

*O.M. Velykoroda  
Candidate of Law,  
assistant professor of civil and  
commercial law and procedure  
Ivano-Frankivsk faculty of  
National University  
"Odesa Law Academy"*

### **Enforcement of perpetual maintenance (care) contracts**

Contractual obligations of the parties shall be complied voluntarily, conscientiously, correctly and in due time. In case of violation of these requirements to the guilty party may be used general measures of coercive influence: taking away of items from the debtor, recovery of damages, etc.

However, a law or a contract may stipulate also special measures of property influence on an offending contracting party which are called to stimulate him (her) to the proper performance of the contract [1, p. 53]. The special feature of the perpetual maintenance (care) contract is just an establishment of an additional measure of influence on the property of the purchaser.

It should be noted that in Ukraine almost no specific research devoted to guaranteeing perpetual maintenance (care) contracts. Partly these issues are explored in the general study of the above agreement, but in these works not enough emphasis is made on highlighting features to ensure performance of this contract.

The purpose of this article is to distinguish the features of the perpetual maintenance (care) contract, the analysis of the legal nature of the institution, as well as the exploration of other ways to ensure the fulfillment of obligations that can be used in legal relationship for perpetual maintenance (care).

According to Article 546 of the Civil Code of Ukraine, an obligation may be provided by penalty, surety, guarantee, mortgage, holding, earnest. A contract or a law may establish other types of ensuring obligations [2]. It should be noted that application of this article to the contract of perpetual maintenance (care) needs keeping in mind specifics features of the agreement.

First of all, it should be noted that the law provides a specific way to enforce the contract of perpetual maintenance (care). Under Article 754 of the Civil Code of Ukraine, the purchaser is not entitled until the death of the alienator to sell, give, change the property transferred under the contract of perpetual maintenance (care), sign-on security agreement, to transfer its ownership to another person under a different transaction. The property transferred to the purchaser under the contract of perpetual maintenance (care), can not be levied during the life of the alienator. Loss (destruction), damage to property which has been transferred to the purchaser, shall constitute grounds for termination or reduction of his duties before disposing [2].

As we see, the article does not give a name to this method of guaranteeing the performance of the obligation, but only gives its characteristics. In my opinion, most definitely the legal nature of this method of guaranteeing the enforcement of obligations will be reflected by such a name - "encumbrance of property with a contract of perpetual maintenance (care)".

It should be noted that the encumbrances of property with a contract of perpetual maintenance (care) has a certain specificity in comparison with other methods of guaranteeing the performance of an obligation.

First of all, it should be noted that it is established by law as a usual condition of a contract of perpetual maintenance (care). Thus, the conclusion of this agreement automatically leads to a ban on the sale of assets to be transferred to the purchaser, regardless of whether it was mentioned about in the contract. Some researchers, analyzing a similar provision in the old Soviet republics' civil codes, not excluded the possibility of permission by an alienator to the purchaser to dispose of the residential building [3, p. 382]. However, in my opinion the statement, that under the permission of the alienator the purchaser may alienate or pledge the property transferred to him, is invalid. If the purchaser nonetheless alienates property to another person, even under the permission of the alienator, the latter still has a right to sue for recovery of property from illegal possession, since such consent in any case is invalid.

Encumbrance of property with a contract of perpetual maintenance (care) provides that authority of the purchaser to dispose of the property are limited because he has no right to alienate or pledge the property. At the same time the authority of the purchaser to own and use the property are complete, unless otherwise provided by the contract of perpetual maintenance (care). In this agreement it may be indicated that the alienator reserves to himself a right to use the property, which was transferred to the purchaser.

Another specific feature of this method of guaranteeing the performance of the obligation is that the property transferred to the purchaser, may not be levied on during the life of the alienator. This rule is extremely important because it protects the interests of the alienator and makes the relationship of the parties to the contract of perpetual maintenance (care) stable.

In addition, the risk of accidental loss of property is set on the purchaser. This means that the loss (destruction), damage to property which has been transferred to the purchaser, shall not constitute grounds for termination or reduction of his duties before alienator.

It should also be noted that another specificity of this method of guaranteeing the performance of the obligation is that only the property transferred under the contract of perpetual maintenance (care) may be levied on.

Upon the termination of contract of perpetual maintenance (care), as a general rule, property that was transferred to the purchaser, returns to the alienator and the expenses of the purchaser are not refundable. Analyzing all the above, we can conclude that the burden of property contract of perpetual maintenance (care) by its legal nature belongs to a proprietary legal ways to enforce the obligation. In addition, it should be noted that this method of enforcement the obligation, as a general rule, has a penal character. That is, no matter what size the damage was caused to an alienator by purchaser, all the property which has been transferred to the purchaser, upon termination of the contract returns back to the alienator and the expenses of the purchaser are not refundable. The same result is provided for the case where the purchaser properly performed his duties, but it is the purchaser who requires the termination of this contract. However, the last rule has one exception, in the case of termination of the contract due to the impossibility of its further implementation by the purchaser on the grounds that are essential, the court may retain ownership to the

purchaser of the property. In this case we cannot talk about the penal nature of the contract, because a part of the property returns to the alienator, and the other – taking into account the length of time during which the purchaser properly performed his duties – may be left to the purchaser. Establishing this rule in the new Civil Code of Ukraine, in my opinion, is an extremely positive decision, which is fully consistent with the principles of civil law such as fairness, good faith and reasonableness.

If we analyze the legislation of other countries, we can distinguish three approaches to the issue of a contract of perpetual maintenance. In some countries, civil law prohibits the purchaser to dispose the property transferred to him under the contract (Moldova, Turkmenistan, Uzbekistan), in other - a purchaser may alienate the property with the permission got from the alienator (Russia, Belarus, Poland, Hungary, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan); in civil codes of another states (Estonia, Latvia, Japan) there are no special ways stipulated to enforce this obligation, the parties may resolve the matter independently.

Our legislators chose the first way – prohibiting alienating and mortgaging the property transferred under the contract of perpetual maintenance (care). If we consider the whole institute of perpetual maintenance (care) under the laws of Ukraine, we can conclude that it has several advantages over similar institution in countries whose legislation allows alienate or mortgage property which has been transferred under a contract of life maintenance. Firstly, a complete ban on alienation performs a security function much better. Secondly, the method of enforcement execution of the contract of perpetual maintenance (care) selected by our legislators will call out much less disputes than the method that allows to alienate the property transferred under the agreement, because in the latter case there may be disputes between the alienator and new grantees, and between the alienator and previous purchaser (who usually has secondary liability), and between the previous and the new purchasers. Third, although our Civil Code forbids alienating the property delivered under a contract of perpetual maintenance (care), but, if necessary, this property can be transferred to other persons. For this aim there are two ways permitted by law. The first is that the parties by mutual agreement may replace the thing that was assigned to the purchaser under a contract of perpetual maintenance (care) to another thing, and then alienate the property which was the subject of the first agreement. In the second method, the parties may use the rule on transferring of debt. In this case, the new owner becomes not only the right to own property, but also all the obligations of the purchaser.

Thus, we believe that this method of enforcement execution of the contract of perpetual maintenance (care) provided in the new Civil Code of Ukraine is the most appropriate and adequately protect the interests of both parties.

Civil Code of Ukraine also provides other ways of enforcement execution of these obligations: a penalty, guarantee, warranty, holding, mortgage and deposit. It should be noted that in real life in relationship of perpetual maintenance (care) they are hardly used. This is due primarily to the fact that encumbrances of the property in fact, for purely technical reasons, prevents the use of most other methods of enforcement.

At the same time the contract of perpetual maintenance (care) is preferable to use a method of performance of the obligation as a penalty in the form of a fine,

especially when a purchaser commits minor violations. This will improve the discipline of the purchaser performing his duties.

As noted above, the risk of accidental loss of property is set on the purchaser. Although the law states that the loss (destruction), property damage are not grounds for termination or reduction of duties of the purchaser before the alienator; but in this case, given the personal nature of the contract and that maintenance should be provided in natural form, in practice, it is very difficult to force the purchaser to properly fulfill his duties, so far as termination of contract in this situation will have positive effect for the purchaser rather than negative. To protect the rights of the alienator and avoid unnecessary disputes in such cases, the contracting parties of perpetual maintenance (care) may provide for compulsory insurance of the property. However, in my opinion, the contract must be provided not only the duty of the purchaser to insure the property transferred to him, but also the way the funds paid by the insurer in the event of property loss will be used. I think it would be most appropriate to note that these funds should be transferred by the insurer to a special account and should be expended for purchase by the purchaser, with the consent of alienator, things similar to the lost property; using of this account by a purchaser without the consent of an alienator would not illegal. In my view, these provisions fully protect the rights of both parties.

Of course, property insurance is not a way to enforce the contract of perpetual maintenance (care), however, in the above situation, it will perform exactly the functions of the obligation and rights sides.

Summarizing the above mentioned, we can conclude that the main method of enforcement the execution of the contract of perpetual maintenance (care) is encumbrance of this property by this obligation. This means that the purchaser cannot during the life of the alienator pledge or transfer to other persons the property which is a subject of this agreement. In the event of termination of the contract, as a general rule, the property returns to the alienator. In addition, in contracts of perpetual maintenance (care) should be used penalty in the form of a fine.