ISTANBUL MEDENIYET UNIVERSITY
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DEPARTMENT OF CIVIL LAW

ABATEMENT OF INTER VIVOS TRANSFERS MADE THROUGH THE CONTRACT OF MAINTENANCE UNTIL DEATH

Master's Thesis

Recep Hakan Ekim Hakeri

September 2024

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THESIS JURY APPROVAL

This Master thesis titled "Abatement of inter vivos transfers made through the contract of maintenance until death." written by Recep Hakan Ekim Hakeri at the Department of Civil Law was accepted by our jury.

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Supervisor:

Title Name Surname Supervisor

Institutional Affiliation

Other Jury Members:

Title Name Surname

Institutional Affiliation

Title Name Surname

Institutional Affiliation

Title Name Surname

Institutional Affiliation

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STATEMENTS

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GENİŞ ÖZET

Ölünceye Kadar Bakma Sözleşmesi Kapsamında Yapılan Sağlararası Kazandırmaların Tenkisi

Hakeri, Recep Hakan Ekim

Yüksek Lisans Tezi, Medeni Hukuk Anabilim Dalı

Danışman: Dr. Öğr. Üyesi Berrak Genç Gelgeç

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Bu çalışmamızda, Türk Borçlar Kanunu'nun 611-619. maddeleri arasında düzenlenmiş olan ölünceye kadar bakma sözleşmesine karşı, miras hukukuna özgü bir çerçeve kavram olan tenkis incelenecektir.

TBK m. 611'e göre ölünceye kadar bakma sözleşmesi, "bakım borçlusunun bakım alacaklısını ölünceye kadar bakıp gözetmeyi, bakım alacaklısının da bir malvarlığını veya bazı malvarlığı değerlerini ona devretme borcunu üstlendiği sözleşmedir." şeklinde tanımlanmıştır. Bakım borçlusu, bu sözleşme kapsamında üstlendiği bakıp gözetme yükümlülüğü karşılığında, bakım alacaklısının sözleşme ile üstlendiği edimin yerine getirilmesini talep etme hakkına sahip olur. Ölünceye kadar bakma sözleşmesi, bakım alacaklısının karşı edimini ifa şekline göre miras hukukuna veya borçlar hukukuna özgü şekilde yapılabilecektir. Bakım alacaklısının sağlığında ivazı ödemesi durumunda Borçlar Hukuku nitelikli; bakım alacaklısının, ölümünden sonra hüküm doğurmak üzere bakım borçlusunu mirasçı olarak ataması durumunda ise Miras Hukuku nitelikli ölünceye kadar bakma sözleşmesinden söz edilir. Tezimizin sağlararası kazandırmaları incelemesi nedeniyle, tezimizin özünü Borçlar Hukukuna özgü ölünceye kadar bakma sözleşmesi oluşturmaktadır.

Türk Medeni Kanunu'nun 560 ve devamındaki maddelerinde düzenlenmiş olan tenkis, mirasçıların saklı pay haklarını korumayı amaçlayan bir dava türüdür. Tenkis davası, saklı pay sahibi mirasçıların, miras bırakanın tasarruf edilebilir kısmını aşan tasarruflarına karşı miras paylarının korunması için açtıkları davadır. TMK'nın 565. maddesinde hangi karşılıksız kazandırmaların tenkise tabi olabileceği düzenlenmiştir. Ölünceye kadar bakma sözleşmesi ise karşılıklı borç doğuran ivazlı bir sözleşme olduğundan, karşılıksız

kazandırmaların tenkise tabi olabileceğini düzenleyen TMK m. 565 kapsamında değerlendirilemeyecek ve kural olarak tenkise tabi olamayacaktır. Bununla birlikte, TMK m. 565/3-4 hükümleri, mirasbırakanın serbestçe dönme hakkını saklı tutarak yaptığı bağışlamalar ile ölümünden önceki bir yıl içinde âdet üzere verilen hediyeler dışında yapmış olduğu bağışlamalar ve mirasbırakanın saklı pay kurallarını etkisiz kılmak amacıyla yaptığı açık olan kazandırmalarının tenkise tabi olabileceğini düzenlemiştir. Dolayısıyla ölünceye kadar bakma sözleşmesinin bağışlama ya da saklı payı ihlal kastı ile yapılması halinde artık tenkise tabi olabilecektir.

Ölünceye kadar bakma sözleşmesine karşı tenkis isteminin uygulamada sıkça rastlanan örneği, bakım alacaklısının bu sözleşme kapsamında gerçekleştirdiği kazandırmaların, saklı payı ihlal etme amacıyla yapıldığı iddiasına dayanmaktadır. TMK m. 565/4 maddesinde de işaret edilen bu olguya dayanarak tenkisin ölünceye kadar bakma sözleşmesine karşı uygulanabilmesi için objektif ve sübjektif koşulların bir arada bulunması gerekir. Objektif koşul mirasbırakanın saklı payları ihlal etmesi, sübjektif koşul ise mirasbırakanın bu kazandırmayı saklı payları etkisiz kılmak amacıyla yapmış olmasıdır.

Yargıtay kararlarına göre, bakım alacaklısının bakım ihtiyacının olup olmaması, edimler arası dengesizlik, malvarlığının tamamının ya da tamamına yakınının devri, bakım borçlusunun bakım alacaklısının eşi olup olmaması gibi durumlar bakım alacaklısının saklı payı ihlal kastına karine teşkil etmektedir.

Saklı payı ihlal kastının varlığına işaret eden önemli bir olgu da tarafların muvazaa anlaşması içerisinde sözleşmeyi gerçekleştirmesidir. Murisin saklı paylı mirasçılarından mal kaçırma amacıyla gerçekleştirdiği, görünüşte farklı bir işlem olarak düzenlenen, fakat taraflar arasındaki muvazaa anlaşması gereğince görünüşteki işlemin hüküm doğurmayacağı yönünde mutabık kalınan işlem uygulamada ve öğretide "muris muvazaası" olarak tanımlanmıştır.

Saklı payı ihlal etme amacı taşıyan bir ölünceye kadar bakma sözleşmesinin, muvazaa ile ilikşili olup olmadığının belirlenmesi için Yargıtay, sözleşme tarihindeki mirasbırakanın yaşı, fiziksel ve genel sağlık durumu, aile koşulları ve ilişkileri, sahip olduğu varlıkların miktarı, devredilen malın tüm varlıklarına oranı ve bu oranın makul bir sınır içinde olup olmadığı gibi bilgi ve olguları dikkate almıştır.

Ölünceye kadar bakma sözleşmesinin, tarafların anlaşması ile, gerçekten de görünürdeki amacın dışında farklı bir saikle (genellikle saklı payı ihlal kastı ile) yapıldığının anlaşılması halinde sözleşme ile yapılan kazandırmalar artık tenkise konu olabilecektir. Bununla birlikte, tenkis istemi en başta geçerli bir sözleşmeye karşı ileri sürülebilecektir. Ölünceye kadar bakma sözleşmesinin payları muvazaalı olarak gerçekleştirilmesi durumunda ise sözleşme geçersiz kabul edilecektir. Bu durumda geçersiz bir sözleşmeye karşı tenkisin nasıl mümkün olabileceği hususu, tezimizin aydınlatmayı amaçladığı bir problemdir.

Muvazaalı işlemin, nisbî ve mutlak şeklinde iki çeşidi vardır. Görünürdeki işlemin ardında, tarafların gerçek iradesini yansıtan gizli bir işlemin varlığından bahsedilebiliyorsa nisbî muvazaadan, aksi takdirde mutlak muvazaadan bahsedilir. Dolayısıyla mutlak ve nisbî muvazaayı birbirinden ayıran unsur gizli işlemin varlığıdır.

Muvazaalı olarak gerçekleştirilmiş bir ölünceye kadar bakma sözleşmesinin tenkisinin istenebilmesi için öncelikle muvazaanın nisbî muvazaa niteliğinde olması gerekmektedir. Zira mutlak muvazaanın sonucu olarak görünürdeki işlem geçersiz olur, bu işleme bağlanan müeyyide de butlandır. Taraflar arasında gizli bir işlemin mevcut olmaması ve gerçek iradelerinin görünürdeki sözleşmenin hukuki sonuç doğurmaması yönünde şekillenmesi nedeniyle, baştan itibaren geçersiz bir sözleşmeden söz edilir. Muvazaalı sözleşme taraflar için olduğu kadar üçüncü kişiler için de hükümsüzdür. Nisbi muvazaada ise durum bundan biraz daha farklıdır. Taraflar ölünceye kadar bakma sözleşmesinin arkasında gerçek ve ortak iradelerini yansıtan gizli bir sözleşme yapmaktadır. İşte bu gizli sözleşme, kanunun aradığı usul şartlarını karşılaması halinde geçerlidir. Zira TBK md. 19 hükmüne göre, bir sözleşmenin türünün ve içeriğinin belirlenmesinde tarafların gerçek ve ortak iradeleri esas alınacaktır. Böyle bir durumda saklı payları ihlal edilen mirasçılar, ölünceye kadar bakma sözleşmesinin muvazaalı olarak gerçekleştirildiği iddiasına dayanarak, geçerli olan gizli sözleşmeye karşı tenkis isteminde bulunabilecektir.

Tenkis kararı, saklı paylı mirasçıların lehine sonuçlandığında, mirasbırakanın saklı payları ihlal eden tasarrufları, bu payları koruyacak şekilde azaltılır. Bu durumda saklı paylı mirasçılar, mirasbırakanın yaptığı tasarrufların saklı paylarına zarar veren kısmını geri alabilirler. Bu nedenle, tenkis kararı inşai bir karardır. Saklı payı ihlal eden işlemin kısmen veya tamamen indirgenmesiyle, mirasın açıldığı andan itibaren geçerli olmak üzere, saklı pay mirasçısı, tenkisle indirgenmiş olan ve henüz yerine getirilmemiş olan işlemi yerine getirme yükümlülüğünden kurtulur. Daha önce yerine getirilmiş işlemlerle ilgili olarak ise, tenkis kararı, işlemden faydalanan kişiyi indirgenmiş kısmı iade etme yükümlülüğü altına sokar.

Ölünceye kadar bakma sözleşmesi kapsamında yapılan sağlararası kazandırmaların tenkisi konusunun seçilmesiyle, kural olarak ivazlı sözleşmelerde söz konusu olamayacak tenkis isteminin, ivazlı yapılması şart olan ölünceye kadar bakma sözleşmesine karşı ileri sürülmesinin nasıl mümkün olduğunun irdelenmesi amaçlanmıştır. Ayrıca, ölünceye kadar bakma sözleşmesinin muvazaalı olarak gerçekleştirildiği ve geçersiz sayıldığı durumlarda, geçersiz olan sözleşmeye karşı tenkis talebinin nasıl ileri sürülebileceği probleminin açıklığa kavuşturulması hedeflenmiştir. Karşılıklı borç ve hak doğuran ölünceye kadar bakma sözleşmesindeki edim ile saklı paylı mirasçıların miras hakkı arasında uygulamada sıkça rastlanılan uyuşmazlıklarda, kanun koyucu tarafından hakkaniyetin gözetilmesi için kabul edilmiş kural setleri incelenmiştir. Aynı zamanda bu konuya dair uyuşmazlıkların çözümü, tarafların gerçek ve ortak iradelerine göre şekillendiğinden, hukukumuzda irade teorisinin benimsendiğinin de bir göstergesidir. Bu bakımdan, "ölünceye kadar bakma sözleşmesi kapsamında yapılan sağlararası kazandırmalarin tenkisi", hukuk sistemimize birden fazla yönüyle ışık tutan bir konu olmasından ötürü seçilmiştir.

Tezimizde ilk olarak genel olarak ölünceye kadar bakma sözleşmesi, unsurları, hukuki niteliği, tarafları, tarafların yükümlülükleri, şekil şartları, sona ermesi ve üçüncü kişilerin sözleşmeye karşı öne sürebileceği iddialar incelenecektir. Sonrasında genel olarak tenkis davası, unsurları, tarafları, tenkis hükmü ve geri verme yükümlülüğü incelenecektir. Tezimizin süregelen başlıklarında genel olarak muvazaalı işlem, muvazaalı işlemin türleri ve unsurları, muris muvazaası ve ölünceye kadar bakma sözleşmesinin muvazaalı olarak gerçekleştirilmesi incelenecektir. Son olarak ise ölünceye kadar bakma sözleşmesi kapsamında yapılan sağlararası kazandırmaların tenkisi incelenecektir.

Anahtar Kelimeler: Ölünceye Kadar Bakma Sözleşmesi, Tenkis, Muris Muvazaası, Saklı Paylı Mirasçı, Bakım Alacaklısı, Bakım Borçlusu

ABSTRACT

Abatement Of Inter Vivos Transfers Made Through The Contract Of Maintenance Until Death

Hakeri, Recep Hakan Ekim

Master’sThesis, Department of Civil Law

Supervisor: Asst. Prof. Dr. Berrak Genç Gelgeç

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In this study, we will examine the concept of "request for abatement" which is a well-established legal concept in inheritance law, against the contract of maintenance until death regulated in Articles 611- 619 of the Turkish Code of Obligations.

In the maintenance until death contract, the caregiver has the right to demand the fulfillment of the obligation undertaken by the care beneficiary through the contract, in exchange for the caregiving and supervision obligation undertaken within the scope of this contract. The contract of maintenance until death can be made according to either inheritance law or obligations law, depending on the manner of performance of the the care beneficiary. If the care beneficiary fulfills their obligation towards the caregiver through a testamentary disposition, the contract is considered to be of an inheritance law nature. However, if the obligation is fulfilled through an inter vivos legal transaction, it is regarded as a contract governed by obligations law. Given that our thesis examines inter vivos transfers, the essence of our thesis is the contract of maintenance until death within the context of obligations law.

The abatement action, regulated in Articles 560 and following of the Turkish Civil Code, is a type of lawsuit aimed at protecting the reserved share rights of heirs. An abatement lawsuit is filed by heirs with reserved shares to protect their shares against dispositions that exceed the testator’s disposable portion. Article 565 of the TCC specifies which gratuitous transfers may be subject to abatement. Since a contract of maintenance until death is a reciprocal contract that creates mutual obligations, it is not typically subject to abatement under Article 565 of the TCC.

However, Articles 565/3-4 of the TCC provide that donations made by the testator while retaining the right to revoke freely, donations made in the last year of life customary gifts, and transfers that are clearly intended to undermine the reserved share rules may be subject to abatement. Therefore, if a contract of maintenance until death is made with the intent to donate or to violate reserved shares, it can be subject to abatement.

A frequently encountered example in practice regarding the assertion of an action for abatement against the maintenance until death contract is based on the allegation that the benefits provided by the care recipient under this contract were made with the intention of violating the reserved portion.

According to the Court of Cassation decisions, whether or not there is a need for maintenance, imbalance between performances, transfer of the entire or nearly entire estate, and whether the care beneficiary is the spouse of the caregiver are factors that can indicate an intent to violate the reserved share.

A key indicator of the intent to violate the reserved share is when the parties execute the contract within the framework of a simulation agreement. Transactions intended to violate the reserved share but disguised as different types of transactions, while actually being agreed upon to have no legal effect under a simulation agreement, are referred to in practice and doctrine as "decedent simulation."

According to the rulings of the Court of Cassation, determining whether the transfer made by the decedent under a contract of maintenance until death is related to simulation requires considering various factors such as the age, physical and general health of the heir at the time of the contract, family conditions and relationships, the amount of assets owned, the proportion of the transferred property to the total assets, and whether this proportion falls within a reasonable limit.

If it is understood that a contract of maintenance until death was made with a different motive (usually with the intent to violate the reserved share) rather than the apparent purpose agreed upon by the parties, the transfers made under the contract may then be subject to abatement. However, abatement claims can initially be made against a valid contract. If the contract of maintenance until death was executed with simulation, it will be considered invalid. The issue of how abatement can be applied to an invalid contract is a problem that this thesis aims to clarify.

There are two types of simulated transactions: relative and absolute. If there is a concealed agreement behind the apparent transaction that reflects the true intentions of the parties, it is considered a relative simulation; otherwise, it is an absolute simulation.

For the abatement of a simulated contract of maintenance until death, the simulation must be relative. In cases of absolute simulation, since there is no concealed transaction between the parties and their true intention is that the apparent contract should not produce legal effects, the contract is deemed null and void from the outset. The simulated agreement holds no validity, not only between the parties but also with respect to third parties. In relative simulation, however, the situation is somewhat different. The parties enter into a concealed agreement behind the contract of maintenance until death, which reflects their true and mutual intentions. This concealed agreement is valid as long as it meets the formal requirements prescribed by law. In such a case, heirs whose reserved shares have been violated can request abatement by arguing that the contract of maintenance until death was simulated and by challenging the valid concealed agreement.

This thesis addresses the topic of abatement of inter vivos transfers made through the contract of maintenance until death, focusing on how the abatement claim which is typically not applicable to reciprocal contracts, can be pursued in the context of contracts of maintenance until death, which involve reciprocal obligations. Additionally, the aim is to clarify the issue of how a claim for abatement can be made against a contract of maintenance until death that has been executed with simulation and deemed invalid. The thesis explores the conflicts that arise between the performance of reciprocal obligations under such contracts and the inheritance rights of heirs with reserved portions. Also, the legislative rules designed to ensure fairness in these disputes is examined. At the same time, the resolution of disputes on this matter is shaped by the genuine and mutual intentions of the parties, which also indicates that our legal system embraces the theory of intent. Thus, the topic of "abatement of inter vivos transfers made through the contract of maintenance until death" has been chosen for its relevance in illustrating various facets of our legal framework.

In our thesis, we will first examine the contract of maintenance until death, its elements, legal nature, parties, obligations of the parties, formal requirements, termination, and claims that third parties can assert against the contract. Following that, we will analyze the abatement lawsuit, its elements, parties, abatement judgments, and the obligation to return. The ongoing sections of our thesis will cover the concept of simulation, types and elements of simulated transactions, decedent simulation, and the simulation of the contract of maintenance until death. Finally, we will address the abatement of inter vivos transfers made under the contract of maintenance until death.

Keywords: Contract of Maintenance Until Death, Abatement Lawsuit, Decedent Simulation, Reserved Share Heir, Care Beneficiary, Caregiver

LIST OF ABBREVIATIONS

ART	Article
BEL	Bankruptcy and Enforcement Law
ETC	Et Cetera
E.G.	Exempli Gratia (for example)
I.E.	Id Est (in other words)
TCC	Turkish Civil Code
TCO	Turkish Code of Obligations
TCPC	Turkish Civil Procedure Code
TPL	Turkish Property Law

CONTENTS

INTRODUCTION

In this thesis, the main focus is the "request for abatement" which is a well-established legal concept in inheritance law, against the contract of maintenance until death which is regulated in Articles 611- 619 of the Turkish Code of Obligations[1] (TCO).

In this contract, it is envisaged that individuals who are in need of care and supervision will be cared for and supervised until the end of their lives. According to Article 611 of the TCO, by this contract, the caregiver undertakes the obligation to provide care and supervision, while the care beneficiary undertakes to transfer their assets or certain asset values to the caregiver in return.

There are two types of contracts of maintenance until death: those qualified under the law of inheritance and those qualified under the law of obligations. The primary distinction between theese two types lies in how the care beneficiary fulfills their obligation. If the care beneficiary fulfills their obligation towards the caregiver through a testamentary disposition, the contract is considered to be of an inheritance law nature. However, if the obligation is fulfilled through an inter vivos legal transaction, it is regarded as a contract governed by obligations law[2]. Since our thesis focuses on inter vivos transfers, we will primarily address the contract of maintenance until death governed by obligations law.

Although there are two types of contracts of maintenance until death, it is a formal requirement for both to be executed in the form of an inheritance contract. Even if a contract of maintenance until death does not contain an assignment of heirs clause, it must still be made in the form of an inheritance contract under Article 612 of TCO and and in accordance with Article 545 of the Turkish Civil Code[3] (TCC), which states that for the inheritance contract to be valid, it must be drawn up in the form of an official will.

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[1] Turkish Code Of Obligations (TCO), Official Gazette 27836 (11 November 2011), Legal Code no. 6098.

[2] Fikret Eren, B*orçlar Hukuku Özel Hükümler*, (Ankara: Yetkin, 2018), 812.; Aydın Zevkliler -Emre Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri,* (İstanbul: Vedat, 2021), 774.; Cevdet Yavuz – Faruk Acar – Burak Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* (İstanbul: Beta, 2022), 1660.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* (İstanbul: Filiz, 1992) 550.; Alparslan Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, (İstanbul: Vedat, 2010), 27.

[3] Turkish Civil Code (TCC) Official Gazette 24607 (22 November 2001), Legal Code no. 4721.

The reserved shares of the heirs may have been violated due to some of the testator’s actions. Abatement is a type of lawsuit that allows reserved heirs to have inter vivos transfers and testamentary dispositions that violate their reserved portions reduced proportionately.

Abatement has specific conditions that must be met. According to Article 560 of the TCC there are two main conditions for an abatement. First, a testator, through post-mortem dispositions or gratuitous transfers made while alive, should have exceeded the statutory share recognized by the law, Second, the testator's disposals should have violated the reserved shares of the reserved share heirs. However, it is important to note that for abatement to be possible, the transfer subject to abatement must at first be legally valid. The transfer subject to abatement must not violate personal rights, the law, public order, morality, mandatory provisions, or formal requirements. If the transfer is invalid, the property or rights would not have effectively left the estate. In such cases, instead of abatement, the invalid transfer must be returned to the estate. Aside from these absolute conditions, for abatement to be possible, the transfer that causes the violation of the reserved portion must be made gratuitously (without consideration), as abatement can only apply to gratuitous transfers.

In some instances, the transfer of assets agreed upon in the contract of maintenance until death may potentially violate the reserved shares of the care beneficiary's heirs. In such a scenario, the law entitles heirs to a right to start abatement proceeding against the transaction carried by the care beneficiary under the contract of maintenance until death.

However a contract of maintenance until death is a contract made with consideration and it is bileteral. In other words, this contract imposes obligations on both parties; while the care beneficiary transfers a property value as a consideration, the caregiver undertakes the obligation of care and supervision in return. Thus, it cannot be gratuitous. So as a rule, contract of maintenance until death cannot be subject to abatement. However, Articles 565/3-4 of the TCC provide that donations made by the testator while retaining the right to revoke freely, donations made in the last year of life customary gifts, and transfers that are clearly intended to undermine the reserved share rules may be subject to abatement. Therefore, if a contract of maintenance until death is made with the intent to donate or to violate reserved shares, it can be subject to abatement.

In practice, it is sometimes observed that the contract of maintenance until death is executed with simulation to evade the reserved share heirs. Parties may engage in a gratuitous transfer under the guise of a contract of maintenance until death. Therefore, what appears on paper as a bilateral (consideration-based) contract of maintenance until death may actually be a simulated contract that does not reflect the true intentions of the parties and has no legal effect. In this case, since a simulated contract of maintenance until death is not based on consideration and is deemed gratuitous, it may be subject to abatement.

That being said, as previously mentioned, for abatement to be possible, the inter vivos transfer subject to abatement must at first be legally valid. A contract of maintenance until death that has been simulated on the other hand cannot be considered valid. Indeed, if an inter vivos transfer is invalid, the property or right does not leave the estate. Instead of abating such an invalid transfer, it must be returned to the estate[4].

Since abatement can only be asserted against valid contracts, how can a claim for abatement be made against a contract of maintenance until death that is deemed invalid due to simulation? This thesis aims to clarify this issue.

It should be noted that there are two types of simulated transactions: relative and absolute. If there is a concealed agreement behind the apparent transaction that reflects the true intentions of the parties, it is considered a relative simulation; otherwise, it is an absolute simulation[5].

According to TCO Article 19, the nature or content of a contract should be determined based on the real and mutual intentions of the parties, rather than the words used to conceal their true purpose. Thus, if a contract of maintenance until death is carried out with relative simulation and the existence of a concealed contract is being discussed, This concealed contract will be deemed valid, provided it meets the necessary validity requirements, as it accurately reflects the true intentions of the parties. In this case, there will be a valid contract that is not gratuitous and has violated the reserved shares, allowing heirs to assert a claim for abatement. Therefore, the contract of maintenance until death can only be subject to abatement in this manner.

However, it is essential for the party seeking abatement to prove the existence of simulation. In case law, it is acknowledged that a contract of maintenance until death might have been executed with the intention of violating the reserved portion under specific

[4] Hüseyin Hatemi, *Miras Hukuku,* (İstanbul: Onikilevha, 2022), 54.; Sezer Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* (İstanbul: Onikilevha, 2022), 961.
[5] Eren, B*orçlar Hukuku Genel Hükümler,* 371.; M. Kemal Oğuzman – M. Turgut Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* (İstanbul: Vedat, 2018), 129.;

circumstances. Nevertheless, according to rulings from the Court of Cassation[6], the recognition of decedent simulation and the intent to breach the reserved share is only valid when multiple objective and substantial indications collectively support such claims. Factors such as the age of the testator at the time of the contract, their physical and general health condition, whether there is a need for maintenance, family conditions and relationships, whether the caregiver is the testator's spouse, the amount of assets they possess, the ratio of the transferred property to the entire assets, and whether it remains within a reasonably manageable limit should be taken into account.

In practice, it is frequently observed that contracts of maintenance until death are conducted with the intention of simulating a violation of the heirs' reserved shares. Indeed, if a simulated contract of maintenance until death contains a valid concealed agreement that reflects the true intentions of the parties, the heirs may seek abatement against this concealed agreement.

However, since the transaction was carried out with simulation, the formal requirements were not met. Thus, a concealed transaction subject to formal requirements will also not be considered valid. Therefore, this issue may only apply to transfers that are not subject to formal requirements. Since testamentary dispositions are often subject to formal requirements, they would be deemed invalid if not executed in accordance with these requirements, and thus abatement would not be possible. However, a concealed contract, which is an inter vivos transfer that is not subject to formal requirements, could be fit for abatement.

This thesis addresses the topic of abatement of inter vivos transfers made through the contract of maintenance until death, focusing on how the abatement claim which is typically not applicable to reciprocal contracts, can be pursued in the context of contracts of maintenance until death, which involve reciprocal obligations. Additionally, the aim is to clarify the issue of how a claim for abatement can be made against a contract of maintenance until death that has been executed with simulation and deemed invalid. The thesis explores the conflicts that arise between the performance of reciprocal obligations under such contracts and the inheritance rights of heirs with reserved portions. Also, the legislative rules designed to ensure fairness in these disputes is examined. At the same time, the resolution of disputes on this matter is shaped by the genuine and mutual intentions of the parties, which also indicates that our legal system embraces the theory of

[6] The Civil General Council of the Turkish Court of Cassation, 1997/238, (26 March 1997).

intent. Thus, the topic of “abatement of inter vivos transfers made through the contract of maintenance until death” has been chosen for its relevance in illustrating various facets of our legal framework.

In our thesis, we will begin by exploring the contract of maintenance until death, focusing on its elements, legal nature, involved parties, their obligations, formal requirements, termination, and the claims that third parties may raise against the contract. Next, we will examine the abatement action, detailing its elements, parties, abatement rulings, and the obligation to return. Subsequent sections will discuss the concept of simulation, including the various types and elements of simulated transactions, decedent simulation, and the simulation associated with the contract of maintenance until death. Finally, we will analyze the abatement of inter vivos transfers conducted under the contract of maintenance until death.

1. CONTRACT OF MAINTENANCE UNTIL DEATH IN GENERAL TERMS

1.1. Terminology and Definition

Contract of maintenance until death is regulated between Articles 611 and 619 of the TCO. They are considered agreements whose outcomes depend on chance and coincidence.

Article 611 of the TCO defines the Contract of Maintenance Until Death as follows: "lifetime maintenance contract is the contract which the settlor undertakes to provide beneficiary with maintenance and care for his lifetime, whereasthe beneficiary undertakes to transfer an estate or some estate assets to the settlor"[7]

The caregiver obtains the right to demand the performance of the consideration (quid pro quo) that he/she undertakes by contract from the care beneficiary for the care obligation he/she assumed under this agreement until the latter's death[8]. As understood from Article 611 of the TCO, the care beneficiary can perform the reciprocal obligation either during his/her lifetime or after his/her death by appointing the caregiver as an heir[9].

There are two types of contracts for maintenance until death, based on how the caregiver fulfills his/her obligations. Those qualified under the law of succession and those qualified under the law of obligations. While both types are mentioned in the TCO, they are treated separately in legal doctrine[10] and practice.

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[7] Çağlar Özel, *Turkish Code Of Obligations,* (Ankara: Seçkin, 2021) 553.

[8] Eren, B*orçlar Hukuku Özel Hükümler,* 811.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri,* 773.; Yavuz –Acar –Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1667.; Ahmet Kılıçoğlu, *Borçlar Hukuku Özel Hükümler,* (Ankara, Turhan, 2019) 707.; Kenan Tunçomağ, *Ölünceye Kadar Bakma Akdi,* (Ankara:1959), 23.

[9] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.

[10] Eren, B*orçlar Hukuku Özel Hükümler,* 812.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.; Yavuz – Acar – Özen *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1660.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 550.; Kenan Tunçomağ, *Ölünceye Kadar Bakma Akdi,* 28.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 26.

The type of agreement in which the caregiver fulfills the duty of caring for the care beneficiary throughout their lifetime, and in return, the care beneficiary designates the caregiver as their heir, known as the contract of maintenance until death that is regulated under the law of inheritance[11]. As it is understood, the determining feature of the maintenance until death contracts under the law of inheritance is that it becomes due upon the death of the care beneficiary and the performance is fulfilled with a death-related disposition.

In cases where the care beneficiary does not fulfill his/her reciprocal obligation by a disposition contingent on death, but rather fulfills it through an inter vivos transaction (between living persons), providing assets or certain asset values, the type of contract that emerges is qualified under the law of obligations as a contract of maintenance until death[12]. As explained, this type of contract of maintenance until death is the main focus of our thesis. Therefore, throughout our thesis, this type of contract of maintenance until death will be emphasized.

1.2. Elements

The most crucial aspect for the formation of a contract is undoubtedly its elements. The parties must agree on the elements of the contract[13]. The legislator has defined each type of contract by providing a specific provision for it, thereby explaining its essential elements and characteristics[14].

As stated, Article 611 of TCO defines maintenance until death contracts as follows: “The contract of maintenance until death is a contract in which the caregiver undertakes to care for and supervise the care beneficiary until death, and the care beneficiary undertakes to transfer some assets or certain asset values to the caregiver.” A fundamental element of the contract of maintenance until death is the continuation of the care beneficiary's life throughout the duration of the contract. The TCO explicitly states the duration element of the contract of maintenance until death. It requires that the parties have

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[11] Eren, B*orçlar Hukuku Özel Hükümler,* 812.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.; Yavuz – Acar - Özen *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1660.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 550.; Akartepe*, Ölünceye Kadar Bakma Sözleşmesi*, 27.
[12] Eren, B*orçlar Hukuku Özel Hükümler,* 813.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1660.; Kenan Tunçomağ, *Ölünceye Kadar Bakma Akdi,* 28.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi,* 26.
[13] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1*, 73.
[14] Fikret Eren, B*orçlar Hukuku Genel Hükümler,* (Ankara: Yetkin, 2018), 199-200.; Fatih Birsen, *Ölünceye Kadar Bakma Sözleşmesi,* (Ankara: Seçkin, 2022), 26.;

agreed on the continuation of the caregiver's duty of care for the lifetime of the care beneficiary. Since the law stipulates that the contract will continue until the death of the care beneficiary, the parties do not have the freedom to determine the duration of the contract[15].

Also, the parties are required to agree on undertaking mutual obligations[16]. In the contract, the obligation to be performed by the caregiver is the duty of care and supervision, while the obligation to be performed by the care beneficiary is the duty to transfer assets or an asset value[17].

Finally, the parties must have reached an agreement on all the aforementioned elements[18].

1.3. Legal Nature

The legal nature of a contract is determined by its content, which also defines its legal characteristics. A contract of maintenance until death is a bilateral contract meaning that it creates mutual obligations. Each party to the contract is obliged to provide something to the other[19]. The care beneficiary receives care and attention throughout their lifetime. The caregiver, in return, receives some assets or certain portions of assets. It is not necessary for ownership rights to be provided to the caregiver in the relevant assets. For example, leaving them usufruct would be sufficient. Similarly, it would be sufficient for a caregiver to transfer an asset to secure a loan needed[20]. However, a contract of maintenance until death is not a document solely transferring ownership like a deed. It only confers personal rights. Therefore, the unilateral application of the caregiver for registration in the land registry would not be sufficient, but it may constitute a basis and

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[15] Eren, B*orçlar Hukuku Özel Hükümler,* 815.

[16] Eren, B*orçlar Hukuku Genel Hükümler*, 210.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 773.

[17] Eren, B*orçlar Hukuku Özel Hükümler*, 815.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.

[18] Eren, B*orçlar Hukuku Özel Hükümler,* 816.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 773.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 548.; Tunçomağ, *Ölünceye Kadar Bakma Akdi,* 27.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 32.; Kılıçoğlu, *Borçlar Hukuku Özel Hükümler,* 710.

[19] Eren, B*orçlar Hukuku Genel Hükümler,* 210.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 45.; Nihat Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* (Ankara: Adalet, 2015), 3133.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 773.

[20] Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* 3133.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1660.

evidence for filing a registration lawsuit[21]. Furthermore, as this contract entitles personal rights to the parties, these rights may only be asserted against the contracting parties and their heirs. The contract of maintenance until death grants personal rights to the party who fulfills the obligation. Personal rights are acquired only when the obligation imposed by the contract is fulfilled. In other words, it is not possible for a party who fails to fulfill or avoid performance of their obligation to make a claim for personal rights[22].

A contract of maintenance until death is a consensual contract. To form and enforce the contract of maintenance until death, it is sufficient for parties to express their mutual and corresponding wills in compliance with the formal requirements specified by law[23].

A contract of maintenance until death is a contract whose outcomes depend on chance and coincidence. The contract only imposes obligations on the caregiver depending on the lifetime of the care beneficiary. The performance of the obligation is contingent on when life will end[24].

1.4. Parties to the Contract

Care beneficiary is the person who will be taken care of according to the contract. Due to the nature of the contract, the care beneficiary must necessarily be a natural person. This is because this contract is made to meet the natural needs of a person until their death and to take care of them[25]. As a rule, while one of the parties to the contract is the caregiver and the other is the care beneficiary, the parties may also agree on the care of a third person[26]. There may also be multiple care recipients. Thus, with a single contract, the

[21] Erhan Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* (Ankara: Seçkin, 2023), 27.
[22] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 28.
[23] Eren, B*orçlar Hukuku Özel Hükümler*, 814.; Eren, B*orçlar Hukuku Genel Hükümler*, 238.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 773.
[24] Yavuz – Acar - Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1660.; Eren, B*orçlar Hukuku Özel Hükümler*, 814.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 773.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 28.
[25] Eren, B*orçlar Hukuku Özel Hükümler*, 816.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 45.
[26] Eren, B*orçlar Hukuku Özel Hükümler*, 816.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.

care and supervision of multiple individuals can be provided . Thus, with a single contract, the care and supervision of multiple individuals can be provided[27].

Whether the care beneficiary is elderly, minor, or incapacitated does not affect the validity of the contract of maintenance until death under obligations law. However, for a contract of maintenance until death governed by obligations law to be validly executed by a minor or someone under guardianship, it is necessary to obtain permission from the guardianship and supervision authorities[28]. However, for a contract of maintenance until death related to inheritance law (whether in the form of a will or inheritance contract) to be valid, the care beneficiary must personally enter into the contract, rather than doing so through a representative. This means the care beneficiary must be of legal age and possess testamentary capacity[29].

Caregiver, on the other hand, as stipulated by the contract, is the person responsible for taking care of the other party to the contract or a third party designated in the contract for their entire life. While it is mandatory for care beneficiary to be a natural person, caregiver may also be a legal entity since the obligations of the contract may also be fulfilled by legal entities. The choice belongs to the care beneficiary[30]. The choice of the caregiver as a natural or legal person does not result in any differences in the rights and obligations arising from the contract.

Minors or incapacitated individuals can also act as caregivers if they obtain permission from the guardianship authorities[31], according to Article 463/4 of the TCC. However, in practice, it would be uncommon for a person with limited capacity to act as a caregiver. It is because the obligations that the caregiver is responsible for would practically hinder the exercise of these rights by individuals with limited capacity[32].

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[27] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 53.

[28] Eren, B*orçlar Hukuku Özel Hükümler,* 816.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 775.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 550.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 22.

[29] Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 550.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 22.

[30] Eren, B*orçlar Hukuku Özel Hükümler,* 816.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 775.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 550.; Teslime Akkan Akol, *Ölünceye Kadar Bakma Sözleşmesi,* (Konya: KTO Karatay University, Institute of Social Sciences, Master’s Thesis, 2019) 25.

[31] Eren, B*orçlar Hukuku Özel Hükümler*, 816.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 775.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm*, 550.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 22.

[32] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 26.

1.5. Requirements to Form a Contract of Maintenance Until Death

The law establishes validity conditions for certain types of contracts. The reason for the law to prescribe validity conditions is to promote reflection during contract formation, protect the parties, and provide assurance for third parties[33]. The imposition of formal requirements on the contract of maintenance until death, which carries significant financial value, also plays a crucial role in ensuring that the parties contemplate beforehand, preventing any detriment to their interests, and establishing legal certainty[34].

A contract of maintenance until death must meet specific legal requirements to be formed validly. According to Article 612 of the TCO, a maintenance contract must be arranged in the form of an inheritance contract[35]. Under Articles 545 and 532 of the TCC, an inheritance contract is established by a text drawn up ex officio by a conciliation judge or a notary in the presence of two witnesses, signed by the parties and witnesses. If a contract of maintenance until death is externally drafted and notarized, it would be invalid. As the article requires, the notary official, the parties and two witnesses must be present together when the contract is drafted. If the notary official, the witnesses or one of the parties signs the contract later, or if the official who drafts and signs the contract and the approving official are different individuals, the contract of maintenance until death becomes invalid due to formal irregularity[36]. Thus, a contract of maintenance until death shall be made in accordance with the form required to be valid[37].

As mentioned above[38], there are two types of contracts of maintenance until death: those qualified under the law of succession and those qualified under the law of obligations. However, the form requirement is applied regardless of the type of the contract of maintenance until death chosen.

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33 Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 140.

34 Eren, B*orçlar Hukuku Genel Hükümler,* 280.

35 Eren, B*orçlar Hukuku Özel Hükümler,* 817.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 775.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 775.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 549.; Yavuz – Acar - Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1661.

36 Mustafa Dural – Turgut Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* (İstanbul: Filiz, 2016), 107-109.; Eren, B*orçlar Hukuku Özel Hükümler,* 817.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 776.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 775.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 549.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 112.; Kılıçoğlu, *Borçlar Hukuku Özel Hükümler,* 710.

37 Eren, B*orçlar Hukuku Özel Hükümler,* 817.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 776.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1661.; Hatemi –Serozan –Arpacı, *Borçlar Hukuku Özel Bölüm,* 549.

38 See: Section 1, Under "Terminology and Definition"

Even if a contract of maintenance until death does not contain an assignment of heirs clause, it must still be made in the form of an inheritance contract under Article 612 of the TCO and in accordance with Article 545 of the TCC, which states that for the inheritance contract to be valid, it must be drawn up in the form of an official will. Therefore, it is necessary for a contract of maintenance until death to be structured as an inheritance agreement in order to meet the requirement for validity[39]. In other words, if the formal requirements are not met, the contract is absolutely void[40].

On this, the Court of Cassation held: "Article 512 of the (former) TCO states that a contract of maintenance until death must be executed in the form of an inheritance agreement... According to Article 545 of the Turkish Civil Code, an inheritance agreement must be prepared as an official will, and Article 532 of the TCC specifies that an official will must be drafted by an official in the presence of two witnesses. The second paragraph also states that the official can be a Justice of the Peace, a notary, or another official authorized by law. In the case under review... the document was not prepared in the manner prescribed by law but was instead drafted in writing by the parties. This formal requirement specified by law is an essential condition for the validity of the contract. If the contract is not prepared in this manner, it is not valid."[41]

That being said, Article 612/2 of TCO brings an exception to the form requirements. It establishes that if a contract of maintenance until death in the form of an inheritance contract is made with a State-recognized institution according to conditions determined by competent authorities, ordinary written form would suffice to the form requirement.

Moreover, the Court of Cassation held that "even though a contract of maintenance until death is subject to formal requirements, when untitled real estate is transferred with a conditional donation through an informal document, the transaction is valid. The contract is considered fulfilled by the transfer of the property to the defendants, thereby eliminating the need for formalities and effectively transforming the contract into a donation."[42] Therefore, it is established that, if a real property without a deed (untitled) is

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[39] Eren, B*orçlar Hukuku Özel Hükümler,* 817.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 776.

[40] Eren, B*orçlar Hukuku Özel Hükümler,* 817.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 154.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 776.

[41] The 8th Civil Chamber of the Court of Cassation, 2002/5112, (25 June 2002).

[42] The 13th Civil Chamber of the Court of Cassation, 5746/7288, (29 November 1992).

made a subject to a contract of maintenance until death, such contracts would be an exception to the form requirement, as well.

The deficiency in a contract lacking the legal form is considered by the court ex officio. However, this deficiency cannot be raised by the care beneficiary's heirs against the caregiver who fulfills the duty of care after the death of the care beneficiary. Article 2 of the TCC regarding the principle of good faith prohibits this[43]. In the case of a contract of maintenance until death establishing a continuous obligation relationship, if the parties terminate the contract retroactively by claiming that the formal rules are not complied with after performing their obligations for a certain period, it should not be accepted as contrary to the principle of good faith[44]. As the parties have performed the contract without claiming the formal defect, in such cases, where the contract is almost performed, basing the termination on formal irregularity may be considered an abuse of right[45].

Furthermore, in a contract of maintenance until death drafted without adherence to the form, care beneficiary could not raise the objection of formal irregularity if the obligations have been fully performed by the caregiver. This is because the complete performance of the obligation signifies the passage of time until the death of the care beneficiary, as implied by the nature of the contract. Moreover, for the caregiver, who has already fulfilled the contract, it would be against their interests. Therefore, in practice, the most common situation is for the heirs of the care beneficiary to raise the allegation of formal deficiency after the care beneficiary's death. In such cases, the claim of formal deficiency is considered under the principle of good faith. If it is considered to be contrary to the principle of good faith and an abuse of rights, the claim of formal deficiency is not accepted[46]. On this, the Court of Cassation established: “If the parties have fulfilled the contract rules while the contract has not been drawn up in accordance with the forms determined by the law, it is incompatible with the principles of good faith for the heirs of the deceased to demand the annulment of the contract, which they accepted as valid while

[43] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 776.; Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 58.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 113.

[44] Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm,* 549-550.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 83.

[45] Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm,* 549-550.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 84.

[46] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 84.; Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 41.

they were alive, due to formal deficiencies. And this situation constitutes an abuse of the right deprived of legal protection."[47]

1.6. Rights and Obligations of the Parties

A contract of maintenance until death, as a bilateral contract, imposes obligations to both parties involved. Therefore, both the care beneficiary and the caregiver are in the position of both creditor and debtor. This means that they both have rights and obligations under the contract of maintenance until death. Under this heading, the rights and obligations of the parties will be discussed.

1.6.1 Rights of the Care Beneficiary

1.6.1.1. The General Rights of the Care Beneficiary

In a contract of maintenance until death, the most important right of the care beneficiary is undoubtedly the right to demand care throughout their lifetime. The scope of this right includes the obligation of the caregiver to provide care and supervision to the care beneficiary until the end of their life. Article 614 of the TCO provides a few general examples regarding the rights of the care beneficiary. According to the relevant article, the rights of the care beneficiary can be summarized as follows: Receiving care services in accordance with the value of the received assets and the previous social status, to be provided with suitable food and suitable housing and to be provided with necessary care and medical treatment.

However, the rights of the care beneficiary are not limited to those specified in Article 614 of the TCO. These are given as examples. Therefore, the parties are free to determine the content of the contract as long as they do not deviate from its essence. If there is no provision in the contract, the provisions of Article 614 of the TCO will apply[48].

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[47] The Civil General Council of the Turkish Court of Cassation, 1959/63, (10 October 1958). See also: "The plaintiffs did not make any claim or file a lawsuit regarding the invalidity of the contract of maintenance, the annulment of which is requested while the testator was alive and healthy. In such a case, the plaintiffs' request for the annulment of the contract of maintenance until death, claiming its invalidity due to formal deficiencies and non-fulfillment of the care duty, is not in accordance with the principle of good faith stated in Article 2 of the Civil Code. Therefore, the court's decision to annul the contract due to formal deficiency is contrary to the law." The 13th Civil Chamber of the Court of Cassation, 1989/5086, (19 November 1989).

[48] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 777.; Yavuz – Acar- Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1663.; Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm*, 552.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 92.; Tunçomağ, *Ölünceye Kadar Bakma Akdi*, 89.

In a contract of maintenance until death, the caregiver generally has the discretion to dispose of the assets transferred to him/her by the contract. However, the care beneficiary cannot freely dispose of his/her rights. The rights of the care beneficiary differ from an ordinary creditor's rights and are therefore protected by the legislator. They are not fully transferable. This provides protection against both the caregiver's potential misuse of the obligations and external interventions by third parties. The scope of protection for care beneficiary’s obligations briefly includes non-transferability, non-mortgageability, and non-attachment to execution[49].

Article 619/1 of the TCO explicitly prohibits the transfer of these rights: “The care beneficiary cannot transfer their rights to another.” As this is a mandatory rule, parties cannot agree otherwise[50]. The reason for prohibiting the transfer of the rights provided to the care beneficiary in a contract of maintenance until death to another person is that the obligation of the caregiver corresponds to the personal needs of the beneficiary[51]. The prohibition on transferability covers both the root right and the individual obligations arising from it. It also applies to the caregiver who is a legal entity. In these institutions designated by the state, the needs and personal circumstances of the care beneficiary are important factors in determining the care and supervision obligations[52].

However, once the obligations have been fulfilled, the care beneficiary's rights are no longer subject to the principle of non-transferability. After fulfillment, these rights become the care beneficiary's possession, allowing him/her to dispose of them as he/she wishes[53]. For example, an allowance provided as part of the obligation can be disposed of by the care beneficiary as they wish. However, the obligations that have not yet been fulfilled cannot be disposed of by the care beneficiary[54]. For instance, the care beneficiary cannot donate clothes that have not yet been delivered to them[55].

The non-transferability of the care obligation also means that it cannot be seized or subject to a lien. The obligations constituting the care debt are tied to the personality of

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[49] Yavuz – Acar- Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1665.; Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm,* 552.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 87.

[50] Yavuz – Acar- Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1666.

[51] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar*, 234.

[52] Yavuz – Acar- Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1666.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 552.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 87-88.

[53] Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm,* 553.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 88.

[54] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 88.

[55] Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 79.

the care beneficiary. Therefore, the care beneficiary cannot be subject to seizure by their creditors or be subject to a lien[56].

1.6.1.2. The Rights of the Care Beneficiary to Provide Security

A contract of maintenance until death provides assurance. The decision of the General Assembly of the Court of Cassation, which adopts this view, is as follows: "A contract of maintenance until death is, by its nature, an assuring contract. The scope of the care and supervision obligation is not determined at the beginning or during the continuation of the contract but defines the conditions that will arise throughout the life of the care beneficiary."[57]

In a contract of maintenance until death governed by obligations law, the care beneficiary fulfills his/her obligation at the outset of the contract. Once the care beneficiary has transferred the agreed-upon obligation, he/she forfeits any rights over these obligations. On the other hand, the caregiver performs the agreed-upon obligations over a period of time. This situation places the care beneficiary in a rather disadvantaged position compared to the caregiver[58]. To address this vulnerability, Article 613 of the TCO entitles care beneficiary a right to mortgage. It reads as: "The care beneficiary who has transferred an immovable property to the caregiver shall have a statutory mortgage right on this property, similar to that of a seller, in order to secure their rights." To exercise this right, which is similar to the rights of a seller in real estate sales, the care beneficiary must act in accordance with Articles 893/1 and 894 of the TCC and Article 613 of the TCO[59]. In Article 893/1 of the TCC, it is stipulated that the seller may request the registration of their mortgage right on the property sold for the receivable arising from the sale. Article 894 of the TCC, on the other hand, mandates that the statutory mortgage rights of sellers, heirs, and other co-owners must be registered in the land registry within three months following the transfer of ownership. The care beneficiary does not need the permission of the caregiver to exercise the statutory mortgage right[60].

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[56] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 89.
[57] The Civil General Council of the Turkish Court of Cassation, 1996/354, (16 April 1997).
[58] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 93-94.
[59] Eren, B*orçlar Hukuku Özel Hükümler*, 818.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 778.; Yavuz – Acar - Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1665.
[60] Eren, B*orçlar Hukuku Özel Hükümler*, 818.; Yavuz – Acar - Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1665.

While this mortgage right granted by law to the care beneficiary can be asserted against anyone within a three-month statute of limitations period, the ability of the care beneficiary to enforce this right against third parties after the expiration of the three-month statute of limitations period depends on the registration of the mortgage right in the land registry within three months. On this, the Court of Cassation held: "Although the care beneficiary may assert this statutory mortgage right against anyone within the aforementioned statute of limitations period, they cannot use this right against third parties after the expiration of the statute of limitations period unless it is registered in the land registry. In other words, if the care beneficiary does not register the right within the stipulated statute of limitations period, they have no legal recourse against third parties."[61]

In addition to the statutory mortgage right specified in Article 613/2 of the TCO, the care beneficiary may secure their care claim with both real and personal guarantees by mutual agreement with the caregiver. The establishment of these rights depends on the consent of the caregiver in virtue of their freedom of contract. These rights, which will be jointly determined by the care beneficiary and the caregiver, may include mortgages, penalty clauses, and guarantees to the extent that they are in line with the nature and basic characteristics of the contract of maintenance until death. If the specified care obligation does not involve real estate, only such rights that provide such guarantees can be used to secure the obligation. However, if the care obligation involves real estate, in addition to the statutory mortgage right, contractual guarantees can also be decided upon[62].

1.6.2. Care Beneficiary's Obligations

While the caregiver fulfills their duty of care and supervision towards the care beneficiary, in return, the care beneficiary undertakes the obligation to transfer part or all of their assets (as determined and agreed in the contract) to the caregiver[63].

If the parties have entered into a care contract under the TCO, the care beneficiary undertakes the obligation to transfer the assets while they are alive[64]. In contrast, in the case of a care contract under the inheritance law, the transfer of assets can be carried out by

[61] The 1st Civil Chamber of the Court of Cassation, 2005/5674, (05 May 2005).
[62] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 50.
[63] Eren, B*orçlar Hukuku Özel Hükümler,* 817.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 777.
[64] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.

appointing the caregiver as an heir to all or part of the estate[65]. It should be noted that the care beneficiary may designate the caregiver as a testamentary creditor or renounce their inheritance in favor of the caregiver, rather than appointing the caregiver as an heir. The phrase "if an heir is appointed" in Article 611/2 of the TCO should be interpreted broadly, and a contract of maintenance until death made in this manner should be accepted as valid[66]. An heir cannot claim rights in the estate while the testator is alive. This right will only arise upon the death of the testator[67]. During the term of the contract, the care beneficiary is also obligated to treat the caregiver well, refrain from causing trouble, and behave in a manner consistent with the requirements of human relations[68].

In the contract of maintenance until death, the primary obligation of the care beneficiary is to transfer the value of the assets, which is the consideration for the care obligation, to the caregiver[69]. However, the care beneficiary must also comply to the principle of good faith throughout the duration of the contract. The care beneficiary is obliged to behave towards the caregiver in a manner consistent with the requirements of human relations throughout the continuation of the contract[70].

1.6.3. Caregiver's Rights

The obligations of the care beneficiary constitute the rights of the caregiver[71]. The most important right of the caregiver in the contract of maintenance until death is undoubtedly the right to demand the transfer of the assets in return for the care given by them in accordance with the agreed contract. Accordingly, caregiver has a personal right to demand the transfer of the assets. However, their right is subject to a statute of limitations of 10 years according to Article 146 of the TCO[72].

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[65] Eren, B*orçlar Hukuku Özel Hükümler,* 818.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.

[66] Tunçomağ, *Ölünceye Kadar Bakma Akdi,* 29.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 29.

[67] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 50.

[68] Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1663.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 115.

[69] Eren, B*orçlar Hukuku Özel Hükümler,* 817.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri,* 778; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1667.

[70] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 778; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1663.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 115.

[71] For detail: 6.2.

[72] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 778.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1668.

Moreover, if the caregiver fails to fulfill their duty of care and supervision, they do not have the right to demand the transfer of the assets[73]. However, the caregiver, in exchange for the consideration they have duly fulfilled, may sell or transfer the assets and rights transferred to them to another party[74].

1.6.4. Caregiver's Obligations

1.6.4.1. The General Obligations of the Caregiver

The caregiver is obligated to provide care to the care beneficiary throughout the care beneficiary's lifetime. While the contract specifies the scope of the care obligation, the law also provides a general framework for these duties.

Article 614 of the TCO specifies the care obligation as follows: "Upon the establishment of the contract, the caregiver becomes a member of the caregiver's family community. The caregiver is obliged to perform the duties required by equity, considering the value of the assets received and the social status previously owned by the care beneficiary.

The caregiver is particularly required to provide appropriate food and housing, take necessary care during illness, and ensure treatment for the care beneficiary.

Institutions established for the purpose of caring for the beneficiary until death, with their consent, determine the scope and implementation of the care obligation through general regulations approved by the competent authorities. These regulations are considered part of the contract."

As this article is a complementary provision, parties may be agreed otherwise to[75].

The legislator has stated that the caregiver's participation in the family community of the care beneficiary would be appropriate for the essence and content of the contract. If the caregiver and the care beneficiary live together, it would be easier for the caregiver to fulfill the agreed duties. However, the parties may agree otherwise, as this rule is not mandatory[76]. Furthermore, the caregiver cannot compel the care beneficiary to live in another house or avoid bringing them into their own family community. Similarly, the care

[73] The 1st Civil Chamber of the Court of Cassation, 2021/856, (24 November 2021).
[74] The 14th Civil Chamber of the Court of Cassation, 1980/519, (31 January 1980).
[75] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 116-117.
[76] Eren, B*orçlar Hukuku Özel Hükümler*, 819.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 119.

beneficiary cannot force the caregiver to provide care in a separate house, if they wish to live there[77].

The parties must show respect, love, and care for each other. Love, respect, and care are also part of the scope of the care obligation[78]. If we infer from the provision in Article 614 of the TCO, regarding the provision of care services according to the value of the assets received and the previous social status, it can be said that the parties must also respect each other's social status. As stated in Article 614 of the TCO, the caregiver is required to provide appropriate food and housing, take necessary care during illness, and ensure treatment for the care beneficiary. In this regard, the caregiver is obliged to meet the needs of the beneficiary for shelter, nutrition, clothing, cleanliness, health, as well as to take care of their treatment[79]. Although the quality and quantity of nutrition may vary, the main idea is to take care of the beneficiary's habits and health with care[80].

If there is a provision in the contract between the parties regarding the scope of the clothing obligation, that provision prevails; however, in cases where there is no provision in the contract, the value of the care beneficiary's counterpart obligation and their social status determine the scope[81].

One of the most important obligations of these is perhaps the obligation of taking care of the health of the care beneficiary. Indeed, in practice, poor health conditions of beneficiary is the most common reason for parties to conclude a contract of maintenance until death. Hence, taking care of beneficiary’s treatment during illness is of utmost importance in terms of caregiver's obligations. The limit of the caregiver's liability for treatment expenses is defined both by the contract agreed upon by the parties and by the value of the care beneficiary’s corresponding obligation[82]. The caregiver is also obliged to perform service duties for the care beneficiary. Service duties are duties that ensure the beneficiary leads a humane and peaceful life[83].

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[77] Eren, B*orçlar Hukuku Özel Hükümler*, 819.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 779.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 120.

[78] Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm*, 552.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 122.

[79] Eren, B*orçlar Hukuku Özel Hükümler,* 820.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri,* 778.; Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm,* 552.

[80] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 123.

[81] Eren, B*orçlar Hukuku Özel Hükümler*, 820.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 123.

[82] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 124.

[83] Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm*, 552.; Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 102.

Although the care and supervision duties are performed by the caregiver, the care beneficiary may need money to meet some personal needs. Thus, the parties may agree to provide money for such expenses[84]. To prevent future disputes, it would be appropriate to specify the amount and duration of the provision of expenses in the contract[85]. Since the contract is inherently long-term, it would also be appropriate to determine the amount or rate of annual increase[86].

1.6.4.2. Other Obligations of the Caregiver: Place of Performance, Time of Performance, and Period of Limitation

In terms of place of performance of the caregiver's obligations, Article 614 of the TCO states that, unless otherwise agreed, the care beneficiary is considered to be accepted into the caregiver's family and lives with the caregiver's family. Therefore, the caregiver's obligation to provide care and supervision is naturally performed at the caregiver's place of residence. If the caregiver performs care and supervision duties elsewhere, then the place of performance is the care beneficiary's place of residence[87].

For the time of performance of the obligations, however, the TCO does not provide a specific provision. Therefore, the parties may freely determine. If the time of performance of the obligations undertaken by the caregiver is specified in the contract, it will be determined accordingly; otherwise, it will be determined based on the characteristics and nature of the obligation in accordance with Article 90 of the TCO which states that unless the time of performance is determined by the parties or understood from the nature of the legal relationship, each debt becomes due at the moment of its inception[88].

Similarly, there is no specific limitation period provided by the law for contracts of maintenance until death. The general provisions of the TCO would therefore be applicable here. Accordingly, the claim for damages arising from the breach of the contract

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[84] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 128.
[85] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 59.
[86] Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 104.
[87] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 779.; Necip Kocayusufpaşaoğlu – Hüseyin Hatemi – Rona Serozan – Albülkadir Arpacı, *Borçlar Hukuku Genel Hükümler Cilt 3,* (İstanbul: Filiz, 2016), 42.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 130.
[88] Kocayusufpaşaoğlu – Hatemi – Serozan – Arpacı, *Borçlar Hukuku Genel Hükümler Cilt 3,* 53.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 29.

of maintenance until death is subject to a limitation period of ten years under Article 146 of the TCO. This limitation period starts with the maturity of the claim, as per Article 149[89].

1.7. Termination of the Contract of Maintenance Until Death

The contract of maintenance until death terminates by mutual agreement, due to performance, or upon the death of the care beneficiary. Additionally, it can be terminated in accordance with the general provisions of the TCO regarding the termination of contracts (renewal, merger of creditor and debtor status, discharge, set-off, subsequent impossibility of faultless performance and statute of limitations). Moreover, it can be terminated based on the specific termination reasons provided in Articles 616 (Termination by notice), 617 (Termination without prior notice), 618 (Care beneficiary’s death) of the TCO concerning this contract, if the conditions specified therein are met[90]. This section will focus more on these specific termination reasons.

1.7.1. Care Beneficiary's Death

Since the primary purpose of the contract of maintenance until death is to care for the beneficiary until the end of their life, death of a care beneficiary will naturally terminate the contract, as there is no longer a person to care for[91]. With the death of the care beneficiary, the obligations of care and supervision incumbent upon the caregiver will also cease. The only obligation left for a caregiver is to take care of the funeral arrangements[92].

If the contract of maintenance until death is made under inheritance law, the contract still terminates upon the death of the care beneficiary. However, here, by the death of the care beneficiary the counter-performance owed by the care beneficiary becomes due

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[89] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 29.

[90] Eren, B*orçlar Hukuku Özel Hükümler*, 823.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1670.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 555.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 133.

[91] Eren, B*orçlar Hukuku Özel Hükümler*, 823.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1670.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 227.; Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* (Ankara: Adalet, 2015), 3154.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 555.

[92] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 141.; Tunçomağ, *Ölünceye Kadar Bakma Akdi*, 119.

and payable, since the caregiver is appointed as an heir in a broad sense to the care beneficiary through this contract[93].

1.7.2. Termination of the Contract by the Will of the Parties

1.7.2.2. Termination of the Contract by Rescission

The contract of maintenance until death is a continuing performance contract. As a rule, termination of a continuing performance contract would have its effects *ex nunc* (as effective from the termination) and is called rescission. Put differently, rescission is a way of terminating a contract that does not affect the obligations already fulfilled. Hence, the obligations fulfilled during rescission cannot be reclaimed[94].

The contract of maintenance until death constitutes an exception to the rule of the future-effective termination of contracts generating continuous debts. Therefore, the legal consequences of rescission applicable to sudden performance contracts are valid for the contract of maintenance until death[95]. The legal consequences of rescission, not termination, are specified in Articles 616 and 617 of the TCO, where the contract of maintenance until death is regulated[96]. Since the term "termination" is used in the law, the term "termination" is used throughout the thesis, accordingly.

1.7.2.3. Termination by Notice

Article 616 of the TCO provides a way of termination specific to contract of maintenance until death. It states that: “If there is a significant disproportion between the performances of the parties, and the party with the excess cannot prove that it was intended as a donation, the other party may terminate the contract at any time by giving notice six months in advance. In determining this disproportion, the difference between the principal value tied to the income corresponding to what is given to the caregiver by the relevant social security institution is taken into account.

[93] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 142.
[94] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 381-383.; Eren, B*orçlar Hukuku Özel Hükümler,* 823.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1671.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 130.
[95] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 136-137.
[96] Eren, B*orçlar Hukuku Özel Hükümler,* 824.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1670.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781-782.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 130.

Until the termination of the contract, the performances performed are evaluated together with the principal and interest, and the party who emerges as a creditor as a result of the reconciliation is refunded."

By virtue of this Article, to terminate the contract of maintenance until death by notification of rescission, firstly there should be a significant disproportion between the performance of the care beneficiary and the caregiver[97]. As beforementioned, the contract of maintenance until death is a contract that imposes mutual rights and obligations on the parties. Since it is onerous, there may be a significant disproportion between the obligations undertaken by the care beneficiary and the caregiver[98]. Since the law requires the disproportion to be "significant," if the difference in value between the performances is not significant, it cannot be said that there is disproportionality[99].

On the other hand, the nature of the contract of maintenance until death consists of inequality to a some degree. Unlike other contracts where both parties have clearly defined obligations, in this case, the caregiver's duties are contingent upon the duration of the care beneficiary's life and his/her specific needs. Hence, this may place one of the parties of a contract in more advantageous position and may result in the disproportion in between the performances of parties[100]. However, it should be pointed out that the disproportion sought by the law is not disproportion arising from the structure of the contract, but disproportion between the performances at the time of the conclusion of the contract[101]. According to the relevant Article, in determining the significant disproportion, the difference between the principal value tied to the income corresponding to what is given to the caregiver by the relevant social security institution is taken into account.

The disproportion between the parties' performances would, however, not be sufficient for a party to terminate the contract by issuing a notification of rescission under Article 616 of the TCO. It also requires that there should be no intention of donation for the excess portion of the party with the excess performance for termination based on this

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[97] Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1671.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 163.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 555.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 180.

[98] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 163.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 180.

[99] Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1671.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 180.

[100] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 69.

[101] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 164.

article. If there is a claim of donation, the article leaves the burden of proof (to prove that there is a disproportionality between the acts for the purpose of donation) on the party whose act is in the excess. If it is shown that the party giving the excess knew of this excess at the time of the conclusion of the contract and signed the contract despite this, the intention to donate is accepted[102]. The absence of a donation intention in the party with the excess performance is a legal presumption. The party receiving the excess has the obligation to prove that this excess was not intended as a donation[103].

According to Article 616 of the TCO, if there is a significant disproportion between the performance of the caregiver and the performance of the care beneficiary and if it cannot be proven that the excess performance was intended as a donation, the party with the excess performance may terminate the contract by giving notice six months in advance[104].The party with the excess performance may request the termination of the contract and reconciliation of the performances fulfilled.

In the event of termination of the contract due to disproportionality between the performances, the contract terminates retroactively six months after the notice of termination by the party with the excess performance. This result occurs automatically after six months, and there is no need to file a lawsuit[105]. Additionally, the party who has chosen to withdraw from the contract due to performance imbalance does not have a right to claim compensation from the other party. Even if the other party is at fault, the situation remains the same[106].

In the event of termination of the contract under Article 616, the parties must return what they have given to each other until that time[107]. According to Article 616 of the TCO, the performances fulfilled until the termination of the contract are evaluated together with the principal and interest, and the party who emerges as a creditor as a result of the reconciliation is refunded. The scope of the caregiver's return constitutes the return of the

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[102] Eren, B*orçlar Hukuku Özel Hükümler,* 824.; Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1671.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 167.;

[103] Eren, B*orçlar Hukuku Özel Hükümler,* 824.; Yavuz – Acar- Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1671.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 181.

[104] Eren, B*orçlar Hukuku Özel Hükümler,* 824.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 555.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 181.

[105] Eren, B*orçlar Hukuku Özel Hükümler*, 824.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 168.

[106] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 72.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 181.

[107] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 181.

property in kind or, if not possible, the determination of the value to be returned. Determining the scope of the care beneficiary's return is more difficult. As long as the contract of maintenance until death continues, it is necessary to determine the values of the care and supervision performances provided to the care beneficiary and to determine the return obligation of the care beneficiary by adding interest to this value[108].

1.7.2.4. Termination without Prior Notice

Article 617 of the TCO entitles parties to a right to terminate the contract of maintenance until death without issuing a prior notice. This article states: "If the continuation of the contract becomes unbearable due to the breach of obligations arising from the contract, or other significant reasons make the continuation of the contract impossible or excessively difficult, each party may terminate the contract without prior notice. If the contract is terminated based on one of these reasons, the party at fault shall return what they have received and shall be liable to pay appropriate compensation to the faultless party for the damage suffered.

The judge may find the termination of the contract without prior notice justified or, at the request of one of the parties or spontaneously, may terminate the living together within the family by granting lifetime income to the care beneficiary."

Article 617 of the TCO specifies the grounds for the termination of the contract without prior notice. The first one is breach of obligations arising from the contract and make the continuation of the contract unbearable. The second condition is more broadly defined and refers to termination due to other significant reasons. Under this article, then, first ground provides that if one of the parties fails to comply with their obligations under the contract, the other party may terminate the contract without prior notice. Non-compliance with the obligations arising from the contract results from either non-performance or inadequate performance of the obligations undertaken. The possibility of termination without prior notice is given to both parties[109]. However, since the care beneficiary usually fulfills their counter-performance at the time of the formation of a

[108] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 171-172.
[109] Eren, B*orçlar Hukuku Özel Hükümler,* 825.; Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* 3152.; Yavuz – Acar- Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1671.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 782.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 147.

contract of maintenance until death under obligations law, the likelihood of caregiver's termination on this ground appears to be low[110].

Since the caregiver's performance obligation continues as long as the contract continues, the other party may terminate the contract without prior notice in the event that the caregiver fails to fulfill its obligations[111]. However, the probability or the concern that the caregiver may likely fail to fulfill their obligation cannot be a ground for a breach of the care contract until death. To terminate the contract under this article, there must be an actual non-performance or a performance that deviates from the terms of the contract[112]. The Court of Cassation held on this matter: "The plaintiff did not claim in the lawsuit petition that the defendant did not take care of him/her, but rather opened the present case by claiming that the plaintiff was not yet in need of care and that he/she believed that the defendant would not fulfill his/her future care obligations. From the contents of the file and the testimony of the witnesses, it is understood that the defendant has fulfilled his/her care obligation towards the plaintiff. It is not acceptable for the plaintiff to file a lawsuit with the concern that he/she will not be cared for in the future after transferring the property, especially considering that it is always possible to file a lawsuit when the care obligation is not fulfilled. Therefore, it is concluded that the dismissal of the lawsuit is appropriate."[113]

The burden of proving that the other party has not fulfilled their obligations lies with the party making the claim [114].

The second reason regulated by the legislator under this article is termination due to significant reasons. If there are significant reasons for example, if the caregiver suffers a stroke, making it impossible to fulfill the care obligation[115] that make it impossible for the contract to continue or significantly complicate its continuation, the contract can be terminated based on Article 617 of the TCO[116].

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[110] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 147.

[111] Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1671.; Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* 3152. Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 782.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 147.

[112] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 184.

[113] The Civil General Council of the Turkish Court of Cassation, 2014/68, (05 April 2014).

[114] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 76.

[115] The 1st Civil Chamber of the Court of Cassation, 2020/498, (3 February 2020).

[116] Yavuz – Acar – Özen, *Türk Borçlar Hukuku Özel Hükümler,* 1671.; Eren, B*orçlar Hukuku Özel Hükümler,* 825.; Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* 3152.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 782. Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 147.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 183.;

Nevertheless, any dispute that may arise between the parties does not give the parties the right to terminate the contract. The parties must not be expected to continue the contract in good faith[117]. For instance, it must be acknowledged that it is impossible to continue the contract with a caregiver who fails to fulfill their duty and abandons the shared residence[118].

Unlike Article 616 of the TCO, Article 617 does not specify a period for the termination of a contract of maintenance until death[119]. When the conditions in Article 617 are met, the contract can be termitaned without any waiting period or prior notice[120]. Terminating a contract is the right to end it unilaterally, and once communicated to the other party, it effectively ends the contract[121]. As unilateral termination of the contract is the exercise of a right that gives rise to a new legal situation, it is not necessary to file a lawsuit to reveal its consequences. The contract is considered to be terminated retroactively from the moment the intention to terminate reaches the other party[122].

1.7.2.5. Consequences of Termination

If the contract is to be terminated according to Article 616 of the TCO, upon the fulfillment of the conditions, the contract is considered terminated upon the delivery of the termination notice to the other party. The other party's acceptance of this notice is not required. Additionally, there is no need to file a lawsuit for the contract to cease to exist[123].

Upon the termination of the contract, the parties are obliged to return what they have received from each other up to that point. According to the relevant provisions of the TCO, the performances rendered until the termination of the contract are evaluated with their principal and interest and returned to the party entitled to them as a result of the reconciliation[124]. The scope of the return for the caregiver includes either the restitution of the property in its original form or, if this is not possible, the determination of the value to be returned[125].

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[117] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 76.
[118] The 1st Civil Chamber of the Court of Cassation, 2021/481, (28 January 2021).
[119] Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 119.
[120] Eren, B*orçlar Hukuku Özel Hükümler,* 826.
[121] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 381.
[122] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 184.
[123] Eren, B*orçlar Hukuku Özel Hükümler,* 824.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 168.
[124] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 181.
[125] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 171-172.

If the maintenance until death contract is terminated according to TCO Article 617, the contract is retroactively terminated, meaning that the obligations performed by the parties until that point are nullified. Until the contract is terminated, the care beneficiary must refund the monetary equivalent of the care and supervision provided by the caregiver. The caregiver, on the other hand, becomes obliged to return the performed reciprocal performance[126]. TCO Article 617 does not contain any provision regarding the liability for reimbursement according to the faults of the parties. The existence of fault is not a prerequisite for the termination of the contract[127]. Although fault is not considered among the conditions under Article 617, the article states: "...In case the contract is terminated for one of these reasons, the faulty party shall return what it has received and shall be obliged to pay the non-faulty party a fair compensation for the damage suffered." Thus, if the party causing the termination of the contract was at fault, it is obligated to pay fair compensation to the non-faulty party[128].

If the reasons for termination under TCO Article 617 are not considered valid by the judge, the court may, upon request of one of the parties or ex officio, decide to grant lifetime income to the care beneficiary according to Article 617/2 of the TCO. This, however cannot be understood as the obligation of care and supervision owed by the caregiver has ended. In such cases, the care beneficiary is required to fulfill the counter-performance owed to the caregiver, while the obligation of the caregiver undergoes a transformation based on the value of the reciprocal performance fulfilled by the caregiver, his/her social status, and equity, according to Article 617/2 of the TCO[129].

The care beneficiary and the caregiver may also mutually agree to grant lifetime income to the care beneficiary. However, if the conditions for termination are not met and the parties request termination of the contract, the judge may grant lifetime income instead of termination[130]. Article 617/2 of the TCO shows similarity to article 517/3 of repealed Turkish Code Of Obligations No: 818. In light of this provision, a decision taken by the Court of Cassation during the time of the old law is as follows: "It is evident that the dispute between the parties needs to be resolved by taking into account Article 517 of the TCO. Therefore instead of terminating the contract, the judge may, at the request of one of

[126] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 150.
[127] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 151.
[128] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 783.
[129] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 153.
[130] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 783.

the parties or ex officio, put an end to their cohabitation and allocate a periodic income to the care beneficiary."[131]

For a decision to grant lifetime income, it is necessary to determine whether there is a benefit to the parties in continuing the contract and whether converting it into income is sustainable for them. The judge is not bound by the parties' wishes when making a decision. Even if the parties have filed a lawsuit requesting termination of the contract, the judge may still decide to grant lifetime income[132].

1.7.3. Death of the Caregiver

According to TCO Article 618, death of a caregiver is another reason for the termination of a contract of maintanence until death. The Article states "If the caregiver dies, the care beneficiary may request termination of the contract within one year. In this case, the care beneficiary may request the heirs of the caregiver to pay him/her a sum of money equal to the amount he/she may request from the bankruptcy estate in case of bankruptcy of the caregiver". It is evident from the Article that death of a caregiver does not automatically end the contract[133]. The obligation of care and supervision transfers to the heirs of the caregiver. The legislator attaches importance to the will of the care beneficiary in such situations. The care beneficiary's decision whether to continue the contract with the heirs of the caregiver after the caregiver's death is evaluated[134]. This right is only granted to the care beneficiary, not to the heirs of the caregiver [135].

If a care beneficiary would like to terminate the contract due to the caregiver's death, he/she should issue a termination notice. There is not any requirement as to the form of the notice. It should only be communicated to the other party (all heirs in this case since the caregiver is dead). There is no obligation to file a lawsuit. Once the termination notice reaches the caregiver, the contract is terminated. The crucial point here is that the termination notice does not have retroactive effect, meaning that the consequences that have already occurred remain valid[136].

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[131] The 1st Civil Chamber of the Court of Cassation, 2008/7908, (24 June 2008).

[132] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 81.

[133] Eren, B*orçlar Hukuku Özel Hükümler,* 823.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 547.

[134] Eren, B*orçlar Hukuku Özel Hükümler,* 828.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 556.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 227.

[135] The 1st Civil Chamber of the Court of Cassation, 1989/998, (06 March 1989).

[136] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 178.

There is also a time limitation for care beneficiary to issue the notice if he/she would like to terminate the contract due to the caregiver's death. Article 618 establishes that the care beneficiary must express his/her wish to terminate the contract within one year of the caregiver's death. If the care beneficiary does not make any contrary notification within one year after the caregiver's death, it is deemed that the obligation of care has transferred to the heirs[137].

According to TCO 618, if the care beneficiary notifies the intention to terminate the contract within one year of the caregiver's death, he/she may demand an amount equal to what the caregiver could claim from the bankruptcy estate in case of bankruptcy of the caregiver[138]. The Court of Cassation held on this matter that "there is no legal possibility for the care beneficiary to demand the return of the property given to the heirs of the caregiver if the contract is terminated due to death. In this case, as clearly stated in Article 618 of the TCO, he/she may only demand an amount equal to what could be claimed from the bankruptcy estate if the caregiver is bankrupt."[139] Unless otherwise agreed between the care beneficiary and the heirs of the caregiver, all heirs are jointly and severally liable for the care obligation[140].

If the care beneficiary transfers the counterperformance during his/her lifetime, there is an inter vivos transaction subject to the right of disposition upon death, and Article 618 of the TCO applies. In this case, again, the care beneficiary may terminate the contract within one year. In case of termination, the care beneficiary may demand the determined amount from the heirs of the caregiver according to Article 619 of the TCO[141].

If the care beneficiary has not fulfilled the obligation arising from the contract during his/her lifetime, inheritance provisions applies, and the contract of care until death will automatically terminate according to Article 548/1 of the TCC, which states that if the appointed heir or the person left with specific property is not alive at the time of the testator's death, the inheritance contract automatically ceases to exist. In this case, the heirs of the caregiver may demand the monetary value of the care and supervision provided until

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137 Eren, B*orçlar Hukuku Özel Hükümler*, 828.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 556.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 227.

138 Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.

139 The 1st Civil Chamber of the Court of Cassation, 2012/9912, (24 November 2012)

140 Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 556.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 181.

141 Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 781.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 182.

the death of the caregiver, according to the unjust enrichment rules, pursuant to Article 548/2 of the TCC[142].

1.7.4. Insolvency of the Caregiver

TCO Article 619/2 states: “In the event of the insolvency of the caregiver, the care beneficiary obtains the right to register a claim with the bankruptcy estate for an amount equal to the principal value that should be paid by the relevant social security institution to obtain the periodic income the debtor is obligated to pay.” As per this subsection, in case of the caregiver's insolvency, the contract of care until death terminates according to the law of obligations. The termination date of the contract is the date of the insolvency decision[143]. This termination does not have retroactive effect; it terminates prospectively[144].

The calculation of the value to be paid in case of the caregiver's insolvency in a qualified contract of care until death is explicitly determined by the law. After the caregiver's insolvency, it is not possible to fulfill the obligation exactly. The obligation of care and supervision owed by the caregiver is determined by calculating an amount equal to the principal value that should be paid by the relevant social security institution[145].

In a qualified contract of care until death governed by inheritance law, in the event of the caregiver's insolvency, the caregiver will be either an appointed heir or a testamentary beneficiary upon the death of the care beneficiary. Therefore, the value of the counterperformance, which is still pending, has not been fulfilled to the caregiver[146].

In case of the caregiver's insolvency, the care beneficiary obtains the right to rescind the contract under TCC Article 547, which states: “In accordance with the inheritance contract, the party entitled to inter vivos performances may rescind the contract under the rules of the law of obligations if these performances are not performed in accordance with the contract or secured.” However, until a bankruptcy decision is made regarding the caregiver, the care beneficiary is subrogated to the bankruptcy estate for the amount of care and supervision provided by the caregiver[147].

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[142] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 183.
[143] Eren, B*orçlar Hukuku Özel Hükümler,* 827.; Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* 3156.
[144] Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* 3157.
[145] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 184.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 234.
[146] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 187.
[147] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 187.

1.7.5. Seizure of the Caregiver's Assets and Participation in the Seizure

The seizure of the assets of the caregiver does not directly lead to the termination of the contract of care until death; rather, it indirectly brings about its termination[148]. TCO Article 619/3 grants the care beneficiary the right to participate in the seizure to satisfy this claim: "The care beneficiary may participate in the seizure proceedings initiated against the debtor by third parties." If seizure proceedings are conducted against the caregiver by third parties, the care beneficiary may join in these seizures[149]. Furthermore, if the seizure of the caregiver's assets results in the inability to fulfill obligations, the care beneficiary may terminate the contract[150]. Seizure is carried out by third parties who are creditors of the caregiver. It is not possible for the care beneficiary's claim for care and supervision in the contract to transfer to these creditors upon the conclusion of the seizure conducted by the creditors[151].

The care beneficiary has the right to choose whether to participate in the seizure. However, if the assets seized by the creditors of the caregiver prevent the caregiver from fulfilling the care and supervision obligations, the care beneficiary may participate in the seizure for the portion of the care and supervision obligation that has not been fulfilled[152].

1.8. Claims and Allegations Third Parties Can Assert Against Contracts of Maintenance Until Death

According to Article 615 of the TCO, those who have the right to object are granted the following right: "If the care beneficiary loses the right to fulfill their obligation against individuals who are obliged to pay alimony according to the law due to the contract of care until death, those who are deprived of this right may request the cancellation of the contract.

Instead of canceling the contract, the judge may decide to allocate alimony payments to the individuals who are obligated to pay alimony, to be offset against the

[148] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 187.; Eren, B*orçlar Hukuku Özel Hükümler,* 828.
[149] Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* 3157.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 778.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 553.; Günay*, Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 234.
[150] Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2,* 3157.
[151] Günay*, Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 234.
[152] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 89.

obligations that the caregiver will fulfill. The rights of heirs to claim reduction and creditors to cancel the contract are reserved."

The objection lawsuit against individuals who are obligated to pay alimony to the care beneficiary is regulated in Articles 615/1-2 of the TCO, and the rights of heirs to claim reduction and creditors to cancel the contract are regulated in Article 615/3.

Under this heading, cancellation lawsuits will be assessed, and due to being the main subject of this thesis, the heirs' claim for reduction will be addressed under a separate main heading.

1.8.1. Cancellation Lawsuits Initiated by Those Entitled to Claim Alimony from the Care Beneficiary

In the event that the care beneficiary transfers a portion or all of their assets as the counter-performance in the contract of care until death, as clearly stated in the first paragraph of the Article 615, those who have a legal right to claim alimony from the care beneficiary may file a cancellation lawsuit if their rights become unenforceable[153]. Due to the existence of the said contract, the payment of alimony must have been obstructed. The purpose of the lawsuit filed by alimony creditors is to ensure that the right to alimony is not hindered by the contract of maintenance until death[154]. The plaintiff may alternatively request the cancellation of the contract of maintenance until death or demand alimony from the caregiver along with the cancellation of the contract. The burden of proof in these cases lies with those who have a legal right to claim alimony. The judge has a discretionary power in rendering decisions[155].

The judge may exercise such discretion based on the specifics of the case before him/her. He/she may render a decision based on the parties' requests in the lawsuit, or alternatively, in accordance with Article 615/2 of the TCO, beyond their requests. The legislator has granted the judge an exception to the principle of adherence to the request through the law[156]. As indicated in the second paragraph, the judge may decide for alimony

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[153] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 779.; Yavuz – Acar - Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1669.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 553.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 194.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 164.

[154] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 164.

[155] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 779.; Yavuz – Acar - Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1669.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 195-197.

[156] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 779.; Yavuz – Acar - Özen, *Türk Borçlar Hukuku Özel Hükümler Cilt 2*, 1669.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku*

payments to be allocated to the individuals who are obligated to pay alimony to the care beneficiary, to be offset against the obligations that the caregiver will fulfill.[157]. Thus, the obligations that the caregiver must fulfill to the care beneficiary are appropriately reduced, and alimony payments are ensured to be made accordingly[158].

1.8.2. Cancellation Lawsuits Initiated by Creditors of the Care Beneficiary

In a contract of care until death, if the care beneficiary transfers a portion or all of their assets to the caregiver as a counter-performance, one of the individuals who may be weakened and placed in a difficult situation by such an action might be the creditors of the care beneficiary. Since the care beneficiary, as being the debtor, transfers their assets to the caregiver instead of paying their debts, creditors may suffer losses. In order to protect the rights of the care beneficiary's creditors, the law provides them with the opportunity to start proceedings for the cancellation of the transaction[159], under Articles 277-284 of the Bankruptcy and Enforcement Law (BEL)[160]. Since Article 278 of the BEL pertains to donations, and the dispositions made through a contract of maintenance until death are considered akin to donations under this provision, they can be subject to annulment proceedings by the creditors of the care beneficiary[161].

Generally, in cancellation lawsuits, the assets of the debtor are preserved in favor of the creditors. The assets transferred to the caregiver do not become the property of the care beneficiary in cancellation lawsuits; however, they are seized and sold as if they were owned by the care beneficiary, and the proceeds from the sale are used to satisfy the creditors' claims, with any remaining amount being given to the defendant third party[162]. Even if the creditors wins the lawsuit, the contract of maintenance until death does not

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Özel Bölüm, 554.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 164.

[157] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 779.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 554.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 164.

[158] Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 779.

[159] Baki Kuru, *İcra ve İflas Hukuku Cilt 1,* (Ankara: Evrim, 1988), 1196.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 171.

[160] Bankruptcy And Enforcement Law (BEL), Official Gazette 2128 (19 June 1932), Legal Code no. 2004, Art. 277-284.

[161] Baki Kuru, *İcra ve İflas Hukuku Cilt 1*, 1201.

[162] Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 100.

terminate; they only gain the ability to collect from the specific asset subject to the transaction[163].

There may be two different plaintiffs in a cancellation lawsuit. If the creditors of the care beneficiary have opted for enforcement through seizure, they must have pursued enforcement through seizure and failed to collect their receivables, resulting in them obtaining a definitive or provisional incapacity certificate[164]. In the event of the care beneficiary's bankruptcy, the right to file a lawsuit belongs to the bankruptcy administration, as the legal representative of the bankruptcy estate[165].

The defendant in a cancellation lawsuit is also subject to two different distinctions. If enforcement through seizure has been initiated against the care beneficiary, then the defendant is both the care beneficiary and the caregiver. In this case, there is a compulsory joinder of parties. If the care beneficiary is bankrupt, then the defendant is solely the caregiver[166]. In the event of the death of the caregiver, the heirs become defendants. Similarly, individuals who maliciously acquired the assets transferred to the caregiver would also be defendants[167].

Since there is no specific jurisdiction rule for cancellation lawsuits provided by the BEL, the competent court will be determined according to the Turkish Civil Procedure Code (TCPC) No. 6100[168]. Therefore, in cases of seizure where the care beneficiary and the caregiver reside in the same place, the lawsuit will be filed at their joint residence. If they reside in different places, the lawsuit can be filed at the residence of either party. In cases of bankruptcy, the competent court will be the place of residence of the care beneficiary[169]. The primary civil courts will have jurisdiction over cancellation lawsuits[170].

According to the Article 284 of the BEL, The statute of limitations for filing a cancellation lawsuit is five years from the date of the transaction. As this is a statute of limitations, it must be taken into account ex officio by the judge. Cancellation lawsuits filed after the expiration of the five-year statute of limitations will be dismissed on grounds of timeliness[171].

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163 Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 217.
164 Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 210.
165 Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 210.
166 Akol, *Ölünceye Kadar Bakma Sözleşmesi,* 101.
167 Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 217.
168 Turkish Civil Procedure Code (TCPC), Official Gazette 27836 (4 February 2011), Legal Code no. 6100.
169 TCPC, Art. 5-7.
170 TCPC, Art. 2.
171 Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 152.

1.8.3. The Request for Abatement Against the Contract of Maintenance Until Death

Another claim that third parties may assert against the contract of maintenance until death is abatement.

Since the abatement claim against the contract of maintenance until death constitutes the central focus of this thesis, it will be thoroughly discussed under a seperate heading. However, before delving into it, in order to make the abatement claims more understandable, it is necessary to address the concepts of "Abatement Lawsuit" and "Decedent Simulation" and their places in our legal system. Therefore, these two legal terms will be elaborately discussed under separate headings.

2. ABATEMENT LAWSUIT

Abatement, which means "reduction, deduction" in the dictionary[172], is a legal term specific to inheritance law that brings together the ways to challenge benefits exceeding the testator's disposition ratio, the procedures to be followed, and their outcomes[173]. In this sense, abatement is not just a lawsuit or a legal procedure, but a multifaceted legal consequence that will arise if the necessary conditions exist[174].

In inheritance law, abatement is regulated in Article 560 and subsequent articles of the TCC. The legislator's aim here is to protect the reserved shares of heirs. The descendants of the deceased, the parents of the deceased, and the spouse of the deceased are heirs with reserved portions as per Articles 505-506 of TCC. According to TCC Article 560, heirs who have not received the equivalent of their reserved shares can sue for the abatement of disposals exceeding the portion that the testator could dispose of[175]. The limit of the testator's disposition ratio is determined by the amount of the reserved share of the heirs entitled to a reserved share[176]. As per Article 506 of TCC, the reserved portion consists of the following ratios: half of the legal inheritance share for descendants, one-quarter of the legal inheritance share for each parent, for the surviving spouse, the entire

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[172] Türk Dil Kurumu Sözlükleri, "Tenkis" (Access 25 May 2024)

[173] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku*, 275.; Rona Serozan – Baki İlkay Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* (Ankara: Seçkin, 2022), 224.; Ali Naim İnan – Şeref Ertaş – Hakan Albaş, *Türk Medeni Hukuku Miras Hukuku* (Ankara; Seçkin, 2024). 393; Fikret Eren – Yücer İpek Aktürk, *Türk Miras Hukuku,* (Ankara, Yetkin, 2019), 243.; Ahmet Nar, *Türk Miras Hukukunda Tenkis,* (İstanbul: Onikilevha, 2016), 16.; Ahmet M. Kılıçoğlu, *Miras Hukuku,* (İstanbul: onikilevha, 2018) 53.; Gökhan Antalya – İpek Sağlam, *Miras Hukuku Cilt 3,* (Ankara: Seçkin, 2021), 348.

[174] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 275.; Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 224.; Zahit İmre – Hasan Erman, *Miras Hukuku,* (İstanbul: Der, 2021), 261.; İnan – Şeref–Albaş, *Türk Medeni Hukuku Miras Hukuku,* 393.; Süleyman Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* (Ankara: Yetkin, 2022), 138.

[175] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 276.; Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 225.; İmre –Erman, *Miras Hukuku,* 261.; İnan – Şeref–Albaş, *Türk Medeni Hukuku Miras Hukuku,* 394.; Hatemi, *Miras Hukuku,* , 53.; Nar, *Türk Miras Hukukunda Tenkis,* 16.

[176] İmre –Erman, *Miras Hukuku,* 262.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 225.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 201.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 139.

legal inheritance share if inheriting together with descendants or parents, and three-quarters of the legal inheritance share in other cases.

Abatement lawsuits are backward-looking, innovative lawsuits aimed at drawing the legal limit to gains arising from inter vivos or post-mortem transfers that abuse the reserved shares of the testator[177]. Abatement lawsuits are actually the types of annulment proceedings specific to inheritance law. The difference here in annulment compared to the annulment in family law due to absolute or relative nullity of marriage, the annulment in contract law due to defects in consent or lesion, and the annulment of testamentary dispositions in inheritance law due to lack of capacity, defects in consent, or lack of form, is that the abatement decision is made in line with the claim advanced by the heir only after the testator's death, and until the abatement decision is made, the transaction subject to abatement is valid, and there are no deficiencies for both parties[178].

In an abatement lawsuit, the right asserted by the plaintiff against the defendant is a personal claim. Therefore, it can only be asserted against the person who benefited from the transfer. However, if the recipient of the inter vivos transfer from the testator has subsequently transferred the benefit to a third party in order to avoid abatement, and this third party was aware of the situation, then this third party may also be involved in the proceedings[179].

2.1. Conditions

Article 560/1 of the TCC reads as follows: “Heirs who have not received the equivalent of their reserved shares can sue for the abatement of disposals exceeding the portion that the testator could dispose of.”

As it can be seen, the Article requires two conditions to be met for making a valid abatement claim. First, a testator, through post-mortem dispositions or gratuitous transfers made while alive, should have exceeded the statutory share recognized by the law (Article 505). Second, the testator's disposals should have violated the reserved shares of the reserved share heirs (Article 506)[180]. Additionaly, The General Assembly of Civil

[177] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 276.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 225.; Hüseyin Hatemi, *Miras Hukuku,* 53.; Erhan Günay, *Miras Hukukunda Tenkis (İndirim) Davaları*, (Ankara: Seçkin, 2019), 75.
[178] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 276.
[179] İmre –Erman, *Miras Hukuku,* 263.; Günay, *Miras Hukukunda Tenkis (İndirim) Davaları*, 76.
[180] İmre –Erman, *Miras Hukuku,* 262.; İnan – Şeref–Albaş, *Türk Medeni Hukuku Miras Hukuku*, 394.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 227.; Hüseyin Hatemi, *Miras*

Chambers of the Court of Cassation held that the following conditions should also be fulfilled to start an abatement proceedings: “In an abatement lawsuit; it is a prerequisite for the lawsuit to be filed that the testator, by violating the reserved share of the heir, has made a donation to another heir or a third party with a will or another disposition upon death.”[181]

The fact that the statutory share has been exceeded does not always imply that an abatement lawsuit will be filed. For example, an heir whose reserved share has not been violated cannot file an abatement lawsuit. Because, the reserved shares and statutory shares are different things. Therefore, although two conditions are required for an abatement lawsuit, when evaluating the conditions related to the lawsuit, it should first be examined whether the statutory share has been exceeded, and then whether the person's reserved share has been violated should be examined[182]. The reserved share heir must not have received the equivalent of their reserved share in order to file an abatement lawsuit. The heir does not have the option to reject the benefits received, return them, and claim their reserved share[183].

Furthermore, even if both conditions are fulfilled, (both the statutory share has been exceeded and the reserved share has been violated), the abatement request will be rejected, if there is no causal relationship between the exceeding of the statutory share and the violation of the reserved share. In other words, for the abatement request to be accepted, the violation of the reserved share must stem from the testator exceeding the statutory portion[184].

Additionally, According to Art. 565 of the TCC, for an inter vivos transfer to be eligible for abatement, it must be gratuitous. Transfers that involve consideration are not subject to abatement and do not factor into the estate calculation[185].

Only reserved share heirs can file an abatement lawsuit. Legal heirs other than the reserved share heirs are not entitled to this right[186]. Legal heirs are regulated between

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Hukuku, 53.; Günay, *Miras Hukukunda Tenkis (İndirim) Davaları,* 77.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 201.

[181] The Civil General Council of the Turkish Court of Cassation, 2010/684, (22 December 2010).

[182] İmre –Erman, *Miras Hukuku,* 263.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 227.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 139.

[183] Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 227.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 395.

[184] İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 395.; Aydın Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* (Ankara: Seçkin, 2022), 152.

[185] İnan – Şeref–Albaş, *Türk Medeni Hukuku Miras Hukuku,* 367.; Gökhan Antalya – İpek Sağlam, *Miras Hukuku Cilt 3,* 332.

Articles 495 and 501 of the TCC. As per these Articles, legal heirs include blood relatives, adopted children and their descendants, the surviving spouse, and the state. Legal heirs who are not mentioned in Article 506 of the TCC are not reserved portion heirs. In short, the testator's siblings, nieces, nephews, cousins, aunts, uncles, grandparents etc. do not have reserved portion rights. In order for a reserved share heir to file an abatement lawsuit, they must have the status of an heir at the time when the testator made inter vivos transactions. If the person was not a legal heir of the testator at the time of the inter vivos transaction concluded, it cannot be claimed that the testator violated the rules of reserved shares[187]. The General Assembly of Civil Chambers of the Court of Cassation held on this as follows: "…since there was no reserved share holder at the time of transfer, it cannot be said that the reserved share has been violated."[188]

Exceptionally, an action for abatement may also be brought by the creditors of reserved share heirs and bankruptcy estate, in addition to the reserved heirs themselves[189]. This situation, which is possible under Article 562 of the TCC, will be detailed below.

An abatement lawsuit can only be filed after the death of the testator[190]. The abatement cannot be asserted while the testator is alive by claiming that the transfer violates the reserved shares. Even if it is certain that the reserved shares have indeed been bypassed, and waiting for the testator's death would result in irreparable damages, an abatement lawsuit cannot be filed while the testator is alive. Nor can a request for provisional measures be made for any reason[191]. The reason for this is that the status of heirship only arises upon the death of the testator[192].

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[186] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 278.; İmre –Erman, *Miras Hukuku,* 263.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 226.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 396.; Hüseyin Hatemi, *Miras Hukuku,* 53.; Eren – Aktürk Yücer, *Türk Miras Hukuku,* 251.

[187] Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 226.; İmre –Erman, *Miras Hukuku,* 263.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 396.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 151.

[188] The Civil General Council of the Turkish Court of Cassation, 1988/983, (30 November 1988).

[189] Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 227.

[190] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku*, 277.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1*,1042.

[191] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku*, 277.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1*,1042.

[192] Sezer Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1*,1042.

2.2. Parties

2.2.1. Plaintiff

2.2.1.1. Reserved Share Heirs

According to Article 560/1 of the TCC, only reserved share heirs (those mentioned in Article 506 of the TCC) have the right to file an abatement lawsuit. Article 506 of the TCC lists the reserved heirs, accordingly, the reserved heirs are the descendants of the deceased, including their children, adopted children, grandchildren, and their descendants, as well as the deceased's parents and spouse. Other legal heirs do not have such a right[193]. Actually, since this action is already initiated as a remedy for the violation of the reserved portion, it is natural that it can only be brought by the reserved heirs[194]. For a reserved share heir to be able to file an abatement lawsuit, they must have acquired the status of an heir[195] which would only happen upon the death of a testator who is also the care beneficiary under the contract of maintenance until death. Since each reserved share heir protects their own share separately, they can individually start proceedings[196]. However, the representative appointed to the inheritance or the executor of the will does not have the authority to file this lawsuit[197]. If there are multiple heirs who are unable to obtain their reserved share, they may file a lawsuit for abatement either separately or jointly. The other heirs cannot benefit from a lawsuit filed by only one of the heirs. The court's ruling on abatement is personal and only has legal effect for the parties involved in the lawsuit[198]. If a reserved share heir lacks legal capacity, their legal representative files the abatement lawsuit on their behalf. If the legal representative neglects this duty, they will be held responsible within the framework of the provisions regarding the responsibility of parents or guardians[199].

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193 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 276.; İmre –Erman, *Miras Hukuku,* 263.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 396.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 226-227.; Hüseyin Hatemi, *Miras Hukuku,* 53.

194 İmre –Erman, *Miras Hukuku,* 263.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 396.

195 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 278.; İmre –Erman, *Miras Hukuku,* 263.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 226-227.

196 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 278.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 894.

197 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 278.

198 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 278.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 397.; Antalya –Sağlam, *Miras Hukuku Cilt 3,* 351.

199 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 278.

Someone who does not have the direct right to initiate an action for abatement, is considered to have the right to initiate the action if the heir who has the right to initiate the action dies before bringing the action. Therefore, the right to initiate an action for abatement passes to the heirs of the person who did not bring the action[200].

2.2.1.2. Creditors of Reserved Share Heirs and Bankruptcy Estate

Although abatement lawsuits may only be brought by reserved share heirs, exceptionally, the right to file this lawsuit is also granted to the bankruptcy estate and certain creditors of the reserved share heir under certain conditions[201]. This is regulated in Article 562 of the TCC. This Article aims to protect the creditor, in case the reserved share heir refrains from seeking the disposals that constitute a violation of their reserved share by initiating an abatement lawsuit, due to the fear of being seized by their creditor[202].

However, the right given to the creditors is limited compared to the reserved share heirs' rights. According to Article 562 of the TCC, the following conditions must be met for creditors of the heir or the bankruptcy estate to start an abatement proceedings: The creditors must have obtained an insolvency certificate or a bankruptcy decision against the reserved share heir; the reserved share heir must not have requested or initiated an abatement lawsuit; the creditors of the reserved share heir or the bankruptcy estate must have notified the reserved share heir of their intention to file an abatement lawsuit, and this notification must have remained unrequited[203]. However, even if these conditions are met and an action for abatement can be initiated, in a lawsuit brought by creditors, the reduction can never exceed the amount of the debt[204].

The first condition for a creditor to be able to file an abatement lawsuit is that the creditors must have an insolvency certificate against the reserved share heir. The insolvency certificate must be in the hands of the creditors at the time of the inheritance opening (which opens with the death of the testator as per Article 575, TCC). Even if there

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[200] İmre –Erman, *Miras Hukuku,* 264.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 398.

[201] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 280.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 227.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 398.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 141.

[202] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 280.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 227.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 399.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 141.

[203] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 280.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 399.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 141.

[204] İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 399.

has been a court decision against the debtor heir or an execution proceedings before the inheritance is opened, an abatement lawsuit cannot be started based on this court decision or execution proceedings after the inheritance is opened, unless an insolvency certificate based on this court decision or execution proceeding has been obtained. In the event of the bankruptcy of a reserved share heir, creditors cannot start an abatement lawsuit individually. Here, the bankruptcy estate should file an abatement lawsuit[205].

The second condition is that the creditors and the bankruptcy estate must give the reserved share heir a certain period of time to file an abatement lawsuit, and the debtor must not initiate a lawsuit within this time. The time given should be "reasonable ". This is similar to the period given to abandon performance in case of debtor’s default in contracts, as regulated in Article 123 of the TCO[206]. If there are multiple creditors, the requirement of notification should be fulfilled separately by each creditors[207]. Notification is a condition for the lawsuit and will be investigated ex officio by the court. However, the failure to meet the notification requirement would not result in an immediate dismissal of the abatement lawsuit; the bankruptcy estate or creditor who is the plaintiff would be given time to rectify this deficiency[208].

According to Article 562/2 of the TCC, if the disinherited person does not object to the disinheriting disposition, the bankruptcy office or creditors can also initiate an action for abatement if the conditions mentioned above are fully met[209].

2.2.2. Defendant

Although Articles 560/1 and 562 of the TCC clearly specify who can be the plaintiffs in an action for abatement, they do not indicate who the defendants will be[210]. In

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[205] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 280.

[206] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 280.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 399.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 141.

[207] Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 483.

[208] Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 483.

[209] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 281.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 399.

[210] İmre –Erman, *Miras Hukuku,* 265.

summary, the defendants in an abatement lawsuit are the third parties or heirs who have received dispositions exceeding the disposable share of the estate left by the decedent[211].

Individuals who, due to gains made by exceeding the deceased's statutory share, are legally subject to abatement for the benefits they received. The conditions of abatement, its assessment, and the fact of whether the defendant is an heir or not are irrelevant to the abatement claim and the lawsuit. If the person who received the disposal is deceased, their heirs are the defendants. If multiple disposals have been made to different individuals and each would be subjected to an abatement, each of them will be the defendants. A reserved share heir has the right to sue all of them, but is not obliged to do so. However, if the proceedings are started against some of them, abatement is to be decided accordingly. More precisely, as set out by Article 570 of the TCC, only the amount subject to abatement as determined by the rules of order in the abatement lawsuit will be possible for an abatement[212].

The abatement lawsuit is considered a personal claim, therefore it can be directed against the person who has benefited from the abatement granted by the deceased. Moreover, if the defendant who received the property subject to abatement has transferred it to a third party, whether recourse can be made against this third party is debatable[213]. The debates revolve around the following questions: Due to the relative nature of the abatement lawsuit, can it be filed against third parties? If it cannot be filed, wouldn't this lead to the occurrence of transfers made in bad faith?

Initially, since the abatement lawsuit is a relative action, it should only be brought against the person to whom the testator granted the abatement[214]. However, the Court of Cassation allows the possibility of bringing this action against third parties acting in bad faith. On that the Court held: “If, after the testator transferred the property with the intention of eliminating the reserved shares, the person benefiting from it, without the knowledge and instructions of the testator, transfers the immovables to third parties who are aware of the situation, solely to deprive the reserved shareholding heirs of their rights, in such case, the reserved shareholding heirs may bring an action for abatement against

[211] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 282.; Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 228.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 399.; İmre – Erman, *Miras Hukuku,* 265.
[212] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 282.
[213] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 282.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 229.
[214] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 283.

these bad-faith individuals."[215] To summarize, as a rule, this relative action cannot be brought against third parties. However, according to the established case law of the Court of Cassation, an action for reduction can be brought against third parties who knew that the disposition was made in bad faith[216]. In this decision, although the Court mentioned the filing of an abatement lawsuit against a third party, it should be understood not as a new-action abatement lawsuit, but as an action based on the abatement provision. However, the Court did not provide an insight on how such an action, which is accepted to be based on a personal claim, can be brought against third parties who acquire the subject matter of the action. Therefore, the decision has been criticized in legal doctrine for fundamentally undermining the core principles of property law, casting doubt on the reliability of commercial transactions, and lacking any legal basis[217].

If the abatement obligor obtained consideration when disposing of the property subject to abatement, this consideration will continue to be a subject to abatement. However, if the defendant, while not knowing that he is subject to abatement, has not obtained consideration from the property disposed of or has also disposed of the consideration obtained, then in this case, he would only be liable of what remains in his possession as of the date the inheritance is opened, pursuant to Article 566 of the TCC[218].

Additionally, in the doctrine, it is accepted that reserved heirs may also have certain claims against third parties who have acquired the property subject to abatement for spesific other legal reasons. The first of these claims is that if the third party acquires the property from the abatement obligor with the common purpose of avoiding abatement, it is interpreted as an invalid transfer operation according to Article 27 of the TCO, which regulates that contracts contrary to imperative provisions of the law, morality, public order, or impossible in subject matter are definitively void. Therefore, reserved heirs can still request the transfer of ownership of the property, which is subject to abatement in proportion to the abatement claim, from the abatement debtor and may file a reivindication lawsuit against a third party who is unjustly possessing the property[219].

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[215] The Civil General Council of the Turkish Court of Cassation, 1975/1, (13 January 1975).
[216] İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 400.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 490.
[217] Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 229.; Rona Serozan, "Tenkis Davasını Bütünleyen Edim Davası Üçüncü Kişilere Yöneltilebilir Mi?" *Journal of Istanbul University Law Faculty 3/1-4,* (July 2011), 209-218.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 901.
[218] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 284.
[219] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 284.

The second claim is that if the third party acted with the intent to render ineffective the reserved heir's ability to file an abatement action when acquiring the property, then pursuant to Article 49/2 of the TCO, which regulates that someone who intentionally harms another person with an act contrary to morality is obliged to compensate for this harm, the reserved heir may claim ownership to the extent that remains with the plaintiff as a result of abatement, with a claim for compensation in exactly the same amount under the scope of “harming another with immoral intent.”[220]

The third claim is that since the abatement decision is retroactively effective until the opening of the inheritance, in a testamentary disposition subject to abatement, transfers made by the abatement obligor to third parties after this point will be deemed to have retroactively terminated the ownership rights of these individuals; therefore, an action for possession can be raised against them.

Apart from those mentioned above, if the abatement obligor and the third party appear to have entered into a contract such as a sale or donation to evade abatement, the reserved heir can prove the existence of this collusion with any evidence and establish the ownership of the abatement obligor, ensuring that the property corresponding to the reserved share is transferred to them[221]. Additionally, in the event of the death of the person who benefited from the disposition subject to abatement, the action can be brought against his/her heirs[222].

2.2.3. The Court with Jurisdiction and the Competent Court

According to Article 2/1 of the TCPC, it is stated that “the competent court for cases concerning property rights and personal status, regardless of the value and amount of the subject matter of the lawsuit, shall be the Court of First Instance, unless otherwise regulated”. Since an action for abatement also pertains to property rights, the Civil Court of First Instance will be competent in accordance with this provision[223].

In terms of determining the competent court, the type or nature of the transaction subject to abatement, whether the transaction subject to abatement is inter vivos or mortis

[220] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 284.
[221] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 284-285.
[222] Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 469.
[223] İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 400.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 143.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 512.

causa (by reason of death), and whether the property subject to abatement is movable or immovable, are irrelevant. The competent court is regulated both in the TCC and the TCPC. According to Article 576 of the TCC, “An inheritance action is filed in the domicile of the deceased for the entire property of the estate. Actions for the annulment or abatement of the deceased's dispositions, the division of the estate, and claims arising from the inheritance are heard in the court of this domicile.” Thus, it is indicated that an abatement action will be heard in the domicile court of the deceased[224]. Although Article 12 of the TCPC states that in actions concerning real rights on immovable property or which may result in a change in ownership of real rights, as well as in actions concerning the possession or retention of immovable property, the court of the place where the immovable property is located shall have exclusive jurisdiction, Article 11/1-b of it states that all actions against the heirs until the final distribution of the estate are definitively under the jurisdiction of the last domicile court of the deceased. Therefore, according to the principle of definitive jurisdiction, the court of the deceased's last domicile is competent for abatement actions. Although Article 12 of the TCPC mentions the jurisdiction rule in actions concerning real rights, no change in ownership of any real right occurs in terms of ownership recorded in the land registry of the immovable property subject to abatement as a result of the abatement action[225].

2.2.4. Time Limitation

2.2.4.1. One-year and Ten-year Time Limitations

Two separate time limitations are prescribed by Article 571/1 of the TCC for the initiation of an abatement action: “The right to initiate an abatement action expires one year from the date the heirs learn that their reserved shares have been violated, and in any case, ten years from the date of opening of the inheritance in other dispositions or the date of opening of the will.” These time limitations are of a statute of limitations nature as a consequence of the abatement action being an innovative lawsuit, thus possessing a barring effect on rights[226].

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[224] İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 400.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 143.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 512.

[225] Nar, *Türk Miras Hukukunda Tenkis,* 306.

[226] İmre –Erman, *Miras Hukuku,* 266.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 230-231.

Article 571/2 of the TCC introduces a separate possibility as the starting date for the expiration of the statute of limitations: “If the annulment of one disposition leads to the enforcement of the previous one, the periods start running from the date the annulment decision becomes final.”

As seen, the law prescribes two time limitations and regulates different commencement date for a special situation. The one-year time limitation is the shortest statute of limitations period provided for an abatement action. The one-year period begins when the reserved heir learns that their reserved share has been violated. In this regard, the starting date of the one-year period is different for each heir[227]. However, since an abatement action cannot be filed before the death of the deceased, this period may begin at the earliest on the day the inheritance is opened[228]. For the commencement of this period, the heir must be aware both of the death of the deceased and of an acquisition that violates their reserved share. It is not necessary to know which acquisition violates the reserved share or to what extent. It would be sufficient to know that the reserved share has been violated[229]. The ten-year time limitation, on the other hand, is the general statute of limitations period in abatement actions. The ten-year statute of limitations begins at the date of opening of the will in the case of wills, and on the date of opening of the inheritance, i.e., the date of death of the deceased, in other dispositions[230].

As a special circumstance, the presence of cancellation and abatement actions in the same event affects the starting date of the periods[231]. If the annulment of one disposition results in the validity of a disposition subject to abatement, the periods will start from that moment. Because before that moment, the reserved heirs do not have the opportunity or necessity to file an abatement action. For example, if the deceased first made a disposition subject to abatement in a will, but later revoked the first will with a second will, the period for the reserved heirs to file an abatement action against the

[227] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 285.; Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 231.; İmre –Erman, *Miras Hukuku,* 266.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 404.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 539.

[228] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 285.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 404-405.

[229] Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 539.

[230] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 286.; Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 231.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 406.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,*1052.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 548.

[231] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 286.; İmre – Erman, *Miras Hukuku,* 266.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 145.

acquisition in the revived first will starts from the date of cancellation according to Articles 557-559 of the TCC.[232].

2.2.4.2 Abatement Defence

In accordance with Article 571/3 of the TCC, "An abatement claim can be raised at any time by way of defence." Here, law grants the reserved heir, who may not be able to file an abatement action due to missing the deadlines, an opportunity to assert the abatement through defense against claims directed towards them[233].

So far, it has been observed that an acquisition subject to abatement, which violates reserved shares, would not be automatically invalid, but can be partially or entirely invalidated by the abatement claim granted to reserved heirs, which can only be exercised through legal action. While reserved heirs can generally protect their reserved shares only by initiating an abatement action, if an acquisition subject to abatement, which has not yet been fulfilled, is demanded from the reserved heir, the reserved heir can assert through defence, without having to file a counterclaim, that the acquisition violates their reserved share and is therefore subject to abatement. This opportunity exists only for acquisitions that have not yet been fulfilled[234]. Nevertheless, an abatement defence cannot be asserted by the reserved heir against every demand made by the beneficiary of the acquisition subject to abatement. It can only be raised against direct demands by the beneficiary for the delivery of the subject matter of the acquisition based on that acquisition. Although this is not explicitly stated in the article, this conclusion can be drawn from the nature of the abatement defence and the purpose of the regulation[235].

By eliminating the need to initiate an abatement action, the abatement defence provides great convenience to the reserved heir. The main benefit of using the abatement defence for the reserved heir, as opposed to an abatement action, is that it is not subject to any time limitations. Thus, a reserved heir, who misses the deadline to file an abatement action against an acquisition that violates their reserved share, may avoid fulfilling

[232] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 286.
[233] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 287.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 232.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 406.
[234] Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 232.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 406.
[235] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 287.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 406.

demands for the delivery of that acquisition, regardless of how much time has passed, by using the abatement defence to the extent it constitutes a violation of their reserved share[236].

2.3. Abatement Decision and Obligation to Return

2.3.1. Abatement Decision

The abatement decision nullifies the acquisitions that violate the reserved share. Therefore, the abatement decision is an innovative decision. As a rule, reserved heirs resort to the persons violating their reserved shares for the enforcement of this decision upon its issuance. This would mean that reserved heirs must start a separate enforcement action to enforce the abatement decision. However, in practice, it is accepted that the abatement action encompasses both[237]. In other words, a reserved shareholder may start a single lawsuit regarding both the determination of the violation and the enforcement of the abatement judgment[238]. The General Assembly of the Court of Cassation held on the matter as follows: "The abatement decision should be evaluated in two parts in this state. The first part is the innovative part that determines the violation of the reserved share and the reduction of the reserved share to the extent of those transactions of the testator. The second part covers the enforcement part aiming to complete the reserved share if necessary and to remedy the deficiency in the property."[239]

A decision cannot be rendered against persons who do not participate in the abatement action. This would mean that, the judgment is rendered subject to abatement only to the extent of the attack on the reserved share of the heir who initiated the action. The order of abatement rule regulated in Article 570 of the TCC (it will be explained in detail under the heading "Order of Abatement" below) is also applicable only in terms of persons involved in the action[240].

[236] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 287.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 232.
[237] Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 154.; İmre –Erman, *Miras Hukuku,* 278.
[238] Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 154.; İmre –Erman, *Miras Hukuku,* 278.
[239] The Civil General Council of the Turkish Court of Cassation, 2010/372, (7 July 2010).
[240] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 278.; İnan –Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 397.; Günay, *Miras Hukukunda Tenkis (İndirim) Davaları,* 101.

2.3.2. Scope of Defendant's Obligation to Return

Upon partially or completely nullifying the transaction violating the reserved share, which would be effective from the moment of the opening of the inheritance, the reserved heir is relieved of the obligation to perform the transaction nullified by abatement and not yet performed. With respect to already performed transactions, the abatement decision rendered against them places the beneficiary of the transaction under the obligation to return the nullified portion[241]. Article 566 of the TCC introduces a rule that protects the good faith of the obligor to return, stating, “If a person who has received a transaction subject to abatement is in good faith, they are only obliged to return what remains in their possession at the time of the passing of the inheritance.” Since transactions by causa mortis inherently do not leave the estate and are not transferred to the beneficiary, the application of this provision will be relevant to transactions subject to inter vivos abatement[242].

According to Article 566/1 of the TCC, if the obligor in good faith holds the transaction, they are obliged to return it in its condition as of the opening of the inheritance, i.e. what remains in their possession from the transaction. The obligor in good faith is not liable to compensate if the transaction is lost or damaged. However, if they have received compensation instead, they must return the remaining compensation at the time of death[243].

A person who receives a transaction in their favor is considered to be acting in good faith if they are unaware that the transaction violating the reserved share is subject to abatement or if they are not in a position to know. Merely being able to anticipate that at least some portion of the transaction received is subject to abatement is sufficient to be deemed not in good faith[244].

When a person who receives a transaction without consideration transfers it to a third party, as a general rule, reserved heirs cannot assert an abatement claim may be asserted against them according to the Court of Cassation's Joint Jurisprudence Decision which reads as follows: “Rights are protected when used in good faith. (TCC 2) Indeed,

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[241] Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 229.; İmre –Erman, *Miras Hukuku,* 278-279.

[242] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku*, 314.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 155.

[243] Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 230.; İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku*, 450.

[244] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku*, 315.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 230.

everyone can acquire property. However, a person who intends to harm others while exercising this right deprives himself of the guarantee of the law because he acts contrary to the principle of good faith. Therefore, acquisitions of persons who are not acting in good faith in real rights have been deemed invalid. (Former Civil Code 931-932)”[245]. This decision has been criticized in doctrine for violating the fundamental principles and core values of Turkish Property Law (TPL), targeting third parties with unknown and unexpected claims for restitution, and potentially hindering transactions conducted in security and trust[246].

2.4. Order of Abatement

As explained, inter vivos gratuitous transactions and causa mortis transactions of the testator are both subject to abatement. If the net worth requirement is exceeded as a result of both types of transactions, which or how much of these transactions will be subject to abatement is regulated in Article 570 of the TCC [247]. According to the Article,

“Abatement is made first from causa mortis transactions until the reserved share is completed; if this is insufficient, abatement is made from inter vivos gratuitous transactions in reverse chronological order, starting from the most recent.

Causa mortis transactions (transactions that take effect upon the death of the testator) and inter vivos gratuitous transactions made to public legal entities or to associations and foundations serving the public interest are abated last.”

As evident from the Article, while this provision specifies the order of abatement between causa mortis transactions and inter vivos gratuitous transactions, it also regulates the order of abatement among inter vivos gratuitous transactions themselves. Accordingly, if there are both inter vivos gratuitous transactions and causa mortis transactions subject to abatement in a situation where the reserved share is exceeded, causa mortis transactions will be abated first. If the reserved shares are satisfied with these transactions, inter vivos gratuitous transactions subject to abatement will not be affected[248].

[245] The Civil General Council of the Turkish Court of Cassation, 1975/1, (13 January 1975).
[246] Serozan, “Tenkis Davasını Bütünleyen Edim Davası Üçüncü Kişilere Yöneltilebilir Mi?” 209-218.
[247] Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 210.; Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku*, 289.
[248] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 289.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 210.; İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku*, 411.

2.4.1. Abatement of Causa Mortis Transactions

Causa mortis transactions are the transactions that take effect upon the death of the testator[249]. As per Article 570/1 of the TCC, abatement is primarily made for causa mortis transactions.

If a testator maked multiple causa mortis transactions and the required amount for abatement is less than the total of these transactions, the first step is to examine whether the testator has anticipated a specific abatement method. According to Article 563/1 of the TCC, if the testator stipulates the abatement of some of the causa mortis transactions, this will be followed[250]. Similarly, if the testator agrees on abatement with different rates among causa mortis transactions instead of specifying the order of abatement, as long as all reserved shares prescribed by law are preserved, the testator's wish should be followed[251]. In other words, whether the testator has made ordinary or charitable donations, they can specify the order and rate of abatement for these. However, the rates determined by the testator cannot make it impossible to obtain the reserved share in any way[252]. However, if the testator has not specified a different abatement arrangement, the causa mortis transactions will be abated proportionally according to Article 563/1 of the TCC[253].

The proportion of abatement for some causa mortis transactions violating the reserved share when made to reserved heirs is regulated in Article 561 of the TCC. According to this, causa mortis transactions made to multiple reserved heirs will be abated proportionally based on the ratio of the amount exceeding each heir's reserved share in the transaction made in their favor[254]. Under this rule, Article 561 of the TCC, in the abatement of transactions made to reserved heirs, more abatement is made to the reserved heir who received a greater amount of transaction than their reserved share, and less abatement is made to the reserved heir who received a lesser amount. Additionally, when calculating among reserved heirs, if a reserved heir's share has been violated, they will

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[249] Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 315.

[250] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 289.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 211.; İmre –Erman, *Miras Hukuku,* 285.; İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku,* 412.

[251] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 294.; İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku,* 412.

[252] İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku,* 412.

[253] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 295.; İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku,* 412.

[254] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 296.

offset the transaction made to them against their reserved share[255]. Furthermore, in the cases where some of the transactions exceeding the reserved share are made to reserved heirs and some to other persons, Article 561 of the TCC provides for the proportional abatement of the portion exceeding the reserved share for the reserved heir and other persons[256].

2.4.2. Abatement of Inter Vivos Gratuitous Transactions

In cases where the testator did not make causa mortis transactions or where the causa mortis transactions they made have been abated but there is still an amount that needs to be abated, some inter vivos gratuitous transactions will be subject to abatement. Among inter vivos gratuitous transactions, abatement will be carried out not according to a proportional basis, but according to their chronological order. According to Article 570 of the TCC, if there are multiple inter vivos gratuitous transactions subject to abatement and their complete abatement is not necessary, they will be abated in chronological order starting from the most recent transaction made at the time of their occurrence. The law gives a priority to more recent transaction closer to the testator's death compared to older ones[257].

Thus, in terms of inter vivos dispositions, the date of the transaction is of significant importance[258]. Even the smallest time difference among inter vivos gratuitous transactions subject to abatement will result in a ranking. However, in the presence of inter vivos gratuitous transactions made simultaneously or where it cannot be determined which one was made first, they are considered to be subject to abatement in proportion to their amounts, similar to the rule applies to causa mortis transactions [259].

The main focus of our thesis is the abatement of inter vivos transfers made through the contract of maintenance until death. Therefore, this contract of maintenance until death, qualified under obligations law, will be subject to abatement as mentioned in this context. Consequently, the abatement of this contract will be evaluated concerning the

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255 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 297.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 212.

256 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 298.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 212.

257 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 299.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 213.; İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku,* 422.

258 İmre –Erman, *Miras Hukuku,* 287.

259 Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 300.; İmre –Erman, *Miras Hukuku,* 287.

inter vivos gratuitous transfers. In situations where the testator did not make a causa mortis disposition or if such a disposition does not completely cover the abatement amount, the abatement process will commence with the most recent inter vivos transfers. Therefore, if the abatement amount is not fully satisfied, the obligations law-qualified contract of maintenance until death will be subsequently considered, provided that the conditions for abatement are met.

2.4.3. Abatement of Public Interest Transactions

Article 570/2 of the TCC states that "transactions and inter vivos gratuitous transactions made to public legal entities or to associations and foundations serving the public interest will be abated last." It introduces the rule stipulating that public legal entities and associations and foundations serving the public interest will be abated last among transactions and inter vivos gratuitous transactions made to them[260]. The rationale behind this is to promote transactions made for the public interest. It must be accepted that the principles applicable to ordinary transactions subject to abatement are also valid for transactions made for the public interest. Based on this principle, then, it must first be examined whether the testator has made any arrangements regarding how abatement would be carried out. If there is no such intention, transactions made for the public interest must be abated after ordinary causa mortis transactions, but subject to the same principles[261].

If there is a need to abate multiple transactions made for the public interest, the general rules regarding the order of abatement among them will be applied. Therefore, transactions made in the form of causa mortis will be abated first, and if this is not sufficient, transactions made in the form of inter vivos gratuitous transactions will be abated. Multiple transactions made for the public interest will be abated proportionally, while multiple transactions made for the public interest will be abated starting from the most recent[262].

[260] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 301.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 213.; İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku,* 421.
[261] İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku*, 421.
[262] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 303.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 214.; İnan – Ertaş – Albaş, *Türk Medeni Hukuku Miras Hukuku,* 421.

3. SIMULATION IN GENERAL TERMS

3.1. The Concept and Definition of Simulation in General

According to Article 1 of the TCO, a contract is formed when the parties mutually and appropriately express their wills. The parties must declare their wills in a manner that corresponds with one another. These declarations of will can be made either explicitly or implicitly. Parties may project a different will outwardly than their actual will when forming a contract. This situation gives rise to the concept of simulation[263].

In contract law, a simulation occurs when parties concludes a contract by mutual agreement that actually does not reflect their true intentions. The aim behind is generally to deceive third parties. In other words, it is a deliberate mismatch between the declared intentions of the parties and their true intentions[264]. For a situation to be considered a simulation, the discrepancy between the will and the declaration of the parties must be intentional. Thus, the parties collaborate to deceive third parties regarding the nature of the legal transaction they have undertaken[265].

3.2. Types of Simulation

Simulations can be classified into two distinct categories: absolute and relative.

In addition to this, simulation may be classified as complete and partial simulations. When the simulation covers the entirety of the contract, it is referred to as complete simulation, whereas if the simulation pertains only to certain provisions of the

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[263] Eren, B*orçlar Hukuku Genel Hükümler,* 362.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 127.; Mehmet Ayan, *Borçlar Hukuku Genel Hükümler* (Ankara: Seçkin, 2016), 119.; Murat Doğan – İsmail Atamulu – Gökhan Şahan, *Borçlar Hukuku Genel Hükümler,* (Ankara: Seçkin 2023), 139.; Gökhan Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* (Ankara: Seçkin, 2019), 62; Serdar Nart, *Borçlar Hukuku Genel Hükümler Özel Hükümler* (Ankara: Adalet, 2014), 13.; Selahattin Sulhi Tekinay – Sermet Akman – Haluk Burcuoğlu - Atilla Altop, *Borçlar Hukuku Genel Hükümler*, (İstanbul: Filiz, 1993). 407.; Mehmet Eren Erenler, *Muris Muvazaası,* (Ankara: Seçkin, 2023), 15.

[264] Eren, B*orçlar Hukuku Genel Hükümler,* 362.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 127.; Ayan, *Borçlar Hukuku Genel Hükümler,* 203.; Aydın Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* (Ankara: Seçkin, 2021), 22.; Nart, *Borçlar Hukuku Genel Hükümler Özel Hükümler*, 29.

[265] Eren, B*orçlar Hukuku Genel Hükümler,* 362.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 128.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 280.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 139.; Tekinay– Akman – Burcuoğlu – Altop, *Borçlar Hukuku Genel Hükümler,* 407.

contract, it is referred to as partial simulation[266]. As the absolute and relative classification is the main classification, these will be examined below respectively.

3.2.1 Absolute Simulation

Absolute simulation refers to a situation where the parties conclude an agreement, despite having no intention of actually engaging in a valid legal transaction. The purpose behind concluding a contract which they do not want is to mislead third parties[267]. More precisely, parties conclude a deceptive contract that is valid and enforceable, but in reality, this contract does not have any legal effect.

The characteristic of an absolute simulation is that there is no hidden transaction behind the ostensible transaction that the parties genuinely intend to be effective. The parties are not concealing another contract whose provisions they want to come into effect. Instead, they agree solely to prevent the enforcement and consequences of the contract they ostensibly enter into, with the intent to deceive third parties. In reality, the parties have no intention of engaging in any transaction[268].

3.2.2. Relative Simulation

In a relative simulation, there are two contracts concluded between the parties. First one is the simulation contract which is the apparent contract that the parties agreed. The second one is the dissimulating contract which the parties intend to give a legal effect to. More presicely, in relative simulation, the parties conceal a transaction they genuinely intend to take effect behind an apparent transaction. Unlike absolute simulation, where there is no intent to engage in any transaction whatsoever, in relative simulation cases the parties wish to conduct a transaction (dissimulating contract), but choose to hide it behind another transaction for certain reasons. The transaction known as a relative simulation

[266] Erol Cansel – Çağlar Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* (Ankara: Seçkin, 2017), 190-191.
[267] Eren, B*orçlar Hukuku Genel Hükümler,* 370.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 129.; Ayan, *Borçlar Hukuku Genel Hükümler,* 184.; Öztürk Aydın, *Muris Muvazaası,* (İstanbul: Legal, 2023), 26.
[268] Eren, B*orçlar Hukuku Genel Hükümler,* 370.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 129.; Doğan –Atamulu –Şahan, *Borçlar Hukuku Genel Hükümler,* 139.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 348; Ayan, *Borçlar Hukuku Genel Hükümler,* 205.; Aydın, *Muris Muvazaası,* 27.

serves the purpose of concealing another transaction[269]. The most frequently encountered examples of simulation transactions are those involving relative simulation situations. An example relevant to our thesis is the "decedent simulation" which is a type of relative simulation.

3.3. Elements of Simulation

The elements of simulation vary depending on whether the simulation is absolute or relative. In a case of an absolute simulation, the elements include the apparent transaction (simulation transaction), the simulation agreement, and the intent to deceive. For a relative simulation, these elements are supplemented by the additional element of a concealed transaction[270].

3.3.1. Apparent Transaction

An apparent transaction, also known as a simulation transaction, refers to an act undertaken by the parties with the intention to deceive third parties, but which does not reflect their true intentions. The parties have agreed amongst themselves that this transaction will not have legal consequences[271]. An apparent transaction can take the form of a contract or a unilateral declaration of intent that is required to be made in accordance with the provisions of the law for its validity, in any case[272].

3.3.2. Simulation Agreement

The agreement between the parties to the contract, wherein they acknowledge the discrepancy between their intentions and declarations and agree to deceive third parties,

[269] Eren, B*orçlar Hukuku Genel Hükümler,* 371.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 129.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 140.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 349.; Ayan, *Borçlar Hukuku Genel Hükümler,* 206.

[270] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 130.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 347; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 188.; Nart, *Borçlar Hukuku Genel Hükümler Özel Hükümler,* 29.

[271] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 346; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 25.

[272] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 346.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 25.

thus rendering the apparent transaction ineffective, is termed a simulation agreement[273]. There is no form requirement for a simulation agreement; it can be made orally or in writing. If there is no such agreement between the parties, simulation cannot be established[274]. However, the simulation agreement must be made simultaneously with or prior to the apparent transaction. Otherwise, the apparent transaction will be considered valid as it would reflect the true and mutual intentions of the parties[275].

3.3.3. Intent to Deceive

The element of intent to deceive in a simulation refers to the deliberate and knowing creation of a discrepancy between the parties' intentions and declarations with the intention of deceiving third parties[276]. It is not necessary for the simulation to cause harm to third parties; the mere act of concealing the transaction from third parties implies an intent to deceive[277].

3.3.4. Concealed (dissimulated) Transaction

While the other three elements mentioned above exist in both types of simulation, a concealed transaction, in contrast, only occurs in cases of relative simulation.

The concealed transaction refers to the transaction that the parties intend to undertake in accordance with their true intentions but conceal behind the apparent transaction. In absolute simulation, the parties do not intend or aim to enter into a contract; rather, they solely intend to deceive third parties. Therefore, there is no concealed transaction in case of an absolute simulation. The concealed transaction is essentially an

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[273] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 347.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 189.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 26.

[274] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 189.

[275] Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 189.

[276] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 348.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 189.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 27.

[277] Eren, B*orçlar Hukuku Genel Hükümler*, 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 348.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 189.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 27.; Aydın, *Muris Muvazaası,* 23.

element of relative simulation[278]. The concealed contract and the simulation contract are independent contracts with separate identities. If the concealed transaction alters the nature of the apparent transaction entirely, it constitutes complete simulation; if it alters some elements of it, it constitutes partial simulation[279].

Although the simulation agreement is not subject to any specific formality, if it is subject to a formal requirement by law, it is a requirement for the concealed transaction to be made in accordance with the form prescribed by law for its validity. This is because the contract that reflects the true intentions of the parties is this contract[280]. This matter will be explained in more detail in the subsequent sections.

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[278] Eren, B*orçlar Hukuku Genel Hükümler,* 369.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 129.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 189.; Nart, *Borçlar Hukuku Genel Hükümler Özel Hükümler,* 29.

[279] Eren, B*orçlar Hukuku Genel Hükümler,* 369.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Nart, *Borçlar Hukuku Genel Hükümler Özel Hükümler,* 29.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 28.

[280] Eren, B*orçlar Hukuku Genel Hükümler,* 369.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Nart, *Borçlar Hukuku Genel Hükümler Özel Hükümler,* 29.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 28.

4. DECEDENT SIMULATION

4.1. Concept and Definition of Decedent Simulation

Decedent simulation is a legal concept that is created by case law and doctrine[281]. According to the principles accepted in the decisions of the Court of Cassation, the decedent simulation can be defined as follows: it is a lawsuit filed by heirs for the annulment of concealed donation contracts, which are disguised as sale contracts or contract of maintenance until death in the land registry, with the intention of evading the legitimate shares of the heirs, whether they have reserved shares or not[282]. Based on this it can be concluded that decedent simulation is a type of relative simulation by its nature and also possesses the characteristics of complete simulation.

In decedent simulation, there is an agreement between the testator and the counterparty regarding the transfer of the property, but the nature of the apparent contract is altered. While the real intention of the testator is to make a donation, they typically conceal this intention by entering into a sale contract or a contract of maintenance until death. The concealed contract here is a donation, while the apparent contract is a sale or a contract of maintenance until death[283].

Decedent simulation is the most common type of simulation encountered in practice. There is no regulation concerning decedent simulation apart from Article 19 of the TCO, which regulates that the true and common intentions of the parties will be taken as the basis for determining and interpreting the type and content of a contract.

The most well-known and still debated decision regarding decedent simulation is the decision of the Joint Chambers of the Court of Cassation dated 1974 and numbered 1/2. This decision established the fundamental principles applied to decedent simulation[284]. According to this decision, the apparent transaction is considered a sale, while the concealed transaction is regarded as a donation. Hence, it is accepted that all heirs, whether

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281 Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 358.; Erenler, *Muris Muvazaası,* 48.; Aydın, *Muris Muvazaası,* 67.; İmre – Erman, *Miras Hukuku*216.

282 Talih Uyar, "Yargıtay Kararlarında Muris Muvazaası", *İstanbul Barosu Dergisi, 73/2,* 387.

283 Eren, B*orçlar Hukuku Genel Hükümler,* 371.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 358.; Ayan, *Borçlar Hukuku Genel Hükümler,* 206.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 152.; İmre – Erman, *Miras Hukuku,* 295.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 105.; Aydın *Muris Muvazaası,* 68.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 428.

284 Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 358.; Aydın, *Muris Muvazaası,* 67.

their inheritance rights are encroached upon or not, can request the correction of the land registry. It is also established that the correction will only affect the inheritance share of the heir who initiates the lawsuit and that simulation can be proven with any type of evidence[285].

According to the principles accepted in the decisions of the Court of Cassation, the decedent simulation can be defined as follows: it is a lawsuit filed by heirs for the annulment of concealed donation contracts, which are disguised as sale contracts or contract of maintenance until death in the land registry, with the intention of evading the legitimate shares of the heirs, whether they have reserved shares or not[286]. Based on this it can be concluded that decedent simulation is a type of relative simulation by its nature and also possesses the characteristics of complete simulation.

The individual initiating a lawsuit based on decedent simulation must first and foremost hold the status of an heir. Additionally, they must hold this status at the moment the inheritance is opened[287]. If the testator entered into a simulation contract with one or more of the heirs, or if it was with a third party, it is presumed that the intent to deceive applies to all heirs[288].

4.2. Elements

Since decedent simulation is a type of relative simulation, it consists of four elements: the apparent transaction, intent to deceive, simulation agreement, and concealed transaction. In the absence of any of these elements, simulation cannot be established[289]. Although these elements are examined before, they are to be addressed here in relation to the decedent simulation cases.

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[285] Baki İlkay Engin (ed.), *Medeni Hukuk Alanındaki Güncel Yargıtay Kararlarının Değerlendirilmesi Cilt IV Miras Hukuku,* (İstanbul: Onikilevha, 2023), 53. [Sabah Altay].

[286] Talih Uyar, "Yargıtay Kararlarında Muris Muvazaası", *İstanbul Barosu Dergisi, 73/2,* 387.

[287] Aydın, *Muris Muvazaası,* 78.

[288] Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 431.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 111.

[289] Eren, B*orçlar Hukuku Genel Hükümler*, 371.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 349.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 140.; Ayan, *Borçlar Hukuku Genel Hükümler,* 207.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 152.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 108.

4.2.1. Apparent Transaction

An apparent transaction refers to a contract arranged by the testator with the intention to deceive the heirs, prevent their objections, and avoid potential lawsuits, ultimately aiming to deceive them. This contract does not reflect the true intention of the testator and does not result in any legal consequences between the parties[290]. In practice, the testator commonly structures the apparent transaction as a sale or a contract of maintenance until death[291].

Apparent transactions are considered valid under the law as they are conducted in accordance with the prescribed legal forms (for example, if it is a sale, the transfer of the property is registered in the land registry). However, they are deemed invalid in reality since they do not align with the true intentions of the parties. Indeed, by entering into a simulation agreement, the parties acknowledge that the apparent transaction is not valid and does not reflect their true intentions[292]. This aspect also indicates the acceptance of the doctrine of will in our legal system[293].

4.2.2. Simulation Agreement

In the context of a decedent simulation, the simulation agreement refers to the agreement between the testator and the counterparty regarding the fact that the apparent transaction does not actually have legal consequences, and that the concealed transaction between them is actually a concealed donation[294]. The simulation agreement is not subject to any specific formality. While the apparent transaction may be subject to formalities, there is no objection to the simulation agreement being made orally or informally[295].

If only a part of the apparent contract is rendered invalid through the simulation agreement, i.e. if partial simulation is involved, then it cannot be considered as decedent

[290] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 347; Aydın, *Muris Muvazaası,* 82.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 109.

[291] Erenler, *Muris Muvazaası,* 56.

[292] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 347.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 25.

[293] Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 109.

[294] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 189.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 26.; Aydın, *Muris Muvazaası,* 73.

[295] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 189.; Aydın, *Muris Muvazaası,* 73.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 110.

simulation. This is because decedent simulation requires complete simulation to be established[296].

4.2.3. Intent to Deceive

In the context of decedent simulation, the testator must act with the intent to deceive the heirs when creating an apparent contract[297]. In the decisions of the Court of Cassation, the intention to deceive in decedent simulation is used in the sense of evading inheritance[298]. It must be proven that the testator acted with the intent to deceive the heirs when arranging the transaction, meaning that their aim was to evade inheritance. The true intention of the testator must be clearly established beyond doubt. Whether the testator had the intention to evade inheritance must be separately examined in each specific case[299].

It is a shared opinion of the Court of Cassation that the true intention of the testator must be proven. The heir can substantiate their claim of simulation with any type of evidence. In one decision, the Court of Cassation concluded that the transfer was actually a donation rather than a sale, based on the lack of necessity for the testator to sell three different properties within the same year[300]. In another decision, it was concluded that the transfer of only a portion of the property, despite the possibility of transferring the entire property, was not indicative of the intent to evade inheritance[301]. The Court of Cassation is in agreement with legal doctrine, emphasizing the need for separate examination of simulation in each specific case. The Court of Cassation's views on proving decedent simulation in contracts of maintenance until death will be examined in more detail under the section on the Burden of Proof.

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[296] Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 111.
[297] Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 348.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 189.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 27.
[298] Aydın, *Muris Muvazaası,* 74.
[299] Aydın, *Muris Muvazaası,* 74.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 115.
[300] The Civil General Council of the Turkish Court of Cassation, 2019/327, (21 March 2019).
[301] The Civil General Council of the Turkish Court of Cassation, 2019/336, (21 March 2019).

4.2.4. Concealed Contract

There is no concealed transaction in case of an absloute simulation. The concealed transaction is essentially an element of a relative simulation.[302]. Therefore, because decedent simulation is a relative simulation, concealed transaction is an essential element of a decedent simulation[303]. A concealed contract is a contract that reflects the true intentions of the testator and the counterparty, but is concealed. This contracts mostly appear as donation contracts[304].

As long as it meets the validity requirements set forth by the law, which depends on the type of the contract that is concluded, the concealed transaction is deemed valid and enforceable[305]. In this regard, it differs from the apparent transaction. While the apparent transaction is invalid because it does not reflect the true intentions of the parties[306], the concealed transaction is in accordance with their intentions and therefore the concealed transaction is valid. This valid contract binds the parties and their universal successors. In this case, only actions for annulment or abatement can be initiated[307]. The abatement action will be covered in more detail later, as it is the primary focus of the thesis.

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[302] Eren, B*orçlar Hukuku Genel Hükümler,* 369.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 129.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 189.; Nart, *Borçlar Hukuku Genel Hükümler Özel Hükümler,* 29.

[303] Aydın, *Muris Muvazaası,* 82,

[304] Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 433.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 124.

[305] Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 354.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 141.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 192.; Ayan, *Borçlar Hukuku Genel Hükümler,* 209.

[306] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 130.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 351; Ayan, *Borçlar Hukuku Genel Hükümler,* 208.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 192.; Kocayusufpaşaoğlu –Hatemi –Serozan –Arpacı, *Borçlar Hukuku Genel Hükümler Cilt 1,* 356.

[307] Eren, B*orçlar Hukuku Genel Hükümler,* 369.; Oğuzman – Öz, *Borçlar Hukuku Genel Hükümler Cilt 1,* 131.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 433.

5. SIMULATION OF THE CONTRACT OF MAINTENANCE UNTIL DEATH

5.1. Overview

As previously mentioned, a contract of maintenance until death can be established either with the characteristics of inheritance law or obligations law[308]. The simulation of a contract is more commonly encountered in contracts of maintenance until death with the characteristics of obligations law, rather than those with the characteristics of inheritance law. This is because, in a contract of maintenance until death with the characteristics of inheritance law, the obligation undertaken by the care beneficiary is fulfilled through a disposition upon death. Therefore, the care beneficiary still retains the right of disposition over this asset, meaning they can exercise this right as they wish. On the other hand, in a contract of maintenance until death with the characteristics of obligations law, the parties fulfill their obligations through an inter vivos disposition. Consequently, once the care beneficiary has performed their obligation during their lifetime, their right of disposition is extinguished. This fact makes the contract more suitable to a simulation. As in the rest of our thesis, this section will focus on the contract of maintenance until death with the characteristics of obligations law, and therefore, the simulation of such contracts will be examined.

It is possible for a contract of maintenance until death to be executed with both absolute and relative simulation. For example, in the case of a debtor who transfers their assets to third parties through a contract of maintenance until death to evade creditors, absolute simulation is present[309]. In the case where a care beneficiary, acting with the intent to deprive heirs and violate the reserved share, conceals this intention through a

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[308] Eren, B*orçlar Hukuku Özel Hükümler*, 812.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.; Yavuz – Acar – Özen *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1660.; Hüseyin Hatemi – Rona Serozan – Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm,* 550.; Kenan Tunçomağ, *Ölünceye Kadar Bakma Akdi*, 28.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 27.

[309] Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 348.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 139.; Ayan, *Borçlar Hukuku Genel Hükümler,* 205.

contract of maintenance until death, relative simulation is present. This type of relative simulation also constitutes the decedent simulation that we previously discussed[310].

It can be claimed by anyone that the transfer based on the contract of maintenance until death is made with simulation. In response to this claim, the primary focus is to determine the true and mutual purposes of the parties in the contract. If it is understood that the care beneficiary's intent in the transfer was not to ensure the care and supervision condition, but rather to achieve another objective, then it cannot be said that the contract is supported by consideration. The conclusion would be that the contract was pursued with a different purpose.[311]. In lawsuits filed due to simulation, it is necessary to ascertain the common intent in the contract between the care beneficiary and the caregiver. The essential task is to determine the purpose of the care beneficiary and the other party in entering into this contract[312].

In practice, it is often observed that contracts of maintenance until death are carried out as simulated transactions with the intent of evading the reserved portions of inheritance. Therefore, the issue of examining whether contracts of maintenance until death are executed with the simulated intent of violating the reserved shares of heirs should be examined in detail which is to be done now.

5.2. Presumptive Situations Indicating the Intent to Violate Reserved Shares in Contracts of Maintenance Until Death

In doctrine[313] and in the ongoing decisions of the Court of Cassation[314], it is observed that there is consensus on certain presumptive indicators that may suggest the presence of an intent to violate the reserved shares of the care beneficiary under contracts

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310 Eren, B*orçlar Hukuku Genel Hükümler,* 371.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 349.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 140.; Ayan, *Borçlar Hukuku Genel Hükümler,* 206.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 152.

311 The 14th Civil Chamber of the Court of Cassation, 2008/5566, (29 April 2008).

312 Eren, B*orçlar Hukuku Genel Hükümler,* 368.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 347.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 189.; Tekdoğan, *Muris Muvazaası Nedeniyle Açılan Tapu İptal ve Tescil Davaları,* 26.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 309.; Aydın, *Muris Muvazaası,* 73.

313 Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 170.

314 The Civil General Council of the Turkish Court of Cassation, 1997/238, (26 March 1997).; The Civil General Council of the Turkish Court of Cassation, 1999/1003, (01 February 1999).; The 1st Civil Chamber of the Court of Cassation, 2012/6582 (05 June 2012).; The 1st Civil Chamber of the Court of Cassation, 2020/5641 (04 November 2020).; The 1st Civil Chamber of the Court of Cassation, 2006/13020 (25 December 2006).; The 14th Civil Chamber of the Court of Cassation, 2011/1604 (16 February 2011).

of maintenance until death. These presumptive indicators will be examined below under specific headings.

5.2.1. Special Care Need of the Care Beneficiary

In decisions by the Court of Cassation[315], the special care need of the care beneficiary has been discussed as one of the situations where the intention to violate the reserved portion may exist within the scope of the contract of care until death. Indeed, it is evident that a person who does not require care will not enter into a contract of care until death. In this respect, the Court of Cassation took this fact into the consideration in some cases. However, the Court also emphasizes that the emergence of a special care need after the contract or a very short duration of the care beneficiary's need until their death does not affect the validity of the contract[316].

The Civil General Council of the Court of Cassation held a decision that could eliminate the differences of opinion on this matter. The judgment reads as follows: “It is not mandatory for the care beneficiary to have a special care need at the time the contract is concluded. The emergence of this need after the contract or its short duration until the beneficiary's death does not affect the validity of the contract. The main issue to be determined is whether this transfer was made with the intention of evading the reserved portion of the heirs and whether the purpose of the transfer was to prioritize donation over care and supervision conditions. For this determination, factors such as the age of the testator at the time of the contract, their physical and general health condition, the assets they possess, family conditions and relationships, and whether the transferred property remains within a reasonable limit in proportion to the entire estate, should be taken into account…”[317] Therefore, based on these decisions and especially the aforementioned Civil General Council desicion, it can be concluded that the special care need of the care beneficiary alone is not a criterion for a decedent simulation. There must be some other factors present showing the testator’s intention to circumvent the rules, as well.

[315] The 2nd Civil Chamber of the Court of Cassation, 1976/3280, (14 April 1976).; The 2nd Civil Chamber of the Court of Cassation, 1986/9964 (13 November 1986).; The 2nd Civil Chamber of the Court of Cassation, 1974/6246 (31 October 1974).

[316] The Civil General Council of the Turkish Court of Cassation, 1999/313, (26 May 1999).; The 1st Civil Chamber of the Court of Cassation, 2020/6554, (09 December 2020).; The 2nd Civil Chamber of the Court of Cassation, 2003/1918 (17 February 2003).; The 2nd Civil Chamber of the Court of Cassation, 2006/129 (23 January 2006).; The 1st Civil Chamber of the Court of Cassation, 2014/14202 (21 April 2016).

[317] The Civil General Council of the Turkish Court of Cassation, 1997/238, (26 March 1997).

Moreover, even if the caregiver has an obligation to provide care without any existing contract (for example, if the care beneficiary is their spouse), entering into a care contract still does not necessarily indicate a decedent simulation. A person requiring care and special attention may transfer their assets in exchange for care to ensure better treatment and to prevent their caregivers from being burdened by weakness, especially with the intention of not feeling indebted. This act does not necessarily violate the rights of the reserved portion holders[318].

Although this is the case, when the caregiver is the spouse of the care beneficiary, the Court of Cassation decisions require a special need for care in contracts of maintenance until death[319]. This presumption is further strengthened when the caregiver is a second spouse. In practice, it is observed that care beneficiaries often harm the reserved shares of their first spouses and children from their first marriage by transferring these shares to the second spouse. Particularly, when there is a clear estrangement between the reserved share holder and the care beneficiary, and the caregiver is a second spouse, it can be argued that the intent to violate the reserved shares is more pronounced[320].

The fact that the care beneficiary lives more or less after the contract is made does not imply that the care beneficiary was not cared for. According to the decisions of the Court of Cassation, claims that the deceased was not cared for cannot be made by heirs if such claims were not asserted during the lifetime of the deceased. It is stated that heirs asserting such claims after the deceased's death would be inconsistent with the principles of good faith[321]. However, while entering into a contract of maintenance until death shortly before the testator’s death does not alone indicate simulation, it may constitute a presumption of simulation when supported by other factors (e.g., the transfer of all assets)[322].

[318] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 168.
[319] The 2nd Civil Chamber of the Court of Cassation, 1974/180, (15 January 1974).; The Civil General Council of the Turkish Court of Cassation 1988/51, (27 January 1988).
[320] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 170.
[321] The 14th Civil Chamber of the Court of Cassation, 2001/7851, (13 November 2001).; The Civil General Council of the Turkish Court of Cassation, 1988/247, (16 March 1988).
[322] The Civil General Council of the Turkish Court of Cassation, 1972/97, (09 February 1974).; The 1st Civil Chamber of the Court of Cassation 2014/5815, (18 March 2014).; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 170.

5.2.2. Inter Vivos Imbalance

In Court of Cassation decisions, another fact examined in assessing the existence of the intention to violate reserved portions is the necessity of proportionality between the income from the transferred property and the maintenance element[323]. In this context, if the care beneficiary can maintain themselves with the value of the transferred property, then it can be argued that the intention to violate the reserved portion exists[324]. There must be an appropriate and fair proportionality between the income from the transferred property and the consideration for the services. This is because the transferor must transfer property to the extent required by the maintenance obligation. If a contract of maintenance until death is made in a manner that unnecessarily transfers wealth, it cannot be said that this proportionality exists. Such an approach is considered objective evidence of an intention to violate the reserved portion through a maintenance contract until death[325].

In this regard, the The Civil General Council of the Court of Cassation decided as follows: "... there are objective evidence showing the intention. For example, it is thought-provoking and meaningful, for someone to provide maintenance to themselves with their income while it is possible, instead of doing so under the pretext of providing maintenance until death. In the case at hand, it is possible for the deceased to provide maintenance with their income. On the other hand, the transfer of a significant portion of the estate to the defendants through maintenance until death is also evidence that good faith was not acted upon..."[326].

5.2.3. The Transfer of the Entire or Almost Entire Estate

An important criterion in determining the real intention of the testator to evade inheritance through donation is the ratio of the value of the transferred property to the estate and whether the value of the property constitutes a reasonable consideration equivalent to the maintenance obligation. The transfer of all or a significant portion of one's assets by a person, through a contract of maintenance until death, is considered an

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[323] The 1st Civil Chamber of the Court of Cassation, 2019/4121, (26 June 2019).; The 2nd Civil Chamber of the Court of Cassation, 1977/1473 (21 February 1977).

[324] Şeyda Dursun Karaahmetoğlu, "Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi," *İstanbul Hukuk Mecmuası* (79.4, 2021), 1244.

[325] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 168.

[326] The Civil General Council of the Turkish Court of Cassation, 1978/287, (5 April 1978).

objective evidence of the intention to eliminate reserved portion[327]. Therefore, under the contract of maintenance until death, if the beneficiary transfers all or nearly all of their assets to the obligor, or if a transfer is not made in proportion to and at a reasonable level for the security of the maintenance obligation, or if the more valuable properties among the transferred properties are selected compared to the remaining properties, the existence of the intention to violate the reserved portion of the beneficiary is assumed[328]. The Court of Cassation has rightly made the following decision on this matter: "It is evident that if the deceased had the intention to evade inheritance, they could have transferred their entire share. Leaving behind only half a share of the property subject to the claim... It cannot be said that the deceased's real intention and purpose was to evade inheritance."[329]

In another decision, the Court emphasized the importance of whether the deceased had assets other than the property transferred by the deceased in terms of deceased simulation and decided: "As for the specific case, it is observed that the deceased, who was the owner of the property in parcel No. 392, transferred 1/3 of it and the entire property in parcel No. 547 to the defendant daughter-in-law with a contract of maintenance until death. Considering that the parties did not specify any other assets of the deceased, it can be seen that the properties subject to the lawsuit constitute the entire estate of the deceased. Therefore, since the contract of maintenance until death is a mutually beneficial contract, in order to ensure the provision of the caretaking obligation, a transfer proportional and reasonable to this must have been made. However, it is impossible to say that the properties transferred to the defendant through the contract of maintenance until death remained at a reasonable level compared to the entire estate of the deceased."[330]

In cases where, contrary to the normal course of life, a significant number of properties, almost equivalent to the entire estate, are unnecessarily transferred to someone else through a contract of maintenance until death, it cannot be said that a contract was truly made for caretaking purposes[331]. However, if the caretaker had been taking care of the deceased for many years even before the contract of maintenance until death was made,

[327] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 168.
[328] The 1st Civil Chamber of the Court of Cassation, 2019/4121, (26 June 2019).
[329] The 1st Civil Chamber of the Court of Cassation, 2020/3488, (6 July 2020).
[330] The 1st Civil Chamber of the Court of Cassation, 2014/1868, (10 February 2014).
[331] The 1st Civil Chamber of the Court of Cassation, 2013/1645, (11 February 2013).; The 1st Civil Chamber of the Court of Cassation, 2013/9763, (12 June 2013).

the caretaking process carried out at this stage should be taken into account in determining whether the transferred assets corresponded to the caretaking obligation[332].

5.2.4. General Assessment Regarding Burden of Proof

As addressed, according to case law[333], in the presence of certain indications, it is accepted that a contract of maintenance until death was made with the intention of violating the reserved portion. Such factors can be stated as follows;

The absence of special care needs for a person, the lack of a fair and just proportion between the transferred asset and the services provided and the transfer of the entire estate or a substantial portion of it. This follows that if some of these are established in the cases, there may be an intention to violate the reserved portion of the heirs[334].

Against this background, the objective evidences that are considered as the intentional violation of the reserved portion rules through a contract for care until death can be summarised as follows[335]:

a) Transferring all assets to the spouse responsible for care until death shortly before the decedent's death, in exchange for care until death, especially when there is a clearly bad relationship between the decedent and the heir, and particularly if the spouse is a second spouse, constitutes conclusive evidence of the decedent's intention to circumvent the reserved portion.

b) While it is a legal and moral duty for a person to care for and assist their parents or spouse, it becomes reasonable for the caretaker to expect compensation when the burden of care becomes unreasonably heavy. Especially when the individual in need of care is sick, requires special care, or is bedridden, providing assets in exchange for care until death does not violate the rights of the reserved portion holders. It should be

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332 Aydın, *Muris Muvazaası,* 138.

333 The Civil General Council of the Turkish Court of Cassation, 1997/238, (26 March 1997).; The Civil General Council of the Turkish Court of Cassation, 1999/1003, (01 February 1999).; The 1st Civil Chamber of the Court of Cassation, 2012/6582 (05 June 2012).; The 1st Civil Chamber of the Court of Cassation, 2020/5641 (04 November 2020).; The 1st Civil Chamber of the Court of Cassation, 2006/13020 (25 December 2006).; The 14th Civil Chamber of the Court of Cassation, 2011/1604 (16 February 2011).; The 1st Civil Chamber of the Court of Cassation, 2019/4121, (26 June 2019).; The 2nd Civil Chamber of the Court of Cassation, 1977/1473 (21 February 1977).; The 1st Civil Chamber of the Court of Cassation, 2013/1645, (11 February 2013).; The 1st Civil Chamber of the Court of Cassation, 2013/9763, (12 June 2013).

334 Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 167-169.; Şeyda Dursun Karaahmetoğlu, "Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi," 1246-1247.

335 Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 170.

acknowledged that such transfers are made in return for consideration. However, if the decedent, who is the beneficiary of the care until death, is not in need of special care, the issue of simulation may arise regarding the transfers made to the spouse.

c) Transferring all or a significant portion of the estate to someone else through a contract for care until death objectively constitutes evidence of the intention to circumvent the reserved portion.

d) The lack of a fair and just proportion between the income from the transferred asset and the services provided constitutes an objective indicator of the intention to circumvent the reserved portion.

As understood from the case law of the Court of Cassation[336], although there may be an impression of violation of the reserved portion with separate indications, due to the mutual obligations arising from the contract of maintenance until death, in order to avoid prejudice to the caregiver, the existence of a decedent simulation and accordingly the intention to violate the reserved portion are accepted only when there are objective, strong, and multiple indications supported together. In other words, the Court of Cassation emphasizes that for the existence of the intention to violate the reserved portion, the evidence in the specific case must sufficiently dispel the doubt regarding the good faith execution of the contract.

In my opinion, while I agree with the view that the Court of Cassation's criterion should not be based solely on the need for care and that the presence of an intent to violate reserved shares should be determined by evaluating other factors together, I believe that the need for care, which is the main subject of the contract and the primary obligation of the caregiver, should be considered more prominently compared to other factors when assessing the presence of an intent to violate reserved shares. In practice, there are situations where the testator has a strained relationship with their descendants and thus does not wish to leave an inheritance. Therefore, contrary to the Court of Cassation's practice, I am of the opinion that the need for care should be considered as a general criterion not only for the spouse but also for descendants and third parties. However, in the

[336] The Civil General Council of the Turkish Court of Cassation, 1997/238, (26 March 1997).; The Civil General Council of the Turkish Court of Cassation, 1999/1003, (01 February 1999).; The 1st Civil Chamber of the Court of Cassation, 2012/6582 (05 June 2012).; The 1st Civil Chamber of the Court of Cassation, 2020/5641 (04 November 2020).; The 1st Civil Chamber of the Court of Cassation, 2006/13020 (25 December 2006).; The 14th Civil Chamber of the Court of Cassation, 2011/1604 (16 February 2011).

doctrine[337], it is argued that there is no need for the care beneficiary to be in special need of care at the time of establishing the contract of maintenance until death for the contract's validity. According to the legal definition of the contract of maintenance until death in Article 611 of the TCO, such a requirement is not mentioned in the establishment of the contract. Therefore, since there is no legal requirement for such a need, insisting on the presence of a special care need at the time of the contract's establishment would imply an additional condition for the validity of the contract

Additionally, while I agree with the Court of Cassation's view that a presumption of intent to violate reserved shares exists in cases of imbalance between performance obligations and the transfer of the entire estate of the care beneficiary, it should be noted that, for example, in a situation where there is only a single asset in the care beneficiary's estate, this asset may fulfill the reciprocal obligation of the care beneficiary under the contract of maintenance until death. In such a case, it is clear that the care beneficiary did not act with the intent to violate reserved shares. Therefore, I believe that exceptional cases should be considered, and each case should be evaluated on its own merits.

On the other hand, the contract of maintenance until death is a contract that creates mutual obligations. During the debate on whether the reserved share has been violated (after the care beneficiary has passed away), the caregiver may have already completed his/her obligations. Therefore, I agree with the Court of Cassation's view[338] that proving whether the contract of maintenance until death is simulated must be challenging and requires the presence of multiple objective factors. Therefore, as agreed in the Court of Cassation decisions and in the doctrine, unless the intention to violate the reserved portion is conclusively proven, the caregiver's rights should be protected.

It must be stated that, simulation is inherently a situation that can only arise through mutual agreement between the two parties. When examining the elements of simulation under the section on simulation, it was stated that a simulation agreement is a prerequisite for establishing simulation. However, the Court of Cassation considers the care beneficiary's intention to violate reserved shares sufficient to accept that the contract of maintenance until death was executed with simulation and emphasizes the need to prove

[337] Şeyda Dursun Karaahmetoğlu, "Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi," 1245.

[338] The Civil General Council of the Turkish Court of Cassation, 1997/238, (26 March 1997).; The Civil General Council of the Turkish Court of Cassation, 1999/1003, (01 February 1999).; The 1st Civil Chamber of the Court of Cassation, 2012/6582 (05 June 2012).; The 1st Civil Chamber of the Court of Cassation, 2020/5641 (04 November 2020).; The 1st Civil Chamber of the Court of Cassation, 2006/13020 (25 December 2006).; The 14th Civil Chamber of the Court of Cassation, 2011/1604 (16 February 2011).

this intention. However, before assessing the care beneficiary's intent, it is essential to clarify whether the parties have reached a mutual simulation agreement in this regard. Otherwise, concluding that the simulation exists based solely on the care beneficiary's intention would contradict legal principles and fairness. Despite this, as has been established in the practices of the Court of Cassation, this issue is often overlooked, and disputes related to simulation in contracts of maintenance until death are resolved solely by determining the care beneficiary's intent. This disregards the possibility that the caregiver may be unaware of such intent, thereby suggesting that no mutual simulation agreement exists.

5.3. Consequences of Simulation in Contracts of Maintenance Until Death

As adressed, contracts of maintenance until death can be executed as either absolute or relative simulations. In practice, relative simulation, often carried out with the aim of evading inheritance claims and examined under the title of "decedent simulation," is more commonly encountered than absolute simulation. While both the consequences of absolute simulation and relative simulation will be discussed, the consequences of relative simulation will be addressed in detail.

5.3.1. In Cases of Absolute Simulation

In Turkish law, there is no provision directly regulating the effects and consequences of simulated contracts. However, as a general rule, a contract requires alignment between intention and declaration. Article 19 of the TCO states that the real and mutual intentions of the parties should be considered. Since simulated contracts do not reflect the real and mutual intentions of the parties, such contracts are invalid[339].

On the other hand, there is no consensus on the legal nature of the invalidity. In the doctrine, some argue that since none of the parties to the contract actually intends for their declared intention to be realized, the absence of a declaration should be understood as the contract's non-existence[340]. The prevailing view, however, is that it is definitively null

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[339] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 130.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 351; Ayan, *Borçlar Hukuku Genel Hükümler,* 208.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 192.

[340] Eren, B*orçlar Hukuku Genel Hükümler,* 373.; Necip Kocayusufpaşaoğlu – Hüseyin Hatemi – Rona Serozan – Albülkadir Arpacı, *Borçlar Hukuku Genel Hükümler Cilt 1,* (İstanbul: Filiz, 2017), 356.

and void[341]. As long as there is even a formal mutual declaration of intention, the concept of non-existence cannot be applied[342]. A simulated transaction is invalid from the outset. This transaction, which does not create obligations or claims between the parties, does not cease to exist due to the passage of time, the removal of the reason for simulation, or the parties' acceptance of the simulated transaction[343].

As a result of absolute simulation, the apparent transaction becomes invalid, and the associated sanction is annulled. As a consequence of this invalidity, no obligations or claims arise between the parties. The simulated contract is void not only between the parties but also with respect to third parties[344].

This follows that, in a contract of maintenance until death executed as absolute simulation with the intent to evade creditors, any movable property or unregistered real estate transferred to the caregiver should be returned to the original owner. Since the apparent contract of maintenance until death is invalid due to its simulated nature, there can be no mention of the existence of a hidden transaction. If the care beneficiary's performance involves real estate and the contract is executed solely to evade creditors, the apparent contract of maintenance until death becomes invalid. Thus, in a contract of maintenance until death executed as absolute simulation, any registration made in the name of the caregiver is considered fraudulent[345].

In the case of proof of absolute simulation, the contract of maintenance until death will be absolutely void and will have no effect from the outset. Therefore, even though these assets may appear to have been transferred to the transferee on the surface, they will, in fact, be considered as never having left the transferor's estate[346]. In such a case, the decision given at the end of the lawsuit is not a decision that creates novelty but rather a declaratory judgment[347].

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[341] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 352; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 140.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 192.

[342] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.

[343] Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 352; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 140.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 192.

[344] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 130.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 144.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 192.

[345] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 306.; The 1st Civil Chamber of the Court of Cassation, 2005/12357, (23 November 2005).

[346] The Civil General Council of the Turkish Court of Cassation, 2000/143, (1 March 2000).

[347] The 1st Civil Chamber of the Court of Cassation, 2005/12357, (23 November 2005).

The assertion of invalidity is not subject to any statute of limitations and can be raised at any time[348]. However, although this is the rule, in some exceptional cases (protection of third parties, contradiction to the principle of good faith in raising simulation, impossibility of raising simulation claims under article 19/2 of the TCO) the argument that a transaction is simulated cannot be made, and the simulated transaction may be deemed valid. This issue will be discussed in more detail below when examining the validity of the apparent transaction in cases of relative simulation.

5.3.2. In Cases of Relative Simulation

In a relative simulation, unlike an absolute simulation, there is a hidden contract that reflects the real intentions of the parties. As discussed in detail under the title of "decedent simulation," the most commonly encountered form of relative simulation in practice is decedent simulation, aimed at evading inheritance claims. The relative simulation of a contract of maintenance until death typically involves evading heirs, with the hidden contract being an act of donation, thus qualifying as decedent simulation.

When a contract of maintenance until death is executed as a relative simulation, there will be a hidden contract reflecting the real intentions of the parties alongside the apparent contract. Therefore, when examining the consequences of a contract of maintenance until death executed as relative simulation, it will be necessary to make a dual distinction between the apparent transaction and the hidden transaction.

5.3.2.1. The Apparent Transaction

5.3.2.1.1. Invalidity of the Apparent Transaction

The apparent transaction, as detailed above, is a transaction carried out by the parties involved, despite their actual unwillingness to enter into the contract, with the purpose of concealing a hidden transaction from third parties. In this case, the contract of maintenance until death is considered the apparent contract, while the hidden contract is typically a donation agreement.

When decedent simulation is present, the parties do not wish the apparent transaction to produce any legal effects. The apparent transaction does not reflect the true intentions of the parties; instead, it conceals the actual transaction that reflects their real

[348] Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 352.; Ayan, *Borçlar Hukuku Genel Hükümler,* 209.

intentions and is conducted with the purpose of deceiving third parties. Article 19 of the TCO states that the real and mutual intentions of the parties should be the basis. Since simulated contracts do not reflect the real and mutual intentions of the parties, such contracts are invalid[349].

The nature of this invalidity is a matter of debate in the doctrine.

According to one view, since none of the parties to the contract actually intends for their declared intention to be realized, the absence of a declaration should be understood as the non-existence of the contract[350]. Another view argues that the sanction for a simulated transaction constitutes a unique form of nullity. The basis for this view is the belief that Article 27 of the TCO, which enumerates the reasons for nullity, implies that no new reasons for nullity can exist outside of those specified in this article[351]. The prevailing view in the literature is that a simulated transaction produces no legal effects and that this nullity is absolute. This view is based on the fact that, even if it is merely formal, a declaration of intention is present[352]. A simulated transaction is invalid from the outset. This transaction, which does not create obligations or claims between the parties, does not cease to exist due to the passage of time, the removal of the reason for simulation, or the parties' consent to the simulated transaction[353].

5.3.2.1.2. Situations Where the Apparent Transaction is Considered Valid

As a rule, an apparent transaction is invalid against third parties as well, and a claim of simulation can be raised[354]. However, the legislator has provided protection to those who acquire rights relying on the apparent transaction, even if it does not align with

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[349] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 130.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 351; Ayan, *Borçlar Hukuku Genel Hükümler,* 208.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 192.; Kocayusufpaşaoğlu –Hatemi –Serozan –Arpacı, *Borçlar Hukuku Genel Hükümler Cilt 1,* 356.

[350] Kocayusufpaşaoğlu –Hatemi –Serozan –Arpacı, *Borçlar Hukuku Genel Hükümler Cilt 1,* 356.

[351] Feyzi Necmeddin Feyzioğlu, *Borçlar Hukuku Genel* Hükümler, (İstanbul: 1976), 195.; Turhan Esener, *Türk Hukukunda Muvazaalı Muameleler,* (İstanbul: 1956), 52.; Eraslan Özkaya, *Açıklamalı-İçtihatlı İnançlı İşlem ve Muvazaa Davaları,* (Ankara: Seçkin, 2015), 119.

[352] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 352; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 140.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 192.

[353] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 352; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 140.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 192.

[354] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 130.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 144.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 192.

the parties' actual intentions. By allowing the apparent transaction to be valid in certain situations, the legislator aims to ensure reliability in legal transactions[355]. These exceptional cases which are protection of third parties, contradiction to the principle of good faith in raising simulation and impossibility of raising simulation claims under article 19/2 of the TCO will be addressed below respectively.

5.3.2.1.2.1. Protection of Third Parties Who Acquire Real Rights Based on a Simulated Transaction

Article 1023 of the TCC states: "The acquisition of ownership or other real rights by a third party who relies in good faith on the registration in the land registry is protected." This provision aims to ensure trust in the land registry. According to this provision, the acquisition of ownership or another real right by a third party who relies in good faith on the registration in the land registry is protected. Therefore, a claim of simulation cannot be raised against a person who acquiress the property in good faith[356]. Good faith here should be assessed by determining whether the person was unaware of the simulation and believed it to be an ordinary transaction.

5.3.2.1.2.2. Contradiction to the Principle of Good Faith in Raising Simulation

The principle of good faith[357] is a general and objective rule of conduct that everyone must adhere to. Everyone is required to follow the rules of good faith when exercising their rights and fulfilling their obligations. The misuse of a right to cause harm to another constitutes an abuse of that right. The legal system will not protect the blatant abuse of a right[358].

In some cases, raising a claim of simulation may constitute an abuse of rights[359]. When determining whether an abuse of rights exists, factors such as whether the person has an interest in using that right, whether there is an excessive imbalance between the

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[355] Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 144.; Selin Sert Sütçü, *Miras Bırakanın Muvazaalı Hukuki İşlemleri ve Sonuçları,* (Ankara: Seçkin, 2024), 170.; Aydın, *Muris Muvazaası,* 83.

[356] Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 357.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 144.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 193.; Ayan, *Borçlar Hukuku Genel Hükümler,* 209.; Selin Sert Sütçü, *Miras Bırakanın Muvazaalı Hukuki İşlemleri ve Sonuçları,* 171.

[357] Mustafa Dural – Suat Sarı, *Türk Özel Hukuku Cilt 1 Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri,* (İstanbul: Filiz 2019), 243.; M. Kemal Oğuzman – Nami Barlas, *Medeni Hukuk, Giriş Kaynaklar, Temel Kavramlar*, (İstanbul: Vedat, 2017), 257.

[358] The Civil General Council of the Turkish Court of Cassation, 2021/646, (01 June 2021).; The 1st Civil Chamber of the Court of Cassation, 2014/1631, (30 January 2014).

[359] The 13th Civil Chamber of the Court of Cassation, 1989/5086, (19 September 1989).

benefit obtained from using the right and the harm caused to others, whether the action is contrary to moral standards, and whether it contradicts the trust placed in the person are considered[360]. If as a result of these evaluations, it is determined that actions are in accordance with the principle of good faith, claims of simulation will not be entertained[361].

5.3.2.1.2.3. Impossibility of Raising Simulation Claims Under Article 19/2 of the TCO

The law protects a third party who acquires a receivable right in good faith based on a written acknowledgment of debt. The debtor cannot raise a claim of simulation against a third party who has acquired the receivable based on such a written acknowledgment of debt[362]. For this protection to apply, the receivable right must be based on a written acknowledgment of debt, the acquisition must be valid, and the acquiring third party must act in good faith[363].

5.3.2.2. The Concealed Transaction

According to Article 19 of the TCO, the real and mutual intent of the parties must be considered in determining the nature or content of a contract, regardless of the terms used to conceal their true intentions. Accordingly, the simulated transaction should not be given effect; instead, the intention behind the concealed transaction hidden by the simulation should be considered. In this case, it is clear that the fate of the concealed transaction is different from that of the apparent transaction. The concealed transaction should be evaluated completely independently of the apparent transaction. In other words, the invalidity of the apparent transaction does not invalidate the concealed transaction[364].

The secrecy of the transaction does not affect its validity. What matters is that the concealed transaction aligns with the mutual and congruent declarations of intent of the

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360 Dural – Sarı, *Türk Özel Hukuku Cilt 1 Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri*, 243.; Oğuzman – Barlas, *Medeni Hukuk, Giriş Kaynaklar, Temel Kavramlar*, 257.; The Civil General Council of the Turkish Court of Cassation, 2010/533, (20 October 2010).

361 Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 357.

362 Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 356.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 144.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 193.; Ayan, *Borçlar Hukuku Genel Hükümler,* 209.

363 Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 357.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 144.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 193.; Ayan, *Borçlar Hukuku Genel Hükümler,* 209.

364 Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Selin Sert Sütçü, *Miras Bırakanın Muvazaalı Hukuki İşlemleri ve Sonuçları,* 179.

parties[365]. However, for the concealed transaction to be valid, it is not sufficient for it to merely reflect the true intention of the parties. The existence of other necessary elements for the validity of the transaction must also be present. Therefore, the validity of the concealed transaction depends on whether it contains the elements required for legal transactions and, in particular, for contracts, concerning both form and substance[366]. In other words, if the validity of the concealed transaction is subject to a formal requirement, the transaction must comply with that formal requirement. If no formal requirement is prescribed for the concealed transaction, the transaction is generally valid.

In practice, it has been adopted that the concealed transaction should be evaluated independently of the apparent transaction and must comply with its own formal requirements[367]. Indeed, the Decision of the Joint Chambers of the Court of Cassation dated 1974 and numbered 1/2, which sheds light on decedent simulation, also emphasizes this point: "Even if the sale contract is considered invalid due to simulation, the concealed contract remains valid, and it is unacceptable to argue that the heir would not have any benefit in a lawsuit based on Article 18 of the Code of Obligations and that it would not result in any consequence. In fact, anyone initiating such a lawsuit must have an interest in the case. As a rule, the concealed contract is valid. However, for the concealed contract to be considered valid, all conditions must be met. The case subject to the unification of case law involves the simulated sale of a property registered in the land registry. In such cases, for the concealed contract to be considered valid, if the concealed contract is subject to formal requirements, these formal requirements must also be fulfilled. Otherwise, the existence of the gift contract cannot be affirmed..."

For the validity of the concealed contract, it must not be contrary to law and ethics according to Article 27 of the TCO, and it must not be impossible. When examining the validity conditions of a legal transaction, it is essential first to assess whether the parties have expressed their intentions in a reciprocal and consistent manner, and also to check whether the conditions stipulated in Article 27 of the TCO are met for that transaction. For a concealed contract to be considered valid, the contract in which the parties have declared

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[365] Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler*, 141.

[366] Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 354.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 141.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 192.; Ayan, *Borçlar Hukuku Genel Hükümler*, 209.

[367] Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Selin Sert Sütçü, *Miras Bırakanın Muvazaalı Hukuki İşlemleri ve Sonuçları,* 179.

reciprocal and compatible intentions must not be contrary to mandatory provisions of the law, ethics, public order, and personal rights, and its subject must not be impossible. Otherwise, the contract will be deemed absolutely invalid under Article 27 of the TCO without requiring further examination. Additionally, the concealed contract must not have been annulled due to any defects in intention or due to undue advantage[368].

Just like in the case of the apparent transaction, the legal nature of invalidity for the concealed transaction is also debated in doctrine. It has been argued that contracts not executed in accordance with the legislator's provisions are considered non existed, and therefore, the invalidity of the concealed contract is regarded as non-existence[369]. According to another view, the sanction for a concealed transaction should be considered a specific form of nullity[370]. According to this perspective, it is accepted that the contract will be valid upon performance of the obligations by the parties. A transaction not executed in accordance with the prescribed form, unless its invalidity is claimed by the parties, will produce legal effects and results as if it were a valid transaction. Unlike other views, the court should not automatically take form non-compliance into account.

In practice, the prevailing view is that a concealed transaction is null and void[371]. In this case, the transaction is considered invalid from the outset. The court will address form non-compliance sua sponte, even if the parties do not raise it. The parties' consent, the passage of a certain period, or the fulfillment of the contract terms do not eliminate the non-compliance with form.

As can be understood, the apparent contract and the concealed contract must be evaluated separately. In the case of a concealed contract, such as a maintenance contract until death made with a relative simulation, the apparent contract will be invalid as it does not reflect the true intentions of the parties. The concealed contract should be assessed separately from the apparent contract, and its compliance with the provisions of TCO Article 27 should be examined. Additionally, it should be determined whether the validity of the concealed contract is subject to any conditions and if it is not in compliance with the

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368 Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 354.; Selin Sert Sütçü, *Miras Bırakanın Muvazaalı Hukuki İşlemleri ve Sonuçları,* 175.

369 İsmaul Atamulu, *Türk Borçlar Hukukunda Muvazaa* (Ankara, Adalet, 2017), 187.; Özkaya, *Açıklamalı-İçtihatlı İnançlı İşlem ve Muvazaa Davaları,* 205.

370 Haluk Tandoğan, *Borçlar Hukuk Özel Borç İlişkileri Cilt 1* (Ankara: 1985), 213.; Eren, B*orçlar Hukuku Genel Hükümler,* 379.

371 Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 154.; Kocayusufpaşaoğlu –Hatemi –Serozan – Arpacı, *Borçlar Hukuku Genel Hükümler Cilt 1,* 313.; Tekinay– Akman – Burcuoğlu – Altop, *Borçlar Hukuku Genel Hükümler,* 413.; Turhan Esener, *Türk Hukukunda Muvazaalı Muameleler,* 75.

required formalities, it should be considered invalid. In this regard, a decision by the Court of Cassation serves as an illustrative example regarding the validity of both the apparent and concealed contracts: “The plaintiff claimed that the external sale and the consent based on it were a concealed donation aimed at evading inheritance. Indeed, according to the Decision of the Joint Chambers of the Court of Cassation dated 1.4.1974 and numbered 1/2, although the real intention of the testator was a donation, the apparent sale contract is invalid due to simulation if the testator showed a sale in the land registry to evade inheritance, and the concealed donation contract is invalid due to a lack of formal requirements. However, in the case at hand, the transactions based on Article 32 (c) and (b) of the Land Registration Law are not subject to formal requirements like land registry transactions. Thus, even if the sale contract, which is found to be simulated, is invalid, this does not render the concealed donation contract invalid. Instead, according to Article 18 of the TCO, the existence of the donation contract, which reflects the true and mutual intent of the parties, is upheld.”[372]

[372] The 1st Civil Chamber of the Court of Cassation, 1984/12356, (22 November 1984).

6. ABATEMENT OF INTER VIVOS TRANSFERS MADE THROUGH THE CONTRACT OF MAINTENANCE UNTIL DEATH

As the main concepts of the contract of maintenance until death, abatement proceedings and the simulation of contract of maintenance until death are addressed, now the examination is to be turned to the main focus of the thesis: Abatement of inter vivos transfers made through the contract of maintenance until death.

6.1. Requirements for Abatement

Abatement is a type of legal action granted to heirs with reserved portions, aiming to reduce the deceased's dispositions that violate the reserved share portion. The deceased may have violated this reserved share portion through transfers made via a contract of maintenance until death. If the care beneficiary pays the consideration during their lifetime, the contract is considered a maintenance contract under the law of obligations; if it is intended to take effect after the death of the care beneficiary with the appointment of an heir, it is considered a maintenance contract under inheritance law[373]. Since the focus of this thesis is on the contract of maintenance until death under the law of obligations, the abatement of inter vivos transfers made through such a contract will be examined.

Before discussing the requirements for abatement, it is important to note that for abatement to be possible, the inter vivos transfer subject to abatement must be legally valid. The transfer subject to abatement must not violate personal rights, the law, public order, morality, mandatory provisions, or formal requirements. If the inter vivos transfer is invalid, the property or rights would not have effectively left the estate. In such cases, instead of abatement, the invalid transfer must be returned to the estate[374].

Abatement is regulated under Article 560 of the TCC. The relevant article reads as follows: "Heirs who have not received the equivalent of their reserved shares can sue for the abatement of disposals exceeding the portion that the testator could dispose of". According to this, first, a testator, through post-mortem dispositions or gratuitous transfers made while alive, should have exceeded the statutory share recognized by the law (Article 505). Second, the testator's disposals should have violated the reserved shares of the

[373] Eren, B*orçlar Hukuku Özel Hükümler*, 812.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 774.; Yavuz – Acar- Özen *Türk Borçlar Hukuku Özel Hükümler Cilt 2,* 1660.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 27.

[374] Hüseyin Hatemi, *Miras Hukuku,* 54.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 961.

reserved share heirs (Article 506)[375]. Additionaly, The General Assembly of Civil Chambers of the Court of Cassation held that the following conditions should also be fulfilled to start an abatement proceedings: "In an abatement lawsuit; it is a prerequisite for the lawsuit to be filed that the testator, by violating the reserved share of the heir, has made a donation to another heir or a third party with a will or another disposition upon death."[376]

In parallel with the relevant decision of the Court of Cassation, Article 565 of the TCC specifies that certain gratuitous transfers are subject to abatement as if they were testamentary dispositions. These transfers are listed as follows:: "1-Inter vivos transfers made by the deceased to legal heirs who have lost their status as heirs, offsetting against their inheritance, transfers of assets to descendants without the obligation of return, or unusual dowries and initial capital, 2-Transfers made for the purpose of settling inheritance rights before death, 3-Donations made by the deceased while reserving the right to revoke them and, except for customary gifts given within a year before death, 4-Open transfers made by the deceased with the intention of nullifying the rules of reserved portion."

Additionally, Article 508 of the TCC states that the inter vivos gratuitous transfers made by the deceased, to the extent that they are subject to abatement, shall be added to the estate when calculating the disposable portion. Therefore, when examining inter vivos transfers subject to abatement, the provisions of Articles 565 and 508 of the TCC should be considered together[377]. Therefore, for abatement to be possible, it is not sufficient to merely establish an infringement of the reserved portion; the transfer causing this infringement must have been made gratuitously (without consideration)[378].

However a contract of maintenance until death is a contract made with consideration[379]. Such a contract cannot be gratuitous. This is because in a contract that imposes obligations on both parties, while the care beneficiary transfers a property value as a consideration, the caregiver undertakes the obligation of care and supervision in

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[375] İmre –Erman, *Miras Hukuku,* 262.; İnan – Şeref–Albaş, *Türk Medeni Hukuku Miras Hukuku*, 394.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 227.; Hüseyin Hatemi, *Miras Hukuku*, 53.; Günay, *Miras Hukukunda Tenkis (İndirim) Davaları,* 77.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 201.

[376] The Civil General Council of the Turkish Court of Cassation, 2010/684, (22 December 2010).

[377] İnan – Şeref–Albaş, *Türk Medeni Hukuku Miras Hukuku,* 367.

[378] İnan – Şeref–Albaş, *Türk Medeni Hukuku Miras Hukuku,* 367.; Gökhan Antalya – İpek Sağlam, *Miras Hukuku Cilt 3,* 332.

[379] Eren, B*orçlar Hukuku Özel Hükümler,* 815.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1*, 45.; Hatemi – Serozan – Arpacı, *Borçlar Hukuku Özel Bölüm*, 548.; Nihat Yavuz, *Türk Borçlar Kanunu Şerhi Cilt 2*, 3133.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 773.;

return[380]. Therefore, as a rule, a contract of maintenance until death, being a contract with consideration, cannot be subject to abatement[381]. Consequently, assets and values transferred under a contract of maintenance until death cannot be considered as donations and cannot be evaluated within the scope of Article 565 of the TCC[382].

That being said, in practice, it is observed that contracts of maintenance until death are sometimes made gratuitously. Although this is not possible as a rule, parties may engage in a gratuitous transfer under the guise of a contract of maintenance until death. Thus, a contract of maintenance until death that seems to be a bilateral (consideration-based) agreement on paper might actually represent a transfer made with a different intention. In such cases, the exceptions in the 3rd and 4th paragraphs of Article 565 of the TCC, which address the abatement of gratuitous transfers, come into play. This means that the testator may either have an intention to make a donation or act with the purpose of violating the reserved portion, and thus the contract of maintenance until death may be subject to an abatement.

In summary, the abatement of a contract of maintenance until death can be considered in two situations. The first is when the testator acts with the intent of making a donation through the contract of maintenance until death, and the second is when the contract is made with the intention of violating the reserved share. In these exceptional cases, the contract may be subject to abatement.

Claiming that the testator acted with simulation is a common and significant piece of evidence in practice that indicates an intention to violate the reserved share. If the testator acted with this intention and established the contract based on a simulation agreement with the other party, then, provided this has been clearly established, the contract will be deemed invalid due to simulation. However, as previously mentioned, for abatement to be possible, the inter vivos transfer subject to abatement must at first be legally valid. How abatement can be possible against a simulated contract will be discussed later in the following sections.

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380 Eren, B*orçlar Hukuku Genel Hükümler*, 210.; Zevkliler – Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, 773.; Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 145.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 167.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 376.

381 The 1st Civil Chamber of the Court of Cassation, 2018/11637, (28 June 2018).; Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 145.; Nar, *Türk Miras Hukukunda Tenkis*, 211.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 170.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 394.

382 Birsen, *Ölünceye Kadar Bakma Sözleşmesi*, 145.

6.1.1. The Testator Acting with the Intent of Making a Donation

When a contract of maintenance until death is established gratuitously, it indicates that the testator is acting with the intent of making a donation[383]. In other words, the care beneficiary receives a gratuitous transfer from the caregiver, and this transfer is concealed by the contract of maintenance until death. The parties to the contract of maintenance until death may have acted with a direct intent to donate. Alternatively, the parties' intentions might involve creating a value disparity among the performances within the contract, aiming for a mixed donation. When the parties enter into a contract of maintenance until death with the intent of making a donation it is possible for the reserved share heirs to request abatement for the transfer made[384]. If a mixed donation is involved, the portion of the mixed donation that is without consideration may be subject to abatement aswell[385].

A contract of maintenance until death can simultaneously constitute a mixed donation. In this case, the parties agree that part of the performance under the contract will be subject to consideration, while the other part will remain gratuitous by mutual agreement. For a mixed donation to be present, there must be a discrepancy in the value of the mutual performances, and the parties must agree that this difference is intended to provide a gratuitous benefit to one party[386]. In mixed donations, both objective and subjective elements must be present. The objective element refers to the existence of a discrepancy in value between the mutual performances at the time the contract is concluded. Any value discrepancy arising later should not be taken into account. The subjective element involves the parties being aware that the value difference between the mutual performances is made with the intention of a donation[387].

Mixed donations can be subject to abatement under Article 565 of the TCC. In mixed donations, the portion of the mutual performance that exceeds the value of the counter-performance is considered as a gratuitous transfer. This gratuitous portion is added

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383 Eren, B*orçlar Hukuku Özel Hükümler,* 815.

384 İmre –Erman, *Miras Hukuku,* 276.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 208.; Nar, *Türk Miras Hukukunda Tenkis,* 213.

385 İmre –Erman, *Miras Hukuku,* 276.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 208.; Nar, *Türk Miras Hukukunda Tenkis,* 213.

386 Dural – Öz*, Türk Özel Hukuku Cilt IV Miras Hukuku,* 261.; Necip Kocayusufpaşaoğlu, *Miras Hukuku,* (İstanbul: Filiz, 1987), 393.; Nar, *Türk Miras Hukukunda Tenkis,* 213.

387 Dural – Öz*, Türk Özel Hukuku Cilt IV Miras Hukuku,* 261.; Kocayusufpaşaoğlu, *Miras Hukuku,* 393.

back to the estate and, if it infringes upon the reserved shares of the heirs, it may be abated[388].

Article 615 of the TCO specifically regulates that, in a contract of maintenance until death, if there is a significant imbalance in the obligations to the disadvantage of the care beneficiary (the testator), the transfer will be subject to abatement to the extent of this imbalance. In cases where the contract of maintenance until death constitutes a mixed donation, the portion subject to abatement will only be the gratuitous part of the transfer. This gratuitous part will be calculated based on the probable life expectancy of the care beneficiary. If, upon considering the life expectancy of the care beneficiary, a disproportion arises in favor of the caregiver between the care beneficiary's performance and the caregiver's obligation, and if the care beneficiary consents to this disproportion by relinquishing his/her rights, the existence of a mixed donation can be inferred[389].

Alternatively, while there may appear to be a contract of maintenance until death, the parties might have actually entered into a concealed donation agreement. In such a case, instead of a mixed donation, there is a simulated donation agreement between the care beneficiary and the caregiver. As a result, the apparent contract of maintenance until death will be rendered null and void due to simulation. However, the concealed donation agreement will remain valid unless there is a reason affecting its validity, and it may be subject to abatement to the extent that it violates the reserved shares. This matter will be explained in more detail below, under the heading "Abatement of a Simulated Contract of Maintenance Until Death."

Donations made by the testator during their lifetime with the intent of violating the reserved share portion will be subject to abatement. Such donations, unlike those under TCC 565/3, are not subject to any time limitations. Therefore, donations made by the testator more than one year prior to their death are also subject to abatement if they were made with the intent to violate the reserved share[390].

6.1.2. The Testator’s Intent to Violate Reserved Shares

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[388] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 261.; Kocayusufpaşaoğlu, *Miras Hukuku,* 393-395.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 978.

[389] Şeyda Dursun Karaahmetoğlu, “Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi,” 1240.

[390] Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 151.

Another situation where abatement applies in a contract of maintenance until death is when the testator transfers their property with the intent to violate reserved shares. In this case, the testator's primary aim is not to obtain maintenance but to circumvent the rules that restrict his/her freedom of disposal. In other words, the testator intends to escape the rules regarding reserved shares when entering into this contract[391]. As regulated in Article 565/4 of the TCC, this situation where gratuitous transfers made with a clear intention to violate the reserved share may be subject to abatement. In such cases, the heirs are entitled to request abatement.

Case law from the Court of Cassation establishes that a contract of maintenance until death, when executed with the intention of violating reserved shares, is subject to abatement. On that, the Court held in one decision: “A maintenance until death contract is a reciprocal transaction made in exchange for consideration (Article 511 of the TCC). The assets or money given by the testator to the other party under this contract are not subject to abatement. However, acquisitions made under a maintenance until death contract, which is clearly made for the purpose of circumventing reserved heir rules rather than for genuine care, are subject to abatement.”[392]

In order for a reserved share heir to file an abatement lawsuit, they must have the status of an heir at the time when the testator made inter vivos transactions. If the person was not a legal heir of the testator at the time the contract of maintenance until death was concluded, it cannot be claimed that the testator violated the rules of reserved shares[393]. Similarly, the intent to violate reserved shares must exist at the time the contract of maintenance until death is made[394]. It is sufficient for the intent to be present if the testator is aware that the gratuitous transfer they made violates the reserved shares[395].

Decedent simulation is typically a method used to violate the reserved share of an heir. In practice, it is often observed that a contract of maintenance until death is executed with the intent to violate reserved shares. As detailed under the heading of "decedent simulation”, if the purpose of entering into a contract of maintenance until death is to

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[391] Eren – Aktürk Yücer, *Türk Miras Hukuku,* 266.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 395.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi,* 210.; Nar, *Türk Miras Hukukunda Tenkis,* 213.; Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 167.

[392] The 16th Civil Chamber of the Court of Cassation, 2012/4888, (4 June 2012).

[393] Serozan –Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 226.; İmre –Erman, *Miras Hukuku,* 263.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 151.

[394] The Civil General Council of the Turkish Court of Cassation, 1988/983, (30 November 1988).; The 2nd Civil Chamber of the Court of Cassation, 1982/8974, (30 November 1982).

[395] İmre –Erman, *Miras Hukuku,* 274.

violate the reserved share through simulation, such a contract will constitute the simulated transaction of the decedent simulation. In such cases, the maintenance obligation corresponding to the property transferred under the contract of maintenance until death will effectively be transferred as a donation or fraudulent transaction due to the simulated agreement. Thus, the fraudulent transaction can be subject to abatement[396]. This matter will be examined in more detail under a different heading.

6.2. Burden of Proof

The burden of proof for demonstrating that the contract of maintenance until death was made gratuitously lies with the party making this claim. If an heir alleging that the contract of maintenance until death was made with the purpose of violating the reserved portion initiates an abatement lawsuit, they are obliged to prove this claim as per Article 6 of the TCC. This article states that, unless otherwise provided in the law, each party is responsible for proving the existence of the facts on which they base their rights. Article 190 of the TCPC also provides that, unless there is a specific provision in the law, the burden of proof belongs to the party who claims a legal consequence based on the alleged fact. Otherwise, the lawsuit will be dismissed on the grounds of lack of evidence[397].

On that, the Court of Cassation held: "The plaintiff must prove, under Article 6 of the TCC and Article 190 of the TCPC, that the testator's disposition, namely the contract of maintenance until death, was made with the intention of bypassing the reserved portion. Despite the plaintiff's witnesses not stating that the transferor made the transfer with the aim of bypassing the reserved portion, the fact that it is not necessary for the transferor to be in need of care at the time of contracting the contract of care until death, and considering the poor economic situation, it cannot be proven that the transferor made the transfer with the aim of bypassing the reserved portion... Therefore, the lawsuit should be dismissed."[398]

If the testator did not have this intention at the time of making the contract, or if the claim of such an intention cannot be proven beyond reasonable doubt, the request for abatement will be denied[399]. In accordance with Article 565/3 of the TCC, the heirs who base their abatement claim on this provision must prove that the contract of maintenance

[396] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 170.
[397] Günay, *Miras Hukukunda Tenkis (İndirim) Davaları*, 218-219.
[398] The 1st Civil Chamber of the Court of Cassation, 2017/1685, (4 April 2017).
[399] The 16th Civil Chamber of the Court of Cassation, 2012/4888, (4 June 2012).

until death was made with the intention of donation[400]. In accordance with Article 565/4 of the TCC, the heirs who base their abatement claim on this provision, must prove that the testator acted with the intent to violate the reserved shares [401].

In previous sections of the thesis, under the heading "Simulation of the Contract of Maintenance Until Death," situations that constitute evidence of the intent to violate reserved shares in the contract of maintenance until death were examined[402]. The same evidentiary rules apply here, as proving that the contract of maintenance until death was made with the intention of violating the reserved share is a prerequisite for making an abatement claim based on Article 565/4 of the TCC.

According to the Court of Cassation decisions, whether or not there is a need for maintenance, imbalance between performances, transfer of the entire or nearly entire estate, and whether the care beneficiary is the spouse of the caregiver are factors that can indicate an intent to violate the reserved share[403].

In doctrine[404] the Court of Cassation's decisions have been criticized for relying solely on these criteria without considering specific aspects of the case, and for not examining other factors that might indicate an intent to violate the reserved share.

Another critique in the doctrine[405] is that the Court of Cassation relies solely on the testator's intent to violate reserved shares to determine whether a contract of maintenance until death was executed with simulation. I agree with this justified criticism because, the intent to violate reserved shares is an element that must exist in the testator's will; the caregiver does not even need to be aware of this intention. Therefore, if a testator has made a contract of maintenance until death with the intent to violate reserved shares, it is not necessarily correct to conclude that the contract is invalid solely due to simulation. The caregiver might be unaware of the testator's intention and might genuinely fulfill his/her obligations. What matters here is the presence of a simulation agreement between

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[400] İmre –Erman, *Miras Hukuku,* 276.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 209.; Nar, *Türk Miras Hukukunda Tenkis,* 214.; Özkaya, *Açıklamalı-İçtihatlı İnançlı İşlem ve Muvazaa Davaları,* 279.

[401] İmre –Erman, *Miras Hukuku,* 274.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 210.; Nar, *Türk Miras Hukukunda Tenkis,* 213.

[402] See: Section 3, Under 2. "Presumptive Situations Indicating the Intent to Violate Reserved Shares in Contracts of Maintenance Until Death"

[403] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 170.; Şeyda Dursun Karaahmetoğlu, "Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi," 1247.

[404] Şeyda Dursun Karaahmetoğlu, "Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi," 1247.

[405] Şeyda Dursun Karaahmetoğlu, "Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi," 1253.

the parties, which is an absolute criterion for simulation. Otherwise, the genuine caregiver, who performs their obligations in good faith, could be unfairly affected.

6.3. Abatement of a Simulated Contract of Maintenance Until Death

Decedent simulation is typically a method used to violate the reserved share of an heir. In practice, it is often observed that a contract of maintenance until death is executed with the intent to violate reserved shares. As detailed under the heading of "decedent simulation", if the purpose of entering into a contract of maintenance until death is to violate the reserved share through simulation, such a contract will constitute the simulated transaction of the decedent simulation[406]. Anyone alleging decedent simulation can prove their claim with any type of evidence[407]. In such cases, the maintenance obligation corresponding to the property transferred under the contract of maintenance until death will effectively be transferred as a donation or fraudulent transaction due to the simulated agreement. Thus, the fraudulent transaction can be subject to abatement[408].

According to Article 565/4 of the TCC, acquisitions made by the deceased with the clear intention of nullifying reserved portion rules are subject to abatement regardless of the time elapsed from the date of inheritance opening. For abatement to be applicable under Article 565/4 of the TCC, both objective and subjective conditions must coexist. The objective condition is the violation of the reserved portion rules by the deceased, while the subjective condition is the intention of the deceased to nullify these portions through the acquisition[409]. Aside from these two absolute conditions, for abatement to be possible, the transfer that causes the violation of the reserved portion must be made gratuitously (without consideration), as abatement can only apply to gratuitous transfers.

As it was stated that a contract of maintenance until death is a reciprocal contract that imposes mutual obligations and thus, as a rule, such a contract cannot be subject to abatement. However, in practice, there are contracts of maintenance until death that seem reciprocal but are actually established with the mutual agreement of the parties to have no legal effect. In such cases, no obligations are performed, and the parties often have a different intention behind the arrangement. This issue has been discussed in detail under

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[406] Talih Uyar, "Yargıtay Kararlarında Muris Muvazaası", *İstanbul Barosu Dergisi, 73/2,* 387.
[407] İnan – Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 369.; Yılmaz, *Medeni Hukuk Cilt IV Miras Hukuku,* 150.
[408] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 170.
[409] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 167.; Tekdoğan, *Mirasta Denkleştirme ve Tenkis Davaları,* 204.

the heading of simulation. In cases where a contract of maintenance until death is proven to be simulated, the contract may be subject to abatement, provided that the simulation is clearly demonstrated.

In addition to the general requirements for abatement, it was noted that for abatement to be possible, the inter vivos transfer subject to abatement must first be legally valid. The transfer must not be contrary to personal rights, the law, public order, morality, mandatory provisions, or formal requirements. Under the heading of simulation, as it was adressed that there is consensus in both case law and doctrine that simulated transactions are invalid. At the same time, it is stated in both doctrine and case law that the execution of a contract of maintenance until death in a simulated manner indicates an intent to violate the reserved share, and for this reason, it allows for the possibility of the contract being subject to abatement. This raises the question: if a contract of maintenance until death that is executed with simulation is already invalid, how can an abatement be possible? Indeed, if an inter vivos transfer is invalid, the property or right does not leave the estate. Instead of abating such an invalid transfer, it must be returned to the estate[410]. So, under what circumstances can the abatement of a contract of maintenance until death occur? This section will address this question, which constitutes an important aspect of our thesis.

To discuss the abatement of a contract of maintenance until death that is performed with simulation, it must involve relative simulation. The abatement of an absolutely simulated contract of maintenance until death cannot be considered. This is because, as a result of absolute simulation, the apparent transaction becomes invalid, and the sanction attached to this transaction is nullity. Due to the absence of a concealed transaction between the parties and the formation of their true intent to ensure that the apparent contract does not produce legal effects, the contract will be considered null and void. An absolutely simulated contract is null and void not only for the parties involved but also for third parties[411]. In the case of an absolute simulation, the apparent contract of maintenance until death is invalid due to its simulated nature, and there is no existence of a concealed transaction. Since the apparent contract is invalid, any registration made in favor of the caregiver is considered fraudulent[412]. Therefore, the contract of maintenance until death will be invalid with absolute nullity and will not have any effect from the outset.

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[410] Hüseyin Hatemi, *Miras Hukuku,* 54.; Çabri, *Miras Hukuku Şerhi (TMK 495-574) Cilt 1,* 961.

[411] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 130.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 144.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 192.

[412] Günay*, Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 306.; The 1st Civil Chamber of the Court of Cassation, 2005/12357, (23 November 2005).

Consequently, although the assets may appear to have been transferred in form, they have not actually left the testator's estate[413]. Thus, abatement of an asset that has not left the estate is not applicable.

However, in cases of relative simulation, the situation is different. Unlike absolute simulation, relative simulation involves the existence of a hidden agreement that reflects the true intentions of the parties. When a contract of maintenance until death is executed with relative simulation, the parties do not intend for the apparent transaction to produce any legal effects. The apparent transaction does not reflect the true intentions of the parties but instead masks the concealed transaction and is made with the aim of deceiving third parties[414]. Similar to absolute simulation, the apparent transaction is invalid as it does not reflect the parties' real intentions[415]. However, the hidden transaction reflects the parties' true intentions. According to TCO, Article 19, the nature or content of a contract should be determined based on the real and mutual intentions of the parties, rather than the words used to conceal their true purpose. Thus, the fate of the hidden transaction is distinct from that of the apparent transaction. The invalidity of the apparent transaction does not render the hidden transaction invalid[416].

However, even though the hidden transaction must be evaluated separately from the apparent transaction, certain conditions must be met for the validity of the concealed transaction. To assert that the concealed transaction is valid, it must comply with the mandatory provisions of the law, morals, public order, and personal rights, and its subject matter must not be impossible. Otherwise, the transaction will be absolutely void under TCO Article 27, without the need for further examination. Additionally, the concealed transaction must not have been annulled due to any of the defects in consent or excessive exploitation[417]. Furthermore, for the concealed transaction to be valid, it must meet the necessary formal and substantive elements required in legal transactions and especially

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[413] The Civil General Council of the Turkish Court of Cassation, 2000/143, (1 March 2000).

[414] Eren, B*orçlar Hukuku Genel Hükümler,* 371.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 129.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 140.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 349.; Ayan, *Borçlar Hukuku Genel Hükümler,* 206.

[415] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 130.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 351; Ayan, *Borçlar Hukuku Genel Hükümler,* 208.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1*, 192.; Kocayusufpaşaoğlu –Hatemi –Serozan –Arpacı, *Borçlar Hukuku Genel Hükümler Cilt 1,* 356.

[416] Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Selin Sert Sütçü, *Miras Bırakanın Muvazaalı Hukuki İşlemleri ve Sonuçları,* 179.

[417] Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 354.; Selin Sert Sütçü, *Miras Bırakanın Muvazaalı Hukuki İşlemleri ve Sonuçları,* 175.

contracts. In other words, if the validity of the concealed transaction is subject to a formal requirement, the transaction must conform to that formal requirement. If no formal requirement is prescribed for the concealed transaction, it is generally considered valid[418].

It is understood that in a case where a contract of maintenance until death is executed with relative simulation, even if the apparent transaction, which is the contract of maintenance until death, is invalid due to simulation, the concealed transaction may still be valid. In this context, since the existence of a valid contract is discussed, a valid contract may be subject to abatement. The transaction that can be subject to abatement is the concealed contract, provided it is made in accordance with formal requirements, does not violate mandatory provisions of the law, morals, public order, or personal rights, and its subject matter is not impossible—in summary, the concealed contract must be considered valid.

To illustrate this issue with an example: If a father, who does not want his children to inherit anything upon his death, executes a contract of maintenance until death with a friend instead of a donation contract, and transfers all his real estate to the friend, the underlying intention of the parties is actually to create a donation contract. However, this donation contract is concealed behind the contract of maintenance until death. In such a case, the apparent contract of maintenance until death is invalid due to simulation, while the concealed donation contract remains valid. However, if the concealed contract is subject to formal requirements, it must be executed in accordance with the legally prescribed form to be considered valid. In the example, if the caretaker transfers all real estate to the caretaker under the guise of a contract of maintenance until death, the apparent contract is invalid due to simulation. Since Article 288 of TCO states that a donation of a property right must meet legal formal requirements to be valid, the concealed donation contract would also be invalid due to non-compliance with formal requirements. Thus, abatement based on the concealed donation contract would not be applicable. Since a transfer must be based on a valid donation to be subject to abatement, and the concealed donation contract is invalid due to formality issues, the registration based on this contract would also be invalid. As a result, regardless of whether there are reserved heirs, the deceased's heirs can file a lawsuit to correct the land registry under Article 1025 of the

[418] Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 354.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 141.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 192.; Ayan*, Borçlar Hukuku Genel Hükümler,* 209.

TCC. This article allows anyone whose property rights have been violated by an unlawful registration to request the correction of the land registry and have the properties returned to the estate[419]. As the land registry cancellation lawsuit would return the property to the estate, there would be no need for abatement[420].

The following decision by the Court of Cassation sheds light on this issue: "It is well-known that the type of simulation defined in legal doctrine as 'decedent simulation' is a form of relative simulation. In such cases, the deceased indeed wishes to make a contract and transfers real estate. However, to deprive their heirs of their inheritance rights, the deceased hides their true intention and effectively makes a donation of the property by presenting their intention as a sale or a contract of maintenance until death in the official contract made at the land registry. In this situation, as explained in the desicion of the Joint Chambers of the Court of Cassation dated 1974 and numbered 1/2, the apparent contract does not reflect the true intentions of the parties. Therefore, since the concealed donation contract is also lacking the formal requirements prescribed by Article 705 of the Civil Code, Article 213 of the Obligations Code, and Article 26 of the Land Registry Law. As a result, all heirs whose inheritance rights are violated, whether they are reserved heirs or not, can file a lawsuit to declare the apparent contract invalid due to simulation and request the cancellation of the land registry based on it"[421]

In similar decisions by the Court of Cassation, it has been stated that when a contract of maintenance until death is executed with simulation, the apparent contract is invalid because it does not reflect the true intentions of the parties. Furthermore, the concealed contract is also invalid due to non-compliance with formal requirements. As a result, the Court has determined that instead of abatement, the primary remedy should be to seek the cancellation and correction of the land registry[422].

If the concealed transaction behind a simulated contract is not subject to formal requirements, then heirs with reserved portions cannot file a lawsuit for annulment based on simulated transactions, because the concealed contract would be valid. The simulation of the apparent contract does not affect the validity of the concealed contract. Instead, it

[419] İmre –Erman, *Miras Hukuku,* 295.; Şeyda Dursun Karaahmetoğlu, "Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi," 1249.

[420] İnan – Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 369.

[421] The 1st Civil Chamber of the Court of Cassation, 2007/2612, (13 March 2007).

[422] The 1st Civil Chamber of the Court of Cassation, 2001/140, (16 January 2001).; The 1st Civil Chamber of the Court of Cassation, 2017/1109, (08 March 2017).

reflects the true and mutual intentions of the parties[423]. In such a case, the concealed transaction will be considered valid due to its compliance with the necessary formal and substantive elements in legal transactions and contracts[424]. Heirs with reserved portions, who cannot file an annulment lawsuit against a valid transaction, may request abatement under Article 565/3-4 of the TCC if conditions are met[425]. In this case, a donation made without formal requirements (valid transfer) will be included in the estate through abatement[426]. For example, under a simulated contract of maintenance until death, the care beneficiary may transfer the possession of a valuable vase from their estate to a friend with the intention of harming the rights of heirs with reserved portions. In this case, the apparent contract of maintenance until death will be invalid due to simulation. However, the concealed donation behind this contract will be valid since it is not subject to formal requirements. Upon the death of the care beneficiary, the heirs with reserved portions can file a claim for abatement based on Article 615/III of the TCO, which preserves the right to abate, and Article 565/4 of the TCC, which allows for the abatement of transfers made with the intent to violate on reserved portions[427].

Moreover, if there is no intention to violate the reserved portion in the transfer made by the deceased, or if this intention cannot be proven, the heirs may base their abatement claim on Article 565/3 of the TCC[428]. In such a case, the heirs must prove that the contract of maintenance until death was made with the intention of a donation[429]. If the contract of maintenance until death has a mixed donation nature, the heirs must prove that the parties were aware of the value difference between the performances and that the deceased acted with the intention of making a donation[430]. If the deceased has made a contract of maintenance until death with the intention of concealing a donation to violate the reserved portion, and this is certainly proven, the reserved portion heirs will be able to

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[423] The 1st Civil Chamber of the Court of Cassation, 1984/12356, (22 November 1984).
[424] Eren, B*orçlar Hukuku Genel Hükümler,* 378.; Oğuzman – Öz, B*orçlar Hukuku Genel Hükümler Cilt 1,* 131.; Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1,* 354.; Doğan – Atamulu – Şahan, *Borçlar Hukuku Genel Hükümler,* 141.; Cansel – Özel, *Borçlar Hukuku Genel Hükümler Cilt 1,* 192.; Ayan, *Borçlar Hukuku Genel Hükümler,* 209.
[425] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 268.; İnan – Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 369.
[426] İnan – Ertaş –Albaş, *Türk Medeni Hukuku Miras Hukuku,* 369.
[427] Şeyda Dursun Karaahmetoğlu, "Ölünceye Kadar Bakma Sözleşmesi Kapsamında Bakım Alacaklısının Saklı Payı İhlal Kastı ile Yaptığı Sağlararası Kazandırmaların Tenkisi," 1250.
[428] Dural – Öz*, Türk Özel Hukuku Cilt IV Miras Hukuku,* 269.
[429] İmre –Erman, *Miras Hukuku,* 276.; Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 209.; Nar, *Türk Miras Hukukunda Tenkis,* 214.; Özkaya, *Açıklamalı-İçtihatlı İnançlı İşlem ve Muvazaa Davaları,* 279.
[430] Akartepe, *Ölünceye Kadar Bakma Sözleşmesi*, 209.; Nar, *Türk Miras Hukukunda Tenkis*, 214.

request abatement under Article 565/4, even if the transaction is dated more than one year before the deceased's death, despite the appearance of the contract of maintenance until death[431].

It should be noted that, based on what has been discussed above, the action for abatement and the action for annulment due to simulation are distinct legal concepts.

The abatement action is an innovative action filed against the deceased's inter vivos transactions that violate the reserved portions[432]. Abatement lawsuit deals with valid contracts and transactions. In contrast, the action for annulment based on simulation concerns invalid contracts and transactions. Therefore, the abatement action is based on the validity of the transaction, while the annulment action is based on its invalidity[433]. In this regard, the Court of Cassation has stated: "Since the plaintiffs claim that both the properties transferred by sale and those transferred under the condition of maintenance until death were transferred by the deceased with the intent to simulate and evade the heirs, the essence of the simulation claim is that the transfers are invalid. Firstly, since it is claimed that the transfer carried out by sale is simulated, meaning invalid, it cannot be subject to abatement. Furthermore, even if the sale transaction were valid, the transaction would have been reciprocal, and thus abatement could not be requested."[434] Therefore, the benefit for reserved share heirs to file a claim for abatement arises in cases where the reserved portion is violated in a legally valid contract. If the intention to violate the reserved portion is proven, the valid contract will be subject to abatement.

The action for annulment based on simulation and the action for abatement also differ in terms of standing to sue. While an action for annulment based on the testator's simulation can be initiated by all heirs whose reserved shares are violated, whether they are reserved-share heirs or not, as well as by the creditors of the care beneficiary, the action for abatement can only be initiated by reserved-share heirs and, as an exception, by their creditors or bankruptcy estate. Additionally, the ruling in an abatement action is directed towards the annulment or collection of the portion of inter vivos or testamentary transfers made by the testator that affects the reserved shares. In contrast, in a simulation case, the entire transfer can be annulled.

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[431] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 270.

[432] Dural – Öz, *Türk Özel Hukuku Cilt IV Miras Hukuku,* 276.; Serozan – Engin, *Miras Hukuku ve Tamamı Çözümlü Pratik Çalışmalar,* 225.; Hüseyin Hatemi, *Miras Hukuku,* 53.; Erhan Günay, *Miras Hukukunda Tenkis (İndirim) Davaları*, 75.

[433] Günay, *Ölünceye Kadar Bakıp Gözetme Sözleşmesinden Kaynaklanan Uyuşmazlıklar,* 322.

[434] The Civil General Council of the Turkish Court of Cassation, 2011/130, (13 April 2011).

To conclude, abatement can be asserted against gratuitous transfers. However, a contract of maintenance until death is a reciprocal consideration-based agreement, and as a rule, a request for abatement cannot be made against such a contract. However, the parties may carry out the care contract fraudulently to conceal an intention different from what appears on the surface. In such cases, even though the maintenance contract seems to be a consideration-based agreement, it is actually not intended to be one. In such instances, those seeking abatement can request it based on allegations of simulation. However, a simulated transaction lacks legal validity. Abatement can only be claimed against a legally valid contract. A claim for abatement cannot be made against an invalid contract, and such a claim would not be in the heirs' best interest. This is because, with an abatement request, one can seek the return of the portion of the transfer that exceeds the reserved share, while asserting invalidity allows for the return of the entire transfer to the estate. In such cases, it should be argued that the transfer never had legal validity and, thus, should be considered as not having left the estate. That being said, while a simulated transaction may lack legal validity, the rules concerning formal requirements for a concealed transaction still apply, and the concealed contract may still be valid if it meets these requirements. In such cases, the hidden contract reflects the true intentions of the parties and may be valid independently of the simulated transaction. Therefore, heirs can request abatement against the concealed contract. Consequently, abatement against a simulated contract of maintenance until death can only be possible if the concealed contract is valid. The concealed contract must not be subject to formal requirements to be valid; otherwise, it would also result in invalidity, as the parties did not comply with the formal requirements. Therefore, a claim for abatement against a simulated maintenance contract can only be made if it is directed at concealed transfers that are not subject to formal requirements and are thus considered valid.

CONCLUSION

The contract of maintenance until death is regulated between Articles 611- 619 of the TCO. By this contract, the caregiver undertakes the obligation to provide care and supervision, while the care beneficiary undertakes to transfer their assets or certain asset values to the caregiver in return.

There are two types of contracts of maintenance until death: those qualified under the law of inheritance and those qualified under the law of obligations. The primary distinction between theese two types lies in how the care beneficiary fulfills their obligation. If the care beneficiary fulfills their obligation towards the caregiver through a testamentary disposition, the contract is considered to be of an inheritance law nature. However, if the obligation is fulfilled through an inter vivos legal transaction, it is regarded as a contract governed by obligations law. Since our thesis focuses on inter vivos transfers, the contract of maintenance until death governed by obligations law is addressed.

Abatement, which means "reduction, deduction" in the dictionary, is a legal term specific to inheritance law that brings together the ways to challenge benefits exceeding the testator's disposition ratio, the procedures to be followed, and their outcomes. Abatement is a type of lawsuit that allows reserved heirs to have inter vivos transfers and testamentary dispositions that violate their reserved portions reduced proportionately. Abatement has specific conditions that must be met. According to Article 560 of the TCC there are two main conditions for an abatement. First, a testator, through post-mortem dispositions or gratuitous transfers made while alive, should have exceeded the statutory share recognized by the law, Second, the testator's disposals should have violated the reserved shares of the reserved share heirs. However, it is important to note that for abatement to be possible, the transfer subject to abatement must at first be legally valid. The transfer subject to abatement must not violate personal rights, the law, public order, morality, mandatory provisions, or formal requirements. If the transfer is invalid, the property or rights would not have effectively left the estate. In such cases, instead of abatement, the invalid transfer must be returned to the estate. Aside from these absolute conditions, for abatement to be possible, the transfer that causes the violation of the reserved portion must be made gratuitously (without consideration), as abatement can only apply to gratuitous transfers.

In some instances, the transfer of assets agreed upon in the contract of maintenance until death may potentially violate the reserved shares of the care beneficiary's heirs. In such a scenario, the law entitles heirs to a right to start abatement proceeding against the transaction carried by the care beneficiary under the contract of maintenance until death. However a contract of maintenance until death is a contract made with consideration. Such a contract cannot be gratuitous. This is because in a contract that imposes obligations on both parties, while the care beneficiary transfers a property value as a consideration, the caregiver undertakes the obligation of care and supervision in return. So as a rule, contract of maintenance until death cannot be subject to abatement.

In practice, it is sometimes observed that contracts of maintenance until death are carried out without consideration. Although this is typically not allowed, parties might disguise a gratuitous transfer as a contract of maintenance until death. Consequently, what appears on paper as a bilateral (consideration-based) agreement might actually be a transfer intended for a different purpose. In such scenarios, the exceptions outlined in the 3rd and 4th paragraphs of Article 565 of the TCC, which concern the abatement of gratuitous transfers, become relevant. This means that the testator may either have an intention to make a donation or act with the purpose of violating the reserved portion. If these exceptional situations are present in a contract of maintenance until death, then the contract may be subject to abatement. The burden of proving the existence of these exceptional circumstances lies with the heirs.

Decedent simulation is commonly employed to undermine an heir's reserved share. In practice, it is frequently observed that a contract of maintenance until death is used with the intent to violate reserved shares. If the contract of maintenance until death is created with the aim of violating the reserved share through simulation, it becomes the simulated transaction in a decedent simulation scenario. In such situations, the obligation to provide maintenance, which is tied to the property transferred under the contract, is essentially converted into a donation or a fraudulent act due to the simulation agreement. Consequently, because a simulated contract of maintenance until death lacks consideration and is considered gratuitous, and since it is created with the intent to violate reserved shares, it may therefore be subject to abatement.

As a result of simulation, it is certain that the apparent agreement will be legally invalid. However, as addressed under the requirements of abatement, for abatement to be possible, the transfer subject to abatement must at first be legally valid. A contract of maintenance until death that has been simulated on the other hand cannot be considered valid. For this reason, since the simulated contract is not valid, it cannot be subject to abatement. If the contract is deemed invalid, the heirs will seek to have the entire transfer reverted to the estate based on this invalidity. The action for abatement and the action for annulment due to simulation are distinct legal concepts. The abatement action is an innovative action filed against the deceased's inter vivos transactions that violate the reserved portions· Abatement lawsuit deals with valid contracts and transactions. In contrast, the action for annulment based on simulation concerns invalid contracts and transactions. Additionally, since the entire transfer can be returned to the estate, requesting only the abatement of the portion exceeding the reserved share would not be in the heirs' best interest. In addition to this, the ruling in an abatement action is directed towards the annulment or collection of the portion of inter vivos or testamentary transfers made by the testator that affects the reserved shares. In contrast, in a simulation case, the entire transfer can be annulled.

That being the case, there are two types of simulated transactions: relative and absolute. If there is a concealed agreement behind the apparent transaction that reflects the true intentions of the parties, it is considered a relative simulation. If a contract of maintenance until death is carried out with relative simulation and the existence of a concealed contract is being discussed, this concealed contract will be deemed valid, provided it meets the necessary validity requirements, as it accurately reflects the true intentions of the parties. In this case, there will be a valid contract that is not gratuitous and has violated the reserved shares, allowing heirs to assert a claim for abatement. Since testamentary dispositions are often subject to formal requirements, they would be deemed invalid if not executed in accordance with these requirements, and thus abatement would not be possible. However, a concealed contract, which is an inter vivos transfer that is not subject to formal requirements, could be fit for abatement. Therefore, the contract of maintenance until death can only be subject to abatement in this manner.

It is essential for the party seeking abatement to prove the existence of simulation. In case law, it is acknowledged that a contract of maintenance until death might have been executed with the intention of violating the reserved portion under specific circumstances. Nevertheless, according to rulings from the Court of Cassation, the recognition of decedent simulation and the intent to breach the reserved share is only valid when multiple objective and substantial indications collectively support such claims. To avoid causing harm to the caregiver, while the Court of Cassation's general rules of evidence are appropriate and accurate, considering the mere intention to violate the reserved portion as sufficient for proving simulation can have the opposite effect and result in the unjust suffering of an honest caregiver. Furthermore, when evaluating simulation in a contract of maintenance until death, I believe that the need for care should be given more emphasis and should be considered not only for the spouse but also for descendants and third parties.

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