

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE LEGAL OBLIGATION TO MAINTAIN

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ABSTRACT: *Even if it did not provide a definition of the statutory maintenance obligation, the legislator did regulate this institution in detail.*

Careful regulation of the legal maintenance obligation did not lead to the avoidance of divergent interpretations in judicial practice, with courts facing a wide range of situations that could not be foreseen by the legislator.

This study aims to analyze the legal provisions governing the maintenance obligation and how they have been interpreted and applied by the courts, highlighting the issues currently controversial.

KEYWORDS: *statutory maintenance obligation; state of need, Civil Code; maintenance pension; debtor's means.*

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The obligation of maintenance is the duty imposed by law on a person to provide another person with the necessary means of living, as well as in the case of the obligation of maintenance of parents towards their minor children – the means necessary for vocational education and training (Florian, 2016).

1. LEGAL FRAMEWORK

The Legislator regulated in detail the institution of the maintenance obligation in the Civil Code, Title V, Second Book, entitled About the Family. These general legal provisions are also supplemented by other special provisions that customize the right to maintenance and maintenance between some special categories of persons, namely between former spouses (art 389 Civil Code) or between parents and children (art. 499 Civil Code), as well as with the provisions of special laws, such as Law no. 272/2004 on the protection and promotion of the rights of the child.

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2. LEGAL CHARACTERS ALE OBLIGAȚIEI DE ÎNTREȚINERE OF THE MAINTENANCE OBLIGATION

The legal nature of the maintenance obligation is expressed in several aspects. Thus, it is the legislator who establishes all aspects of this institution: the categories of persons between whom the maintenance obligation exists; the order in which the categories provided by law owe maintenance; the conditions under which maintenance is due, imposed by law both for the one who requires it and for the one who has the vocation to perform it; the limits of the maintenance obligation, both in terms of establishing the obligation, and as well as in the execution, etc.

Regarding the proclamation of the legal character of the maintenance obligation, by the marginal name given to art.513 of the current Civil Code, was appreciated (Bodoasca , 2012) that it is useless because in the case under consideration, the legal nature of the maintenance obligation derives from the very fact that it is regulated by the Civil Code.

The obligation of maintenance is the perfect expression of the principle of family solidarity, in general, the concern of the legislator is to ensure a fair balance between the independence of each member of the family and solidarity at the level of the family circle (Tudoroaia & Buzincu , 2021).

The personal character of the maintenance obligation means that this obligation is extinguished by the death of the debtor or the creditor of the maintenance obligation, unless otherwise provided by law. As a consequence of the personal character of the maintenance obligation, being recognized as a measure of protection of the person in need, capable of ensuring the minimum conditions of existence of the creditor, and therefore closely related to the state of the creditor, the maintenance obligation cannot be transmitted, in principle, to the heirs of the debtor or creditor, but also to other persons. Exceptions, which can only be those expressly provided by law, confirm the legal character of this obligation.

The maintenance obligation cannot be transmitted through any of the modes of transmission of obligations (it cannot be transferred and the subrogation in the rights of the creditor cannot be performed); it cannot be subject to the modes of transformation of obligations (the innovation by changing the creditor).

The maintenance obligation cannot, in principle, be pursued and is imperceptible.

The maintenance obligation may not be the subject of compensation due to the insensibility generated by its personal character.

However, the possibility of compensation was recognized by Decision no. 6/2019 regarding the appeal in the interest of the law regarding the unitary interpretation and application of the provisions art. 1.616-1.618 letter c) reported in art. 499, art. 514 para. (1) and (3), art. 515, art. 525 para. (1), art. 529-531 of the Civil Code and art. 729 para. (3) and (7) of the Civile Procedural Code by which it has been established that the court of guardianship may order compensation for maintenance obligations owed by each parent to the child who does not live with him, up to the limit of the smallest of them and to the extent that the compensation does not contravene the best interests of the child.

The recitals in this judgment showed that the legal nature of the maintenance obligation has some consequences, such as inadmissibility of maintenance, which is expressly provided in the provisions of Article 515 of the Civil Code and censorship by the court of guardianship of the parental understanding of the provision of maintenance to children, in order to verify that the best interests of the child are respected.

The purpose of conventional compensation is to cover precisely those situations in which legal compensation cannot be operational, such as the fact that the debts are not yet mature, are not certain or the amount does not exactly result from their title, while the reason for judicial compensation is to facilitate the execution of mutual obligations between the parties to the dispute, as they have resulted from the evidence administered in the case.

The essential effect that occurs between the beneficiaries of the compensation is that the obligations are extinguished mutually and simultaneously, as if a payment of each obligation had been made.

In the case of legal compensation, the extinctive effect occurs automatically, *ope legis*, so without the need for any manifestation of will on the part of the mutual debtors, instead, in the case of conventional compensation, the settlement of debts occurs as agreed by the parties through their contract, and in the case of judicial compensation, the termination of obligations is carried out under the provisions of the court.

The fact that the civil law regulates only legal compensation is explained by the fact that the existence of conventional compensation is nothing else than the result of the freedom of contract and the autonomy of will of the mutual debtors, the parties being free to conclude any legal act by which to put an end to mutual obligations in a way other than by actual payment, and the judicial compensation occurs when the court, the court finding out proven mutual claims in question, proceed to the compensation of the debts that the parties have towards each other up to the value of the smallest and disposes the debtor's obligation having the highest debt to pay the remaining difference not covered by compensation, in application of Art. 1616 of the Civil Code.

The fact that conventional compensation is possible cannot in any case mean that the parent renounces the maintenance allowance due to the child, since, as previously indicated, the right to maintenance pension belongs to him, not to the parent to whom he was entrusted for growth and education, and the compensation is to be made up to the limit of the lowest of the maintenance obligations thus avoiding harm to the interests of the child. Moreover, the judicial compensation, whereby the court acquires the conventional compensation, cannot be considered as a waiver of the maintenance allowance due to the child.

The reasoning of the supreme court contained in Decision no. 6/2019 was appreciated as a nuanced one, perceptive and reflective, being approached successively, for the gradual disclosure of the multiple layers of understanding, several legal institutions: the right to maintenance of the minor and the content of the parental authority; the principle of respecting the best interests of the child¹; maintenance obligation; enforcement procedures: legal compensation, conventional compensation and judicial compensation (Tăbăraș, 2024).

In order to establish for the purposes of the unitary authorization of the judicial compensation of the maintenance obligations owed to children separated from each parent, the supreme court has invoked with implacable rigor the main argument put forward by the minority jurisprudence, which substantiated the impossibility of compensating the maintenance obligations on the absence of the reciprocity of these mandatory relations.

¹ On the difficulties in practice in determining the best interests of the minor see (Blaj, 2022).

The decision was criticized in the legal literature (Moloman , 2022), the interpretation of the supreme court is judged to lead to the conclusion that there is a regrettable terminological confusion between the two parties of the binding relationship, between the creditor and the debtor. In the view of the supreme court, the parties of the report are the parents of the child, leaving aside that, in reality, the creditor of an attachment obligation is the child, and not at all the parent to whom the dwelling is established.

As regards the public order nature of the maintenance obligation, no one may waive his right to maintenance for the future. If, however, such a waiver were made, even under the control of justice, it is null precisely because of the public order character of the legal maintenance obligation (Berindei , 2017).

The inadmissibility of maintenance waiving results from the legal and intuitive character of the right to maintenance. As a measure of protection for persons in need, the legal rules governing maintenance are imperative. The holder of the right to maintenance may not waive this right before the obligation is ordered by a court order.

The reciprocal nature of the maintenance in principle means that the persons between whom this obligation exists may have either the capacity of debtor or the quality of creditor, without the existence of the obligation being conditioned by the reciprocity of its performance.

There are exceptions to this rule. Thus, the spouse who has contributed to the maintenance of the child of the other spouse is obliged to provide maintenance to the child while he or she is a minor, but only if his or her natural parents have died, are missing or are in need. In turn, the child may be obliged to provide maintenance to the person who has maintained it for 10 years. Therefore, the vocation to reciprocity exists only under certain conditions. Also, the heirs of the person who was obliged to support a minor or who gave him maintenance without having the legal obligation are kept, to the extent of the value of the inherited property, to continue maintenance, if the parents of the minor died, are missing or are in need, but only for as long as the child is a minor. In the latter situation, the vocation to reciprocity is not recognised.

The legal obligation of maintenance is successive in nature because the execution takes place through periodic benefits, either in kind or by the payment of a sum of money.

The maintenance obligation is variable because the existence, amount and concrete ways of its execution differ from case to case, determined by the concrete factual state in which the parties are located.

Regarding the divisibility of the maintenance obligation, it manifests itself both in an active aspect, between the beneficiaries of the maintenance and in a passive aspect, between those obliged to provide it.

In terms of passive divisibility, if several of the persons are obliged to support the same person, they will contribute to the payment of maintenance, in proportion to the means they have.

From the point of view of active divisibility, when the obligated cannot at the same time provide maintenance to all those entitled to request it, the court of guardianship, taking into account the needs of each of these persons, may decide whether maintenance is to be paid only to one of them, or that maintenance is to be divided between several or all persons entitled to request it. In this case, the court also decides how maintenance is divided between the persons who are to receive it.

By way of exception to the rule of divisibility, there is solidarity in the following situations:

- Parents are obliged jointly to the maintenance of the child², solidarity that is likely to protect minors;
- The heirs of the person who has been obliged to support a minor or who has provided maintenance without legal obligation are kept, to the extent of the value of the inherited property, to continue maintenance, if the parents of the minor have died, are missing or are in need, but only for as long as the child is a minor. If there are several heirs, the obligation is solidarity, each of them contributing to the maintenance of the minor in proportion to the value of the inherited goods. And this time the legislature pursued the protection of the minor.
- If the parent is entitled to maintenance from more than one child, he may, in an emergency, initiate action only against one of them. The one who paid the maintenance may turn against the others bound for the part of each. The legal provision this time seeks the protection of the parent, but it is conditional on the existence of an urgent situation.

3. PERSONS BETWEEN WHOM THERE IS A MAINTENANCE OBLIGATION AND THE ORDER OF PAYMENT OF MAINTENANCE

The legal maintenance obligation exists only between certain categories of subjects.

Thus, between husband and wife, the obligation is based on the obligation of mutual support and the solidarity that must exist between them. Of course, the maintenance obligation remains only to the extent that we are in the presence of a validly concluded marriage, from the date of the conclusion of the marriage until the moment of its termination or the final stay of the divorce judgment.

Between former spouses, the maintenance obligation is conditional on the fulfilment of the conditions laid down in Article 389, para. 2 Civil code. Relatives in a straight line, regardless of whether the kinship is natural or from adoption, that is, between parents and children, grandparents and grandchildren, ancestors and great-grandchildren, etc. have a mutual vocation to maintenance.

Between brothers and sisters, regardless of whether the kinship is natural or from adoption, there is a legal obligation of maintenance.

If in respect of these categories, the maintenance obligation is justified by the quality of the spouse or the kinship relationship, there are other categories of persons between whom this obligation subsists. Thus, the spouse who has contributed to the maintenance of the child of the other spouse is obliged to provide maintenance to the child while he or she is a minor, but only if his or her natural parents have died, are missing or are in need. In turn, the child may be obliged to provide maintenance to the person who has maintained it for 10 years.

Also, the heirs of the person who was obliged to support a minor or who gave him maintenance without legal obligation are kept, to the extent of the value of the inherited property, to continue maintenance, if the parents of the minor died, are missing or are in need, but only for as long as the child is a minor.

² In this regard see Sentence of the Sfântu Gheoghe Court no. 925/2025.

Last but not least, the person who takes a child to care for or protect him temporarily, until a protective measure is established, has the obligation to maintain him.

Art. 519 of the Civil code also provides for a certain order for payment of maintenance. Thus, the first to be called are the spouses and ex-spouses, who owe their maintenance to the other obliged. Then the descendant is obliged to maintain before the ascendant, and if there are more descendants or more ascending ones, the nearest one before the furthest one. Last but not least, brothers and sisters owe maintenance to their parents, but to their grandparents.

4. GENERAL CONDITIONS OF MAINTENANCE OBLIGATION

4.1 The need condition of the maintenance creditor

It is entitled to maintenance only to those who are in need, unable to support themselves from their work or possessions. The state of need signifies the inability of a person to procure the necessities of life - food, clothing, dwelling, medicine, etc. - by his own means, either wholly or in part (Moloman & Ureche , 2015).

The two conditions must be met cumulatively in order to be in the presence of a maintenance obligation. The estimation of the state of need shall be assessed on a case-by-case basis, the assessment being related not only to objective and generally valid criteria (such as gross minimum income or general living standards), but also to aspects specific to the maintainer, such as its normal standard of living. Of course, the estimate will also take into account the real and concrete possibilities of the debtor.

People who are fit to work but who refuse to work are not entitled to maintenance. It is excluded from maintenance people who have inappropriate behavior (Chelaru, 3).

The task of proving the state of need lies with the one who invokes it, that is, the one who claims maintenance. The condition of incapacity to work is not required in the case of the minor, in order for him to benefit from maintenance (Frentiu , 2019). In this regard, it was appreciated that the state of need is presumed *juris tantum*, because they find themselves in the special situation of attending school and preparing for a job or profession (Bacaci, 2022).

4.2. The debtor's means

Only the person who has the means to pay it or has the opportunity to acquire these means may be obliged to maintain. When determining the means of the person who owes the maintenance, account shall be taken of his income and assets, as well as of the possibilities of their realization. His other obligations will also be considered.

If the debtor does not earn income, the maintenance obligation will be set at the value of the net minimum income per economy because the notion of means covered by Article 529 of the Civil Code must be interpreted not only in the sense of material means, but also as the ability to work of the person obliged to maintain³.

In the doctrine (Popescu, 2015) it was argued that the legislator had regard to those material means whose acquisition is certain. They may be included in this category, for example: income from future wages or pensions, income from rents based on the existence of a lease agreement, interest on amounts recorded at banking units under

³ In this regard see Decision no. 493/2025 pronounced by Judecătoria Râmnicu Sărat and Decision of the Court of Appeal of Craiova no. 763/2009.

deposit contracts, etc. The lack of certainty of future means could amount to an impossible benefit to which the debtor would be obliged, which is legally inadmissible.

In judicial practice⁴ but it was emphasized that the debtor parent did not prove that he would be unable to provide, besides the activities that bring him an income of 1890 lei, additional activities that bring income, given that he has the profession of doctor. Among the parental duties of the father, besides the effort to make for a natural relationship with his own child, there is also the task of performing activities in such a way as to make a financial contribution in order to ensure a decent living for the growth and development of the child.

5. ESTABLISHMENT AND PERFORMANCE OF MAINTENANCE

Maintenance is due according to the need of the one who demands it and the means of the one who is to pay it.

As regards the amount of maintenance, when maintenance is due by the parent, it shall be fixed up to one-fourth of its net monthly income for one child, one-third for 2 children and one-half for 3 or more children. Also, the amount of maintenance due to children, together with maintenance due to other people, according to the law, may not exceed half of the net monthly income of the obligated person.

This amount may be exceeded only if the debtor consents to this effect and the right of maintenance of other persons, creditors of the maintenance obligation, is not affected (Mareş, 2022).

As regards the modalities of implementation, the maintenance obligation is carried out in kind, by ensuring the necessary living conditions and, where appropriate, the expenses for education, learning and training. If the maintenance obligation is not performed voluntarily, in kind, the court of guardianship orders its execution by paying a maintenance pension, established in money. The maintenance allowance may be fixed in the form of a fixed amount or a percentage share of the net monthly income of the maintenance payer.

In the matter of maintenance, the judgments rendered have a provisional judicial working authority which is maintained as long as the factual situation envisaged in the judgment remains unchanged, a principle which also applies to the agreements between the parties⁵. Thus, if there is a change in the means of the person providing the maintenance and the need of the person receiving it, the court of guardianship, according to the circumstances, may increase or decrease the maintenance pension or decide to terminate its payment. Also, the maintenance pension established in a fixed amount is indexed by law, quarterly, depending on the inflation rate.

As a rule, the maintenance pension is due from the date of the summons application. However, the pension may also be granted for an earlier period if the application for a summons has been delayed due to the fault of the debtor.

The maintenance pension can not be granted retroactively, for at least two reasons: the passivity of the right holder, that is, the fact that he did not request maintenance, is a sign that until now, the date of the filing of the claim, was not in a state of need; the maintenance pension is meant to cover current needs, not necessarily „historical” of the

⁴ The decision of the Brasov Court no. 165/AP/2023, unpublished.

⁵ Decision no. 1001/2025 pronounced by Vaslui Court.

beneficiary (Moloman & Lazăr , 2022). However, if the application for a summons was delayed due to the fault of the debtor – for good, deluding the creditor with promises of voluntary benefits –, the court may grant maintenance pension for a period prior to the promotion of the action.

The maintenance pension is paid at regular rates, at the terms agreed by the parties or, in the absence of their agreement, at those established by court decision. Even if the maintenance creditor has died within the period corresponding to a rate, the maintenance is due in full for that period. The parties may also agree or, if there are good reasons, the trusteeship court may decide that maintenance shall be carried out by advance payment of an overall amount covering the maintenance needs of the entitled over a longer period or the entire period during which maintenance is due, insofar as the maintenance debtor has the means necessary to cover this obligation.

In judicial practice⁶ it was pointed out that, even if the condition of the debtor's holding of the means necessary for the payment of the overall amount was met, the case did not prove the existence of sound reasons for the guardianship court to decide on the execution of maintenance by paying a global amount. For good reason it would be understood that, for various reasons, the maintenance needs of the minor at a certain date would exceed the needs of the remaining period of time for which maintenance is due.

Undue maintenance is subject to refund. Thus, if, for any reason, it turns out that the maintenance provided, voluntarily or as a result of a court decision, was not due, the person who performed the obligation may request restitution from the person who received it or from the person who was actually obliged to provide it, in the latter case, on the basis of unjust enrichment.

Using the phrase „any reason” the legislator confers a wide margin of discretion on the courts to assess the existence of situations that justify the merits of a refund request.

6. CONCLUSIONS

Unlike the previous regulation, the legislator was concerned to provide careful regulation of the statutory maintenance obligation. Even under these conditions, the courts have been given a wide margin of appreciation for the interpretation of some of the legal texts.

Thus, in relation to the provisions of Article 527 of the Civil Code, when determining the means of the person who owes the maintenance, the income and assets of the latter will be taken into account, as well as the possibilities of their realization. As regards the phrase „the possibilities of achieving the income”, in the absence of clear benchmarks, some courts have considered a restrictive interpretation, namely only the existing income in the estate of the debtor of the maintenance obligation. Other courts, on the contrary, considering its situation, ruled that the possibility of making certain incomes could be taken into account, even if they did not exist in the debtor's property at that time.

Also, as regards the interpretation of Article 529, para. 1 Civil code which refers to the amount of maintenance, namely the fact that it is due according to the need of the person requesting it and the means of the person to pay it, some courts have established that a

⁶ Decision no. 1394/2012 pronounced by Gorj Court.

maintenance pension having the maximum amount provided by law is due, while others have adjusted the amount to the needs and situation of the debtor.

Last but not least, by the Decision of the High Court of Cassation and Justice no. 6/2019 on the appeal in the interest of the law on the unitary interpretation and application of the provisions art. 1.616-1.618 letter c) reported in art. 499, art. 514 para. (1) and (3), art. 515, art. 525 para. (1), art. 529-531 of the Civil Code and art. 729 para. (3) And (7) of the Code of civil procedure it was ruled that the court of guardianship will be able to order compensation for maintenance obligations owed by each parent to the child who does not live with it, up to the limit of the smallest of them and to the extent that the compensation does not contradict the best interests of the child. And the interpretation given by the High Court of Cassation and Justice gives the courts the opportunity to assess in concrete terms the opportunity to order compensation for maintenance obligations, indicating as a criterion the best interests of the child⁷.

In conclusion, given these situations, we consider that some clarifications from the legislator would be beneficial.

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⁷ According to art. 2, paragraph 6 of Law no. 272/2004, in determining the best interests of the child, at least the following are taken into account: a) the needs of physical development, psychological, education and health, security and stability and belonging to a family; b) the opinion of the child, depending on the age and degree of maturity; c) the history of the child, especially considering the situations of abuse, neglect, and exploitation, parental alienation or any other form of violence against the child, as well as potential risk situations that may occur in the future; d) the ability of parents or persons to care for the child to meet his or her specific needs; e) the maintenance of personal relationships with persons to whom the child has developed attachment relationships.

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