo 1237/2006 од 28.07.2006; Judgment of the Supreme Court of Serbia Rev 2598/2006 од 17. 01. 2007-Bilten of Supreme Court in Kraljevo no. 1/2007;

¹⁰ See M. Stevanov, *op.cit.*, стр. 378.

If, in a specific case, a lack of randomness regarding the length of life of the recipient of maintenance is established on the part of the provider of maintenance, the contract can be canceled at the request of the legal heirs of the recipient of maintenance within one year from the knowledge of the contract, i.e. three years from the date of the recipient's death, whereby the deadline for annulment cannot run before the death of the recipient.¹¹ Therefore, the lack of randomness on the part of the maintenance provider is sanctioned by the sanction of annulment according to the current regulation, with the aim of preserving the randomness of the contract as its important legal characteristic, as well as to protect the interests of the legal heirs of the maintenance recipient and prevent abuses when concluding the contract. In the previous Inheritance Law from 1974, this reason for the voidability of the contract on lifelong maintenance was not regulated, so the general rules of the law of obligations on the invalidity of the contract were applied. Namely, if the maintenance provider concluded the contract in order to obtain a disproportionate financial benefit in anticipation of the imminent death of the maintenance recipient, such a contract would be immoral and contrary to good customs, and void according to Article 103 of the Law on Obligations.¹²

The legal and political justification for voiding a life support contract is based on the theory of equitable risk. Namely, in this contract, the element of fairness does not result from an equivalent exchange between the contracting parties, because there is no such equivalence, given the aleatory nature of this contract, but the element of fairness results from the existence of a fair risk. Namely, by concluding the contract, each contracting party agrees to the risk of receiving less than invested, and vice versa, to realize a certain financial benefit.¹³

2. Criteria for determining the lack of randomness - contribution of judicial practice

When it comes to determining the lack of randomness as a reason for annulment of a lifetime maintenance contract, two types of decisions

¹¹ Art. 203(2) (3). Law of Inheritance;

¹² Law on Obligations ("Official Gazette of the SFRJ", no. 29/78, 39/85, 45/89 - decision of the Supreme Court of Justice and 57/89, "Official Gazette of the SFRJ", no. 31/93 and "Official Gazette SCG", No. 1/2003 – Constitutional Charter).

¹³ D. Đurđević, *op.cit.*, p. 268.

are encountered in judicial practice. The first type of decisions is based on the objective criterion of randomness, i.e. the certainty of the death of the maintenance recipient for the maintenance provider is taken into account, but not other circumstances that could be of importance in determining the conscientiousness of the maintenance provider. If, due to the death of the recipient of maintenance close in time, there was no uncertainty for the provider regarding the assumed obligations and the relationship of mutual actions, the contract was annulled on the basis of Art. 203 Law on Inheritance.¹⁴

In certain decisions, especially those made before the adoption of the valid Law on Inheritance from 1995, the courts took the position that if the provider of maintenance at the time of concluding the contract, considering the state of health of the recipient, knew about his imminent death, in that case the contract is against morality and absolutely void within the respect of Art. 103 of Law of Obligation¹⁵. The very provision of the Law on Inheritance that refers to the possibility of annulment of the contract due to lack of randomness (Art. 203 Law on Inheritance) contains the presumption of negligent behavior of the provider of support, because the certain death of the recipient of support within a short time after the conclusion of the contract was the motive for its conclusion. In this sense, the contract is against morality due to the use of its purpose, the acquisition of disproportionate property benefits and the circumvention of the inheritance rights of the legal heirs. If the contract did not represent uncertainty for the provider of maintenance, and he concluded it in bad faith, then such a contract would be immoral and green-handed, so one could rather talk about the reason for the nullity, and not the voidability, of the lifetime maintenance contract.¹⁶

From the analysis of some other court decisions, it can be concluded that the courts were often not only bound by the objective understanding of randomness, which implies a short time period from the moment of the conclusion of the contract to the moment of the death of the recipient of maintenance, but rather appreciated the fulfillment of the conditions for annulment of the contract due to the lack of randomness compared to other circumstances in each individual case.

Thus, in one case, a contract for lifelong maintenance was concluded on

¹⁴Verdict Judgement of the Supreme Court of Serbia Rev. 1449/2005 from 09.06. 2005. god, Verdict of the Supreme Court of Serbia Rev.762/2002 from 16.05.2002; The verdict of the District Court in Čačak, Gž. 1359/2006 from 01.11.2006.

¹⁵ Verdict Judgement of the Supreme Court of Serbia Rev. 286/04 from 1.9.2005..

¹⁶ Z. Ćirić, N. Stojanović, Some Dilemmas of the Annulment of Maintenance Agreement, Legal life no. 10/2002, p. 609, 610.

11/16/2011. between the son, as the recipient of maintenance, and the mother, as the provider of maintenance. On the part of the mother, as the provider of maintenance, the obligation of lifelong maintenance was constituted in favor of the son, which included the provision of care, providing medical assistance, maintenance of hygiene, obtaining medicines, while the son, as the recipient of maintenance, undertook to transfer to the mother the immovable property he owned at the time of the conclusion of the contract. At the end of August of the same year, the maintenance recipient went to the doctor because of stomach pains, when he was diagnosed with a tumor in the region of the right kidney. Then on October 30, 2011, based on the doctor's instructions, he was admitted to the Urology Clinic for surgery, where on November 30, 2011. and passed away.

The court, starting from the established factual situation, the short time gap between the conclusion of the contract and the moment of the recipient's death, as well as the circumstance that the contract had not even begun to be executed by the donor, concluded that the contested contract was concluded in order to circumvent the legal inheritance rights of the plaintiff (daughter of the testator), and that as such it is void due to an inadmissible basis, and in accordance with Art. 52. Law of Obligation.

The appellate court found that the evidence presented did not indicate that the maintenance recipient would not survive the operation, but that a positive outcome was expected. It is also stated in the explanation of the decision that the defendant took care of the maintenance recipient even before the contract was concluded, so the conclusion of the contract only harmonized the factual and legal situation, so that the conclusion of the contract was not influenced by an impermissible motive to undermine the interests of the plaintiff, as a necessary heir. Concluding that the defendant, as the provider of maintenance, was not aware of the imminent death of her son, as the recipient of maintenance, the second-instance court changed the verdict and rejected the plaintiff's request, with the explanation that the conditions for annulment of the contract based on Art. 203 of the Law on Inheritance, which as a special regulation excludes the application of the general rules of contract law, which refer to the nullity of contracts.

Finally, the review of the plaintiff concluded that due to the incorrect application of substantive law, the factual situation remained incompletely determined. Namely, when deciding on the appeal of the plaintiff, the court did not evaluate what was the *causa* of the contract on lifelong maintenance: was the contract really concluded with the aim of providing lifelong support to the recipient of maintenance, or with the aim of circumventing the rights of the legal heirs?

In the explanation, it is stated that the court of second instance did not take into account all relevant circumstances when determining the inadmissibility of the case, as well as the absence of randomness as a basis for annulment of the contract according to Article 203 Law on Inheritance. Those circumstances are: severe illness on the part of the recipient, the time gap between the diagnosis, the creation of the contract and the death of the maintenance recipient

From the extensive case law relating to the annulment of the contract due to lack of randomness, it also follows that the knowledge of the maintenance provider about the imminent death of the maintenance recipient does not always lead to the invalidity of the lifetime maintenance contract. Namely, in certain court decisions, the position is taken that the contract of lifelong maintenance will not be considered null and void if, at the time of the conclusion of the contract, there is knowledge that the recipient of the maintenance suffers from an incurable disease, and that, in addition, he is an old man, if for a long period of time before the conclusion of the contract the provider took care of the maintenance recipient¹⁷. Also, if the conclusion of the contract on lifelong maintenance was necessary for the recipient of maintenance and the maintenance was actually realized due to the circumstances, the circumstance that due to the illness of the recipient of maintenance his death was certain for the recipient of maintenance, does not cause the nullity of the contract.¹⁸

In addition, if at the time of the conclusion of the contract on lifelong support there was uncertainty on the part of the contracting parties regarding the length of life of the recipient of maintenance, and immediately after the conclusion of the contract it is determined that the recipient of maintenance suffers from a serious and incurable disease, the contract will retain its character of aleatory nature, which is determined by the moment of its conclusion. It is also considered that for the validity of the lifetime maintenance contract, it is also relevant who initiated its conclusion. In this sense, if the recipient of maintenance, who at the time of the conclusion of the contract was in the initial stage of an illness, of which the donor knew, and at the same time the recipient himself initiated the conclusion of the contract on lifelong maintenance (while the subject of the contract is only care and treatment, without the involvement of material funds), then there is no place to cancel the contract due to the lack of randomness.

Based on the analysis of judicial practice, it follows that the uncertainty

¹⁷ Decision of the District Court in Valjevo , Gž. 579/2005 from 07. 04. 2005.

¹⁸ Decision on Court of Appeal, Belgrade. 14786/2010 from 24.11 2011.

of the future event - the death of the recipient of maintenance, must be appreciated not only in an objective, but also in a subjective sense.¹⁹This means that when evaluating the fulfillment of the conditions for annulment of the contract on lifelong support based on lack of randomness, it must be judged against the specific circumstances, according to the following criteria: illness and age of the recipient of support as parameters of the certainty of his death; the existence of a real need of the maintenance recipient for maintenance and the necessity of that need, was the maintenance obligation performed for a long period before signing the contract? (was it properly executed after the conclusion of the contract?); who initiated the conclusion of the contract etc.

CONCLUSION

From a medical point of view, determining the lack of randomness in the life maintenance contract, and according to the legal wording and judicial practice, does not contain enough objective elements when considering these facts.

In order to prevent abuse of this contract and immoral procedure, the legislator, respecting the Law on Inheritance, sanctioned the lack of randomness by sanctioning destructibility. This type of contract, which lacks randomness, is in its essence both dishonest and immoral, and according to the general rules of the law of obligations, it would be void as such. In order to find some specific direction when deciding upon randomness as the basis for annulment of the contract, some subjective parameters were introduced through judicial practice, such as: the existence of a real need of the recipient of maintenance for maintenance, provision of maintenance by the provider of the recipient, before signing the contract; initiating the conclusion of the contract by the maintenance recipient, etc. As the aleatory nature of the life support contract cannot be completely excluded, because it is linked to the fact of death which is itself uncertain, even when it seems close, the lack of aleatory nature should, in a legal sense, be relativized and viewed as well-founded the expectation of the death of the maintenance recipient in a relatively short time from the moment of concluding the contract.

¹⁹Verdict of the Supreme Court of Serbia, 2437/2006 од 07.03.2007 - Judicial Practice Bulletin of the District Court in Niš, no. 26/2008;