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## Annuity and life annuity contract used as a home reversion

### Abstract

Equity release services are becoming increasingly popular nowadays. They are a remedy for the financial problems of seniors who do not have enough money to support themselves and cannot count on family support. In practice, these services are provided under a sales model and the entrepreneurs offering them (mortgage funds) treat their business activities commercially as a way to increase their profits. The credit model, despite its regulation, does not work in practice. At the same time, the basis for the economic activity of these funds are the regulations governing annuity (Pl: *renta*) and life annuity (Pl: *dożywocie*) contracts – legal institutions with a maintenance function, whose aim is to help with maintenance. The importance of this function means that the debtor, as a party to annuity contracts, should not focus on making a profit, but on the material or personal support of the recipient. A discrepancy has therefore arisen between the maintenance function of annuity and life annuity and the commercial nature of the business of *home reversion* service providers, which distorts the essence of the former. Therefore, the legitimacy of invoking Articles 903-916 of the Civil Code to home reversion services should be questioned and the aim of this paper is to examine such legitimacy. The analysis leads to the conclusion that annuity and life annuity contracts, due to their maintenance function, are not an appropriate legal basis for a reverse mortgage. The discussion is based on the theoretical method, in particular on a causal and critical analysis.

**Keywords:** reverse mortgage, home reversion, contractual annuity, life annuity, maintenance function

## Introduction

Annuity (Pl: *renta*) and life annuity (Pl: *dożywocie*) contracts are quite common legal institutions regulated in Articles 903-916 of the Civil Code<sup>1</sup> (hereinafter referred to as the CC). They are usually recognised as agreements concluded between relatives, for the purpose of material or personal help. The literature stresses that an annuity and life annuity contract is of a family nature and the nature of the performances established in them is similar to maintenance, so they have a maintenance function.<sup>2</sup> However, these agreements are also used for purposes other than those relating to maintenance or financial support for relatives, as they can also serve as a basis for commercial purposes in economic transactions. We are talking here about the institution of reverse mortgages or equity release services. This is a financial service which occurs in two models – credit (reverse mortgage) and sales (home reversion).<sup>3</sup> The first one consists in the granting by the bank of a loan secured by a mortgage on real estate, the repayment of which is deferred until a certain moment after the death of the borrower, while the second consists in the transfer of the right to the real estate to third parties with the establishment of the right to live in such real estate for life in favour of the transferor.<sup>4</sup> In the Polish legal system, the institution of a reversed mortgage exists only in the credit model, which is regulated by the Reverse Mortgage Act of 23 October 2014.<sup>5</sup> Unfortunately, despite the fact that this Act has been in force for over six years, no eligible entity (bank<sup>6</sup>) has introduced this financial service into its credit offer, which is why legal

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1 Act of 23 April 1964 Civil Code, consolidated text, Dz.U. (Journal of Laws) of 2020, item 740.

2 See Z. Radwański, in: *System Prawa Cywilnego. Prawo zobowiązań-część szczegółowa*, Vol. III, part 2, Wrocław-Warszawa 1976, pp. 949 and 959.

3 See Sejm of the 7th term, *Uzasadnienie do rządowego projektu ustawy o odwróconym kredycie hipotecznym*, Sejm print no. 2392, www.gov.pl, p. 1 or S. Skuza, *Usługi finansowe typu equity release w Polsce na tle rozwiązań międzynarodowych. Stan obecny i propozycje zmian*, "Problemy Zarządzania" 2012, Vol. 10, No. 4 (39), p. 243, [http://bazhum.muzhp.pl/media/files/Problemy\\_Zarządzania/Problemy\\_Zarządzania-r2012-t10-n4\\_\(1\)/Problems\\_Management\\_r2012-t10-n4\\_\(1\)-s242-257/Problems\\_Management\\_r2012-t10-n4\\_\(1\)-s242-257.pdf](http://bazhum.muzhp.pl/media/files/Problemy_Zarządzania/Problemy_Zarządzania-r2012-t10-n4_(1)/Problems_Management_r2012-t10-n4_(1)-s242-257/Problems_Management_r2012-t10-n4_(1)-s242-257.pdf) (accessed 3.01.2020).

4 See P. Kowalczyk-Rólczyńska and T. Rólczyński, *Odwrócony kredyt hipoteczny – dodatkowe źródło zabezpieczenia emerytalnego*, "Wiadomości Ubezpieczeniowe" 2014, No. 3, p. 134.

5 Reverse Mortgage Act of 23 October 2014, consolidated text: Dz.U. (Journal of Laws) of 2016, item 786.

6 Pursuant to Article 4 in connection with Article 2(2) of the Reverse Mortgage Act, the lender can only be a bank, which also means a branch of a foreign bank, a branch of a credit institution or a credit institution conducting cross-border activities, as referred to in the Banking Law of 29 August 1997, consolidated text: Dz.U. (Journal of Laws) of Laws of 2020, item 1896, as amended.

scholars and commentators indicate that this Act is a so-called “dead letter”.<sup>7</sup> As far as the sales model is concerned, although it is not separately regulated in the Polish legal system, there are services in business that are qualified as home reversion. We are talking here about services offered by mortgage funds which, in exchange for the transfer of ownership of real estate, commit to pay a life-time monetary performance.<sup>8</sup> Although there is no specific regulation governing this type of activity, mortgage funds operate under the freedom of economic activity, and as the legal basis for these services they refer to the provisions on contractual annuity regulated in Articles 903-907 of the CC or on life annuity regulated in Articles 908-916 of the CC.<sup>9</sup> Importantly, the mentioned Reverse Mortgage Act has been created precisely to limit the activity of provision of services that are qualified by mortgage funds as home reversion, and which are mainly aimed at making a profit.<sup>10</sup> Already during the legislative work on the draft act, it was recognised that the legal tools used by mortgage funds, i.e., the institutions of contractual annuity and life annuity, are not an adequate basis for the provision of financial services, because these Code contracts are referred to by legal commentators as institutions of a maintenance function.<sup>11</sup> It can therefore be concluded from that the *ratio legis* of this regulation is based on the assumption that a reversed mortgage is assigned another function which, for reasons of profit, can be described as commercial. Unfortunately, the legislative measures taken have not contributed to regulating this practice of mortgage funds. In my opinion, the commercial use of annuity and life annuity contracts raises concerns. While it is true that both reverse mortgages as well as Code annuity and life annuity contracts have many important social functions, in the case of the latter the most important is the maintenance function.<sup>12</sup> That is why annuity

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7 See K. Dziewulska, *O potrzebie nowego uregulowania odwróconej hipoteki*, “Gubernaculum et Administratio” 2017, No. 1, Vol. 15, p. 98.

8 <https://www.funduszhipoteczny.pl/> (accessed 3.01.2020); <http://www.familiasa.pl/renta-dozywotnia> (accessed 03.01.2019), <http://omnes.com.pl/?oferta-korzysci> (accessed 3.01.2020).

9 See K. Dziewulska, *op. cit.*, p. 104.

10 See M. Bączyk, in: M. Stec, (ed.), *System prawa handlowego*, Vol. 5, Warszawa 2017, p. 1021; Urząd Ochrony Konkurencji i Konsumentów, *Raport z kontroli przedsiębiorców zawierających umowy świadczeń dożywcotnich*, Wrocław 2013, [www.uokik.gov.pl](http://www.uokik.gov.pl), p. 8ff. (accessed 3.01.2020).

11 See A. Stangret-Smoczyńska, *Umowa renty*, in: M. Dreła (ed.), *Renta w prawie polskim*, Wrocław 2016, p. 115; [http://www.bibliotekacyfrowa.pl/Content/78228/Renta\\_w\\_prawie\\_polskim.pdf](http://www.bibliotekacyfrowa.pl/Content/78228/Renta_w_prawie_polskim.pdf) (accessed 3.01.2019); K. Radel, *Umowa dożywocia i jej funkcja alimentacyjna*, Białystok 2016, p. 72, [https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/5725/1/K\\_Radel\\_Umowa\\_dozywocia\\_i\\_jej\\_funkcja\\_alimentacyjna.pdf](https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/5725/1/K_Radel_Umowa_dozywocia_i_jej_funkcja_alimentacyjna.pdf) (accessed 3.01.2019).

12 See A. Józwiak, *Institucje dożywocia oraz odwróconego kredytu hipotecznego w świetle ich funkcji alimentacyjnej*, “Iuridica Studia Toruniensia”, Vol. XXII, p. 98. The author argued that the

and life annuity contracts, precisely because of their maintenance function, should not be used for commercial purposes, because in my opinion, these functionalities rather stand in opposition to each other.

In this paper I will present an analysis of annuity and life annuity contracts from the point of view of their maintenance function, because I believe that it is this function and the features of these contracts resulting from it that indicate that Articles 903-916 CC are not an appropriate basis for the commercial activity of mortgage funds. I will precede these reflections with a brief analysis of reverse mortgage.

### Reverse mortgage in Poland

In order to examine the validity of this thesis, it is first necessary to analyse reverse mortgage as an institution with a commercial function. As I pointed out in my introduction, equity release services come in the form of a credit model (reverse mortgage) and a sales model (home reversion), and both are referred to as reverse mortgages. These are financial products for the seniors that enable the release of frozen capital held in the form of real estate in exchange for one-off or periodic cash payments.<sup>13</sup> The parties to a reverse mortgage agreement are, in the case of the credit model, the bank and the consumer, and in the case of the sales model, the mortgage fund and the consumer. As far as the credit model is concerned, Article 4 of the Reverse Mortgage Act explicitly states that the lender can be a bank and the borrower an individual (natural person). In the case of services provided by a mortgage fund, only an individual who meets the requirements set out by the fund may use the offer.<sup>14</sup> In addition, mortgage funds are ordinary entrepreneurs who are not subject to the control of the Financial Supervision Authority or to any specific regulation concerning capital equipment.<sup>15</sup> In the case of the credit

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maintenance function should be attributed to both the annuity and life annuity contract and the reverse mortgage. I do not agree with this assertion regarding reverse mortgages, since this is a financial service offered by commercial entities whose purpose is not to provide maintenance, nor to help consumers personally, but to make a profit by allowing the capital accumulated in property to be unfrozen. The profit-oriented approach, in my opinion, makes a reverse mortgage a legal institution with a commercial function.

- 13 See M. Padászyńska, S. Zbyszewski, *Istota i znaczenie odwróconej hipoteki w obliczu starzenia się społeczeństwa polskiego*, "Finanse i Prawo Finansowe" 2016, Vol. III, No. 2, p. 27.
- 14 <https://www.funduszhipoteczny.pl/> (accessed 03.01.2020); <http://www.familiasa.pl/renta-dozywotnia> (accessed 03.01.2019); <http://omnes.com.pl/?oferta-korzysci> (accessed 3.01.2020).
- 15 See M. Gajewska, *Reverse mortgage jako nowe źródło dochodu starzejącego się społeczeństwa na tle zmian demograficzno-społecznych*, in: J. Osiński and M. Pachocka (eds.), *Zmieniający się świat. Perspektywa demograficzna, społeczna i gospodarcza*, Warszawa 2013, p. 358.

model, the owner of the real estate remains so for the duration of the contract with the bank, and the real estate is only subject to security. The bank does not have to make monthly withdrawals of a certain amount, but this can also be done in the form of a transfer to an account or via a credit line with a fixed limit.<sup>16</sup> The sales model, in turn, consists in the transfer of real estate ownership to the fund in exchange for monthly payments, the amount of which is determined based on a number of factors, such as gender, age of the elderly, data from Statistics Poland (GUS) with average life expectancy, which is then reduced by the costs incurred by the entrepreneur to prepare the entire transaction.<sup>17</sup> In practice, the total value of the cash performances paid by the fund is approximately 30-40% of the value of the property, which is usually determined by a valuer employed by the company.<sup>18</sup> The form of such an agreement usually comes down to the transfer of ownership of the real estate to the fund in exchange for the payment of annuity and the establishment of a lifetime personal servitude (right of habitation) or the right to use the real estate.<sup>19</sup>

Both the sales model and the credit model, as equity release services, rely on the cashing of the capital accumulated in the real estate, so the fundamental issue to determine the value of the bank or fund's performance is the value of the real estate and the legal title to it,<sup>20</sup> not the personal needs of the real estate owner. In their activities, these entities are not directly oriented towards helping the beneficiaries of these services, and the difficult life situation or the inability to support oneself is not relevant to the obligation to fulfil the commitment and to set the level of annuity. In turn, a beneficiary of either services (home reversion or reverse mortgage) aims to earn additional income, supporting only his or her independent living.<sup>21</sup>

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16 See M. Wielgo, *Emerytura za hipotekę*, "Gazeta Wyborcza", 25.07.2012.

17 See A. Marciniuk, *Renta hipoteczna a odwrócony kredyt hipoteczny na rynku polskim*, "Śląski Przegląd Statystyczny" 2014, No. 12, Vol. 18, p. 255.

18 See M. Padaszyńska, S. Zbyszewski, op. cit., p. 29.

19 Ibidem, p. 28.

20 See E. Rutkowska-Tomaszewska, *Odwrócony kredyt hipoteczny – lekarstwo na ubóstwo emerytów (seniorów, osób starszych)?*, in: J. Blicharz, L. Klat-Wertelecka and E. Rutkowska-Tomaszewska (eds.), *Ubóstwo w Polsce*, Wrocław 2015, p. 168.

21 This conclusion is based on the fact that this institution is intended for senior citizens who do not have enough money to support themselves. This was also the reason for granting the first reversed mortgage. Moreover, this was the aim of the legislator, as is clear from the explanatory memorandum to the draft Reverse Mortgage Act and the draft Life Money Assistance Bill Act. In the case of the services offered by mortgage funds, such an objective result directly from the content of their offers.

The conclusion of a contract with a bank or a mortgage fund does not transfer the responsibility for the consumer's livelihood to these entities.

Despite the obviously commercial use of reversed mortgages, including the sales model, mortgage funds cite the provisions on annuity and life annuity contracts as the legal basis for their activities. In my opinion, however, this relationship has little to do with contracts for maintenance. The legal relationship between a consumer and a mortgage fund, which, by the mere fact of undervaluing a real estate, shows that the purpose of its activities is profit, not to provide maintenance, but only to pay a performance and to establish a limited right in rem in the real estate. Equity release services in their current form should therefore be assigned a commercial function. The notion of commerciality (trading) comes from the Latin word *commercium* – trade in goods<sup>22</sup> and, according to the dictionary of the Polish language, means an activity aimed only at making profit or the products of such activity.<sup>23</sup> In the past, this term was simply called trade.<sup>24</sup> Therefore, the commercial function will have a legal institution which, through its functioning, contributes to the exchange of goods and the generation of income, which is certainly the case with reverse mortgages.

### The concept of the maintenance function

The function of the law is to produce specific, significant, and lasting effects in a given community by establishing and applying laws with specific content.<sup>25</sup> As I. Bogucka says the law and its institutions in the social system serve to maintain order in this system. This objective pursues an important social interest leading to the balance necessary for the proper functioning of the community (social function).<sup>26</sup> These institutions should therefore be constructed in such a way as to produce an effect adequate to the objective intended for them by the legislator.

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22 See B. Pakosz, E. Sobol, C. Szkiłądź, H. Szkiłądź and M. Zagrodzka, *Słownik wyrazów obcych*, Warszawa 1991, p. 440.

23 <https://sjp.pwn.pl/szukaj/komercja.html> (accessed 13.02.2020).

24 *Ibidem*.

25 W. Gromski, in: A. Bator, W. Gromski, A. Kozak, S. Kaźmierczyk and S. Pulka (eds.), *Wprowadzenie do nauk prawnych. Leksykon tematyczny*, Warszawa 2006, p. 190.

26 According to I. Bogucka – law performs social functions if there is an adequacy between the normative system and social reality: “social functions are spoken of based on the assumption that there is a connection between legal norms and social reality and human behaviour, that the law influences social reality, and that this influence is expressed in the observable effects of the law. – See I. Bogucka, *Funkcje prawa. Analiza pojęcia*, Warszawa 2000, p. 97.

This is what the functionality of these institutions is all about.<sup>27</sup> The functions of legal institutions are not explicitly expressed in the rules governing them and are usually clarified in scholarly writings. This is also the case with annuity and life annuity contracts, which are precisely assigned a maintenance function. However, the question remains as to what the maintenance function is, what is its nature and how it should be defined. According to the dictionary of foreign words and phrases, the term maintenance (in Latin: *alimentum* – food) should be understood as means provided to a person who is unable to support himself or herself, including money, benefits in kind, as well as the costs of bringing up and looking after children.<sup>28</sup> Although there is no legal definition of the maintenance function itself in the Polish legal system, Article 128 of the Family and Guardianship Code<sup>29</sup> defines the maintenance obligation as the commitment to provide means of subsistence and, where necessary, means of upbringing. However, the maintenance obligation as defined by Article 128 of the Family and Guardianship Code does not apply to legal institutions arising from relations under the Civil Code, such as annuity or life annuity contracts.<sup>30</sup> If such an obligation were to arise on the basis of these agreements, then we would not be able to speak of different legal institutions.<sup>31</sup> The issue of defining the function of a legal institution as maintenance is different, and this is what is attributed to an annuity and life annuity contract. Annuity and life annuity contracts do not have to be a maintenance obligation to have a maintenance function.

Based on the importance of the maintenance obligation laid down in Article 128 of the Family and Guardianship Code, the maintenance function will mean that the objective is to meet the needs of the person concerned and the result is

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27 See T. Zieliński, *Prawo pracy. Zarys systemu*, part I, Warszawa–Kraków 1986, pp. 37-38: The meaning of the law is to introduce order into collective life, so only those ways in which the law affects social relations that serve the above purpose, deserve to be called the function of law”. T. Zieliński clearly emphasises that consideration of the function of the law also means solutions to the function of legal institutions which establish the law for the order of collective life. He also states that: “The word ‘function of law’ in this general sense is used to designate both effects consistent with the socioeconomic purpose of the law (i.e., effects that are assessed positively) as well as negative effects that were unintended by the legislator, i.e., those that meet with social disapproval”. See also I. Bogucka, *op. cit.*, p. 49.

28 See W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych*, Warszawa 1999, p. 29.

29 Act of 25 February 1964 – the Family and Guardianship Code, consolidated text, Dz.U. (Journal of Laws) of 2020, item 1359.

30 See M. Andrzejewski, in: H. Dolecki, T. Sokołowski (eds.), *Kodeks rodzinny i opiekuńczy. Komentarz*, LEX 2013, commentary to Article 128, index 1.

31 Also due to the prohibition of synonymous interpretation.

the realisation of such objective. The maintenance function consists in the fact that the legal institutions concerned act in a similar way to the maintenance obligation, and therefore in such a way as to provide someone with a means of subsistence or upbringing. In my opinion, therefore, the maintenance function must be assessed in the context of the elements of a maintenance obligation and defined from its perspective.

### **Maintenance function of annuity contract and home reversion**

According to Article 903 of the Civil Code, the content of the obligation are periodic performances in money or in fungibles. Legal scholars describe the maintenance function as a contractual payment, because the purpose of the services provided is usually to deliver means of support to the beneficiary.<sup>32</sup> The maintenance function of an annuity contract should be analysed by analogy through the prism of the maintenance obligation. Such an analogy seems appropriate with regard to annuity established without remuneration, but doubt may arise in the context of annuity established against remuneration, in which, after all, the beneficiary is also obliged to deliver the performance. When talking about maintenance in general, whether it is a maintenance obligation governed by Article 128 of the Family and Guardianship Code, or the maintenance functions of some legal institution, it should be borne in mind that the question of payment is also important. As far as the maintenance obligation is concerned, it is clear that the very nature of the relationship from which such an obligation arises precludes demanding of any payment that constitutes equivalent of such an obligation from the beneficiary. But when it comes to the annuity contract under the Code, it is no longer so obvious. There are two cases where the issue of remuneration needs to be discussed: annuity without remuneration (donation) and annuity established against remuneration. This issue is regulated by Article 906 of the Civil Code, according to which the provisions on sale apply to annuity established against remuneration, while the provisions on donation apply to annuity established without remuneration. Lack of remuneration for the annuity, pursuant to the provisions on an annuity and donation contract (Article 888 et seq. of the Civil Code), means that in return for periodical performances in money or fungibles, the beneficiary is not obliged to provide any performances, as the

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<sup>32</sup> See E. Niezbecka in: A. Kidyba (ed.), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część szczególna*, LEX 2014, as well as Z. Radwański, J. Panowicz-Lipska, *Zobowiązania – część szczegółowa*, Warszawa 2012, p. 305.



obliged party provides free of charge the value of his/her property.<sup>33</sup> Moreover, the beneficiary shall not be obliged to provide any performance, which makes the analogy with the maintenance obligation described above clear. The question remains, however, as to whether, in the case of a remuneration reservation in the annuity contract, it will still be possible to attribute the maintenance function to it? If there is a kind of exchange of goods, to which the sales law applies *mutatis mutandis*, the claim about the purpose of maintenance or upbringing, and therefore about the maintenance function, can be called into question. However, I believe that no remuneration for an annuity deprives this agreement of its maintenance function. Pursuant to Article 906(1) of the Civil Code, the payment in an annuity contract is reduced exclusively to the remuneration for establishing the annuity and there is no equivalence of performances in this provision. The remuneration is not related to the value of the sum of annuity performances, which, *nota bene*, are not known in advance. Reservation of remuneration for an annuity cannot change the legal nature and function of this legal institution. The aim of the obliged party should be primarily to provide the beneficiary with the means of support or to enable him/her, for example, to take up or continue his/her education,<sup>34</sup> and not to make a profit from the conclusion of the annuity contract. This position is confirmed by the current views of legal scholars and commentators, who assume that: “not without significance is also the fact that, pursuant to the Civil Code, the annuity has been placed next to a life annuity contract or other institutions serving as maintenance. (...) One should not forget about its model code approach, where the annuity functions strictly as a contract of maintenance. This determines its situation in family or other relationships of a personal, rather than an economic nature. In principle, therefore, the purpose of an annuity contract is to provide financial support for

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<sup>33</sup> As the provisions on donation apply accordingly to the pension established without remuneration, the obliged person is liable for non-performance or improper performance of the commitment pursuant to Article 891 of the Civil Code, liability on account of warranty for defects of things pursuant to Article 892 of the Civil Code, and may make a declaration of termination of the contract for reasons indicated in Articles 896 and 898 of the Civil Code, with the exception of those contained in Article 902 of the Civil Code, i.e. when the donation (here: a pension) makes satisfaction of an obligation resulting from the principles of social coexistence. Moreover, pursuant to Article 897 of the Civil Code, in case of an impoverishment, the party obliged to pay the annuity may demand from the beneficiary to provide means of support within the limits of the existing enrichment due to the annuity paid. See Z. Radwański, *System*, op. cit., p. 594.

<sup>34</sup> See the judgment of the Voivodship Administrative Court in Łódź of 19 March 2008, I SA/Łd 1189/07, LEX No. 468808; judgment of the Supreme Administrative Court in Warsaw of 17 May 2006, II FSK 716/05, LEX No. 282605.

a specifically identified person”.<sup>35</sup> The judiciary also stresses that, if the entire performance is defined in a contract, it will not, in fact, be an annuity contract, because the performance will be a one-off payment, yet payable in instalments.<sup>36</sup> Therefore, I think that if, at the time of the annuity contract, the remuneration is in the form of ownership of property, and the amount of the performance to be paid is determined by reference to the value of the property constituting the remuneration, we are dealing with a sales contract with a price paid in instalments. All the more so, if the obliged party is an entrepreneur whose objects are to conclude a contract for a cash performance granted in exchange for the transfer of ownership to real estate, where the amount of the performance depends on the value of such real estate, we may speak of a sale by instalments as specified in Article 583(1) of the Civil Code. This particular type of sale cannot be equated with a contractual annuity institution. I believe that such a legal act, i.e., a contract of sale by instalments made as a payable annuity contract, may, pursuant to Article 83 of the Civil Code, be ostensible and thus defective, and as such be null and void. The *causa* of this contract, which is based on the motives of the parties, which in turn should be sought in the relationship between the debtor and the person entitled to performances, is also relevant.<sup>37</sup> I take the view that this motive involves the financial assistance to the beneficiary to enable him/her to meet his/her livelihood needs.

With regard to the activities of mortgage funds, I do not think it is right to use an annuity contract for home reversion services. This is due to the recognition of the maintenance function as the basis of the annuity contract. The purpose of this contract is, irrespective of the question of remuneration, to meet the needs of maintenance of the beneficiary or to satisfy his/her other needs, through the periodic provision by the obliged party of performances in money or in fungibles. However, in spite of the arguments that have been set out, leading to the conclusion that the annuity contract is unlikely to be used for commercial purposes, especially in the form in which it is used by mortgage funds, it should be stressed that this issue is not so clear. The qualification of the type of such an agreement will depend on the content of the given contract and it may turn out that if a given performance (even if its amount depends on the value of the real estate and the average life expectancy) is to be paid for life, and due to the random nature of the life expectancy factor, it

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<sup>35</sup> See A. Stangret-Smoczyńska, *op. cit.*, pp. 117-118.

<sup>36</sup> See judgment of the Supreme Administrative Court in Warsaw of 1 March 2006, II FSK 409/05, LEX No. 202167 and judgment of the Supreme Administrative Court in Warsaw of 1 March 2005, FSK 1533/04, LEX No 154732.

<sup>37</sup> See A. Stangret-Smoczyńska, *op. cit.*, p. 118.

is difficult to determine the amount of the entire performance, it will be closer to a contract of annuity against remuneration than to a sales contract. However, even in this case, I would rule out recognition of this contract as annuity pursuant to Article 903 of the Civil Code, and I would suggest that it should be considered an innominate contract with elements similar to annuity. Despite the similarity in the subject matter of *essentialia negotii* both legal relations, i.e. contractual annuity and home reversion, perform different functions which should not be mixed and treated interchangeably. In my opinion, the use of contractual annuity by a mortgage fund for commercial purposes may cause harm to the real estate holder, who is also a consumer.

### Maintenance function of a life annuity contract and home reversion

Already during the period of validity of the Code of Obligations,<sup>38</sup> an annuity contract solved the problem of maintenance for seniors or incapacitated persons who, due to the lack of universal retirement provision, did not have an income sufficient to provide for themselves and meet basic life needs.<sup>39</sup> From the very beginning, this agreement had a specific maintenance objective, which has also been reiterated under the current Civil Code. The content of the current life annuity contract, pursuant to Article 908 of the Civil Code, is the maintenance for life for the beneficiary in exchange for the transfer of ownership of the real estate by him/her onto the obliged party. In the case of this contract, there is no distinction between a contract against or without remuneration, since the obligations of the parties are the essence of this legal institution, i.e., they are a *sine qua non* of its legal existence. We are therefore dealing with a bilaterally binding contract, in which each party is providing at the expense of its assets. The beneficiary's performance is the ownership of the real estate, and the commitment of the obliged party is to provide lifetime maintenance – also at the expense of its assets. Legal commentary stresses that a life annuity contract is an act in law that is binding, payable and reciprocal<sup>40</sup>, and because the burden of the annuitant's performances is dependent on the length

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38 Ordinance of the President of the Republic of Poland of 27 October 1933 – the Code of Obligations, Dz.U. (Journal of Laws) of 1933, No. 82, item 598.

39 See Z. Polickiewicz-Zawadzka, *Umowa o dożywocie*, Warszawa 1971, p. 25, as well as the judgment of the Supreme Court of 28 June 1945, I C 5/45, LEX No. 159388.

40 See W. Zabagło, *Uwagi o dożywociu*, "Nowe Prawo" 1951, No. 11, p. 19; Ł. Węgrzynowski, *Ekwiwalentność świadczeń w umowie wzajemnej*, Warszawa 2011, p. 138.

of his/her life, it cannot be determined in advance, whereby it is also random.<sup>41</sup> Pursuant to Article 908(1) of the Civil Code, the *essentialia negotii* of a life annuity contract is to provide the transferor (the beneficiary, the annuitant) with food, clothing, accommodation, light, and fuel, to provide him/her with appropriate help and care in case of illness and to give him/her at the expense of the acquirer (the obliged party) a funeral in accordance with local customs. Of course, it should be borne in mind that this understanding of maintenance has been preceded by the legislator with the phrase “in the absence of a different contract”, which means that these elements apply if the parties did not regulate their obligations in detail. However, shaping these elements of subsistence differently cannot limit the commitments arising from the obligation to support the annuitant, since the purpose of the annuitant’s performance is to ensure that the party obliged to provide the service shall meet the needs of the beneficiary in such a way as not to force the beneficiary to search for other sources to meet his/her necessary life requirements.<sup>42</sup> This position is well established in legal scholarship, as it already existed under the Code of Obligations. In accordance with the view of the Supreme Court, expressed in its ruling of 28 June 1945, a life annuity contract must specify the performances of the acquirer, which are capable of providing the transferor with all the needs of life to such extent that he/she will no longer need to get other means to meet the necessary requirements of life.<sup>43</sup> The same applies to the provision of adequate help for the annuitant. However, this concept should not be limited to help during illness, as it also applies to other personal activities, such as dealing with an official matter or sending a letter, cleaning the annuitant’s flat, washing his/her clothes and other activities that are necessary in a given situation.<sup>44</sup> Such an understanding of this legal institution stems primarily from the socio-economic purpose of life annuity, the principles of community life and established customs.<sup>45</sup> A different contract –

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41 See W. Czachórski, *Zobowiązania. Zarys wykładu*, Warszawa 1999, p. 498; A. Kidyba, in: E. Niezbecka, *Kodeks cywilny. Komentarz*, Warszawa 2010, p. 1228 – calls a life annuity contract an agreement that is nominate, executed against remuneration, voluntary, obliging, causing bilateral, mutual and random commitment.

42 See the judgment of the Court of Appeal in Biaystok of 6 March 2015, I ACa 858/14, LEX No. 1661139.

43 See the judgment of the Supreme Court of 28 June 1945, I C 5/45, LEX No. 159388; judgment of the Supreme Court of 9 May 2008, III CSK 359/07, LEX No. 453125; judgment of the Court of Appeal in Łódź of 27 February 2015, I ACa 1279/14, LEX No. 1665831; as well as G. Bieniek, *Komentarz do Kodeksu cywilnego. Księga trzecia*. Vol. 2, p. 765.

44 See Z. Policzekwicz-Zawadzka, op. cit., p. 88.

45 See A. Szafrńska, A. Szyszka, *Umowa o dożywocie i służebność mieszkania*, “Doctrina. Studia Społeczno-Polityczne” 2011, No. 8, p. 205.

that is, one that does not provide the transferor with life maintenance – cannot be qualified as a life annuity contract.<sup>46</sup> Although a life annuity contract is random and, as in the case of a contract of annuity against remuneration, it is not possible to determine the amount of the performance of the obliged party *a priori*, the size of the performance is influenced by the value of the real estate being sold and its profitability, as well as the life standard of the annuitant to date.<sup>47</sup> Legal scholars and commentators stress that, contrary to appearances, it is not, however, economically possible to determine the amount of the annuitant's performance, since it is secondary to the obligation to support the annuitant, which means that, regardless of the amount of the performance, the obliged party is required, if necessary, to meet the higher needs of the annuitant if justified by circumstances such as his/her state of health.<sup>48</sup> The primacy of the subsistence function of a life annuity contract is strongly emphasised in legal writings. According to Z. Radwański's view, since the main, and perhaps even the only, purpose of a life annuity contract is to support the real estate transferor, and if it is also properly performed, the primary function of this contract is the maintenance function.<sup>49</sup> In my opinion, the function of the life annuity contract, as defined in this way, determines the use of this contract for support purposes in the broad sense, which also includes personal performances, which, in turn, calls into question the commercial use of this legal institution by economic operators, such as, for example, mortgage funds. Of course, the provisions governing a life annuity contract do not limit the personal scope of the real estate acquirer, so it should be concluded that it may be a natural person, a legal person, or an organisational unit under Article 33<sup>1</sup> of the Civil Code. Legal commentary also indicates that entities such as religious congregations running nursing homes, which can successfully perform the duties resulting from a life annuity contract, can also be a party to this contract.<sup>50</sup> On the other hand, the transferor, and therefore subsequently the annuitant, can only be an individual, because of the maintenance nature of this service.<sup>51</sup> There is no doubt about this. However, when assessing the possibility of using a life annuity by commercial operators, consideration must not be overlooked as regards the relationship between the party which is

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<sup>46</sup> See the judgment of the Court of Appeal in Łódź of 27 February 2015, I ACa 1279/14, LEX No. 1665831.

<sup>47</sup> See Z. Policzkiwicz-Zawadzka, *op. cit.*, p. 90.

<sup>48</sup> *Ibidem*.

<sup>49</sup> See Z. Radwański, *System*, *op. cit.*, pp. 614-615.

<sup>50</sup> See G. Bieniek, *op. cit.*, p. 764; K. Radel, *op. cit.*, p. 91.

<sup>51</sup> See A. Józwiak, *op. cit.*, p. 86.

obliged and the annuitant. Legal scholars and commentators highlight that, in view of the maintenance objective of a life annuity contract, there must be a relationship between the party which is obliged and the annuitant that is sufficiently close to justify the will to ensure life support.<sup>52</sup> In the opinion of Z. Policzekiewicz-Zawadzka, the very fact of establishing life annuity proves the existence of a relationship of closeness between the parties (usually kinship or affinity).<sup>53</sup> Such a conclusion can also be drawn from the provision of Article 913(1) of the Civil Code, which speaks about the deterioration of relations between the parties, resulting in the inability to continue direct contact. In my opinion, this provision suggests that the *ratio legis* of life annuity contracts is based on the assumption that these contracts will be concluded between people who already have a close relationship.

From the point of view of these arguments, it is also important to indicate the admissibility of encumbering the real estate with a right to habitation or other personal servitudes referred to in Article 908(2) of the Civil Code. *Prima facie* it could seem that since a life annuity contract may consist in encumbering the property with an easement, actually nothing stands in the way of concluding a life annuity contract of this form between the owner of the real estate and a mortgage fund. However, it should be borne in mind that the right to encumber a real estate with easement is only an additional legal possibility, which the parties may include in the life annuity contract. Such encumbrances do not result from the obligation of the acquirer, as mentioned in Article 908(1) of the Civil Code, to provide the transferor with life support.<sup>54</sup> It is not, therefore, a question of choosing whether the annuitant is entitled to a livelihood or an easement. The latter can only exist alongside rights arising from subsistence, because rights arising from a limited right in rem do not constitute an *essential negotii* of a life annuity contract and therefore become part of the contract by virtue of the will of the parties.<sup>55</sup> This means that the inclusion of such legal provisions in the agreement does not result in a validity of the life annuity contract, as this provision merely emphasises that the inclusion of such provisions in the agreement does not preclude it from being considered a life annuity contract.<sup>56</sup> The aim and consequence of the inclusion of usufruct and easement

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52 See K. Radel, *op. cit.*, p. 88.

53 See Z. Policzekiewicz-Zawadzka, *op. cit.*, p. 78.

54 See G. Bieniek, *op. cit.*, p. 765.

55 See A. Biały, in: M. Frasz and M. Habdas (eds.), *Kodeks cywilny. Komentarz. Zobowiązania. Część szczególna. Tom V, (art. 535–764(9))*, Warszawa 2018, commentary to Article 908.

56 *Ibidem*.

is to give the annuitant his or her rights to more extensive protection.<sup>57</sup> However, regardless of the reservation of limited rights in rem, it is precisely the obligation to provide subsistence to the annuitant that is essential for the legal existence of a life annuity contract. It should therefore be made clear that it is not acceptable for a contract to be designed in such a way that a right in rem or an annuity has a dominant function, since the basis of a life annuity contract is, in any case, the obligation of the acquirer to maintain the life annuity for the person for whom the life annuity has been established.<sup>58</sup> Thus, life annuity is a subjective right which always covers the subsistence of the real estate transferor until his or her death, and only if the parties expressly agree, can life annuity also cover usufruct or personal servitude.<sup>59</sup> From this point of view, a contract with a mortgage fund cannot be considered a life annuity contract, as it does not consist in subsistence within the meaning of Article 908 of the Civil Code, but only in the conversion of capital into a life annuity and the granting of a limited right in rem in exchange for the transfer of property. The performance of a mortgage fund cannot be considered subsistence, and the resulting legal relationship has no maintenance function.

In order to complete the analysis of a life annuity contract, it is worth noting the lack of reference to other provisions in the regulations governing this legal institution, which can be seen in turn in the regulation of the annuity contract. In the latter, in the unregulated scope, we apply provisions either on the contract of sale (when establishing annuity against remuneration) or on the contract of donation (when establishing annuity without remuneration). In the case of a life annuity contract, therefore, there are no grounds for applying the rules governing any other type of contract, as this is a *sui generis* regulation. This also seems inappropriate in view of the specific nature of a life annuity contract, which is mainly based on personal maintenance payments. This institution should therefore be considered as a comprehensive regulation. If, on the other hand, the parties decide to conclude a contract with features which combine several types of agreements, including a life annuity contract, but also other features not regulated by the provisions of Articles 908-916 of the Civil Code, such a contract cannot be considered a life annuity contract, but a kind of innominate contract. In my opinion, the legal relationship between mortgage funds and elderly people, under which the latter transfer ownership of real estate to the fund in exchange for a life annuity calculated based on average life expectancy data from Statistics Poland (GUS) and on the value of the

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57 Ibidem.

58 Judgment of the Court of Appeal in Łódź of 27 February 2015, I ACa 1279/14, LEX No 1665831.

59 See Z. Policzkiwicz-Zawadzka, op. cit., p. 35.

real estate, without considering the real needs of the owner and his/her previous status, cannot be considered a life annuity, regardless of the parties' positions.

### Conclusions

Annuity and life annuity contracts presented herein undoubtedly have a maintenance function, which is their primary and most important one. The purpose of an annuity contract is to provide the beneficiary with certain periodic performances in order to satisfy his or her legitimate needs, while the purpose of a life annuity contract is to support the beneficiary in a broader sense. Legal institutions with a maintenance function are intended to meet the specific needs of the recipient. This interpretation leads to the conclusion that none of these agreements should be used for commercial purposes, i.e., the conclusion of such agreements should not be a route to a profit for the entity concerned. It is not right that the activities of a legal institution with a maintenance function, that is to say, a legal institution whose purpose is to make it possible to meet the needs of the beneficiary (this is the case even if an annuity contract established against remuneration is concluded), should lead to a multiplication of such entity's assets. Providers offering reverse mortgage services aim to make a profit. A service provider that is an entrepreneur aims to sell the service in return for remuneration, while a service recipient (consumer) aims to unfreeze its own capital accumulated in real estate with the help of such a provider. There can be no question of providing services at the expense of the provider's assets because the latter only helps to cash in the recipient's capital and does so for adequate remuneration. That is why I do not think it is right for mortgage funds to use the codified annuity and life annuity contracts as a sales model for reverse mortgages. The maintenance function of annuity and life annuity contracts and the commercial function of reversed mortgages are putting these legal institutions in conflict. In my opinion, the proposed action of mortgage funds is detrimental to the interests of those to be protected by the institutions of contractual annuity and life annuity.

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