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THE LEGAL NATURE OF THE PRIVATE NURSING HOME AND NURSING HOME ELDERLY CARE CENTER ADMISSION CONTRACT IN TURKISH LAW

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Abstract

Old age became a problem in the modern society when we consider getting old of World population day by day. Therefore institutions emerged which take upon old people's care. With increasingly loneliness of older people and they failure to address their own needs, the importance of care which presented for them has increased. Private nursing homes and nursing home elderly care centers are one of the most important institutions involved in care and take into account the wishes and expectations of the older people and service meets these demands and expectations are of great importance. The private nursing homes along with social reforms which in recent years have been rapidly increased in number are preferred with a view of getting better care more often than not by old people. In this study, the legal nature of the contract was examined that established between the old people who applied to the private nursing home which was referred to as the private nursing home admission contract in the doctrine and practise. The different views put forward are discussed in it. The case law on the issue has been taken into consideration in addition to the options of the doctrine on the legal nature of the acceptance contract to the private nursing home in the study. And the provisions to be applied according to the nature of the contract have been established after the legal nature of the admission contract to the private nursing home has been determined.

Keywords

Elderly Care, Private Nursing Home, Elderly Care Center, Admission Contract

1. Introduction

An admission contract to a private nursing home or a nursing home elderly care center is not a type of contract that is regulated by our legislation and where rights and obligations of parties and their other qualities are mentioned. Although it is quite similar to a rental contract and a place to reside in is allocated to the elderly in accordance with the contract, it is of a different legal nature from a rental contract, for it includes a variety of other acts. Thus, the nature of a contract depends on the obligations of the establishment determined by the contract (Petek, 2016).

The acts in question involves various obligations of the establishment. As an example, with regard to Private Nursing Homes and Nursing Home Elderly Care Centers Article 25 Section 2, in the old people care unit, feeding the elderly, bathing them, doing the body cleaning of the elderly daily or immediately, assisting them relieve themselves, changing their diapers, changing their sheets and clothes daily or immediately, keeping their bed clean, transferring them to and from other departments of the establishment, assisting them exercise, dressing their wounds, giving their medicine on time, following their blood pressure and injections, providing attendants for those sent to or already in hospital are included in the contractual obligations of the establishment.

2. Contractual Obligations of the Establishment

2.1 Allocation of Place (Room and/or Bed)

2.1.1 General

It is obligatory that the establishment allocate an appropriate room and/or bed to the old person admitted, which is based on the contract and good faith between parties. It can be explained as follows: In accordance with The Turkish Code of Obligations Articles 301, 304 and 305, the lessor is obliged to deliver the leasehold possession to the lessee in a condition that is makes it suitable to use in line with the purpose stated in the contract and keep it in the same condition until the lease ends. If the lease possession is delivered in a condition which makes it impossible or not completely suitable to use in line with the purpose stated in the contract, the lessee is entitled to terminate the contract or demand a reasonable reduction on the rent. If the defect poses a serious danger to the health of the lessee, the lessee can still terminate the contract even if the lessee has known of this danger while executing the

contract or has waived the right to terminate the contract. Thus, the contract can be terminated by the old person even after a contract stating that the old person shall stay in a place posing a danger to health has been executed. In accordance with the Articles 306-308 of the Law, the lessee is entitled not only to demand a reasonable reduction on the rent if the lease possession, during the period of rental and without the lessee's fault, has become impossible or much less suitable to use in line with the purpose stated in the contract, but also to terminate the contract if the defect is not eliminated in a reasonable amount of time. If the lessee cannot prove that he/she has no fault, the lessee is obliged to pay compensation. Despite the previously mentioned provisions of The Turkish Code of Obligations considering rent, it must be remembered that the old person can end the contract at any time without any reason. If the old person stays in the establishment free of charge, the provisions in The Turkish Code of Obligations Article 379 and the following articles are applied accordingly.

2.1.2 Consideration of Allocation of Place (Room and/or Bed) Within the Scope of Possession

Allocation of room and/or bed to the old person by the establishment means handing over the possession of it, which is based on the admission contract to a private nursing home or a nursing home elderly care center. An old person receives the possession of the leased place to benefit from the service and facilities of the establishment through, in accordance with the Civil Code Article 977, "...the delivery of any tool enabling the possession...", that is, the delivery of the key or an identity card to allow entrance to the establishment to the old person. The possession must be handed over to the old person from the time when the contract has effect and bears consequence until it ends. The old person is the direct and derivative possessor of the allocated place, while the establishment is the indirect and proprietary possessor of it. Someone who has the actual control over the possession is the direct possessor; someone who has the control by means of another person is the derivative possessor (TCC. Art. 975). A person who is the true owner of a possession is the original possessor, but a person who has the possession on the basis of limited property right or individual right is the derivative possessor (TCC. Art. 974).

2.1.3 Protection of Possession

It can be claimed that the old person can benefit from the terms of protection of possession (especially protection of possession by force) as long as he/she has the possession. However, in this case it can also be argued that the old person is in the same situation as, for

instance, someone borrowing a book from the library or someone using a shopping cart in a market, and just as they cannot benefit from the terms of protection of possession, neither can the old person. According to Petek (2016), the old person can benefit from the terms of protection of possession. If there is any interference in the possession (usurpation of the possession, i.e. if there is someone else on the lessee's bed or willing to use the bed; encroachment on the possession, i.e. preventing the possessor from benefiting from the possession or making it difficult), the old person can stop such things by force. However, the old person can also demand the elimination of such a situation of the establishment, or take legal action based on non-compliance with the contract if the establishment cannot eliminate such actions, since the establishment is obliged to provide the old person with the rights to benefit from the services and facilities of the establishment without any interference as long as the old person has the possession (Petek, 2016). In accordance with The Turkish Code of Obligations Article 301, the lessor is obliged to deliver the leasehold possession to the lessee in a condition that is makes it suitable to use in line with the purpose stated in the contract and keep it in the same condition until the lease ends. If a room and/or bed has been allocated to someone else other than the lessee, the application of The Turkish Code of Obligations Article 309 may be considered. With regard to this provision, when a third party asserts a claim on the leased possession non-compliant with the rights of the lessee, the lessor is obliged to settle the controversy upon the notification of the lessee (i.e. allocating the same place or the equivalent of it to the lessee) and pay compensation to the lessee if the lessee has been prevented from benefiting from the leased possession in accordance with the contract. On the other hand, when the same place has been allocated to two persons, there cannot be found a paramount right in a sense that the provision seeks for, as there are two equal rights to claim (Petek, 2016). As a consequence, if the old person has not been delivered a place though he/she has already paid, the establishment may be found liable due to non-compliance with obligation. If this right of the old person has been hindered, the old person must appeal to the establishment in accordance with the provisions of the contract: *“The claimant demanded that the court confirm the Room 206 Block 1 has been allocated to the claimant, and the claimant has the right to use it when needed by claiming that the defendant Foundation accepted the claimant's application dated 16.11.1985 and allocated the Room 206 Block 1 to the claimant, the claimant paid 3.000.000 TL in return, but the defendant allocated the room to someone else though the room had been allocated to the claimant without any further payment until the claimant starts to accommodate. The defendant*

requested for dismissal. Following the acceptance of the lawsuit by the court, it was resolved that the interference of the defendant in the claimant by not allocating a room in the retirement home of the Foundation be restrained ...the dispute be ended somehow. After the appeal of the court decision by both parties, by the sentence dated 25.3.2002 numbered 640-3056 of our chamber, it was resolved that the appeal of both parties be denied and the verdict be upheld; upon our chamber's decision of approval, both parties requested a revision of decision. The defendants all requests of revision decision are to be rejected with regard to the records in the file and the necessitating reasons stated in the court decision and adopted in Supreme Court's verdict." (Turkish Supreme Court of Appeals 13.HD., 17.6.2002, 5569/7271 [Kazanci Court Practices Databank]).

2.2 Feeding the Old Person

The obligations of the establishment as to feeding the old person are regulated by the Code. Thus, the old person is provided with breakfast, lunch and dinner prepared by a dietician taking their ages and health conditions into consideration and considering the food rationing (daily nutritional needs) purchased. Besides, it is resolved in the code (Art. 30) that two courses of snacks before meals, in the morning and in the evening, are distributed and diet foods are prepared for the elderly on diet on medical advice. All other expenses related to the feeding obligations of the establishment are included in the monthly care fee, and it is not necessary to pay any extra money to the establishment for it.

2.3 Medical Check-Ups of the Old Person

Another obligation of the establishment related to the medical check-ups of personnel and the elderly is regulated by the Code Article 39. This obligation is not only based on the contract between the establishment and the old person, yet also a must for the public safety for the purpose of protecting the health of the elderly (Petek, 2016). In compliance with the mentioned provision, it is obligatory that the personnel and the elderly in the establishment be examined and checked up periodically when necessary, the personnel be chest X-rayed and examined for infectious diseases at least once a year, the old people who are mentally ill be provided with psychiatric follow-up, medical check-up, treatment if necessary and regulation of drugs by a psychiatrist on a contract of service or in an institution at least once a month, the results of the mentally ill old people's medical check-ups be kept in the personnel and the old people's files and submitted during supervisions.

2.4 Actions to Be Taken in Case of an Old Person's Death in the Establishment

In case an old person dies in the establishment, it is obligatory to deliver the property of the deceased (cash, deposit, extra care fee and personal possessions in the establishment) to his/her heirs or to the treasury if there are no heirs, as the government is considered to be so: *“In accordance with the Law 2828 Article 28, the inheritance of those, while being cared in an institution subsidiary to Social Services and Child Protection Institution, who die without a will is transferred to the institution. The institution is only responsible for the obligation for the inheritance to the extent that is inherited... In pursuance of the Law 2828 Article 28, the lawsuit should be accepted, but the inherited property should not be transferred to the treasury.”* (Turkish Supreme Court of Appeals 2.HD., 15.3.2004, 1303/3215; 2.HD., 14.4.1988, 2911/4177; 2.HD., 5.10.2006, 5714/13263 [Kazanci Court Practices Databank]). The actions the establishment will take in case of the death of an old person shall be determined in accordance with the Nursing Homes-Nursing Home Elderly Care and Rehabilitation Centers Code applied as to nursing homes-nursing home and rehabilitation centers owned by the Ministry of Family and Social Policies (State-Owned)¹¹. According to the code in question Article 60, *“Actions to be taken as to a deceased old person are regulated as follows. a) A death certificate is prepared. b) The money, jewelry and securities of the deceased old person with himself/herself, in his/her room, in the safety deposit box or in the check room are identified and written in the minute by a committee of three formed by those among the assistant manager, social worker, psychologist, nurse and the personnel working in the accounting office for equipment and office supply inventory. c) A copy of the old person's identity card, the names and the addresses of the existing relatives, the identification minute of the possessions and, if available, the will is submitted to the related Civil Court of Peace via an official letter. The possessions are handed to the committee which come to identify the inheritance. d) The relatives of the deceased old person are informed and delivered the body. e) The funeral, equipping, enshrouding and burial of the deceased old person who does not have any relatives or whose relatives cannot afford to conduct the funeral is run due order. f) The delivery of a body of medical and legal inconvenience to the relatives is fulfilled in accordance with the law in force. g) The prepared death certificate of the old person is submitted to the local census bureau in then days with the copy of the identity card if the original is not available. h) No property or possession of the deceased old person except those the old person officially, via a written and signed letter, donated to the institution can be kept by the institution. i) The death certificate of the old*

person who passed away in hospital or were off the institution is provided and kept in that person's file. Necessary process is followed for the old person's possessions in the institution."

3. The Legal Nature of the Contract

3.1 Qualification in the Scope of Lease Contract

The old person is allocated a room or a bed in a room to be shared with another old person/other old persons specifically stated in the contract. If a place (a specific room or bed) whose features are specifically stated in the contract are leased, it requires an obligation involving a unique item, but if any room or bed which is not specifically stated in the contract, it requires an obligation involving a fungible item, which necessitates an average place to be allocated to the old person. If a room or a bed in a specific building or department (or in a place with specific qualifications), a limited obligation involving a unique item occurs. Allocation of a specific place in this way to an old person means that the contract has lease contract qualifications (Petek, 2016).

A lease contract is a type of contract by which the lessor rents a specific property and through which the lessor becomes obliged to allow the lessee to use and benefit from the leased possession during the leasing period (TCO Art. 299, 357).

In The Turkish Code of Obligations Article 299, a definition which is different from the one in The Turkish Code of Obligations Number 818 Article 248 and including all types of leasing (ordinary rent and usufructuary lease) is given as follows; *"A lease contract is a contract under which the lessor accepts to allow the lessee to use or benefit from a possession and the lessee accepts to pay the rent determined regarding the use and benefit."*

A lease contract can be of a definite or an indefinite period. The admission contract to a private nursing home or a nursing home elderly care center is of indefinite period. Nevertheless, it should be stated that even though the termination of lease contracts, despite being of indefinite period, and the liabilities of parties in such a case are regulated by the laws of The Turkish Code of Obligations, the old person can leave the establishment any time and the establishment cannot demand any rights in accordance with the Private Nursing Homes and Nursing Homes Elderly Care Centers Code Article 28 Section 6, *"No recognizance as to residing period can be demanded of the admitted old persons, nor can a contract be executed."*, which means that an admission contract has different qualifications other lease contracts does not include. It should also be noted that an old person can be removed from the establishment on reasonable grounds, or an old person is obliged to pay his/her debts to the

establishment arising from the contract (unpaid care fees or compensation for damages) if he/she leaves the establishment willingly.

3.2 Qualification in the Scope of Other Types of Contracts

The establishment is also obliged to provide the old person with the necessary conditions to lead a peaceful life. The old persons sign this contract to lead a life whose details are determined both by the contract between the parties and the brochures and declarations of the establishment. By signing this contract, the old person receives the right to benefit from this concrete act of the establishment which is also qualified as an act of work and service (Petek, 2016).

In this scope, the old person can be provided with such rights as to be met needs like being fed, to receive medical treatment, room cleaning, to benefit from recreational facilities of the establishment, to be cared for, to be transferred to hospital or to be protected apart from accommodating in the establishment. These responsibilities of the establishment are considered to be acts in relation to contracts of lease, work, service, mandate or sale (Petek, 2016). In the hostel accommodation contract, which is similar, allocation of the room includes elements related to “*lease contract*”, serving breakfast and food includes elements related to “*successive performance contract*”, room cleaning includes elements related to “*service contract*” (Kocayusufpasaoglu, 2014). In the admission contracts to private nursing homes and nursing home elderly care centers, there are also elements related to “*contract of mandate*” or “*contract of work*” for the treatment of the old person. It should also be noted that other acts of the establishment could be related to other types of contracts (Petek, 2016).

3.3 Review

As it is clear from the explanations above, the contract between the establishment and the old person should be qualified as a mixed contract of (anonymous, atypical) contracts which are not regulated by the law including mostly such types of contracts as contract of work, contract of mandate, lease contract, contract of service, transport contract or contract of sale, as it involves lots of acts and therefore has the features of above mentioned contracts (Petek, 2016).

The acts on which parties agree upon in mixed contracts are primary acts in a variety of contracts, and they preserve this quality in mixed contracts, as well. Obligations for the secondary acts placed in a contract by the will of parties, even if they are obligations for the primary acts in another type of contract, has been turned into acts dependent on and subsidiary to primary acts, and thus secondary acts by the will of parties themselves.

Consequently, an obligation for act qualified as a primary act in a type of contract regulated by the law may lose its quality as a primary act and turn into an obligation for a secondary act if the parties agree upon to do so in another contract. It is also possible for the parties agree to consider this obligation for act as primary with the other obligation for primary act. In this case, the contract becomes a mixed one including two primary acts, rather than a subsidiary obligation contract (Aral & Ayrancı, 2012; Eren, 2012; Yavuz, 2014).

Mixed contracts are contracts formed by combining several elements related to a variety of contracts regulated by the codes in a way that cannot be stipulated by the law. Although these contracts include elements peculiar to various contracts, they are qualified as independent from the contracts they comprise elements of. Mixed contracts are divided in to four types which are double-nature contracts, combined contracts, contracts in which elements belonging to various types are intermingled and contracts including subsidiary acts that are not intrinsic (Tuncomag, 1977; Tandogan, 1990; Zevkliler & Gokyayla, 2014). Under the admission contracts to private nursing homes and nursing home elderly care centers, the old person pays a certain amount of money in return for the acts, belonging to several types of contracts, the establishment is obliged to perform. In accordance with the Private Nursing Homes and Nursing Home Elderly Care Centers Code Article 27 Section 7, *“Each establishment is obliged to provide old persons, 5% of its capacity, with free care. Old persons to receive free care are designated by the Provincial Directorate.”* As it is clear, the old person by no means pays money in such a case. Although such an old person has no acts to perform, while the establishment has acts belonging to several types of contracts, a combined contract should be reminded of in this case (Petek, 2016), since for a contract to be called combined, acts belonging to several types of contracts do not have to be exchangeable, and they can belong to only one party (Petek, 2016). Thus, in spite of the fact that the establishment is obliged to provide a place (not leased but lent) and perform the acts belonging to such contracts as sale contract or contract of mandate, the other party’s, the old person’s, not paying any money in return does not change the contract’s quality as a combined one, that is, the performance of acts by one of the parties is sufficient to name a contract combine, and the other does not necessarily have to be obliged to perform an act. Because the establishment is obliged to provide old persons, 5% of its capacity, with free care, it is necessary to execute a contract arising from the civil code, yet the controversies occurring are resolved in compliance with the law of contracts, for another contract is executed with the old person (Petek, 2016). If the establishment voluntarily accepts to

provide other old persons with free care, controversies are resolved with regard to the contract executed between parties.

The admission contracts to private nursing homes and nursing home elderly care centers is classified as combined contracts under mixed contracts. In combined contracts, one party is responsible for several acts belonging to various types of contracts, but the other is only responsible for one. While the obligations of the former are a combination of elements belonging to various types of contracts, the latter is generally only obliged to pay money. In such sorts of contracts – i.e. hostel accommodation contracts, hospital admission contracts, dental contracts, build-operate-transfer contracts, travel (package tour) contracts, portfolio management contracts, boarding school contracts, time share vacation contracts and factoring contracts - the acts belonging to various types of contracts are not exchanged, but rather assembled in only one party (Tandogan, 1990; Zevkliler & Gokyayla, 2014). According to Tuncomag (1977), names such contracts as “*twin contract*” (a contract in which typical acts are combined), and states that each of the primary acts mixed (combined) in this contract is applied the provisions considering the related type of contract on condition that only one of them is in question.

When controversies occur regarding mixed contracts, there are four theories to consider while resolving: Absorption, Elimination, Composition and Analogy. Generally, the Analogy theory is followed in the doctrine and Supreme Court decisions. According to this theory, the rules related to private contracts regulated by the law should not be directly applied to mixed contracts. Instead, they should be applied via analogy depending on how much the nature of the mixed contract is in compliance with that of a private contract (Tuncomag, 1977; Tandogan, 1990; Zevkliler & Gokyayla, 2014). In other words, because mixed contracts are not regulated by the law, any provision can be applied not directly but via analogy. As a result, a judge should apply the provisions related to the types of contracts whose elements are included to the mixed contract by considering how to comply the purpose of the contract with the mutual interests of the parties fairly. When necessary, the judge can either choose a resolution belonging to one type or apply the general principles of the code of obligations disregarding all the provisions relevant to various elements. If no resolution can be achieved, common law should be applied, and if common law is not applicable, the judge should legislate like a law-maker (Tuncomag, 1977; Tandogan, 1990) (TCC. Art. 1/II).

4. Conclusion

A contract governed by private law is executed between private nursing homes and nursing home elderly care centers and an old person or a third person acting on behalf of the old person. Several rights and liabilities arise from this contract both for the establishment and the old person. The legal nature of this contract is obvious considering the obligations mentioned above within the context of this study. Consequently, such contracts are classified as combined contracts under mixed contracts, as they include acts belonging to several types of other contracts (Petek, 2016).

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