

# LEGAL PROTECTION AND EMPOWERMENT OF VULNERABLE ADULTS

## RUSSIA

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### SECTION 1 – GENERAL

- 1. Briefly describe the current legal framework (all sources of law) regarding the protection and empowerment of vulnerable adults and situate this within your legal system as a whole. Consider state-ordered, voluntary and ex lege measures if applicable. Also address briefly any interaction between these measures.**

The three pillars of the current legal framework regarding the protection and empowerment of vulnerable adults are:  
the Civil Code of the Russian Federation (hereinafter the ‘Civil Code’), the First Part of which, being the *sedes materiae* (Art. 29 – 41), was adopted on 30 November 1994 and which, as far as the relevant provisions are concerned, entered into force on 1 January 1995 (as amended);

- the Code of Civil Procedure of the Russian Federation (hereinafter the ‘Code of Civil Procedure’), which was adopted on 14 November 2002 and entered into force on 1 February 2003 (as amended); and
- the Federal Law on Full and Partial Guardianship No. 48-FZ dated 24 April 2008, in force since 1 September 2008 (as amended) (hereinafter the ‘Law on Full and Partial Guardianship’). Medical matters are governed primarily by Federal Law No. 323-FZ, dated 21 November 2011 (as amended), entitled “On the Foundations of the Protection of Citizens’ Health in the Russian Federation” (hereinafter the ‘Law on the Citizens’ Health’) and by the Law of the Russian Federation No. 3185-1, dated 2 July 1992, entitled “On Psychiatric Care and Guarantees of Citizens’ Rights in the Provision of Psychiatric Care” (hereinafter the ‘Law on Psychiatric Care’).
- The Constitution of the Russian Federation, dated 12 December 1993 (hereinafter ‘the Constitution’), which tops the hierarchy of legal

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<sup>1</sup> I prepared this report while working as a Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law (Hamburg).

authority, contains only two provisions of immediate relevance for this area of law. Art. 32(3) of the Constitution stipulates that citizens fully incapacitated by order of a court shall enjoy neither active nor passive electoral rights, and Art. 60 provides that a Russian citizen can perform their rights and duties starting from 18 years of age.

The last fifteen years have been marked by activism by the Constitutional Court of the Russian Federation (hereinafter the ‘Constitutional Court’) in this area of law. Accordingly, several of its resolutions, which this report repeatedly cites, have become an important element in the law of vulnerable adults.

It should be noted that the Supreme Court of the Russian Federation (hereinafter the ‘Supreme Court’), faithful to the Soviet tradition, communicates ‘explanations on questions of judicial practice’ to the lower courts to ensure uniformity and coherence of the case law. There are two main types of such explanations: some provide abstract statements with no reference to a particular case, while others, called ‘overviews’ or ‘surveys of the case law’ and suchlike, contain more or less detailed descriptions of concrete cases that serve as models for the general statements. Though invariably highly authoritative, such guidelines weigh differently: resolutions issued by the Plenum of the Supreme Court are not legally binding, but their factual authority makes them virtually so in all but name; surveys of case law issued by the Presidium of the Supreme Court carry considerable but lesser authority and can hardly be considered effectively binding. Many such resolutions and surveys are cited throughout the report.

In Russian law, state-ordered measures are the principal response to the challenges posed by vulnerability of adults suffering from mental disorders. These consist of orders of full or partial incapacitation by courts, followed by the appointment of a full or partial guardian by a Guardianship Authority (see below) or – if the adult is placed in residential care at a medical or similar institution – by automatic vesting of such powers in the residential institution. As regards adults suffering from deficits of mental capacity, theoretically only a scant few voluntary measures are even available in respect of property management, but these play hardly any role in practice. The law provides a voluntary measure available specifically to adults facing health issues other than mental disorders (*‘patronaž’*), but the adequacy of its design appears questionable, and its practical relevance is limited.

- 2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *oneka - опека*]. As explained in the General Instructions above, please briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.**

The following key terms are used throughout this report:

- Adult [*soveršennoletnij/soveršennoletnjaja*]: a person who has reached 18 years of age, which is the age of majority under Russian law<sup>2</sup>.
- Legal capacity: the ability to hold rights and duties (passive legal capacity or legal standing, [*pravosposobnost'*]) and to exercise those rights and duties (active capacity or legal agency, [*deesposobnost'*]). When speaking of limitation or deprivation of legal capacity, this report refers primarily to active capacity.
- Mental capacity: the *de facto* decision-making and decision-communication skills of a person.
- Fully incapacitated adult [*nedeeposobnyj/nedeeposobnaja; graždanin, priznannyj nedeeposobnym*]: an adult declared by court order to be legally incapable in virtually every respect due to a major mental disorder.
- Partially incapacitated adult ([*grāždanin, deesposobnost' kotorogo ograničena*]): an adult whose legal capacity is limited by court order due to a minor mental disorder, substance abuse or addiction to gambling.
- Representative [*predstavitel'*]: a natural or legal person who acts on behalf of the adult.
- Full guardianship, full guardian [*opeka, opekun*]: a state-ordered measure of substituted decision-making for fully incapacitated adults. The principal function of guardians is to act on behalf of the ward in all matters in which legal representation is allowed unless otherwise provided by law, including as regards property management and civil procedure.
- Partial guardianship, partial guardian [*popečitel'stvo, popečitel'*]: a state-ordered measure for partially incapacitated adults. All the ward's legal acts in respect of property require the partial guardian's consent except for a few that the ward may perform on their own. In certain matters (most importantly in civil proceedings), the partial guardian acts on behalf of the ward.  
If the fully or partially incapacitated adult is placed in a residential institution, no guardian is appointed, and the institution performs the duties and exercises the powers of full or partial guardian. If no representative is appointed within a month of the incapacitation order

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<sup>2</sup> Art. 60 of the Constitution; Art. 21(1) of the Civil Code.

and the adult has not been placed in a residential institution, the Guardianship Authority shall perform such duties and exercise such powers itself. Hence, this report's explanations as to full and partial guardianship apply not only to full or partial guardians in the strict sense but also to all kinds of state-appointed representatives and caretakers, including residential institutions and Guardianship Authorities where these are responsible.

- Guardianship Authorities [*organy opeki i popečitel'stva*]: state bodies on the level of constituents of the Russian Federation or, if so provided by the respective constituent, on the local (municipal) level officially identified as such and vested with comprehensive powers in respect of legal protection of minors and vulnerable adults. In particular, Guardianship Authorities are responsible for identifying adults in need of full and partial guardianship, filing claims for full or partial incapacitation, appointing and removing full and partial guardians of fully or partially incapacitated adults, and supervising full and partial guardians' performance of their duties.

**3. Briefly provide any relevant empirical information on the current legal framework, such as statistical data (please include both annual data and trends over time). Address more general data such as the percentage of the population aged 65 and older, persons with disabilities and data on adult protection measures, elderly abuse, etc.**

Table 1. Share of the elderly in the Russian population<sup>3</sup>.

	2005	2007	2009	2011	2013	2015	2017	2019	2021	2022	2023
Total population (in millions)	144	143	143	143	143	146	147	147	146	147	146
Including people over	29	30	31	32	33	35	37	38	37	35	36

<sup>3</sup> Based on official statistics from the Russian Federal State Statistics Service (<[https://rosstat.gov.ru/storage/mediabank/SP\\_1.1.xlsx](https://rosstat.gov.ru/storage/mediabank/SP_1.1.xlsx)>); rounded to millions. The numbers have included the population of Crimea since 2015; they do not reflect the populations of the Donetsk, Luhansk, Kherson and Zaporizhzhia regions.

In view of the retirement age reform, the cohort of people older than the working age covers men of and over 60 and women of and over 55 for the years 2005–2019, men of and over 61 and women of and over 56 for 2020 and 2021, and men of and over 62 and women of and over 57 for 2022 and 2023.

retirement age (in millions)											
Share of people over retirement age (in %)	20.4	20.8	21.4	22.3	23.1	24.0	25.0	25.9	25.3	24.0	24.5

Table 2. Life expectancy at age 60 (for men) or 55 (for women)<sup>4</sup>.

	2005	2007	2009	2011	2013	2015	2017	2019	2021	2022
men	13	14	15	15	16	16	16	17	14	17
women	23	24	24	25	25	26	26	27	23	26

According to the World Health Organisation, life expectancy at birth in Russia increased from 65.3 years in 2000 to 73.2 years in 2019<sup>5</sup>.

Table 3. Numbers of persons with various forms of officially recognised disability<sup>6</sup>.

	2016	2018	2020	2022	2023
Numbers of people with disabilities (in millions)	13	12	12	11	11

Table 4. Number of persons with a mental or conduct disorder<sup>7</sup>.

	2010	2015	2019	2020	2021	2022
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<sup>4</sup> Based on official statistics from the Russian Federal State Statistics Service (<<https://rosstat.gov.ru/storage/mediabank/dem2.xlsx>>); rounded to the whole number of years.

<sup>5</sup> <<https://data.who.int/countries/643>>. For slightly different figures, cf. Core health indicators in the WHO European Region 2023. Special focus: European Programme of Work measurement framework. Document number: WHO/EURO:2023-8228-48000-71087, p. 9 <<https://iris.who.int/bitstream/handle/10665/373411/WHO-EURO-2023-8228-48000-71087-eng.pdf?sequence=1>>.

<sup>6</sup> Based on official statistics from the Russian Federal State Statistics Service (<[https://rosstat.gov.ru/storage/mediabank/Pi\\_1.1.docx](https://rosstat.gov.ru/storage/mediabank/Pi_1.1.docx)>); rounded to millions).

<sup>7</sup> Based on *Zdravooxranenie v Rossii. 2023: Statističeskij sbornik / Rosstat* [Health Care in Russia. 2023: A Statistical Collection by the Russian Federal State Statistics Service] (Moscow 2023) 48 <<https://rosstat.gov.ru/storage/mediabank/Zdravooxran-2023.pdf>>; rounded to tenths of millions.

Number of persons registered with and receiving regular care from early-treatment centres (in millions)	1.6	1.5	1.4	1.4	1.4	1.4
Number of other patients receiving consultative medical care (in millions)	2.2	2.1	2.1	2.1	2.1	2.2

By contrast, according to estimates of the Institute for Health Metrics and Evaluation, there were approximately 10 500 cases of mental disorder per 100 000 inhabitants in Russia in 2019<sup>8</sup>, which would correspond to approximately 15.4 million total cases.

Table 5. Number of persons with mental or conduct disorders due to alcohol or substance abuse<sup>9</sup>.

	2010	2015	2019	2020	2021	2022
Number of persons receiving regular care from an addiction psychiatrist						
due to alcohol use disorder	2.4	1.9	1.3	1.2	1.2	1.2
due to substance abuse (in millions)	0.5	0.5	0.4	0.4	0.4	0.4

In 2022, there were 540 neuropsychiatric residential institutions operating in Russia, with approximately 159 000 inhabitants<sup>10</sup>.

**4. List the relevant international instruments (CRPD, Hague Convention, other) to which your jurisdiction is a party and since when. Briefly indicate whether and to what extent they have influenced the current legal framework.**

<sup>8</sup> <<https://www.healthdata.org/research-analysis/health-risks-issues/mental-health>>.

<sup>9</sup> Health Care in Russia. 2023: A Statistical Collection by the Russian Federal State Statistics Service (n. 7) 49; rounded to tenths of millions.

<sup>10</sup> Health Care in Russia. 2023: A Statistical Collection by the Russian Federal State Statistics Service (n. 7) 95.

The Russian Federation is a party to the CRPD (which entered into force for Russia on 25 October 2012<sup>11</sup>), but not to the Optional Protocol to it<sup>12</sup>. Russia used to be a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, which was in force for Russia from 5 May 1998 to 16 September 2022<sup>13</sup>. Russia does not participate in the Hague Convention<sup>14</sup>.

Russia filed its initial report on implementation of the CRPD in 2014. The report had received consideration from the Committee on the Rights of Persons with Disabilities by 2018<sup>15</sup>. As evidenced by the file, Russia has put in considerable effort and made progress in implementing the CRPD. Russia's hosting of both the Olympic Games in 2014 and the FIFA World Cup in 2018 was a strong additional impetus to do so. However, an overwhelming majority of steps were related to disabilities other than intellectual and psychosocial ones. Accordingly, a large portion of the Committee's concerns envisaged the situation of persons suffering from a mental disorder.

An overarching concern of the Committee was the "lack of mechanisms for the implementation of the existing legislation"<sup>16</sup>. The study underlying the present national report supports this conclusion in many instances.

Among other things, the Committee noted with concern that Russian "legislation [...], especially the Civil Code and the Civil Procedure Code, upholds the concept of substituted decision-making and that it does not provide for supported decision-making mechanisms for persons with disabilities"<sup>17</sup>. Both the submissions and explanations of the Russian government on the one hand and the concluding observations of the Committee on the other make it clear that deinstitutionalization in respect of vulnerable adults remained a pressing issue for which no solution had been put forward.

"The Committee is deeply concerned about the large number of persons with disabilities living in institutions and about the limited opportunities for persons with disabilities, in particular those with intellectual and/or psychosocial disabilities, to gain access to services

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<sup>11</sup> Pursuant to Art. 45(2) of the CRPD. See <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en)>. The CRPD had been ratified by the Federal Law No. 46-FZ dated 03.05.2012.

<sup>12</sup> <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15-a&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=en)>.

<sup>13</sup> <<https://www.coe.int/en/web/conventions/cets-number/-/abridged-title-known?module=signatures-by-treaty&treatynum=005>>

<sup>14</sup> <<https://treatydatabase.overheid.nl/en/Treaty/Details/009250>>.

<sup>15</sup> <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/SessionDetails1.aspx?SessionID=1204&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionDetails1.aspx?SessionID=1204&Lang=en)>; <<https://www.ohchr.org/en/press-releases/2018/03/committee-rights-persons-disabilities-examines-report-russia>>.

<sup>16</sup> Para 9 of Concluding observations on the initial report of the Russian Federation dated 9.04.2018 <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FRUS%2FCO%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FRUS%2FCO%2F1&Lang=en)> (hereinafter 'Concluding observations on the initial report of the Russian Federation').

<sup>17</sup> Para 26 of Concluding observations on the initial report of the Russian Federation.

and participate in their local communities. It also notes with concern the lack of a strategy for deinstitutionalization, and that not all persons with disabilities are aware of the support services available to them or the ways in which they can claim assistance in their local community”<sup>18</sup>.

The urgency of deinstitutionalization was clearly apparent from other concerns about the institutions. Thus, the Committee pointed to

“the reported ill-treatment of persons with disabilities in institutions, which may amount to torture or cruel and degrading treatment. The Committee is also concerned about the reported use of drugs to ‘control the sexual behaviour’ of persons with disabilities, especially those with intellectual or psychosocial disabilities”<sup>19</sup>.

A further concern was

“the reported physical and psychological violence against persons with disabilities, in particular persons with intellectual and/or psychosocial disabilities, including autistic persons and children, and the use of physical and chemical restraints against those persons in institutions”<sup>20</sup>.

A separate, particularly topical concern, again in the context of institutions, relates to

“the reported instances of forced sterilization of persons with disabilities, especially women and girls with intellectual or psychosocial disabilities and autistic persons, including when consent is given by the guardian of the person subjected to sterilization”<sup>21</sup>.

Further concerns related to access to justice and “the lack of documents in accessible formats for [...] persons with intellectual and/or psychosocial disabilities in various proceedings”<sup>22</sup>, to the provisions “which do not allow a person with certain types of intellectual or psychosocial disability to marry and adopt a child, irrespective of the possible best interest of the child concerned”<sup>23</sup> and to “insufficient information available on the ‘special posts’ and the labour market programmes for persons with disabilities, in particular for persons with intellectual or psychosocial disabilities”<sup>24</sup>.

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<sup>18</sup> Para 40 of the Concluding observations on the initial report of the Russian Federation.

<sup>19</sup> Para 34 of the Concluding observations on the initial report of the Russian Federation.

<sup>20</sup> Para 36 of the Concluding observations on the initial report of the Russian Federation.

<sup>21</sup> Para 38 of the Concluding observations on the initial report of the Russian Federation.

<sup>22</sup> Para 28 of the Concluding observations on the initial report of the Russian Federation.

<sup>23</sup> Para 46 of the Concluding observations on the initial report of the Russian Federation.

<sup>24</sup> Para 53 of the Concluding observations on the initial report of the Russian Federation.



Russia filed its combined second, third and fourth<sup>25</sup> periodic reports<sup>26</sup> on 5 October 2022<sup>27</sup>. The assessment will tentatively last until the spring of 2029<sup>28</sup>. As this report clearly shows, Russia has taken no serious steps to remedy the above concerns. Most importantly, no mention is made of any efficient measures to address the deinstitutionalization issue; noteworthy progress is not even alleged<sup>29</sup>. Russia has explicitly insisted on its right to keep its national approach of substituted decision-making and to refrain from adopting the supported decision-making solution, as requested by the Committee. According to the report, this is in keeping with Art. 12 of the CRPD<sup>30</sup>.

Russia considers ratification of the Optional Protocol to the Convention to be premature as of the time of the reports<sup>31</sup>.

The Convention for the Protection of Human Rights and Fundamental Freedoms and perhaps to an even greater extent the judgements of the ECtHR have played a prominent role both in legislative reforms (as evidenced by the explanatory notes referred to throughout this report) and scholarly discussion. One might even legitimately say that the case law of the ECtHR used to feature even more prominently than the CRPD in the legal debate and reform effort as regards empowerment and protection of vulnerable adults. It remains to be seen how Russia's withdrawal from the European Convention on Human Rights will affect this field of law<sup>32</sup>.

## **5. Briefly address the historical milestones in the coming into existence of the current framework.**

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<sup>25</sup> The expectation was that Russia would file combined second and third reports (Para 72 of the Concluding observations on the initial report of the Russian Federation).

<sup>26</sup> Combined second, third and fourth periodic reports on implementation of the CRPD (CRPD/C/RUS/2-3), <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FRUS%2F2-3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FRUS%2F2-3&Lang=en)> (hereinafter 'Combined second, third and fourth periodic reports').

<sup>27</sup> <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/MasterCalendar.aspx?Treaty=CRPD](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/MasterCalendar.aspx?Treaty=CRPD)>.

<sup>28</sup> <[https://www.ohchr.org/sites/default/files/documents/hrbodies/crpd/Tentative\\_forecasts\\_Country\\_reviews.docx](https://www.ohchr.org/sites/default/files/documents/hrbodies/crpd/Tentative_forecasts_Country_reviews.docx)>.

<sup>29</sup> See primarily Paras 152 – 162 of the Combined second, third and fourth periodic reports.

<sup>30</sup> Paras 96 – 107 of the Combined second, third and fourth periodic reports.

<sup>31</sup> Second paragraph of Para 14 of the Combined second, third and fourth periodic reports.

<sup>32</sup> Apparently seeking to protect the legacy of the ECtHR, Tat'jana V. Solov'eva argued that most of the legislative amendments its judgments had triggered in procedural law, including those on the procedural capacity of adults in incapacitation proceedings, have been salutary and are in any event in conformity with Russian national traditions and should not be affected by the withdrawal (Tat'jana V. Solov'eva, *Značenje denonsacii Konvencii o zaštite prav čeloveka i osnovnyx svobod v 2023 g. dlja graždanskogo sudoproizvodstva Rossijskoj Federacii* [Implications of the Denunciation of the Convention for the Protection of Human Rights and Fundamental Freedoms in 2023 for the Civil Procedure of the Russian Federation], 1 (2024) *Arbitražnyj i graždanskij process* [Arbitrazh (Commercial) and Civil Procedure] 3 – 7).

The three pillars of the current legal framework governing the status of vulnerable adults are the Civil Code, the First Part of which entered into force, as far as the relevant provisions are concerned, on 1 January 1995; the Code of Civil Procedure, which entered into force on 1 February 2003; and the Federal Law on Full and Partial Guardianship, which entered into force on 1 September 2008.

From a systematic point of view, this framework is rooted in the history of Soviet law. In the late 1910s and early 1920s, Soviet legislation adopted a division between the civil and family codes that has turned out to be persistent and was reproduced in the post-Soviet legal reforms<sup>33</sup>. The law of vulnerable adults was distributed between the two: concise principal provisions on incapacitation and the scope of legal capacity of fully or partially incapacitated adults were included in the civil codes<sup>34</sup>, whereas detailed rules on incapacitation procedures and the appointment of full and partial guardians as well as on the law of full and partial guardianship were located in separate codes alongside or within family law<sup>35</sup>. Besides these, the government also issued a statute on Guardianship Authorities that determined the responsible bodies, their powers, the applicable procedures, and suchlike<sup>36</sup>.

The first significant modification came when the handling of incapacitation cases was assigned to the courts and the previously applicable procedures were removed from the Family Code of 1926<sup>37</sup> and replaced by new ones entrenched in the Code of Civil Procedure of 1964. Accordingly, the last Soviet Family Code of 1969 contained provisions on full and partial guardianship including those governing appointment, but it no longer contained procedural rules related to incapacitation<sup>38</sup>.

The second change was introduced in 1994 by the new Russian Civil Code, in which the law of persons, traditionally situated in the general part, now included a set of provisions on full and partial guardianship, most of

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<sup>33</sup> On the history of this peculiar feature of Russian law, see, e.g., Maria V. Antokolskaya, 'Place of Russian Family Law in the System of Branches of Law and Correlation between Family and Civil Law', 5:53 (1996) *Tilburg Foreign Law Review*, 53 – 68; Wolfram Müller-Freienfels, 'Zur Diskussion um die systematische Einordnung des Familienrechts: Teil I', 37 (1973) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 609 – 659, 620 – 629.

<sup>34</sup> Art. 8 and 9 of the Civil Code of the Russian Soviet Federative Socialist Republic, dated 1922, in the original version, and Art. 8 of the Code as amended on 14.11.1927; Art. 15 and 16 of the Civil Code of the Russian Soviet Federative Socialist Republic dated 1964.

<sup>35</sup> Art. 184 – 246 of the Code of Laws on Acts of Civil Status, Marriage, Family and Guardianship dated 16.09.1918 and the Instruction on Examination of Mentally-Ill Persons published as an annex to the Code; Art. 68 – 102 of the Code of Laws on Marriage, Family and Guardianship dated 19.11.1926.

<sup>36</sup> Resolution of the All-Russian Central Executive Committee and the Council of People's Commissars of the RSFSR, "On Adoption of the Statute on the Guardianship Authorities", dated 18.06.1928 and in force until 16.01.1970 (as amended); Resolution of the Council of Ministers of the RSFSR No. 175, "On Adoption of the Statute on the Guardianship Authorities" of the RSFSR, dated 30.04.1986 and in force until 17.07.1996.

<sup>37</sup> Art. 103 – 110 of the Code.

<sup>38</sup> Art. 119 – 139 of the Code on Marriage and Family of the Russian Soviet Federative Socialist Republic, dated 30.07.1969.

which had previously been in the family codes<sup>39</sup>. As a result, the Civil Code now contained general provisions on full and partial guardianship, whereas the grounds for ordering full or partial guardianship, as well as certain issues regarding various types of full and partial guardianship, were addressed either in the Civil Code or in the Family Code<sup>40</sup>, with vulnerable adults being dealt with in the former. The insufficiency of the general provisions in the Civil Code to cope with a wide range of issues arising in the context of full and partial guardianship, the legislator's reluctance to significantly expand this section of the Civil Code with numerous, often fairly technical provisions and/or with provisions that belong to public rather than to private law, and the perceived need for uniform rules embracing full and partial guardianship over both minors and adults resulted in the adoption of the (separate) Law on Full and Partial Guardianship in 2008.

As for substance, key features of the law of vulnerable adults in the Civil Code (in its original 1994 version) and in the 1995 Code of Civil Procedure date back to a model that Soviet law had embodied by the mid-1960s. This model in turn had matured for decades through scholarly debate, reform proposals and draft legislation<sup>41</sup> from the second half of the nineteenth and the beginning of the twentieth centuries as well as in the first wave of legal codification at the dawn of the Soviet era<sup>42</sup>. Notwithstanding a number of suggestions, documented in the legislative history of the new Code, that it should depart from prior law in this area in one respect or another<sup>43</sup>, the model

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<sup>39</sup> Art. 31 – 37, 39 – 40 of the Civil Code. The fathers of the code regarded it as a salient improvement (Aleksandr L. Makovskij, Stanislav A. Xoxlov, 'Vvodnyj kommentarij k Graždanskomu kodeksu' [An Introductory Commentary on the Civil Code], in: Oleg Ju. Šiloxvost (compiler), *Graždanskoe zakonodatel'stvo Rossii* [...] [Civil Legislation of Russia] (Moscow: Meždunarodnyj centr finansovo-ekonomičeskogo razvitija, 1996) 26).

<sup>40</sup> Family Code of the Russian Federation dated 29.12.1995.

<sup>41</sup> Proekt Opekunskogo Ustava s ob'jasnenijami [Draft Guardianship Regulations with Explanations] (Saint-Petersburg 1897); Graždanskoe Uloženie. Proekt Vysočajše učreždennoj Redakcionnoj Komissii po sostavleniju Graždanskogo Uloženija [Civil Code. A Draft by the Imperially Established Commission for the Drafting of a Civil Code] (Saint-Petersburg 1905).

<sup>42</sup> On the history of this area of law see, e.g., Pavel L. Poljanskij, *Kodeks zakonov o brake, sem'e i opeke RSFSR 1926 g. Istorija i xarakteristika* [...] [The Code of Laws on Marriage, Family and Guardianship of 1926. History and An Account] (Moscow: Norma, Infra-M, 2020) 105 – 106; Viktorija Ė. Šunk, *Rossijskoe zakonodatel'stvo XVIII – XX vekov o duševnobil'nyx: istoriko-pravovoj aspekt* [The Russian Legislation of the Eighteenth and Twentieth Centuries on Mentally Ill: A Legal Historical Perspective], Dissertation for the degree of Candidate of Legal Sciences (Nizhny Novgorod, 2007); Ljudmila Ja. Ivanova, *Graždanskaja pravosub'ektnost' lic, stradajuščix psixičeskimi rasstrojstvami* [Civil Law Personhood of Persons Suffering from Mental Disorders], Dissertation for the degree of Candidate of Legal Sciences (Yekaterinburg, 1993) 11 – 40; Nikolaj A. Semiděrkin, *Sozdanie pervogo bračno-semejnogo kodeksa* [Creating the First Code on Marriage and Family] (Moscow: Izdatel'stvo Moskovskogo universiteta, 1989) 58 – 62; Isaak S. Vol'man, *Opeka i popečitel'stvo* (...) [Guardianship and Curatorship] (Saint Petersburg: Juridičeskij Kniznyj Magazin I.I. Zubkova pod firmoju «Zakonovedenie», 1913) 1 – 3, 187 – 221, passim; Ivan V. Konstantinovskij, *Russkoe zakonodatel'stvo ob umališennyx, ego istorija i sravnenie s inostrannymi zakonodatel'stvami* [Russian Law on Lunatics, Its History and Comparison to Foreign Laws] (Saint Petersburg: Tip. M.M. Stasjuleviča, 1887).

<sup>43</sup> Thus, to name just some of the ideas voiced and rejected at various stages in the drafting and legislative processes: partial incapacitation in cases of minor mental disorder; contractual capacity of fully incapacitated adults during lucid intervals; capacity of fully incapacitated adults to enter

inherited from Soviet legislation continued with no material changes in the 1990s.

Major distinctive elements of this model can be summarized as follows. Two kinds of vulnerability are considered to require the legal system's response: mental disorder resulting in inability to understand the meaning of one's own actions and/or direct them; and substance abuse causing financial hardship to the family. Each kind of vulnerability triggers the standard, legally prescribed response of full or partial incapacitation, which is inseparably linked to the introduction of full or partial guardianship, depending on whether mental disorder or substance abuse is at stake. Proceedings on limitation and restoration of legal capacity are entrusted to the courts, whereas appointment (and displacement) of full or partial guardians as well as supervision of their activities is assigned to an administrative body. Mental disorder as grounds for incapacitation cannot be established by the court without forensic psychiatric expertise. Where needed, the state is responsible for providing residential care through specialized institutions.

The last formative period of this model lies between the first and second waves of the Soviet codification, i.e., between the 1920s<sup>44</sup> and the 1960s. Thus as early as 1927<sup>45</sup>, once (partial) incapacitation due to prodigality had been removed from the Civil Code of 1922, the only form of incapacitation known to the civil law (apart from the civil implications of limitations of legal capacity provided for in criminal law<sup>46</sup>) was full incapacitation due to mental disorder. An adult could be declared incapacitated if they were incapable of conducting their affairs with reason due to mental illness or feeble-mindedness<sup>47</sup>. The codes of the 1910s–1920s provided for incapacitation by order of an administrative body with mandatory participation of medical experts including psychiatrists<sup>48</sup>. The Civil Code and the Code of Civil Procedure, both adopted in 1964, introduced two principal amendments<sup>49</sup>. First, an adult could now be

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into “minor everyday legal acts” if their state of health so allows; appointment of full or partial guardians by the court (not by Guardianship Authorities) (Aleksandr L. Makovskij, Aleksandr I. Muranov (eds), *Zakonodatel'naja istorija prvoj GK RF (1991 – 1994 gg.). Sbornik materialov* [Legislative History of the Part I of the Civil Code of the Russian Federation (1991 – 1994). Collected Materials], 2019 <yadi.sk/i/4qa-n\_93z7fGkQ> 3458 sqq., 7995 et passim; 3370; 3178; 5715).

<sup>44</sup> The law of guardianship as contained in the Family Code of 1918 was adopted in the Family Code of 1926 with minor changes concerning mainly institutional allocation of the respective public functions (see Pavel L. Poljanskij, *The Code of Laws on Marriage, Family and Guardianship of 1926. History and An Account* (n. 42) 105).

<sup>45</sup> Art. 8 and 9 of the Civil Code of 1922 in the original version.

<sup>46</sup> Cf. e.g. Art. 38 of the Criminal Code of the Russian Soviet Federative Socialist Republic dated 1926.

<sup>47</sup> Art. 8 of the Civil Code of 1922 (as amended).

<sup>48</sup> Art. 193 of the Code of Laws on Acts of Civil Status, Marriage, Family and Guardianship dated of 1918 and the annexed Instruction on Examination of Mentally-Ill Persons; Art. 8 of the Civil Code of 1922; Art. 103 – 110 of the Code of Laws on Marriage, Family and Guardianship of 1926.

<sup>49</sup> See on these Olimpiad S. Ioffe, in: Olimpiad S. Ioffe, Jurij K. Tolstoj (eds), *Novyj Graždanskij kodeks RSFSR* [The New Civil Code of the RSFSR] (Leningrad: Izdatel'stvo Leningradskogo universiteta, 1965) 46 – 47; Sergej N. Bartus', in: Ekaterina A. Flejšić (ed.), *Naučno-praktičeskij*

partially incapacitated if he or she caused financial hardship to the family through alcohol or drug abuse<sup>50</sup>. Second, both full and partial incapacitation were entrusted to the courts with mandatory forensic psychiatric examination<sup>51</sup>.

The Law on Full and Partial Guardianship of 2008 laid down an array of detailed rules regarding Guardianship Authorities, the appointment and removal of full and partial guardians, management of over the ward's property etc. Even though this statute (in obvious contrast to prior law) paid considerable attention to property matters and might have brought improvement and clarification of many aspects of full and partial guardianship, it did barely more than fine-tune the general model of the 1960s that the new Russian law inherited from its Soviet predecessor<sup>52</sup>.

Within a relatively short period between 2008 and 2012, a series of judgements issued by the European Court of Human Rights and the Russian Constitutional Court brought a significant turn in the development of this area of law. By its judgements of 2009 and 2012, the Constitutional Court remarkably took the lead against the legislator's conservatism. In its judgement of 2020, it continued reforming procedural aspects of incapacitation. Another new aspect of this development was the emergence and unprecedented increase in the constitutional and international human rights law dimensions of the law of vulnerable adults. Obviously, an ECtHR judgement against Russia, leading to a legislative reform as happened with the *Shtukaturov* case (see below), already puts the said dimensions in the spotlight. This discovery of human rights and international law perspectives on vulnerable adults gained momentum dramatically when the Constitutional Court followed suit. In its first two landmark decisions of 2009 and 2012, the Court extensively and repeatedly invoked not just the national Constitution but also international law and transnational instruments. Specifically, the Court referred to the

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*kommentarij k GK RSFSR* [A Scholarly-Practical Commentary on the Civil Code of the RSFSR] (Moscow: Izdatel'stvo "Juridičeskaja literatura", 1966) 30 – 31.

<sup>50</sup> Art. 16 of the Civil Code of 1964. It is furthermore noteworthy that, whereas the Code of 1922 spoke of inability to conduct one's affairs as a result of mental illness or feeble-mindedness, its successor adopted much more abstract language and referred to inability to understand the meaning of one's own actions and/or direct them as a result of the same mental deficits. Arguably, the new wording favoured medically-laden conceptions of incapacitation rather than interpretations mindful of its social functions and dimension.

<sup>51</sup> Art. 15 and 16 of the Civil Code of 1964; Art. 258 – 263 of the Code of Civil Procedure dated 11.06.1964.

<sup>52</sup> This transpires in particular from the explanations of the drafters, who although visibly seeking to highlight the innovations brought about by this law fail to name any ground-breaking reforms: Pavel V. Krašennikov, in: id. (ed.) *Postatejnyj kommentarij k Semejnomu kodeksu Rossijskoj Federacii, Federal'nomu zakonu "Ob opeke i popečitel'stve" i Federal'nomu zakonu "Ob aktax graždanskogo sostojanija"* [An Article-by-Article Commentary on the Civil Code of the Russian Federation, the Federal Law "On Full and Partial Guardianship" and the Federal Law "On Acts of Civil Status"] (Moscow: Statut, 2012) 21 – 22; Explanatory Note to the Draft <<https://sozd.duma.gov.ru/download/026F385D-88B8-46E3-859A-226722D52646>>; Lidija Ju. Mixeeva, *Kratkij kommentarij k projektu Federal'nogo zakona "Ob opeke i popečitel'stve"* [A Short Commentary on the Draft Federal Law "On Full and Partial Guardianship"] 1(2007) *Semejnoe i žiliščnoe pravo* [Family and Housing Law] 20 – 22.

Convention for the Protection of Human Rights and Fundamental Freedoms, as well as to ECtHR case law (2009, 2012), the CRPD (2012), the Principles for the protection of persons with mental illness and the improvement of mental health care<sup>53</sup> (2009), relevant Council of Europe recommendations<sup>54</sup> (2009, 2012), and to the International Covenant on Civil and Political Rights<sup>55</sup> (2009).

The case, *Shtukaturov v Russia* [2008] ECtHR 44009/05, dated 27 March 2008, exposed several flaws in the Russian procedural framework as regards incapacitation proceedings. In particular, the Court found that the applicant, who had been declared fully incapable by court order, had been effectively deprived of the right to be heard and to present his case through representatives of his choosing. Similar issues were addressed in Resolution No. 4-P, dated 27 February 2009, and to some extent in Resolution No. 3-P, dated 21 January 2020, of the Constitutional Court, according to which a number of statutory provisions were in conflict with the Constitution.

The Constitutional Court in Resolution No. 15-P, dated 27 June 2012, decided that the then-standard, one-size-fits-all response to mental disorder of any kind, consisting of full incapacitation, was not in accordance with the Constitution to the extent that the legal system did not provide differentiated measures depending on the actual degree of impairment.

The above landmark judgements of 2008–2012 triggered two significant legislative reforms in the early 2010s. The statutory rules of civil procedure were amended, with effect from 8 April 2011, in order to safeguard the vulnerable adult's right to be heard and to present their case personally and/or with the help of representatives of their choosing<sup>56</sup>. And through another set of amendments, effective as of 1 March 2015, the long-sought<sup>57</sup> partial

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<sup>53</sup> UN General Assembly resolution 46/119, dated 17.12.1991.

<sup>54</sup> Council of Europe, Committee of Ministers Recommendation No. REC(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder dated 22.09.2004; Council of Europe, Committee of Ministers Recommendation No. R(99)4 of the CM to the member states on principles concerning the legal protection of incapable adults dated 23.02.1999; Council of Europe, Committee of Ministers Recommendation no R(83)2 of the Committee of Ministers to member states concerning the legal protection of persons suffering from mental disorder placed as involuntary patients dated 22.02.1983; Parliamentary Assembly of the Council of Europe, Recommendation 818 (1977) on the situation of the mentally ill dated 8.10.1977.

<sup>55</sup> Dated 17.12.1991.

<sup>56</sup> Federal Law No. 67-FZ dated 06.04.2011. The Explanatory Note to the respective draft amendments to the Code of Civil Procedure explicitly invokes the case *Shtukaturov v Russia* (<<https://sozd.duma.gov.ru/download/76D21E5C-3FD4-4C28-A699-1AA99EE5AAEC>>) and according to a report of the Russian Ministry of Justice these amendments implemented the Resolution of the Constitutional Court No. 4-P dated 27.02.2009 (<<https://minjust.gov.ru/uploaded/files/perechen-reshenij-konstitutsionnogo-suda-rossijskoj-federatsii-vo-ispolnenii-kotoryih-prinyatyi-normativnyie-pravovyye-aktyi-na-01102023.docx>>, Para 48 at p. 36).

<sup>57</sup> Aleksandr T. Bonner, 'Oxrana interesov duševnobil'nyx i slaboumnyx graždan' [Protection of the Interests of Mentally Ill and Feeble-Minded Persons] 11 (1986) *Sovetskoe gosudarstvo i pravo* [Soviet State and Law] 99 – 105, 100 – 101, 103; Aleksandra I. Pergament, in: Sergej N. Bratus' (ed.), *Sovetskoe graždanskoe pravo. Sub"ekty graždanskogo prava* [Soviet Civil Law. Subjects of Civil Law] (Moscow: Juridičeskaja literatura, 1984) 44; Ljudmila Ja. Ivanova, Civil Law

incapacitation due to mental disorder was finally introduced into the Civil Code<sup>58</sup>. The same bill additionally entrenched gambling addiction as grounds for partial incapacitation in the Code.

Triggered by the high courts' activism and subsequently implemented by the legislature, the above statutory amendments were rushed and not properly thought through, as this report notes in various contexts. Yet the change they have brought has certainly been fundamental, and they may or may not become a starting point for revolutionizing the law of vulnerable adults in Russia at large.

**6. Give a brief account of the main current legal, political, policy and ideological discussions on the (evaluation of the) current legal framework (please use literature, reports, policy documents, official and shadow reports to/of the CRPD Committee etc). Please elaborate on evaluations, where available.**

The policy discussions, both on the legal framework governing the status of vulnerable adults and on the law in action, have gone on for centuries, with many topics forming a perennial part of the discourse and others having emerged only in the past few decades. A salient feature of the post-Soviet era and especially of recent years has been that the cause of ensuring the rights of vulnerable adults has been spotlighted outside purely professional discourses such as the legal, forensic, and the psychiatric. Mainly NGOs and independent media have developed and vocalized critical approaches towards current law, state policy, and the ways in which state institutions operate in this area; primarily, these are the courts, forensic psychiatric expert organisations, neuropsychiatric institutions, and Guardianship Authorities. The Russian state's sweeping campaign against both sectors as well as the systematic suppression of dissent, which increased dramatically after Russia's full-scale invasion of Ukraine in February 2022, will inevitably affect the balance of power in this debate and its visibility to the general public. An array of media outlets and individuals who contributed to this discussion, and indeed investigative journalism, have been outlawed in one form or another in the last two and a half years.

Throughout this report, reference is made to numerous disputed issues of the internal legal discourse. Among the major topics of debate, sometimes going back decades, have been:

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Personhood of Persons Suffering from Mental Disorders (n. 42) passim, for further references see p. 73 – 74.

<sup>58</sup> Federal Law No. 302-FZ dated 30.12.2012. According to a report of the Russian Ministry of Justice, these amendments implemented the Resolution of the Constitutional Court No. 15-P dated 27.06.2012 (<<https://minjust.gov.ru/uploaded/files/perechen-reshenij-konstitutsionnogo-suda-rossijskoj-federatsii-vo-ispolnenii-kotoryih-prinyatyie-normativnyie-pravovyie-aktyi-na-01102023.docx>>, Para 96 at p. 91).

that different measures are not available for vulnerable adults depending on their specific situation<sup>59</sup>; but after the reform that introduced partial incapacitation due to mental disorder<sup>60</sup>, also the need to review various provisions of Russian law to do justice to the specifics of the newly introduced category of partial incapacitation; the need to reform neuropsychiatric institutions, in particular (and long overdue) to address the pressing concerns as regards inhuman and degrading treatment, disrespect of privacy etc. on the one hand; a further issue in the context is the structural conflict of interest characteristic in operating such institutions as the sole state-appointed representative, acting as full or partial guardians of the adult while at the same time being the principal service provider and the most likely potential wrongdoer in respect of the adult's interests; relatedly, a hot controversy has surrounded the proposal to promote shared guardianship;

the adult's procedural rights, in particular their right to be heard and to be represented by an attorney of their choosing in all kinds of proceedings related to incapacitation.

The discussion in the media<sup>61</sup>, fuelled by investigative journalism and evidence gathered by the volunteer movement, has focused primarily on the situation in neuropsychiatric homes and has urged multi-faceted, ground-breaking reforms. Advocates have called for profound rearrangement of such institutions, the complete abandonment of this form of care or at least a dramatic narrowing of its scope. Amongst other things, they have demanded to solve the inherent conflict of interest of the neuropsychiatric homes, for instance by allowing for the appointment of alternative and/or multiple guardians for adults who reside in such settings<sup>62</sup>. Additionally, independent media and NGOs have been the main proponents of new ideologies that question the dominant patriarchal approach and aim to enhance the agency of vulnerable adults.

## **7. Finally, please address pending and future reforms, and how they are received by political bodies, academia, CSOs and in practice.**

The most prominent pending reform concerning empowerment and protection of vulnerable adults was conceived in 2014 (or earlier); it is expressed in draft law No. 879343-6, "Concerning the Introduction of

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<sup>59</sup> Remarkably, in his concurring opinion to Resolution No. 4-P of the Constitutional Court, dated 27.02.2009, Justice Gadis A. Gadžiev drew on the respective scholarly discussion from Soviet literature and expressly referred to it in advocating for a differentiated approach to the consequences of full incapacitation due to mental disorder as regards diverse areas of law.

<sup>60</sup> See Q5 *in fine* and numerous other sections of the report.

<sup>61</sup> On which see Ekaterina Rudneva, Diskurs rossijskix SMI o psixonevrologičeskix internatax [Russian Media Discourse about Psychoneurological Residential-Care Institutions], 13(2) 2021 *Laboratorium: žurnal social'nyx issledovanij* [Laboratorium: A Journal of Social Studies] 240 – 266.

<sup>62</sup> See Q7.



Amendments to Certain Legislative Acts of the Russian Federation for the Purpose of Enhancing Guarantees for the Realisation of Rights and Freedoms of Incapable and Not Fully Capable Citizens”<sup>63</sup>. The main purpose of this reform was to deprive the neuropsychiatric institutions of their legal monopoly on full or partial guardianship of the adults residing in them. Instead, it proposed that the situation in which an incapacitated adult who resides in a neuropsychiatric home also becomes a ward of the respective home – the mandatory arrangement so far – should be reserved for exceptional cases only. According to the proposal, fully or partially incapacitated adults who reside in a home should receive a full or partial guardian other than the home as a legal entity or its management. The proposal further suggested that although the appointment of a full or partial guardian should prioritize natural persons, certain NGOs should also be eligible. An array of provisions on multiple full and partial guardians, plenary or partial, were to be introduced.

Beyond that, the draft sought to amend the existing regulatory framework in order to fill some of the gaps resulting from the somewhat hasty and not thoroughly considered introduction of partial incapacitation due to mental disorder or addiction to gambling.

Only a negligible portion of these proposals were adopted as amendments, to take effect as of 1.09.2024<sup>64</sup>. Otherwise the bill is stalled and the prospects of its adoption remain unclear. Intense backroom struggles have weighed on the heated discussions and deliberations such that the actual interests and motives at play can often only be guessed at<sup>65</sup>.

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<sup>63</sup> <<https://sozd.duma.gov.ru/bill/879343-6>>.

<sup>64</sup> Federal Law No. 465-FZ dated 04.08.2023.

<sup>65</sup> Peculiarly, whereas initially the Presidential Council on Codification and Improvement of Civil Legislation generally approved the concept of the draft (Expert Opinion No. 147-2/2015 dated 16.11.2015, in: *Ekspertnye zaključenija Soveta pri Prezidente Rossijskoj Federacii po kodifikacii i soveršenstvovaniju graždanskogo zakonodatel'stva 2015 g. [...]* [Expert Opinions of the Council under the President of the Russian Federation on Codification and Improvement of Civil Legislation of 2015] <<https://privlaw.ru/upload/iblock/943/mrp4bba5berm4rhssfu1vtqaztbnuce.pdf>> 52 – 56 and the unpublished Expert Opinion No. 136-1/2014 dated 24.11.2014 referred to in the Expert Opinion No. 147-2/2015), in its more recent opinions the Council has been decidedly opposed to the whole idea (Expert Opinion No. 187-5/2019 dated 18.04.2019, in: *Ekspertnye zaključenija Soveta pri Prezidente Rossijskoj Federacii po kodifikacii i soveršenstvovaniju graždanskogo zakonodatel'stva 2019 g. [...]* [Expert Opinions of the Council under the President of the Russian Federation on Codification and Improvement of Civil Legislation of 2019] <<https://privlaw.ru/upload/iblock/494/8s3m8vo7dmmsvuj1fgfh9fdk993xm7bi.pdf>> 67 – 73 and Expert Opinion No. 194-1/2020 dated 9.01.2020, in: *Ekspertnye zaključenija Soveta pri Prezidente Rossijskoj Federacii po kodifikacii i soveršenstvovaniju graždanskogo zakonodatel'stva 2020 g. [...]* [Expert Opinions of the Council under the President of the Russian Federation on Codification and Improvement of Civil Legislation of 2020] <<https://privlaw.ru/upload/iblock/e09/vvrx1iuz2wisz53e7tn2gts90cbbjij1.pdf>> 48 – 55). This change of attitude was contemporaneous with the change of chairmanship in the Council. On the debates during the deliberations of the Council, see: Gul'nara Ismagilova, *Nedeesposobnym dali bol'she predstavitelej // Sovet po kodifikacii podderžal zakonoproekt o «vnešnix» opekunax [The Incapacitated Were Given More Representatives // The Codification Council Supported the Draft Law on 'External' Guardianship]* 21.11.2014 <[https://zakon.ru/discussion/2014/11/25/nedeesposobnym\\_dali\\_bolshe\\_predstavitelej\\_sovet\\_p](https://zakon.ru/discussion/2014/11/25/nedeesposobnym_dali_bolshe_predstavitelej_sovet_p)

Most importantly, with the reform at a standstill, the system is left with its major flaw: the neuropsychiatric institutions' guardianship monopoly in respect of the adults residing in them and the resulting structural conflict of interest.

Since 2016, the Ministry of Labour and Social Protection has been considering reforming many aspects of the system of neuropsychiatric homes<sup>66</sup>, but so far this endeavour has not brought about any substantial improvements.

## **SECTION II – LIMITATIONS OF LEGAL CAPACITY**

### **8. Does your system allow limitation of the legal capacity of an adult? N.B. If your legal system provides such possibilities, please answer questions 8 - 15; if not proceed with question 16.**

#### **a. on what grounds?**

Full incapacitation, depriving the affected individual of active legal capacity in virtually every respect, can be ordered for adults who suffer from mental disorder resulting in inability to understand the meaning of one's own actions and/or direct them<sup>67</sup>.

Partial incapacitation, depriving the affected individual of some elements of active legal capacity and limiting their active legal capacity in many other respects in as far as the partial guardian's consent is required, can be ordered for two large categories of adults: those who put their family in a difficult financial situation due to addiction to gambling or to alcohol or drug abuse<sup>68</sup>; and those who suffer from a mental disorder resulting in inability to understand the meaning of one's own actions and/or direct them without the assistance of others<sup>69</sup>.

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[o kodifikaciji podderzhal zakonoproekt o vneshnix](#) >; Evgeniya Efimenko, Plenum VS po "intellektualke" i problemy opeki: čto obsudil Sovet po kodifikaciji [Plenum of the Supreme Court on the intellectual property and the problems of guardianship: what the Codification Council discussed] 19.04.2019 <<https://pravo.ru/story/210967/>>; Ol'ga Plešanova, Mnogogolosnye akcii i prinuditel'naja likvidacija gosučreždenij [Multi-Vote Shares and Forced Liquidation of State Owned Institutions] 10.01.2020 <[https://zakon.ru/blog/2020/01/10/mnogogolosnye\\_akcii\\_i\\_prinuditelnaya\\_likvidaciya\\_gosuchre\\_zhdenij](https://zakon.ru/blog/2020/01/10/mnogogolosnye_akcii_i_prinuditelnaya_likvidaciya_gosuchre_zhdenij)>.

<sup>66</sup> See, e.g., Order of the Ministry of Labour and Social Protection of Russia, No. 391, dated 27.07.2016, "On the establishment of a working group to work out principal approaches to reforming the operation of neuropsychiatric homes" (as amended).

<sup>67</sup> First sentence of Art. 29(1) of the Civil Code.

<sup>68</sup> First sentence of Art. 30(1) of the Civil Code.

<sup>69</sup> First sentence of the first paragraph of Art. 30(2) of the Civil Code: "A citizen who, due to a mental disorder, can understand the meaning of his [or her] actions or direct them only with the assistance of other persons, may be partially incapacitated by a court in accordance with the procedures established by the civil procedural legislation".

Mental disorders as grounds for incapacitation are conceived of primarily in medical terms, and their presence is established by forensic psychiatrists. Furthermore, they constitute a self-sufficient grounds for incapacity, such that in incapacitation cases, either the adult's actual social competence, experience living with the disorder, the eventual risks to be prevented or mitigated by introduction of the measure, or the necessity, purposes and potential benefits of a full or partial guardianship do not fall within the scope of the court's assessment<sup>70</sup>.

Addiction to gambling and alcohol or drug abuse are grounds for partial incapacitation only where they cause financial hardship to the family<sup>71</sup>.

**b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**

Full incapacitation deprives the adult of virtually all elements of active legal capacity. This derives from the very idea of incapacity [*nedeeposobnost'*] as well as from the provisions of the Civil Code stipulating that [all] juridical acts on behalf of the fully incapacitated adult shall be performed by their guardian<sup>72</sup> and that [all] legal acts performed by such adult shall be void<sup>73</sup>.

Partially incapacitated adults cannot perform any legal acts on their own save for those expressly allowed by the law. All other legal acts require the partial guardian's consent. For adults declared partially incapacitated due to addiction to gambling or substance abuse, the scope of limitation is narrower than for those partially incapacitated due to mental disorder<sup>74</sup>.

**c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?**

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<sup>70</sup> See e.g. Paras 93 – 94 of *Shtukaturov v Russia* [2008] ECtHR 44009/05 dated 27.03.2008, Paras 90 – 91 and 93 of *Lashin v Russia* [2013] ECtHR 33117/02 dated 22.01.2013; Paras 47, 50 and 62 of *Shakulina and Others v Russia* [2018] ECtHR 24688/05 dated 05.06.2018.

<sup>71</sup> See, e.g., Tat'jana V. Klimenko in: Elena R. Rossinskaja (ed.), *Sudebnaja èkspertiza v civilističeskix processax* [Forensic Expertise in Civil Proceedings] (Moscow: Prospekt, 2018) 679 – 680; Julija N. Zipunnikova, E.Ju. Rykova Nekotorye osobennosti dokazyvanija po delam o priznanii zaveščanija nedejstvitel'nyim [Certain Features of Evidence Taking in Disputes on Invalidity of a Will] 1 (2007) *Arbitražnyj i graždanskij process* [Arbitrazh and Civil Procedure] 30 – 34, 33. For a critical discussion of this prerequisite, see Klavdija B. Jarošenko, Graždanskij kodeks i prava graždanina: soveršenstvovanie zakonodatel'stva [The Civil Code and the Rights of the Citizen: Improving the Legislation] 5 (2012) *Žurnal rossijskogo prava* [Journal of Russian Law] 104–110, 109–110.

<sup>72</sup> Art. 29(2) of the Civil Code.

<sup>73</sup> First paragraph of Art. 171(1) of the Civil Code.

<sup>74</sup> Second and third paragraphs of Art. 30(1) and second and third paragraphs of Art. 30(2) of the Civil Code respectively.

Both full and partial incapacitation automatically affect various aspects of legal capacity as determined by the statutory framework in respect of specific grounds for incapacitation. The only point at which an adjustment of the standard scope of limitation is provided for concerns the right of an adult partially incapacitated due to mental disorder to dispose of their “earnings, scholarships and other income”. Whereas the adult is generally free to exercise this right on their own, it can be limited or withdrawn by the court, provided that sufficient grounds exist<sup>75</sup>.

**d. can the limited legal capacity be restored and on what grounds?**

If the grounds for full incapacitation or partial incapacitation no longer exist, full capacity shall be restored by the court<sup>76</sup>. If a fully incapacitated adult develops an ability to understand the meaning of their own actions and direct them with other persons’ assistance, full incapacitation is to be replaced by the court with partial incapacitation due to mental disorder<sup>77</sup>.

There is no fixed interval for review of the measures. Accordingly, the limitations remain effective regardless of whether the initial grounds for full or partial incapacitation continue to exist unless an application for restoration of full capacity or for replacement of full incapacitation with partial incapacitation is filed and granted.

**e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?**

The appointment of a full or partial guardian except where neuropsychiatric homes or similar institutions perform the functions of the guardian is inseparably linked to full or partial incapacitation. Under Russian law, no substituted or supported decision-making is possible without a declaration of full or partial incapacitation, which must always lead, at least as per the statutory provisions, to the appointment of a caregiver who will be responsible for decision-making (full or partial guardian, institutional representative).

**f. are there any other legal instruments,<sup>78</sup> besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

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<sup>75</sup> Fourth paragraph of Art. 30(2) of the Civil Code.

<sup>76</sup> Second paragraph of Art. 29(3) and first paragraph of Art. 30(3) of the Civil Code.

<sup>77</sup> First paragraph of Art. 29(3) of the Civil Code.

<sup>78</sup> Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts

N/A

**9. Briefly describe the effects of a limitation of legal capacity on:  
a. property and financial matters;**

A fully incapacitated adult cannot perform any legal acts and in particular cannot enter into contracts on their own, and any legal act performed by them is null and void<sup>79</sup>. In the interest of the adult, the court may upon the guardian's request declare such an act valid provided that it is to the adult's benefit<sup>80</sup>. Legal acts on the adult's behalf in property and financial matters are entrusted to the guardian, as is the administration of the adult's property in general<sup>81</sup>. Alternatively<sup>82</sup>, if constantly necessary, the Guardianship Authorities may assign the administration of (some particular) real property and/or valuable movable property to another person on the basis of a fiduciary management agreement<sup>83</sup>. Such separation of functions between the guardian and a property administrator was unknown to Russian law prior to the First Part of the Civil Code of 1994, and its implementation, both in the statutory framework<sup>84</sup> and reportedly in practice<sup>85</sup> leaves much to be desired.

Apart from certain legal acts that cannot be performed by a representative at all,<sup>86</sup> such as making a will,<sup>87</sup> or that specifically cannot be performed by a representative of a person lacking legal capacity (such as a major donation)<sup>88,89</sup>, all legal acts on behalf of the fully incapacitated adult are entrusted to the guardian<sup>90</sup>. Full or partial guardians may issue powers of attorney to other representatives of their choosing<sup>91</sup>. According to an express statutory

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<sup>79</sup> First paragraph of Art. 171(1) of the Civil Code.

<sup>80</sup> Art. 171(2) of the Civil Code.

<sup>81</sup> Art. 37(1), second paragraph of Art. 37(2), Art. 37(4), second sentence of the first paragraph of Art. 38(1) of the Civil Code, Art. 18 – 21 of the Law on Full and Partial Guardianship.

<sup>82</sup> Second sentence of first paragraph of Art. 38(1) of the Civil Code, Art. 18(3) of the Law on Full and Partial Guardianship.

<sup>83</sup> First paragraph of Art. 38(1), second paragraph of Art. 1026(1) of the Civil Code.

<sup>84</sup> See e.g. Aleksandr A. Il'jušenko, *Dogovor doveritel'nogo upravlenija imuščestvom podopečnogo* [The Entrusted Management Agreement over the Ward's Property] (Moscow: Jurist, 2007).

<sup>85</sup> Lidija Ju. Mixeeva, in: Pavel V. Krašeninnikov (ed.) *Graždanskij kodeks Rossijskoj Federacii. Postatejnyj kommentarij k glavam 1, 2, 3* [The Civil Code of the Russian Federation. An Article-by-Article Commentary on Chapters 1, 2, and 3] (Moscow: Statut, 2014) 140 – 141.

<sup>86</sup> Art. 182(4) of the Civil Code.

<sup>87</sup> Art. 1118(3) of the Civil Code.

<sup>88</sup> Art. 575(1)(1) of the Civil Code.

<sup>89</sup> On both see Q9 d infra.

<sup>90</sup> Art. 29(2), 31(2), 32(2) of the Civil Code, Art. 2(1) of the Law on Full and Partial Guardianship. Art. 37(3) of the Civil Code stipulates additionally that a guardian as well as their spouse and close relatives cannot conclude any legal acts on behalf of the ward in respect of a guardian's spouse and/or close relatives. This provision appears, however, redundant given that the same article bans such legal acts altogether anyway.

<sup>91</sup> Art. 185(2) of the Civil Code.

provision, such issuance of a power of attorney is subject to prior authorization by the Guardianship Authority<sup>92</sup>.

A declaration of full incapacitation of an adult terminates powers of attorney previously issued by that adult<sup>93</sup>. Similarly, in respect of several types of contracts for agency and related services, termination is stipulated by law in case of incapacitation of either or of a certain party; the statutory framework treats these separately and independently from powers of attorney issued in connection with them. For example, limitation of either party's legal capacity terminates the contract of mandate [*dogovor poručenija*]<sup>94</sup>. Other contracts on the carrying out of someone else's affairs terminate upon incapacitation of the agent but not of the principal; this applies to the commission agency contract [*dogovor komissii*]<sup>95</sup>, the agency contract [*agentskij dogovor*]<sup>96</sup>, and the fiduciary management agreement [*dogovor doveritel'nogo upravljenija*]<sup>97</sup>. Incapacitation of a party to various partnerships either terminates the partnership altogether or leads, alternatively, to the exclusion of the incapacitated partner<sup>98</sup>. Although the ground-breaking reforms in the field of legal representation of incapacitated adults<sup>99</sup> arguably call for reconsideration of (some of) these rules, so far they have remained unchanged.

A number of restrictions are imposed by law on full and partial guardians as regards dispositions in property matters. Thus, guardians cannot borrow or lend money on behalf of the ward except in specific situations or under specific conditions<sup>100</sup>. They cannot grant the ward's property by lease for more than five years unless in exceptional cases<sup>101</sup>. Real assets can only be alienated in specific kinds of situations and/or under conditions set out by law<sup>102</sup>.

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<sup>92</sup> Art. 21(2) of the Law on Full and Partial Guardianship. This rule has been criticized for good reason. Its rationale and scope of application are far from clear, on which see, e.g., *Koncepcija sovršenstvovanja obščih položenj Graždanskogo kodeksa Rossijskoj Federacii* [Concept for the Improvement of the General Provisions of the Civil Code of the Russian Federation], 4 (2009) *Vestnik Vyššego Arbitražnogo Suda Rossijskoj Federacii* [The Herald of the Supreme Arbitrazh Court of the Russian Federation] 9 – 101, 91; Julija P. Prisjažnjuk, *O tekste i kontekste (stat'ja 21 Zakona "Ob opeke i popečitel'stve" v zerkale notarial'noj praktiki)* [On Text and Context (Article 21 of the Law "On Full and Partial Guardianship" in the Mirror of Notarial Practice)], in: Ol'ga N. Nizamieva (ed.) *Semejnoe pravo na rubeže XX – XXI vekov: k 20-letiju Konvencii OON o pravax rebenka* [Family Law at the Turn of XX – XXI Centuries: to the 20th Anniversary of the UN Convention on the Rights of the Child] (Moscow: Statut, 2011).

<sup>93</sup> Art. 188(1)(5) and (6) of the Civil Code. For earlier, see Art. 2330(5) of the First Part of the Volume X of the Digest of Laws of the Russian Empire (Svod zakonov), as amended on 22.12.1858. The Soviet legislation adopted the same approach (Art. 260(g) of the Civil Code of the Russian Soviet Federative Socialist Republic, dated 1922; Art. 69(1)(6) and (7) of the Civil Code of the Russian Soviet Federative Socialist Republic, dated 1964).

<sup>94</sup> Fourth paragraph of Art. 977(1) of the Civil Code.

<sup>95</sup> Fourth paragraph of Art. 1002(1) of the Civil Code.

<sup>96</sup> Third paragraph of Art. 1010 of the Civil Code.

<sup>97</sup> Fourth paragraph of Art. 1024(1) of the Civil Code.

<sup>98</sup> Art. 76(1) (full partnership [*polnoe tovariščestvo*]), second paragraph of Art. 1050(1) (simple partnership [*prostoe tovariščestvo*]) of the Civil Code. The latter provision applies, apparently, to the partnership in commendam [*tovariščestvo na vere*] by virtue of Art. 82(5) of the Civil Code.

<sup>99</sup> See Q5, Q9 e, and Q13 a.

<sup>100</sup> Art. 19(4) and (5) of the Law on Full and Partial Guardianship.

<sup>101</sup> Art. 19(6) of the Law on Full and Partial Guardianship.

<sup>102</sup> Art. 20(1) of the Law on Full and Partial Guardianship.

Most transactions in property matters performed by the full guardian on the ward's behalf are subject to prior authorization by the Guardianship Authority<sup>103</sup>.

Written instructions issued by the Guardianship Authority as regards dispositions of the ward's property are binding upon full and partial guardians<sup>104</sup>.

Pursuant to recently introduced<sup>105</sup> provisions, when carrying out their functions in general and specifically when performing legal acts on behalf of the adult or making any dispositions in property matters, full guardians shall take into account the adult's opinion or, where such opinion cannot be established, the adult's preferences<sup>106</sup>. But so far it has hardly been possible to draw any conclusions as to the impact of this new approach on the realities of guardianship; in particular, it is unclear how this dovetails with a largely unamended statutory framework that includes rules on how guardians are to perform their duties and on authorization by and instructions of the Guardianship Authorities.

Where portions of the adult's property are entrusted to a fiduciary manager, the manager's actions are subject to restriction and/or the requirement of prior authorization by the Guardianship Authority stipulated in respect of the guardians<sup>107</sup>.

The consequences of partial incapacitation for property and financial matters depend on its grounds. If a differentiated approach to the two categories of partial incapacitation appears advisable in general (i.e., whether due to mental disorder or addiction to gambling or substance abuse), it is clearly even more so regarding pecuniary issues, given that addiction to gambling and substance abuse only give grounds to partial incapacitation if they cause economic harm to the family. This might explain why the legislature has now provided for diverging regimes although in most cases it paid little attention to the inherent differences between the two categories of partial incapacitation when it introduced partial incapacitation on grounds of mental disorder. Even so, it is doubtful whether the adjustments connected to the new

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<sup>103</sup> Art. 37(1) and (2) of the Civil Code, Art. 19(2),(4) and (6), 20(2), 21(1) of the Law on Full and Partial Guardianship. In a recent case, the Supreme Court emphasized that the Guardianship Authorities' refusal to grant such authorization shall not be arbitrary and any decision as to whether authorization should be granted must be based on a careful consideration of all the relevant circumstances (Cassation ruling of the Judicial Panel for Administrative Cases of the Supreme Court No. 19-KAD23-22-K5 dated 29.11.2023). Whether the Guardianship Authorities' actual decision-making lives up to this standard is another question. Repeated emphasis on this issue in the highest courts's cases on their authorization of legal acts on behalf of minors (who are subject to a largely identical legal regime) seems to indicate to the contrary (see, e.g., Cassation rulings of the Judicial Panel for Administrative Cases of the Supreme Court No. 35-KAD23-3-K2 dated 02.08.2023, No. 5-KAD23-22-K2 dated 19.07.2023, and No. 84-KAD22-1-K3 dated 30.03.2022, Resolution of the Constitutional Court No. 13-P dated 08.06.2010, Ruling of the Constitutional Court No. 119-O dated 06.03.2003).

<sup>104</sup> Art. 19(2) of the Law on Full and Partial Guardianship.

<sup>105</sup> Federal Law No. 302-FZ dated 30.12.2012 with effect as of 1.03.2015.

<sup>106</sup> Fourth paragraph of Art. 36(3), Art. 29(2) and Art. 37(4) of the Civil Code respectively.

<sup>107</sup> Second paragraph of Art. 38(1) of the Civil Code, Art. 23 of the Law on Full and Partial Guardianship.

grounds for partial incapacitation were comprehensive enough or indeed whether they embraced all relevant aspects of the statutory framework on property and financial matters.

Both kinds of partial incapacitation entail far-reaching limitations of the adult's capacity to perform legal acts and in particular to conclude contracts, but their scope differs. Adults partially incapacitated due to addiction to gambling or substance abuse can only perform "minor everyday legal acts"<sup>108</sup>.

In contrast, adults partially incapacitated due to mental disorder are free to dispose of their "salary, scholarship, and other income". They may also perform "minor everyday legal acts", legal acts "aimed at obtaining benefit without consideration" that do not require notarization or state registration, and legal acts regarding funds provided by the partial guardian or, with the guardian's consent, by a third party for a specific purpose or for free disposal<sup>109</sup>. Additionally, the partial guardian can grant such an adult permission to dispose of alimony, pensions, damages received for personal injury and/or in connection with the death of the breadwinner, and other payments for the adult's maintenance<sup>110</sup>. Conversely, the court can limit or withdraw their capacity to dispose freely of their "salary, scholarship, and other income" at request of the partial guardian or the Guardianship Authority<sup>111</sup>.

Legal acts that cannot be performed by a partially incapacitated adult on their own need to be authorized by the partial guardian<sup>112</sup>. If performed without such consent, the partial guardian can apply to have such acts invalidated<sup>113</sup>.

Partial guardians may dispose of the adult's income with the exception of income left at free disposal of the ward<sup>114</sup>.

The partial guardian's consent to legal acts performed by the adult and certain legal acts performed by the partial guardian in respect of the adult's income are subject to authorization by the Guardianship Authority in keeping with the rules as to the guardian's legal acts on behalf of the fully incapacitated adult<sup>115</sup>.

As in the case of full guardianship, partial guardians are bound by written instructions issued by the Guardianship Authority concerning dispositions of the ward's property<sup>116</sup>.

Powers of attorney previously issued by the adult and contracts for various kinds of agency and related services terminate with partial incapacitation of either or of a specific party pursuant to the same rules that apply in cases of full incapacitation (see above). Here again, these rules have remained

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<sup>108</sup> Second paragraph of Art. 30(1) of the Civil Code.

<sup>109</sup> Third sentence of the second paragraph of Art. 30(2), Art. 26(2)(1) and (4), 28(2) of the Civil Code.

<sup>110</sup> Third paragraph of Art. 30(2) of the Civil Code.

<sup>111</sup> Fourth paragraph of Art. 30(2) of the Civil Code.

<sup>112</sup> First sentence of the third paragraph of Art. 30(1), first sentence of the second paragraph of Art. 30(2), first paragraph of Art. 33(2) of the Civil Code.

<sup>113</sup> First paragraph of Art. 176(1) of the Civil Code.

<sup>114</sup> Second sentence of the third paragraph of Art. 30(1), Art. 37(1) of the Civil Code.

<sup>115</sup> Art. 37(1) and (2) of the Civil Code, Art. 19(2),(4) and (6), 20(2) and 21(1) of the Law on Full and Partial Guardianship.

<sup>116</sup> Art. 19(2) of the Law Full and Partial Guardianship.



unchanged so far despite the ground-breaking reforms in the field of legal representation of incapacitated adults<sup>117</sup>, which arguably call for reconsideration of at least some of them.

Unlike in cases of full incapacitation, the partially incapacitated adult's property is not handed over to the partial guardian<sup>118</sup>. Theoretically, administration of (some) real property and/or valuable movable property may be conferred on another person on the basis of a fiduciary management agreement, just as in full incapacitation cases and subject to the same conditions and regulations (see above)<sup>119</sup>.

### **b. family matters and personal rights (e.g. marriage, divorce, contraception);**

Full incapacitation entails drastic changes in the adult's legal status in family law and the law of persons whereas partial incapacitation only brings about several specific limitations. Here again, the applicable rules of family law and the law of persons were initially designed before the legal institution of partial incapacitation due to mental disorder was introduced. Hence, bearing in mind the fundamental difference between the two categories of partial incapacitation, it remains to be seen whether the law as it stands will be subject to review in one respect or another. In family matters as elsewhere, there is obviously no cogent reason to automatically extend a legal regime originally designed for adults who cause financial hardship to the family due to substance abuse to those partially incapacitated due to minor mental disorders.

Also, when amending the Civil Code in order to make sure that the adult's opinion or, if it cannot be established, their preferences are taken into account<sup>120</sup>, the legislature left the Family Code unchanged despite the arguably even more pressing applicability of this new approach in family matters. Yet whereas some of the newly introduced provisions that refer to the adult's opinion or preferences apply specifically to property matters governed by civil law<sup>121</sup> (as distinct from family law), one rule provides that full and partial guardians must generally consider the adult's opinion or preferences when performing their duties<sup>122</sup>. There is hardly any reason why this standard would

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<sup>117</sup> See Q5, Q9 e, and Q13 a.

<sup>118</sup> Art. 18(1) of the Law on Full and Partial Guardianship.

<sup>119</sup> See, e.g., Anatolij N. Levuškin, in: Larisa V. Sannikova (ed.) *Graždanskij kodeks Rossijskoj Federacii. Postatejnyj kommentarij k glavam 1 – 5* [The Civil Code of the Russian Federation. An Article-by-Article Commentary on Chapter 1 to 5] (Moscow: Statut, 2015); Natal'ja V. Kozlova, *Problemy statusa častnogo obrazovatel'nogo učreždenija v svete reformirovanija zakonodatel'stva o veščnyx pravax* [Problems of the Status of a Private Educational Institution in the Light of Reforming the Legislation on Property Rights] 7 (2016) *Žurnal rossijskogo prava* [Journal of Russian Law] 35 – 43, 42.

<sup>120</sup> Federal Law No. 302-FZ dated 30.12.2012 with effect as of 1.03.2015.

<sup>121</sup> Art. 29(2) of the Civil Code concerning legal transactions (a concept that, pursuant to the dominant view, does not embrace legal acts of family law) and Art. 37(4) of the Civil Code concerning property management.

<sup>122</sup> Fourth paragraph of Art. 36(3) of the Civil Code.

not apply to such duties in the family law realm, but I am unaware of any assessment of this rule's actual impact, if any, in family law<sup>123</sup>.

Unlike those partially incapacitated<sup>124</sup>, fully incapacitated adults have no marital capacity: they cannot marry<sup>125</sup>, and a marriage concluded by an incapacitated person can be declared invalid by court order<sup>126</sup>. Importantly, invalidity in such cases can be claimed not only by a spouse who lacked awareness of the incapacity but also by the incapacitated adult's guardian, other persons whose rights were violated by the marriage, or the Guardianship Authority<sup>127</sup> and the public procurator<sup>128</sup>. It should be noted, however, that unless declared invalid by court, a marriage entered into by a fully incapacitated adult is considered effective<sup>129</sup>. The court may deny the claim for invalidation and declare the marriage valid if a declaration of full legal incapacity in effect at the time of marriage ceases to exist by the time of the proceedings<sup>130</sup>. By way of illustration, the Supreme Court included a case in its recent survey of case law in which invalidation was denied and the marriage declared valid because the spouse, who had been declared fully incapacitated by the time of marriage, was afterwards declared partially incapable. Accordingly, the courts concluded that the marriage, although initially tainted by full incapacity of one of the spouses, could no longer be invalidated since full incapacity had been replaced by partial incapacity, which is no obstacle to a valid marriage<sup>131</sup>.

Generally, only divorces by mutual consent of spouses with no common children under the age of majority can be performed before the civil registry authorities<sup>132</sup>. Where mutual consent is lacking and/or the spouses have

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<sup>123</sup> A recent Supreme Court case might be illustrative of the legal system's failure recognize the relevance of the incapacitated adult's opinions and preferences in family matters. The claimant asked the court to order that he be allowed to communicate with his fully incapacitated adult daughter. The Supreme Court criticized the lower courts for not considering whether such communication would be in the daughter's interest but by contrast made no mention of the daughter's opinion or likely preferences regarding this issue (Ruling of the Judicial Panel for Civil Cases of the Supreme Court No. 77-KG23-13-K1 dated 21.11.2023).

<sup>124</sup> See, e.g., Paras 6 and 16 of the Survey of Case Law on Invalidity of Marriage adopted by the Presidium of the Supreme Court on 14.12.2022.

<sup>125</sup> Fifth paragraph of Art. 14 of the Family Code.

<sup>126</sup> Art. 27(1) and (2) of the Family Code.

<sup>127</sup> As for example in the case described in Para 11 of the Survey of Case Law on Invalidity of Marriage adopted by the Presidium of the Supreme Court on 14.12.2022.

<sup>128</sup> Fourth paragraph of Art. 28(1) of the Family Code. Thus, in a case dealt with by the ECtHR, it was upon request of a public procurator that the first marriage of the couple with a newborn child was declared invalid because the wife had been fully incapacitated and had failed to achieve restoration of full capacity. Four years later the woman's legal capacity was restored in full, the couple remarried (see Paras 7 – 13 and 46 – 47 of *Kocherov and Sergeyeva v Russia* [2016] ECtHR 16899/13 dated 29.3.2016).

<sup>129</sup> Ljudmila M. Pčelinceva, *Semejnoe pravo Rossii* [Russian Family Law] 6<sup>th</sup> ed. (Moscow: Norma, Infra-M, 2012) 128.

<sup>130</sup> Art. 29(1) of the Family Code.

<sup>131</sup> Para 16 of the Survey of Case Law on Invalidity of Marriage adopted by the Presidium of the Supreme Court on 14.12.2022.

<sup>132</sup> Art. 19(1) of the Family Code.

common children, judicial process is mandatory<sup>133</sup>. Without mutual consent, the grounds for divorce is irretrievable breakdown of the marriage<sup>134</sup>. The court may adjourn the proceedings for three months in order to give the spouses an opportunity to reconcile. But if one of the spouses keeps insisting on divorce after the adjournment has lapsed, the court is to dissolve the marriage<sup>135</sup>. These regular provisions on divorce do not apply to dissolution of marriage to a fully incapacitated adult<sup>136</sup>; the competent spouse may apply to the civil registry authority for dissolution regardless of the absence of consent of the incapacitated spouse<sup>137</sup>, which effectively renders the consent of the incapacitated spouse legally irrelevant<sup>138</sup>.

The Family Code of 1995 deviates from prior legislation<sup>139</sup> in entitling the guardian to request dissolution of the incapacitated adult's marriage<sup>140</sup>. To be sure, this provision enabling the guardian to initiate dissolution of a marriage detrimental to the ward may serve a good purpose; nevertheless, it appears questionable for a number of reasons. In particular, it seems at odds with the general principle that legal acts of a strictly personal nature cannot be carried out by a representative<sup>141</sup>, which, as a rule, applies to the dissolution of marriage<sup>142</sup>. It is not readily apparent how the guardian is to make such a personal decision, and the law gives no further guidance in this regard<sup>143</sup>. It remains to be seen whether and how this issue will be reconsidered in light of

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<sup>133</sup> Art. 21(1) of the Family Code.

<sup>134</sup> Art. 22(1) of the Family Code.

<sup>135</sup> Art. 22(2) of the Family Code. Cf. also Para 10 of the Plenum's Resolution of the Supreme Court No. 15 dated 05.11.1998 (as amended); Ljudmila M. Pčelinceva, Russian Family Law (n. 129) 168 – 171.

<sup>136</sup> The Supreme Court explained that this does not embrace adults partially incapacitated due to substance abuse so that such cases fall within the scope of the general rule (Para 3 of the Plenum's Resolution No. 15 dated 05.11.1998 (as amended)).

<sup>137</sup> Third paragraph of Art. 19(2) of the Family Code.

<sup>138</sup> Ljudmila M. Pčelinceva, Russian Family Law (n. 129) 162 – 163.

<sup>139</sup> See on that Jurij A. Korolev, *Kommentarij k Semejnomu kodeksu RF (postatejnyj)* [An Article-by-Article Commentary on the Family Code of the Russian Federation] (Moscow: Justicinform, 2004) 51.

<sup>140</sup> Art. 16(2) of the Family Code.

<sup>141</sup> Art. 182(4) and 1118(3) of the Civil Code.

<sup>142</sup> First paragraph of Art. 33(2) of the Federal Law No. 143-FZ dated 15.11.1997 "On Acts of Civil Status" (as amended). On this general approach and the peculiarity of the provision under consideration see: Julija V. Bajguševa, *Osnovnye voprosy prekraščeniya braka* [Principal Issues of Dissolution of Marriage], 1 (2010) *Izvestija vuzov. Pravovedenie* [Proceedings of the Higher Education Institutions. Legal Scholarship] 215 – 225.

<sup>143</sup> Symptomatically, shortly after the introduction of this provision an informed commentator considered it necessary to emphasize that the guardians are entitled, but not obliged, to request dissolution of the adult's marriage (Lidija. Ju. Mixeeva, *Opeka i popečitel'stvo nad vzroslymi* [Guardianship and Curatorship over Adults] (Electronic Database Konsul'tantPljus, 2001). It has been suggested that the guardian should apply for dissolution of the adult's marriage "if being married is not in his or her interest or causes deterioration of his or her health" (Oksana V. Fetisova, *Semejno-pravovoe položenie nedeeposobnyx soveršennoletnix graždan* [The Family-Law Status of the Incapacitated Adults] 11 (2008) *Juridičeskij mir* [The Legal World]). However, it may be doubted that the guardian is in a position to determine whether it is in the adult's interest to remain married.

the newly introduced general requirement that the adult's opinion or, if it cannot be established, their preferences be taken into account<sup>144</sup>.

Just as the establishment of paternity in respect of a legally competent adult requires the adult's consent, the consent of the guardian or the Guardianship Authority is required to establish paternity for a fully incapacitated adult<sup>145</sup>.

Apart from a few specific contexts<sup>146</sup>, neither partial nor full incapacitation entails automatic termination of the incapacitated adult's parental rights and duties. Moreover, the Supreme Court has emphasized that incapacitation by itself is neither grounds nor a condition for judicial limitation of parental rights, which may be ordered in certain cases determined by law<sup>147</sup>. That said, it should be noted that some grounds for deprivation or limitation of parental rights overlap to certain extent with the grounds for full or partial incapacitation. Thus, deprivation of parental rights can be ordered where the parent suffers from a chronic alcohol or drug addiction<sup>148</sup>. Mental disorder is a typical grounds for limitation (but not for deprivation<sup>149</sup>) of parental rights<sup>150</sup>. Similarly, adoption may be revoked if the adoptive parent suffers from a chronic alcohol or drug addiction<sup>151</sup>.

At the same time, children of fully or partially incapacitated adults qualify as children without parental care, who must be identified and for whom care arrangements must be made by the Guardianship Authorities<sup>152</sup>. Such care arrangements include, *inter alia*, placing the child under guardianship or in foster care or adoption<sup>153</sup>. The parent's consent to adoption is not required if the parent has been declared fully (but not partially<sup>154</sup>) incapacitated<sup>155</sup>.

Full legal capacity, of both spouses where applicable, is required for adopting a child<sup>156</sup>, such that fully and partially incapacitated adults are

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<sup>144</sup> Fourth paragraph of Art. 36(3) of the Civil Code.

<sup>145</sup> Art. 48(4) of the Family Code.

<sup>146</sup> Art. 59(2) of the Family Code (irrelevance of the opinion of the fully incapacitated parent living apart on the change of the child's name); Art. 144 of the Family Code (irrelevance of the incapacitated parent's consent to revocation of the adoption after the adoptee has reached the age of majority).

<sup>147</sup> Second sentence of the second paragraph of Para 8 and second sentence of the thirteenth paragraph of Para 16 of the Plenum's Resolution of the Supreme Court No. 44 dated 14.11.2017.

<sup>148</sup> Sixth paragraph of Art. 69 of the Family Code.

<sup>149</sup> Para 17 of the Plenum's Resolution of the Supreme Court No. 44 dated 14.11.2017.

<sup>150</sup> First paragraph of Art. 73(2) of the Family Code.

<sup>151</sup> Art. 141(1) of the Family Code.

<sup>152</sup> Art. 121 – 123 of the Family Code; third paragraph of Art. 1(1) of the Federal Law No. 159-FZ dated 21.12.1996 (as amended). See Natal'ja G. Valeeva, Lidija Ju. Mixeeva, in: Pavel V. Krašeninnikov (ed.) An Article-by-Article Commentary on the Family Code of the Russian Federation [...] (n. 52) 271.

<sup>153</sup> First paragraph of Art. 123(1) of the Family Code.

<sup>154</sup> Third paragraph of Para 10 of the Plenum's Resolution of the Supreme Court No. 8 dated 20.04.2006 (as amended).

<sup>155</sup> Third paragraph of Art. 130 of the Family Code.

<sup>156</sup> Art. 127(1)(1) and (2) of the Family Code.

prevented from adopting. The same requirement applies in regard to becoming a guardian or foster parent of a minor<sup>157</sup>.

Generally, Russian law acknowledges the woman's right to choose to terminate pregnancy: "Every woman decides for herself about motherhood. Artificial termination of pregnancy is carried out at the request of the woman with her informed voluntary consent"<sup>158</sup>. Although it is subject to far-reaching restrictions, medical sterilization, including as a means of contraception, is in principle also every person's free choice<sup>159</sup>.

Both abortion and medical sterilization to be performed on fully incapacitated adults are specifically addressed in the Law on the Citizens' Health. It has been asserted that the respective provisions<sup>160</sup> (effective as of 1 January 2012) were inspired by the international experience and by public opinion<sup>161</sup>. They received additional momentum from the then-recent reform of the Law on Psychiatric Care triggered by the *Shtukatur* cases<sup>162</sup>. These rules are novel in many regards<sup>163</sup>. First, it is already a novelty to have federal statutes dealing with these issues explicitly. Second, in contrast to prior law<sup>164</sup>

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<sup>157</sup> First sentence of Art. 35(2) of the Civil Code, first sentence of the first paragraph of Art. 146 of the Family Code.

<sup>158</sup> Art. 56(1) of the Law on the Citizens' Health.

<sup>159</sup> Art. 57(1) of the Law on the Citizens' Health: "Medical sterilisation as a special medical intervention for the purpose of depriving a person of the ability to produce offspring or as a method of contraception may be carried out only at a written request of a citizen over the age of thirty-five or a citizen having at least two children, and in the case of medical indications and informed voluntary consent of the citizen - irrespective of age and the presence of children".

On informed consent as a general requirement for medical intervention, see Q9 c.

<sup>160</sup> Art. 56(7): "Artificial termination of pregnancy of an adult incapacitated in accordance with the prescribed legal procedure, if she is unable to express her will due to her condition, is possible by a court decision upon application of her legal representative and with the participation of the adult who has incapacitated in accordance with the prescribed legal procedure".

Art. 57(2): "Upon application of the legal representative of an adult incapacitated in accordance with the prescribed legal procedure, if such person is unable to express his or her will due to his or her condition, medical sterilisation is possible by a court decision adopted with the participation of the adult incapacitated in accordance with the prescribed legal procedure".

<sup>161</sup> See the Explanatory Note to the draft law: <<https://sozd.duma.gov.ru/download/B43EAC39-6342-49AF-B206-F85D223D50EE>> p. 9 – 10.

<sup>162</sup> See Q9 c.

<sup>163</sup> See, e.g., Elena C. Dugaron, Graždanskaja processual'naja storona del o medicinskoj sterilizacii i iskusstvennom prerivanii beremennosti u soveršennoletnej, priznannoj nedeespobnoj [Civil Procedural Aspect of Cases on Medical Sterilisation and Artificial Termination of Pregnancy of a Fully Incapacitated Adult] 5 (2017) *Vestnik graždanskogo processa* [Herald of Civil Procedure] 243 – 263, 249; Anna V. Demeneva, Pravovye posledstvija postanovlenij Evropejskogo suda po pravam čeloveka po delam ob okazanii psixiatričeskoj pomošči v Rossii [Legal Implications of Judgements of the European Court of Human Rights in Mental Health Care Cases for Russia] 2 (2014) *Meždunarodnoe pravosudie* [International Justice], 21 – 43, 36; Oleg O. Salagaj, Regulirovanie medicinskoj sterilizacii čeloveka: sravnitel'no-pravovoj analiz i nekotorye aspekty soveršenstvovanija nacional'nogo zakonodatel'stva Rossijskoj Federacii [Regulating Human Medical Sterilisation: Comparative Legal Analysis and Some Aspects of Improving National Legislation of the Russian Federation] 7 (2009) *Žurnal rossijskogo prava* [Journal of Russian Law] 75 – 83, 79 – 80 (on sterilisation).

<sup>164</sup> Cf. Art. 32(3) of the Fundamentals of the Legislation of the Russian Federation on the Protection of Citizens' Health No. 5487-1 adopted by the Supreme Soviet of the Russian Federation on 22.07.1993 (as amended).

the incapacitated adult's right to self-determination is acknowledged. Third, decisions on both questions are now entrusted to courts, so that the guardian's consent is no longer sufficient<sup>165</sup>.

The above reform may certainly be considered a step forward, and the provisions now in force tend to do more justice to the incapacitated adult's rights to bodily integrity and self-determination. Yet the newly introduced legal framework is in many respects flawed and has been heavily criticized for a number of reasons<sup>166</sup>. Most importantly, the law provides only procedural rules while remaining silent as to the substantive standards. Considering that abortion and medical sterilization are in principle both at the person's discretion, substituted decision-making in this field requires particular delicacy. There are certainly good reasons here to make an exception from the general rule that strictly personal legal acts cannot be entrusted to a representative<sup>167</sup>. But given the nature of the matters at stake, this exception should be clearly framed by law. Obviously, the guardian cannot enjoy the same freedom to decide arbitrarily on these matters as the respective adult themselves. The guardian's power in this regard should be limited by some sort of guidance from the legislator (e.g., the adult's opinion or preferences, best interest, last-resort principle in respect of medical sterilization). The guardian's compliance with such tenets would be subject to judicial scrutiny. Unfortunately, Russian law gives no guidance of this kind whatsoever. In view of this silence, the express provisions entitling the guardian to file requests for abortion and/or sterilization might even give the impression that the guardian's decision-making in this area is largely discretionary. Such a reading would make the courts' involvement in this process virtually futile.

Both provisions, on abortion and on sterilization, place express emphasis on consideration of the incapacitated adult's opinion. However, the manner in which the adult's opinion is given legal significance leaves much to be desired. First, in both cases, involvement of a court is mandatory only where the adult is unable to express their will due to their condition. This might create opportunity for abuse: instead of initiating judicial proceedings, the guardian might succumb to the temptation of taking a shortcut by producing the adult's

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<sup>165</sup> Since 1993, judicial procedure was prescribed by secondary legislation standing on too low a level for this kind of dispositions and incoherent with the statutory framework on civil procedure. Accordingly this first attempt to introduce judicial control over these issues remained still born (see on that Oleg O. Salagaj, *Regulating Human Medical Sterilisation* [...] (n. 163) 80).

<sup>166</sup> Elena C. Dugaron, *Civil Procedural Aspect of Cases on Medical Sterilisation and Artificial Termination of Pregnancy of a Fully Incapacitated Adult* (n. 163) 248, 252 – 253, 257 – 262; Svetlana A. Zagorskix, in: Aleksej N. Žerebcov et al., *Kommentarij k Federal'nomu zakonu ot 21 nojabrja 2011 g. N 323-FZ "Ob osnovax oxrany zdorov'ja graždan v Rossijskoj Federacii"* [Commentary on the Federal Law No. 323-FZ dated 21.11.2011 "On the Foundations of the Protection of Citizens' Health in the Russian Federation"] (Konsul'tantPljus. 2022); Jurij D. Sergeev, Salija Š. Murzabaeva, Julija V. Pavlova, Vladimir G. Kuranov, *Soveršenstvovanie mexanizma sudebnoj zaščity prav nesoveršennoletnix i nedeesposobnyx lic pri otkaze zakonnyx predstavitelej ot medicinskogo vmešatel'stva* [Improving the Mechanism for the Judicial Protection of the Rights of Minors and Incapacitated Persons in the Event of the Legal Representatives' Refusal of Medical Intervention] 1 (2015) *Medicinskoe pravo* [Medical Law], 3 – 8.

<sup>167</sup> Art. 182(4), 1118(3) of the Civil Code.

written consent regardless of whether they are actually capable of expressing their will. Second, while both provisions require the adult's participation in the proceedings, neither determines the role of the adult in any detail. According to the Explanatory Note<sup>168</sup>, the purpose of the law was to make sure that the "adult's opinion is taken into account" in such proceedings. The law itself doesn't contain even this vague language. What exactly shall the court take into consideration? Is it the adult's will or their opinion? Where their opinion cannot be established, would mere preferences suffice? How decisive should the adult's self-determination be? Should the court for instance be allowed to grant the request of a guardian contrary to the adult's more or less clear opinion if the respective medical intervention is not meant to prevent imminent danger to life or health? Third, in contrast to incapacitation proceedings<sup>169</sup> or proceedings on psychiatric hospitalization<sup>170</sup>, no determination is made as to the prerequisites and eventual arrangements for the adult's personal participation in the hearing<sup>171</sup>.

A further deficit of the reform is the legislature's failure to adjust the Code of Civil Procedure to embrace these new types of proceedings<sup>172</sup>.

In three out of a total of five cases I could find in databases and in the literature<sup>173</sup>, the courts stated that the adult expressly consented to the medical intervention; in another case, the adult merely "did not object" to the request. The circumstances of this role of the incapacitated adults and the measures taken to ensure the free expression of their opinion are not apparent from the language of the judgements. In one case the adult did not participate in the hearing because she was in a residential psychiatric care institution.

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<sup>168</sup> See the Explanatory Note to the draft law: <<https://sozd.duma.gov.ru/download/B43EAC39-6342-49AF-B206-F85D223D50EE>> p. 10.

<sup>169</sup> Art. 284(1) of the Code of Civil Procedure. See Q13 d.

<sup>170</sup> Art. 34(2) of the Law on Psychiatric Care.

<sup>171</sup> For critical discussion and a suggestion that the entrenched legal regime for incapacitation proceedings be extended to these types of proceedings as well, see: Elena C. Dugaron, *Processual'noe položenie nedeespodobnogo lica v delax o medicinskoj sterilizacii i iskusstvennom preryvanii beremennosti* [The Procedural Position of an Incapacitated Person in Cases on Medical Sterilisation and Artificial Termination of Pregnancy] 9 (2017) *Arbitražnyj i graždanskij process* [Arbitrazh (Commercial) and Civil Procedure] 3 – 7, 5.

<sup>172</sup> See on that, e.g., Elena C. Dugaron, *Civil Procedural Aspect of Cases on Medical Sterilisation and Artificial Termination of Pregnancy of a Fully Incapacitated Adult* (n. 163) 257–262 ; Jurij D. Sergeev, Salija Š. Murzabaeva, Julija V. Pavlova, Vladimir G. Kuranov, *Improving the Mechanism for the Judicial Protection of the Rights of Minors and Incapacitated Persons in the Event of the Legal Representatives' Refusal of Medical Intervention* (n. 166). For an example of resulting misunderstandings in the case law see the Ruling of the City Court of Naberezhnye Chelny of the Republic Tatarstan No. M-11036/2019 dated 11.11.2019.

<sup>173</sup> Abortion: Decision of the Kalachevsky District Court of the Volgograd Oblast in case No. 2-987/2019 dated 14.08.2019 <<https://xn--90afdbaav0bd1afy6eub5d.xn--p1ai/45179645>>; Decision of the Osinsky District Court of the Perm Kray in case No. 22-925/2016 dated 20.04.2016 <<https://xn--90afdbaav0bd1afy6eub5d.xn--p1ai/15448974>>.

Medical sterilisation: Decision of the Glazovsky District Court of the Udmurt Republic in case No. 2-1033/2015 dated 09.04.2015; Decision of the Leninsky District Court of Vladimir in case No. 2-2319/2012~M-1861/2012 dated 17.09.2012; Decision of the Oktyabrsky District Court of Tambov in case No. 2-18982 dated 6.06.2012 (Database "Konsul'tant Plus").

In each of these decisions, the court refers to medical indications for the respective intervention as established by a physician and generally entrenched in the secondary legislation<sup>174</sup>. It should be noted, however, that these official lists emerged from a different regulatory context and for different purposes. Their original function was to define where the standard prerequisites for voluntary abortion or medical sterilization can be considerably loosened or abandoned. Accordingly, the mere fact that such a list includes a certain type of mental disorder should not be deemed sufficient to grant a guardian's request for abortion or sterilization of the adult.

Without statistical data or access to even a halfway representative sample of relevant court decisions, it is not possible here to assess the efficiency of the above statutory framework. In any event, one should remain mindful of the context of the reform, which obviously aimed to foster vulnerable adults' self-determination as regards procreation. To achieve any progress in this direction, what needs to be overcome is more than the traditional general reluctance of Russian law to account for the incapacitated adult's will, opinions or preferences. As repeatedly reported by numerous journalists and volunteers, the neuropsychiatric residential institutions strongly tend to make sure that abortion and/or sterilization is performed in every case that arises. Exerting pressure on the adult, as well as deceit, seems a standard means of achieving this result<sup>175</sup>.

### c. medical matters;

As a general rule, the statutory framework now in place provides that medical interventions in general and in particular in psychiatric care require

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<sup>174</sup> Orders of the Ministry of Health and Social Development of the Russian Federation No. 736 "On Approval of the List of Medical Indications for Artificial Termination of Pregnancy" dated 3.12.2007 (as amended) and No. 121n "On Approval of the List of Medical Indications for Medical Sterilisation" dated 18.03.2009, both of which include a number of mental disorders.

<sup>175</sup> See, e.g., Elena Kostjučenko/Jurij Kozyrev, Internat [Residential Institution], *Novaja gazeta* [Novaya Gazeta] (30.04.2021) <<https://novayagazeta.ru/articles/2021/04/30/internat>>; Aleksandra Sadykova, Kto i kak živet v rossijskix psixonevrologičeskix internatax? Otvety na voprosy o PNI [Who Lives in Russian Neuropsychiatric Residential Institutions and How? Answers to Questions about PNI] (19.10.2020) <<https://takiedela.ru/news/2020/10/19/vopros-otvet-o-pni/>>; Ol'ga Allenova, "PNI — èto smes' bol'nicy i tjur'my". Počemu v Rossii neobходима reforma psixonevrologičeskix internatov ["PNI is a Mixture of a Hospital and a Prison". Why Russia Needs a Reform of Neuropsychiatric Residential Institutions], 13 (04.04.2016) *Žurnal "Kommersant" Vlast'* [Magazine "Kommersant Vlast'"], 12 (available at <<https://www.kommersant.ru/doc/2950620>>); Svetlana Kamyšina, "Čtoby psixov ne rožali" ["So That They Don't Give Birth to Lunatics"] (16.02.2009) *Novye izvestija* <<https://newizv.ru/news/2009-02-17/chtoby-psihov-ne-rozhali-101613>>. Further, on the factual background of *Kocherov and Sergejeva v Russia* [2016] ECHR 16899/13 dated 29.3.2016 see Anna Puškarskaja, *Žizn' posle internata. ESPČ podderžal roditel'skie prava mental'nix invalidov* [Life after Residential Institution. The ECtHR Upheld the Parental Rights of Mentally Disabled Persons] (01.04.2016) *Kommersant* <<https://www.kommersant.ru/doc/2952142>>.



the patient's informed consent<sup>176</sup>. The patient enjoys the right to refuse or terminate an intervention<sup>177</sup>. But exceptions are stipulated for several types of case, including when medical intervention is urgently necessary to eliminate a threat to the person's life and the person's condition does not allow them to express their will, and in respect of persons suffering from severe mental disorders<sup>178</sup>.

These general rules on informed consent likewise apply to fully incapacitated adults unless their condition makes them unable to provide it. In the latter case, their consent may be substituted by that of the guardian<sup>179</sup>. The same approach applies to refusal and to termination of medical intervention<sup>180</sup>. Particularly serious interventions, such as psychiatric hospitalization<sup>181</sup>, abortion or sterilization<sup>182</sup>, can be ordered only by a court upon the guardian's request. It is clearly at odds with these rules when the law, without distinction in regard to the incapacitated adult's actual condition, stipulates that information about their health shall be provided to their guardian<sup>183</sup>. By contrast, specific provisions on psychiatric care acknowledge the adult's right to receive medical information<sup>184</sup>. If the guardian refuses a medical intervention necessary to save the adult's life, the medical institution can request permission for such intervention in court<sup>185</sup>. Removal of organs and tissues for transplantation generally requires informed consent of the donor<sup>186</sup> and cannot be performed in respect of incapacitated adults<sup>187</sup>.

The above framework stems from two consecutive reforms triggered, once again, by the two *Shtukatur* cases. The ECtHR found a violation of Art. 5(1)(e) of the European Convention on Human Rights because the guardian's consent was not deemed sufficient to make the adult's detention in the

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<sup>176</sup> Art. 20(1) of the Law on Citizens' Health: "A necessary precondition for medical intervention is the giving of informed voluntary consent of the citizen or his/her legal representative for medical intervention on the basis of full information provided by the medical worker in an accessible form about the goals, methods of medical care, the associated risk, possible options of medical intervention, its consequences, as well as the expected results of medical care".

Art. 4(1) of the Law on Psychiatric Care: "Psychiatric care shall be provided upon voluntary application of the person and in the presence of his informed voluntary consent to medical intervention, except in cases provided for by this Law"; Art. 11(1) and 28(3) of the Law.

<sup>177</sup> Art. 20(3) of the Law on Citizens' Health and Art. 4(3), 12(1) of the Law on Psychiatric Care.

<sup>178</sup> Art. 20(9)(1) and (3) of the Law on Citizens' Health; Art. 11(4) Art. 4(3) of the Law on Psychiatric Care. See also Q14 c.

<sup>179</sup> Art. 20(2)(1), 20(3) and 47(5) of the Law on Citizens' Health; Art. 4(2) and (3), 11(3) and 28(3) of the Law on Psychiatric Care.

<sup>180</sup> Art. 20(3) of the Law on Citizens' Health and Art. 4(3) and 12(1) of the Law on Psychiatric Care.

<sup>181</sup> Art. 28(4.1) and 33(1) of the Law on Psychiatric Care.

<sup>182</sup> Art. 56(7) and Art. 57(2) of the Law on Citizens' Health. See Q9 b.

<sup>183</sup> Second sentence of Art. 22(2) of the Law on Citizens' Health.

<sup>184</sup> Third paragraph of Art. 5(2) and Art. 11(2) of the Law on Psychiatric Care.

<sup>185</sup> Art. 20(3) of the Law on Citizens' Health.

<sup>186</sup> Art. 47(4) of the Law on Citizens' Health.

<sup>187</sup> Art. 47(3) of the Law on Citizens' Health.

psychiatric institution lawful<sup>188</sup>. In a similar vein, the Constitutional Court considered the then-existing provisions of the Law on Psychiatric Care concerning psychiatric hospitalization of fully incapacitated adults. As a result, the law was declared unconstitutional to the extent that it allowed for psychiatric hospitalization without a court order based exclusively on the guardian's consent<sup>189</sup>.

In response to these judgements, the Law on Psychiatric Care was amended<sup>190</sup>. The key novelties were the adult's right to themselves give informed consent to psychiatric treatment in general and to hospitalization in particular unless they are incapable of doing so due to their condition, and failing the adult's consent, mandating a court order for psychiatric hospitalization. These amendments came at a time when the legislative process for a comprehensive revision of the cornerstone law on medical matters – the Fundamentals of the Legislation of the Russian Federation on the Protection of Citizens' Health No. 5487-1 adopted by the Supreme Soviet of the Russian Federation on 22.07.1993 (as amended) – was about to begin. The initial version of the draft as of the end of April 2011 still contained no provisions to establish as a general rule the incapacitated adult's right to give consent on their own, comparable to the then-novel rules in the Law on Psychiatric Care<sup>191</sup>. These were introduced at a later stage, such that the resulting Law on the Citizens' Health largely adopted the latter statute's approach<sup>192</sup>.

In order to get an impression of how the new approach is applied in practice, I reached out to about a dozen doctors from different hospitals, among them two experienced psychiatrists in leadership positions, and two medical law practitioners. Except for one of the lawyers, no one was aware of this new approach, and after my explanations they had difficulty imagining how exactly it could work. The lawyer knew that these amendments were carried out several years ago but opined that they will probably have hardly any practical relevance after the introduction of partial incapacitation due to mental disorder; according to her, it has been left to individual doctors to deal with this matter in any event. Inspections of several institutions performed in 2019 also suggest

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<sup>188</sup> Paras 112 – 116 and Para 4 of the operative part of *Shtukaturov v Russia* [2008] ECtHR 44009/05 dated 27.03.2008. See also Para 116 of *Lashin v Russia* [2013] ECtHR 33117/02 dated 22.01.2013.

<sup>189</sup> Para 5 of the reasoning and Para 3 of the operative part of the Resolution of the Constitutional Court No. 4-P dated 27.02.2009. See also the Ruling of the Constitutional Court No. 544-O-P dated 05.03.2009.

<sup>190</sup> By the same Federal Law No. 67-FZ dated 06.04.2011 as the Code of Civil Procedure in respect of the adult's right to present their case personally and/or with help of representatives of their choosing, on which see Q5 with n. 56, Q13 introduction and d.

<sup>191</sup> <<https://sozd.duma.gov.ru/bill/534829-5>>.

<sup>192</sup> On that, see Julija N. Argunova, Učēt voleiz"javlenija nedeesposobnogo pacienta v obščemedicinskoj praktike [Taking into Account the Will of the Incapacitated Patient in General Medical Practice] 1 (2012) *Nezavisimyj psixiatričeskij žurnal* [Independent Psychiatric Journal] 58 – 63.

that this new approach to informed consent of fully incapacitated adults is broadly ignored in practice<sup>193</sup>.

Pursuant to the Law on Psychiatric Care<sup>194</sup>, a fully incapacitated adult who due to their condition is unable to file the respective request personally can be admitted to a “residential social service institution designed for persons suffering from mental disorders”, i.e., a neuropsychiatric institution, upon decision of the Guardianship Authority issued on the basis of a medical expert report. The Constitutional Court explained that this provision was to be construed in conformity with the Constitution as not allowing fully incapacitated adults who are unable to express their will to be put in such institutions without a court order<sup>195</sup>. Reportedly, these explanations of the Constitutional Court have often been disregarded in practice<sup>196</sup>, and in light of this it appears particularly worrisome that Russia’s Combined second, third and fourth periodic reports on the implementation of the CRPD, filed on 5 October 2022, nonchalantly refer to this statutory provision without any reservations or qualifications<sup>197</sup>. Although Art. 41 of the Law on Psychiatric Care was recently amended, the long-overdue express alignment of the statutory framework with the positions of the Constitutional Court has not been carried out<sup>198</sup>.

#### **d. donation and wills;**

No donations, except “ordinary gifts” worth no more than three thousand roubles<sup>199</sup>, can be made by guardians or other state-appointed representatives on behalf of fully incapacitated persons<sup>200</sup>. Nor are donations allowed from a person receiving residential care in a medical, social service or similar

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<sup>193</sup> Julija N. Argunova, Rezul’taty obščestvennoj proverki sobljudenija prav graždan, proživajuščix v psixonevrologičeskix internatax [Results of a Public Inspection on the Observance of the Rights of Citizens Living in Neuropsychiatric Residential Institutions] 3 (2019) *Nezavisimyj psixiatričeskij žurnal* [Independent Psychiatric Journal] 53 – 57, 56.

<sup>194</sup> Art. 41(1).

<sup>195</sup> Ruling of the Constitutional Court No. 114-O-P dated 19.01.2011. See on that, e.g., Aleksandr N. Kaljužnyj, Mexanizm prinuditel’noj gospitalizacii v medicinskuju organizaciju, okazyvajuščuju psixiatričeskiju pomošč’ v stacionarnyx uslovijax: probely zakonodatel’noj konstrukcii i praktiki realizacii [The Mechanism of Involuntary Hospitalization in a Medical Institution Providing Residential Psychiatric Care: Gaps in the Legislative Design and Practice of Implementation], 2 (2022) *Medicinskoe pravo* [Medical Law], 47–52; Anna V. Demeneva, Legal Implications of Judgements of the European Court of Human Rights in Mental Health Care Cases for Russia (n. 163) 35.

<sup>196</sup> Julija N. Argunova, Results of a Public Inspection on the Observance of the Rights of Citizens Living in Neuropsychiatric Residential Institutions (n 193) 54 – 55 (Moscow and Moscow Oblast as per mid-2019); Ljubov’ N. Vinogradova. N.V. Spiridonova, Proverka psixonevrologičeskix internatov Moskvy [Inspection of Neuropsychiatric Residential Institutions in Moscow] <<http://npar.ru/proverka-psixonevrologičeskix-internatov-moskvy>> (as per spring 2013).

<sup>197</sup> Para 128 of the Combined second, third and fourth periodic reports.

<sup>198</sup> Federal Law No. 465-FZ dated 04.08.2023 (in force since 01.09.2024).

<sup>199</sup> Approx. EUR 30.

<sup>200</sup> Art. 575(1)(1) of the Civil Code.

institution and/or from such person's spouse or relatives to employees of such institution<sup>201</sup>.

There are no specific limitations on the partially incapacitated adult's capacity to make gifts. Accordingly, a partially incapacitated adult can make donations within the general limitations of his or her legal capacity<sup>202</sup>, which suggests that adults partially incapacitated due to mental disorder can make gifts on their own or with the partial guardian's consent<sup>203</sup>, whereas adults partially incapacitated due to addiction to gambling or substance abuse seem to always require the partial guardian's consent.

Both (admissible) donations on behalf of incapacitated adults and the partial guardian's consent to a partially incapacitated adult's donations are subject to prior authorization of the Guardianship Authority<sup>204</sup>.

Full legal capacity is expressly required for making a will<sup>205</sup>. A will by a testator lacking full legal capacity is null and void<sup>206</sup>. These rules apply to the joint spousal will<sup>207</sup>, inheritance contracts<sup>208</sup> and presently – contrary to what might be expected from the general rules on the scope of partial or limited legal capacity of minors between 14 and 18 years and of partially incapacitated adults<sup>209</sup> – even to dispositions *mortis causa* regarding bank accounts<sup>210</sup>.

Combined with the provision that both wills and inheritance contracts must be executed personally and cannot be entrusted to a legal representative of any kind<sup>211</sup>, these rules make it effectively impossible for a person lacking full legal capacity to make testamentary dispositions<sup>212</sup>.

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<sup>201</sup> Art. 575(1)(2) of the Civil Code.

<sup>202</sup> As entrenched in Art. 30(2) and 26(2)(1) and (4) of the Civil Code.

<sup>203</sup> The landmark Resolution of the Constitutional Court No. 15-P dated 27.06.2012, which led to the introduction of limited incapacitation due to mental disorder into Russian law, dealt with a case in which an adult who had been declared fully incapacitated felt unnecessarily deprived of her capacity to make small donations to those around her (as reported by her counsel Dmitriy Bartenev: Aleksandra Žitinskaja, Svoboda lučše, čem nesvoboda [Freedom is Better Than Unfreedom], <<https://takiedela.ru/2017/10/dmitriy-bartenev/>>).

<sup>204</sup> Art. 37(2) of the Civil Code, Art. 21(1) of the Law on Full and Partial Guardianship.

<sup>205</sup> Art. 1118(2) of the Civil Code (in force from 01.03.2002).

<sup>206</sup> First paragraph of Para 27 of the Plenum's Resolution of the Supreme Court No 9 dated 29.05.2012 (as amended).

<sup>207</sup> Second sentence of the first paragraph of Art. 1118(4) of the Civil Code. For a discussion see Evgenij Ju. Petrov, in: id. (ed.) *Nasledstvennoe pravo: postatejnyj kommentarij k stat'jam 1110–1185, 1224 Graždanskogo kodeksa Rossijskoj Federacii* [Succession Law: An Article-by-Article Commentary to Art. 1110–1185, 1224 of the Civil Code of the Russian Federation] (Moscow: M-Logos, 2018) 200 – 201.

<sup>208</sup> Second sentence of Art. 1118(1) of the Civil Code.

<sup>209</sup> Art. 26(2) of the Civil Code.

<sup>210</sup> Art. 1128 of the Civil Code, second paragraph of Para 22 of the Plenum's Resolution of the Supreme Court No 9 dated 29.05.2012 (as amended). See Evgenij Ju. Petrov, in: id. (ed.) *Succession Law: An Article-by-Article Commentary to Art. 1110–1185, 1224 of the Civil Code of the Russian Federation* (n. 207) 184. For criticisms at least as regards minors, see, e.g., Sof'ja Ju. Filippova, in: Natal'ja V. Kozlova, Sof'ja Ju. Filippova (eds), *Fizičeskie lica kak sub'ekty rossijskogo graždanskogo prava* [Natural Persons as Subjects of the Russian Civil Law] (Moscow: Statut, 2022) 296 – 297.

<sup>211</sup> Art. 1118(3) of the Civil Code.

<sup>212</sup> Evgenij Ju. Petrov, in: id. (ed.) *Succession Law: An Article-by-Article Commentary to Art. 1110 – 1185, 1224 of the Civil Code of the Russian Federation* (n. 207) 117; Boris L. Xaskel'berg,

A lower threshold of active testamentary capacity, allowing (some) minors and partially incapacitated adults to make dispositions *mortis causa*, has been advocated for decades, previously *praeter legem* and currently *de lege ferenda*<sup>213</sup>. In particular, it has been argued that introduction of partial incapacitation due to mental disorder should entail recognition of active testamentary capacity on the part of such incapacitated adults<sup>214</sup>. Moreover, the language of an interpretative guideline of the Supreme Court, in force from 1990 through 2007 and issued before the requirement of full legal capacity was entrenched in the Code, suggested that partially incapacitated adults<sup>215</sup> could make wills with the consent of the partial guardian<sup>216</sup>.

Subsequent limitation of legal capacity does not vitiate an existing will<sup>217</sup>. Problems that may arise here (due to the fact that the incapacitated testator can no longer revoke the will<sup>218</sup>) do not seem to have become topical.

All in all, the long debate (with numerous respected authors advocating a lower threshold for testamentary capacity), the referenced guidelines of the Supreme Court and the recent introduction of partial incapacitation due to mental disorder on the one hand, and the relatively recent, harsh-but-clear requirement of full legal capacity on the other, suggest that the present state of the law might sooner or later come under review.

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Valerij V. Rovnyj, *Perexod vymoročnogo nasledstva k publičnomu obrazovaniju* [Escheat of Estates to a Public Entity], 2 (2012) *Nasledstvennoe pravo* [Succession Law] 31 – 37.

<sup>213</sup> See on that Evgenij Ju. Petrov, in: id. (ed.) *Succession Law: An Article-by-Article Commentary to Art. 1110 – 1185, 1224 of the Civil Code of the Russian Federation* (n. 207) 112, 200 – 201; Klara Ja. Anan'eva, Mixail V. Xlystov, *Nasledodatel' kak učastnik nasledstvennyx pravootnošenij* [Testator as a Party to Inheritance Legal Relationships] 2015 *Nasledstvennoe pravo* [Succession Law] N 3. P. 12 – 15; Roman A. Barkov, *Aktivnaja zaveščatel'naja pravosub"ektnost' graždan Rossii i gosudarstv-učastnikov Sodrūžestva Nezavisimyx Gosudarstv: voprosy zakonodatel'stva, teorii i praktiki* [Active Testamentary Capacity of the Nationals of Russia and of States Parties to the Commonwealth of Independent States: Questions of Legislation, Theory, and Practice], 3(2012) *Nasledstvennoe pravo* [Succession Law] 38 – 44; Julija N. Zipunnikova, E.Ju. Rykova, *Certain Features of Evidence Taking in Disputes on Invalidity of a Will* (n. 71) 33 – 34, all with further references.

<sup>214</sup> Irina A. Mixajlova, *Nekotorye aspekty modernizacii nasledstvennogo prava* [Some Aspects of Modernization of the Succession Law], 1 (2020) *Nasledstvennoe pravo* [Succession Law] 3 – 7.

<sup>215</sup> At that time, this category embraced only adults partially incapacitated due to substance abuse.

<sup>216</sup> Para 2 of the Plenum's Resolution of the Supreme Court No. 4 dated 04.05.1990 (as amended).

<sup>217</sup> Elena L. Sidorova, *Nasledovanie imuščestva: ot soveršenija zaveščanija do priobretenija nasledstva* [Property Inheritance: From Making of a Will to Acquisition of Inheritance] 2<sup>nd</sup> Issue (Moscow: Editorial office of "Rossijskaja gazeta", 2019) 35 – 36; Evgenij Ju. Petrov, in: id. (ed.) *Succession Law: An Article-by-Article Commentary to Art. 1110 – 1185, 1224 of the Civil Code of the Russian Federation* (n. 207) 201; Nadežda V. Sučkova, in: Natalija I. Maryševa, Klavdija B. Jarošenko (eds), *Kommentarij k Graždanskomu kodeksu Rossijskoj Federacii, časti tret'ej (postatejnyj)* [An Article-by-Article Commentary to the Third Part of the Civil Code of the Russian Federation] 3<sup>rd</sup> ed. (Moscow: Kontrakt, Infra-M, 2010); Klavdija B. Jarošenko, in: Aleksandr L. Makovskij, Evgenij A. Suxanov (eds), *Kommentarij k časti tret'ej Graždanskogo kodeksa Rossijskoj Federacii (postatejnyj)* [An Article-by-Article Commentary to the Third Part of the Civil Code of the Russian Federation] (Moscow: Jurist", 2003) 80.

<sup>218</sup> Evgenij Ju. Petrov, in: id. (ed.) *Succession Law: An Article-by-Article Commentary to Art. 1110 – 1185, 1224 of the Civil Code of the Russian Federation* (n. 207) 120, 214.

**e. civil proceedings and administrative matters (e.g. applying for a passport);**

In civil proceedings, active procedural capacity (that is, the capacity to act before the court on one's own behalf and/or to appoint representatives of one's choosing<sup>219</sup>) has traditionally been linked largely to active legal capacity as determined by substantive civil law. Thus, until recently both fully and partially incapacitated adults were considered to possess no active procedural capacity whatsoever and were deemed able to act only through their full and partial guardians (or through representatives appointed by the guardians).

This is still the general rule<sup>220</sup>, but recent developments, including the landmark judgments of the ECtHR and the Constitutional Court as well as the legislative reform they triggered, have brought a number of exceptions, mainly as regards proceedings on limitation and restoration of legal capacity<sup>221</sup>. The active procedural capacity of partially (though not of fully) incapacitated adults in legally specified cases is also recognized in general provisions of the Code of Administrative Procedure<sup>222</sup>. So far, the legal system's changed stance towards the procedural capacity of incapacitated adults has concerned only a limited number of specific situations. Yet it could also be regarded as a paradigmatic shift toward detaching procedural from substantive legal capacity, something esteemed commentators have long awaited and would welcome<sup>223</sup>. It remains to be seen where these developments will ultimately lead. In a recent case<sup>224</sup>, the Supreme Court decided in favour of broadening the sphere in which incapacitated adults effectively enjoy procedural capacity. To achieve this, the Court applied, by way of analogy, the newly introduced provisions on the adult's procedural capacity in incapacitation proceedings to an unrelated factual scenario.

Full legal capacity is a necessary requirement for judicial representatives<sup>225</sup>.

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<sup>219</sup> See, e.g., Art. 37(1) of the Code of Civil Procedure: "The capacity to exercise procedural rights, fulfil procedural obligations and entrust conduct of a case in court to a representative (active civil procedural capacity) belongs in full to citizens who have reached the age of eighteen and to organisations"; Art. 43(2) of the Code of Arbitrazh (Commercial) Procedure: "The capacity to exercise procedural rights and fulfil procedural duties by one's actions before the arbitrazh (commercial) court (active procedural capacity) belongs to organisations and citizens".

<sup>220</sup> Art. 37(3) and (5), 52(1) and (3) of the Code of Civil Procedure; Art. 43(3) and 59(2) of the Code of Arbitrazh (Commercial) Procedure; Art. 31(2) of the Civil Code.

<sup>221</sup> See Q5, Q12 and Q13 introduction, d, and e.

<sup>222</sup> Art. 5(2)(2) and 5(3) of the Code of Administrative Procedure.

<sup>223</sup> Tat'jana V. Saxnova, GPK RF: dolgij put' reform [The Code of Civil Procedure: A Long Way of Reforms] 4 (2013) *Vestnik graždanskogo processa* [Herald of Civil Procedure] 27 – 39, 34; Andrej V. Judin, Novoe ponimanie kategorii "graždanskaja processual'naja nedeеспosobnost'" i delo Štukaturova [New Understanding of the Category of "Civil Procedural Incapacity" and the Shtukaturov case] 1 (2012) *Civilist* [The Civil Lawyer] 108 – 113.

<sup>224</sup> Rulings of the Judicial Panel for Civil Cases of the Supreme Court No. 53-KG21-14-K8 dated 16.05.2022 and No. 53-KG21-13-K8 dated 25.04.2022.

<sup>225</sup> Art. 49(1) of the Code of Civil Procedure; Art. 59(6) and 60(2) of the Code of Arbitrazh (Commercial) Procedure. See also Art. 55(1) of the Code of Administrative Procedure.

- Labour law

The effect of full or partial incapacitation on the adult's status in labour law is not quite clear and remains subject to debate<sup>226</sup>. Legal capacity in labour law, both conceptually and in terms of the statutory framework, differs from capacity in civil law: the age of majority is lower (16 versus 18), and the Labour Code does not address the limited capacity of adults in general terms but instead occasionally stipulates that limitation of legal capacity prevents the adult from holding one or another type of employment. But such provisions are rare, and there is hardly an overarching doctrine behind them. For instance, fully or partially incapacitated adults cannot be civil servants<sup>227</sup> or notaries,<sup>228</sup> and fully incapacitated adults cannot engage in pedagogical activities<sup>229</sup>. Independently from judicial limitation of legal capacity, an adult suffering from a mental disorder may be declared incapable of performing certain types of professional activity<sup>230</sup>. Employment contracts terminate if the employee has been declared fully incapable of carrying out labour activities based on a medical report issued in accordance with a certain procedure<sup>231</sup>.

In its emblematic (though somewhat isolated) decision dated 23.04.2010, the Supreme Court argued that

“[p]rovisions of the Labour Code [...] do not contain a prohibition on the conclusion of employment contracts with persons declared fully incapable by court. [...] The legislator in Art. 20 of the Labour Code [...] explicitly establishes only one restriction for acquiring the status of an employee – the age limit. It follows from the provisions of the same article that an incapacitated person has the right to be a party to labour relations, with particularities provided only for incapacitated persons acting as employers. [...] In ruling that the employment contract concluded with the incapacitated A. was invalid, the court referred to the provisions of Art. 171 of the Civil Code [...], which provides for nullity of transactions made by a citizen who has been declared fully incapable due to mental disorder [...] However, this provision is applicable to civil-law relations; the provisions of the Civil Code [...] are not applicable to labour relations”<sup>232</sup>.

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<sup>226</sup> For a detailed discussion, see Èl'vira N. Bondarenko, *Dinamika trudovogo pravootnošenija* [Dynamics of the Labour Legal Relationship] (Moscow: Norma, Infra-M, 2021) 17 – 51.

<sup>227</sup> Art. 16(1)(1) of the Federal Law No. 79-FZ dated 27.07.2004 (as amended).

<sup>228</sup> Art. 2(2)(2) and 12(5)(2) of the “Fundamentals of Legislation of the Russian Federation on Notarial System” (approved by the Supreme Soviet of the Russian Federation on 11.02.1993 under No. 4462-1) (as amended).

<sup>229</sup> Sixth paragraph of Art. 331 of the Labour Code.

<sup>230</sup> Art. 6 of the Law on Psychiatric Care.

<sup>231</sup> Art. 83(5) of the Labour Code.

<sup>232</sup> Ruling of the Supreme Court No. 13-V10-2 dated 23.04.2010.

## **10. Can limitation of legal capacity have retroactive effect? If so, explain?**

The limitation of legal capacity, be it full or partial, becomes effective as soon as the incapacitation order becomes effective. Such incapacitation has no retroactive effect<sup>233</sup>.

## **11. Which authority is competent to decide on limitation or restoration of legal capacity?**

Both full and partial incapacitation can be ordered and reviewed only by a court<sup>234</sup>, whereas the subsequent appointment as well as dismissal of particular guardians is entrusted to the Guardianship Authorities<sup>235</sup>.

The drawbacks of this traditional (yet on many levels problematic) division are only partially cured by: the mandatory participation of the respective Guardianship Authority in incapacitation proceedings before the court<sup>236</sup>; the court's duty to provide the respective authority with a copy of the incapacitation order immediately (i.e., no later than 3 days) after its entry into force<sup>237</sup>; and explicit subjection of the appointment of guardians to judicial review<sup>238</sup>.

This division of responsibility between the courts and the Guardianship Authorities may be attacked from both substantive and procedural perspectives. Indeed, the appointment of a full or partial guardian is a mandatory consequence of full or partial incapacitation<sup>239</sup>. But this allocation of the decision about incapacitation and the appointment of guardians to different bodies leads to a questionable substantive separation of these two

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<sup>233</sup> Whether subsequent incapacitation makes it easier to invalidate legal acts (including contracts) entered into earlier, as tainted by lack of mental capacity at the time of the contract was concluded, is another question. Such factual or "weak" retroactivity might be observable to some extent in the case law, but no representative studies are available. This tendency might be reinforced by explicit provision of the Civil Code that full or partial guardians are entitled to seek to have legal acts of an adult set aside on grounds of a subsequent order of incapacitation (Art. 177(2) of the Civil Code). Although the referenced provision does not extend the standard grounds for invalidation due to lack of mental capacity in any respect, the mere fact that the Code explicitly addresses this type of situation might be perceived as an indication that invalidation in such cases is particularly natural.

<sup>234</sup> Art. 29(1) and (3), 30(1) and (3) of the Civil Code, Art. 262(1)(4), 281 – 286 of the Code of Civil Procedure.

<sup>235</sup> First paragraph of Art. 35(1) of the Civil Code.

<sup>236</sup> First sentence of the first paragraph of Art. 284(1) of the Code of Civil Procedure. See also Q13 introduction.

<sup>237</sup> Art. 34(2) of the Civil Code.

<sup>238</sup> Second paragraph of Art. 35(1) of the Civil Code.

<sup>239</sup> Second sentence of Art. 29(1), Art. 32(1) and second sentence of the first paragraph of Art. 30(1), Art. 33(1) of the Civil Code, Art. 285(2) and (1) of the Code of Civil Procedure, respectively.



matters<sup>240</sup>: all issues of guardianship fall outside the scope of incapacitation proceedings, and the court's decision on incapacitation is detached from (and the court can hardly consider) questions like what kind of guardianship arrangements are specifically available, whether there is an appropriate person or institution whose appointment would be beneficial to the adult in the circumstances *etc.*

In turn, procedural fairness and procedural safeguards could be secured much more robustly if judicial proceedings were subject to a uniform, transparent statutory framework on the federal level than in the context of underdeveloped administrative regulations that vary from region to region and from authority to authority, as is the case with the procedures applicable to appointment by Guardianship Authorities.

Along different lines, another noteworthy problem with the institutional allocation of incapacitation decisions, as has long been argued, is that the courts rely too uncritically on the reports of forensic psychiatric experts, such that the actual decisions are typically made outside the courtroom and are not necessarily driven by legally valid reasons<sup>241</sup>.

## 12. Who is entitled to request limitation or restoration of legal capacity?

The law explicitly entitles several groups of persons to request limitation of legal capacity<sup>242</sup>. Partial incapacitation of an adult due to alcohol or drug abuse can be requested by members of the family, Guardianship Authorities or

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<sup>240</sup> It has been argued that the principal and decisive purpose of (judicial) incapacitation is – and this should be explicitly entrenched in the law – the appointment of the full or partial guardian. Where this is not feasible or does not serve the interests of the adult, the courts should dismiss the incapacitation requests. Accordingly, the appointment of full or partial guardians should also fall within the court's analysis or even be altogether incorporated into incapacitation proceedings (Aleksandr T. Bonner, 'Oxrana interesov duševnobil'nyx i slaboumnyx graždan' [Protection of the Interests of Mentally Ill and Feeble-Minded Persons] 11 (1986) *Sovetskoe gosudarstvo i pravo* [Soviet State and Law] 99 – 105, 100 – 101, 104 – 105; Aleksej V. Argunov, *Osoboe proizvodstvo v graždanskom processual'nom prave Rossii i Francii* [Special Proceedings in the Russian and French Laws of Civil Procedure in Russia] (Moscow: Prospekt, 2015) 191 – 192).

<sup>241</sup> Tat'jana V. Klimenko, in: Elena R. Rossinskaja (ed.), *Sudebnaja èkspertiza: tipičnye ošibki* [Forensic Expertise: Typical Mistakes] (Moscow: Prospekt, 2014) 242, 244 – 245; Aleksandr T. Bonner, 'Oxrana interesov duševnobil'nyx i slaboumnyx graždan' [Protection of the Interests of Mentally Ill and Feeble-Minded Persons] 11 (1986) *Sovetskoe gosudarstvo i pravo* [Soviet State and Law] 99 – 105, 100 – 101, 102 – 103. For (related) cases on involuntary hospitalization see: Elena S. Smagina, Dmitriy A. Čupilin, Problemy obespečenija sostjazatel'nosti po administrativnym delam o gospitalizacii graždanina v medicinskiju organizaciju, okazyvajuščuju psixiatričeskiju pomošč' v stacionarnyx uslovijax, v nedobrovol'nom porjadke [Problems of Ensuring Adversarial Proceedings in Administrative Cases of Involuntary Hospitalization of a Citizen into a Medical Institution Providing Residential Psychiatric Care], 3 (2021) *Administrator suda* [Court's Administrator] 20 – 25. See also the ECtHR judgements referred to in n. 70 and Q13 c.

<sup>242</sup> As regards partial incapacitation pursuant to the previous Code of Civil Procedure dated 1964 this was emphasized in the second sentence of the first paragraph of Para 4 of the Plenum's Resolution of the Supreme Court No. 4 dated 04.05.1990 (currently not in force but in substance still correct).

medical institutions providing psychiatric care<sup>243</sup>. Arguably, this applies to partial incapacitation due to addiction to gambling as well. Full incapacitation due to mental disorder can be requested by members of the family, close relatives (parents, children, siblings) regardless of whether they live together with the adult, by Guardianship Authorities, and by a medical institution providing psychiatric care or a residential social service institution for persons suffering from mental disorders<sup>244</sup>.

When partial incapacitation due to mental disorder was introduced, in 2015, here again the legislature did not care to align the procedural rules with the changed substantive law<sup>245</sup>. In order to fill the gap, the Supreme Court explained in its virtually binding instructions to the courts that in such cases, the procedural rules for full incapacitation due to mental disorder should apply accordingly<sup>246</sup>. From this, one must conclude that adults are not entitled to apply for partial incapacitation themselves. But such a result does not appear to be justifiable in substance; and arguably, it is at odds with the constitutional dimension of the respective statutory framework and its legislative history. Remember that the functions of this remedy are twofold: namely, requests for partial incapacitation are a means not only to limit the legal capacity of an adult whose capacity is currently unlimited, but alternatively also to replace full with partial incapacity<sup>247</sup>. Given that the adult is entitled to apply personally or through representatives of their choosing for review of full incapacitation<sup>248</sup>, it is only natural (not to mention required by considerations of consistency) that incapacitated adults also be entitled to apply for partial incapacitation.

The ambiguous concept of “family members”, even as distinct from the “close relatives” mentioned on the same line<sup>249</sup>, has caused some confusion<sup>250</sup>. The clause “regardless of whether they live together with the adult” that applies to full incapacitation as opposed to partial incapacitation due to substance abuse stems from the difference between the two grounds for limitation of legal capacity: given that partial incapacitation due to substance abuse (and addiction to gambling) is only possible if it results in financial hardship to the

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<sup>243</sup> Art. 281(1) of the Code of Civil Procedure.

<sup>244</sup> Art. 281(2) of the Code of Civil Procedure.

<sup>245</sup> On the urgent need to amend the Code of Civil Procedure in this regard see, e.g., Nikolaj A. Rjabinin, Ksenija Ju. Kazanceva, *Soveršenstvovanie zakonodatel'stva, regulirujuščego pravovoj status lica, ograničennogo v deesposobnosti* [Improving the Legislation Governing the Legal Status of the Partially Incapacitated Person], 7 (2017) *Sovremennoe pravo* [Modern Law] 53 – 60.

<sup>246</sup> Fifth paragraph of Para 19 of the Plenum's Resolution of the Supreme Court No. 25 dated 23.06.2015.

<sup>247</sup> First paragraph of Art. 29(3) of the Civil Code.

<sup>248</sup> Art. 286(2) of the Code of Civil Procedure. For more detail see *infra*.

<sup>249</sup> Art. 286(2) of the Code of Civil Procedure.

<sup>250</sup> See on this, e.g., Natal'ja V. Laskina, in: ead. et al., *Kommentarij k podrazdelu IV "Osoboe proizvodstvo" razdela II Graždanskogo processual'nogo kodeksa Rossijskoj Federacii ot 14 nojabrja 2002 g. N 138-FZ (postatejnyj)* [An Article-by-Article Commentary on Subsection IV “Special Proceedings” of Section II of the Code of Civil Procedure of the Russian Federation No. 138-FZ dated 14.11.2002] (Electronic Database Konsul'tantPljus, 2016).

family, such is held to be unimaginable unless the respective family members live together with the adult<sup>251</sup>.

Statistically, applications by family members and/or close relatives make up the largest share of cases. The official statistics<sup>252</sup> reflected in the table below show a fairly stable share of “legal persons including public agencies”<sup>253</sup> between roughly 19.3 and 22.8% in full incapacitation cases. The respective numbers as regards partial incapacitation are much less constant and oscillate between roughly 16.7 and 49.9%. This means that in a majority of cases (on average roughly 80% every year), full incapacitation is requested by either members of the family or close relatives.

Table 6. Number of incapacitation applications.

	2023/1 254	2022	2021	2020	2019	2018	2017	2016
Total of full incapacitation applications	20,378	41,028	34,728	32,020	42,883	39,584	38,202	37,236
Thereof filed by legal persons including public agencies	4,348	7,930	7,025	6,565	9,768	8,572	7,667	7,475

<sup>251</sup> For a critical discussion of this popular view see Aleksandra M. Nečaeva, *Deesposobnost' fizičeskix lic* [Active Legal Capacity of Natural Persons], 5 (2015) *Zakony Rossii: opyt, analiz, praktika* [Laws of Russia: Experiences, Analysis, and Practice] 70 – 76.

<sup>252</sup> As provided by the Judicial Department at the Supreme Court of the Russian Federation (<<http://www.cdep.ru/?id=79>>). It should be noted that the official statistics do not allow for separation of limitation proceedings in respect of adults from those in respect of persons under age (which can be incapacitated as well, see Question 50 of the Survey of the Case Law of the Supreme Court for the Fourth Quarter of 2005 dated 01.03.2006). There is, as it seems, no overarching statistical data on incapacitation of minors. Although the number of such cases appears to be non-negligible (for an assessment in selected institutions see Natal'ja K. Xaritonova et al., *Priznanie nesoveršennoletnix vospitannikov detskix domov-internatov nedeesposobnymi: pravovye, social'nye i sudebno-psixiatričeskie aspekty* [Full Incapacitation of Minors Residing in Orphanages: Legal, Social, and Forensic Psychiatric Aspects], 2 (2022) *Rossijskij psixiatričeskij žurnal* [Russian Psychiatric Journal] 52 – 53), their share in the total number of incapacitation proceedings will hardly be substantial.

<sup>253</sup> This category will embrace:

Guardianship Authorities and medical institutions providing psychiatric care for partial incapacitation due to substance abuse;

Guardianship Authorities, medical institutions providing psychiatric care and residential social service institutions for persons suffering from mental disorders for partial incapacitation due to mental disorder;

Guardianship Authorities, medical institutions providing psychiatric care and residential social service institutions for persons suffering from mental disorders for full incapacitation due to mental disorder.

<sup>254</sup> First half-year.

Thereof filed by public procurators	22	57	32	14	97	69	64	41
Total of partial incapacitation applications	473	1,043	958	822	1,511	843	808	796
Thereof filed by legal persons including public agencies	135	418	390	312	754	167	135	136
Thereof filed by public procurators	1	0	0	1	2	6	2	4

Previously, public procurators were also entitled to apply for full or partial incapacitation of an adult<sup>255</sup>. When the Code of Civil Procedure dated 2002 came into force, for the most part as of 1 February 2003<sup>256</sup>, the public procurators of the previous Soviet code of civil procedure did not reappear on the list of those entitled to apply<sup>257</sup>. Shortly after, the Supreme Court explained in its virtually binding instructions to the courts that public procurators indeed no longer had the power to file full incapacitation applications<sup>258</sup>. Whether from force of habit or maybe to fill a perceived social need for intervention in some cases, public procurators still apply for incapacitation every now and then, but the cases make up a statistically negligible portion of applications (see the table below<sup>259</sup>).

The assumption that the functions previously performed by public procurators should necessarily be allocated somewhere else (in other words, that incapacitation might sometimes be desirable where none of those explicitly entitled to file the application is present or willing) has given rise to scholarly discussion. Some authors have pleaded for a return to the old approach of letting public procurators file incapacitation applications, at least in certain groups of cases<sup>260</sup>.

<sup>255</sup> Art. 258(1) of the Code of Civil Procedure of the Russian Soviet Federative Socialist Republic dated 1964 (as amended).

<sup>256</sup> Few chapters of the old code remained effective until 30.06.2003 (Federal law No. 137-FZ dated 14.11.2002).

<sup>257</sup> Art. 281(1) and (2) of the Code of Civil Procedure.

<sup>258</sup> Question 2 of the 'Overview of the Case Law of the Supreme Court of the Russian Federation for the Second Quarter of 2004' dated 06.10.2004.

<sup>259</sup> Based on the official statistics by the Judicial Department at the Supreme Court of the Russian Federation (<<http://www.cdep.ru/?id=79>>).

<sup>260</sup> Mar'jam M. Zakarjaeva, *Problemye voprosy učastija prokurora pri rassmotrenii otdel'nyx kategorij del osobogo proizvodstva* [Problematic Issues of the Public Procurator's Participation in Certain Categories of Special Proceedings], 6 (2018) *Zakony Rossii: opyt, analiz, praktika* [Laws of Russia: Experiences, Analysis, and Practice] 74 – 78; Ol'ga A. Rybalova, *Učastie prokurora v rassmotrenii sudami zajavlenij ob ograničenii deesposobnosti graždanina, o priznanii graždanina*

Russian law does not provide for periodic review of full or partial incapacity once granted. If the fully or partially incapacitated adult recovers their mental faculties to the extent that they can understand the meaning of their own actions and/or direct them on their own, the court is to restore full legal capacity<sup>261</sup>. If a fully incapacitated adult develops such capacity but requires the assistance of other persons, the court is to replace full with partial incapacity<sup>262</sup>. If the grounds for partial incapacitation due to addiction to gambling or substance abuse cease to exist, the court is to restore full legal capacity<sup>263</sup>.

Restoration of full legal capacity to a fully incapacitated adult can be requested by the adult or by representatives of the adult's choosing, or by the guardian, a family member, the respective medical institution providing psychiatric care, the residential social service institution for persons suffering from mental disorders, or by the Guardianship Authority<sup>264</sup>.

Restoration of full legal capacity to an adult who has been partially incapacitated due to addiction to gambling or substance abuse can be requested by the adult themselves, by a family member, by the partial guardian, by the respective medical institution providing psychiatric care, by a residential social service institution for persons suffering from mental disorders, or by the Guardianship Authority<sup>265</sup>. Apparently, this rule also applies to cases where partial incapacitation has been introduced due to mental disorder.

Replacing full incapacity with partial incapacity due to mental disorder is governed by the procedural rules for full incapacitation due to mental disorder<sup>266</sup>. This appears to be highly problematic if it leads (as the language of the respective rules on full incapacitation requires) to the conclusion that the adults themselves are not entitled to request this replacement.

Adults declared partially incapacitated due to substance abuse were already entitled to apply for restoration of full legal capacity<sup>267</sup>, but adults declared fully incapacitated due to mental disorder had no equivalent, unconditional procedural right until a new rule<sup>268</sup> took effect on 8 April 2011<sup>269</sup>. No similar right is explicitly provided as regards adults partially

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nedeosposobnym [Public Procurator's Participation in Judicial Proceedings on Partial or Full Incapacitation], 6 (2015) *Zakonnost'* [Legality] 12 – 16, 13.

<sup>261</sup> Second paragraph of Art. 29(3) and second paragraph of Art. 30(3) of the Civil Code, respectively.

<sup>262</sup> First paragraph of Art. 29(3) of the Civil Code.

<sup>263</sup> First paragraph of Art. 30(3) of the Civil Code.

<sup>264</sup> Art. 286(2) of the Code of Civil Procedure.

<sup>265</sup> Art. 286(1) of the Code of Civil Procedure.

<sup>266</sup> Fifth paragraph of Para 19 of the Plenum's Resolution of the Supreme Court No. 25 dated 23.06.2015.

<sup>267</sup> Art. 286(1) of the Code of Civil Procedure. See also Art. 263(1) of the (previous) Code of Civil Procedure dated 1964.

<sup>268</sup> Art. 286(2) of the Code of Civil Procedure.

<sup>269</sup> The respective reform of the Code of Civil Procedure might have been inspired by the ECtHR case *Shtukaturov v Russia* [2008] ECtHR 44009/05 dated 27.03.2008 (see especially Paras 90, 132 thereof). The Explanatory Note to the law that brought about a number of amendments does refer to the ECtHR case, but not in this context. This particular amendment is not addressed in the

incapacitated due to mental disorder, since here (as elsewhere) the legislator failed to properly amend the procedural rules to reflect the introduction of this new type of partial incapacitation. However, there can hardly be any doubt that this category of incapacitated adult enjoys such a right as well.

In introducing the adult's right to request restoration of full legal capacity, the legislator also stipulated (contrary to its previous approach) that adults declared fully incapacitated have the right to appoint a representative of their choosing empowered to file such a request and to pursue it on their behalf<sup>270</sup>. Particularly in light of the *Shtukaturov v Russia* case, this is to be understood as enabling the incapacitated adult to request restoration of full legal capacity independently of the guardian or another state-appointed representative. Here again, the legislator failed to consider all the implications of this step and adjust related provisions in various areas of law. By way of illustration, one court has recognized – arguably contrary to the letter of the applicable statutory provisions and not in keeping with what was (and perhaps still is) the dominant approach: that the incapacitated adult on one hand has a right to legal aid and on the other is competent to retain counsel<sup>271</sup>. The court reasoned that otherwise, the adult's right to request review of incapacitation in judicial proceedings would not be duly respected.

Full<sup>272</sup> and partial guardians are obliged by law to request review of full or partial incapacity<sup>273</sup>. The same rule applies where no full or partial guardian has been appointed and an institution providing medical or social services performs the respective duties<sup>274</sup>. However, lack of explicit rules on liability for failure to respect this duty and the structural conflict of interest are grounds, reinforced by anecdotal evidence, to doubt the efficiency of this provision<sup>275</sup>.

Further, it has been pointed out that, here again, the legislator failed to address one of the issues that emerged in connection with the introduction of partial incapacitation due to mental disorder: the respective provisions include no mention of the guardian's duty to apply for partial incapacitation of a fully incapacitated adult as soon as his or her mental capacity develops enough to allow a change in the legal status of the ward<sup>276</sup>.

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Explanatory Note at all. See: <<https://sozd.duma.gov.ru/download/76D21E5C-3FD4-4C28-A699-1AA99EE5AAEC>>. For criticisms of prior law see also Paras 96 – 97 of *Lashin v Russia* [2013] ECtHR 33117/02 dated 22.01.2013.

<sup>270</sup> Art. 286(2) of the Code of Civil Procedure.

<sup>271</sup> Cassation Ruling of the First Cassation Court of General Jurisdiction No. 88a-20565/2020 in case No. 2a-87/2020 dated 25.08.2020.

<sup>272</sup> See already Art. 131(2) of the Code on Marriage and Family of the Russian Soviet Federative Socialist Republic dated 1969 (in force until 29.02.1996).

<sup>273</sup> Art. 36(5) of the Civil Code.

<sup>274</sup> Art. 11(5) of the Law on Full and Partial Guardianship.

<sup>275</sup> Irina A. Mixajlova, *Osuščestvlenie sub'ektivnyx prav graždan, stradajuščix psixičeskim rasstrojstvom: novyj podxod i novye problemy* [The Exercise of the Subjective Rights of Citizens Suffering from Mental Disorder: The New Approach and New Problems], 11 (2015) *Zakony Rossii: opyt, analiz, praktika* [Laws of Russia: Experiences, Analysis, and Practice] 26 – 34.

<sup>276</sup> Ol'ga A. Rybalova, *Public Procurator's Participation in Judicial Proceedings on Partial or Full Incapacitation* (n. 260) 13.

- 13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:**
- a. a requirement of legal representation of the adult;**
  - b. participation of family members and/or of vulnerable adults' organisations or other CSO's;**
  - c. requirement of a specific medical expertise / statement;**
  - d. hearing of the adult by the competent authority;**
  - e. the possibility for the adult to appeal the decision limiting legal capacity.**

Limitation and restoration of legal capacity are decided upon within a specific procedure enshrined in the Code of Civil Procedure<sup>277</sup>. This procedure is classified as a sub-category of “special proceedings” [*osoboe proizvodstvo*]<sup>278</sup>, which are generally defined as non-contentious or non-adversarial proceedings<sup>279</sup> and characterized in particular by the absence of clearly antagonistic roles of claimant and defendant. Instead, the principal participants to such proceedings are the applicant and other interested parties<sup>280</sup>.

The almost unanimous conception of this class of proceedings as non-contentious, the corresponding design of the incapacitation procedure and the realities of the courtroom fail to do full justice to the content of incapacitation proceedings and the typical controversies and conflicts of interest it is structurally prone to. In particular, the non-contentious approach disregards the frequent tension between the interests of the adult whose incapacitation is sought and those of the applicant, who will often be the most probable candidate for appointment as full or partial guardian and who in any event might be pursuing a variety of personal interests that do not necessarily coincide with those of the affected adult. In a seminal judgement, the Constitutional Court remarked that

“[a]lthough in such cases, given their specific nature, there are no parties in the ordinary procedural sense, nevertheless the interests of the parties to the proceedings may be divergent and, as such, must be protected and defended by means of the universal principle of adversarial proceedings and equality of arms (article 123(3) of the Constitution of the Russian Federation)”<sup>281</sup>.

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<sup>277</sup> Chapter 31, Art. 281 – 286 of the Code of Civil Procedure.

<sup>278</sup> Art. 262(1)(4) of the Code of Civil Procedure.

<sup>279</sup> Art. 263(3) of the Code of Civil Procedure.

<sup>280</sup> Art. 263(2) of the Code of Civil Procedure.

<sup>281</sup> First paragraph of Para 3.3 of the reasoning of the Resolution of the Constitutional Court of Russia No. 4-P dated 27.02.2009. For a discussion of various related aspects see also, e.g., the third paragraph of the Para 3 of the reasoning of the same Resolution and the second paragraph of

For decades, numerous respected voices in this field have thus advocated for reforms that would ensure the adult's right to be heard and make this kind of proceeding more adversarial<sup>282</sup>.

The procedural law now in force expressly provides for four different types of procedure related to limitation of legal capacity. These apply to partial incapacitation due to substance abuse, full incapacitation, restoration of full legal capacity of an adult partially incapacitated due to substance abuse, and restoration of full legal capacity of a fully incapacitated adult. When introducing partial incapacity due to mental disorder in 2015, the legislator failed to correspondingly amend the procedural law; as a result, the Code of Civil Procedure mentions neither partial incapacitation due to mental disorder nor restoration of full legal capacity of an adult declared partially incapacitated on such grounds. To fill the gap, the Supreme Court explained in its virtually binding instructions to the courts that procedural rules for full incapacitation due to mental disorder are to apply accordingly to partial incapacitation due to mental disorder<sup>283</sup>. As noted above, it bears repeating that this situation is unsatisfactory and calls for reforms that would provide procedural rules to adequately consider the specific features of partial incapacitation due to mental disorder.

The persons and authorities entitled to apply for limitation or restoration of legal capacity were enumerated above<sup>284</sup>. Apart from the applicant, the law requires the mandatory participation of the adult, whose incapacitation is sought, a public procurator and a representative of the Guardianship Authority<sup>285</sup>, which applies equally to proceedings to restore full legal capacity<sup>286</sup>.

Participation of the adult themselves and their representatives is discussed in detail below<sup>287</sup>. As it presently stands, the law provides for the adult's unconditional right to participate personally and/or through legal representatives of their choosing. However, there is still a long way to go before proper safeguards are established to secure this right, both in terms of legal framework and law in action. The current state of the law in this respect appears as an advanced and yet intermediate stage of development rather than as its terminus. Recent years have been marked by a long-awaited shift in the legal system's attitude towards both personal participation of the adult and the importance of involvement of the adult's representatives of their choosing.

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Para 3.1 of the reasoning of the Resolution of the Constitutional Court of Russia No. 3-P dated 21.01.2020 ("it cannot be ruled out that the guardian will have a procedural interest opposite to that of the ward").

<sup>282</sup> For an overview see, e.g., Aleksey V. Argunov, *Special Proceedings in the Russian and French Laws of Civil Procedure in Russia* (n. 240) 188 – 192, 195.

<sup>283</sup> Fifth paragraph of Para 19 of the Plenum's Resolution of the Supreme Court No. 25 dated 23.06.2015.

<sup>284</sup> Q12.

<sup>285</sup> First sentence of the first paragraph of Art. 284(1) of the Code of Civil Procedure.

<sup>286</sup> Art. 286(3) of the Code of Civil Procedure.

<sup>287</sup> Q13 d and a, respectively.



A public procurator and a representative of the Guardianship Authority must be involved in the court proceedings and are obliged to submit reports<sup>288</sup>. However, by some indications their participation may often be merely formal in nature<sup>289</sup>.

**a. a requirement of legal representation of the adult;**

As already mentioned, recent developments put in place by the ECtHR and the Constitutional Court and implemented by the legislature have led not only to the recognition and safeguarding of the adult's right to participate in incapacitation proceedings personally but also to acknowledgment that this right cannot be fully effective unless the adult is given an opportunity to present their case through or with help of a representative of their choosing. Obviously, the adult could already appoint a representative of their choosing to participate in incapacitation proceedings prior to these judgements and legislative reform, so the only added value from these developments, if any, was a strong, explicit emphasis on this right, which may have elevated its importance to some extent.

The actual changes in this field, all pointing in the same direction – extending and ensuring the adult's right to avail themselves of a representative of their choosing – were threefold. First, the ECtHR and the Constitutional Court in effect acknowledged the adult's right to appoint a representative of their choosing for the sake of submissions to and proceedings before them, regardless of the previously dominant general approach in Russian domestic law, pursuant to which no incapacitated adult can issue powers of attorney<sup>290</sup>.

Second, the adult who was not given an opportunity to present their case before the first-instance court personally or through/with the help of a representative of their choosing has received a right to appoint a representative of their choosing to challenge the decision of the first-instance court, even after the decision has already entered into force<sup>291</sup>. This is a new exception to the general rule, according to which the adult can appoint and avail themselves of a representative of their choosing only before the first-instance court decision becomes effective and deprives them of legal capacity (in particular to issue powers of attorney). Once the one-month deadline to appeal had passed, it

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<sup>288</sup> Art. 45(3) and 47 in connection with the first sentence of the first paragraph of Art. 284(1) of the Code of Civil Procedure, respectively. See also the clear explanations regarding a different context but that just as well hold true for the types of case under consideration. Para 3 of the Plenum's Resolution of the Supreme Court No. 10 dated 27.05.1998 (as amended).

<sup>289</sup> Ol'ga A. Rybalova, Public Procurator's Participation in Judicial Proceedings on Partial or Full Incapacitation (n. 260) 16 (in respect of Guardianship Authorities); Paras 16, 74 of *Shtukaturov v Russia* [2008] ECtHR 44009/05 dated 27.03.2008 (in respect of public procurators).

<sup>290</sup> Paras 142 – 143 of *Shtukaturov v Russia* [2008] ECtHR 44009/05 dated 27.03.2008 (since Russia ceased to be a member of the Council of Europe as of 16.03.2022, representation of the adult before the ECtHR is of no practical relevance at present); para 1.2 of the reasoning of the Resolution of the Constitutional Court No. 4-P dated 27.02.2009.

<sup>291</sup> Art. 284(3) of the Code of Civil Procedure as in force from 8.04.2011; Para 2 of the operative part of the Resolution of the Constitutional Court No. 4-P dated 27.02.2009.

always used to be the guardian alone who could challenge the decision, personally or through/with help of a representative appointed by them.

In 2020, the Constitutional Court emphasized that the existence of guardians with the power to challenge incapacitation decisions on behalf of the adult does not suffice to fully respect the adult's right to present their case. One of the reasons was that guardians and the like are structurally prone to having a conflicting procedural interest as regards appeals against incapacitation decisions<sup>292</sup>.

Third, in order to remove practical and/or legal barriers to the adult appointing a representative of their choosing before or after the incapacitation order takes effect, the Constitutional Court has given a binding interpretation to the existing statutory framework which in effect introduces an exception to the general formal requirements for powers of attorney. It enables adults to appoint a representative of their choosing to challenge judgements in incapacitation cases without complying with the standard formal requirements enshrined in law for powers of attorney of this kind<sup>293</sup>.

Although respected authors have been drawing attention to the structural deficiencies of the incapacitation procedure for decades (arguing among other things that the participation of a legal representative on behalf of the adult is generally advisable and advocating mandatory appointment of counsel *de lege ferenda*<sup>294</sup>), there is still no legal requirement that the adult be represented by an attorney in incapacitation cases.

However, two recent developments should be noted that point in the direction of mandatory participation of counsel in incapacitation and similar cases<sup>295</sup>. First, in cases on involuntary hospitalization in a medical institution providing residential psychiatric care, to extend the term of such, or to order an involuntary psychiatric examination, the Code of Administrative Justice of 2015 requires that the adult be legally represented, including where the fully or partially incapacitated adult is already represented through a guardian or the

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<sup>292</sup> Para 3.1 of the reasoning of the Resolution of the Constitutional Court of Russia No. 3-P dated 21.01.2020.

<sup>293</sup> Para 1 of the operative part of the Resolution of the Constitutional Court of Russia No. 3-P dated 21.01.2020.

<sup>294</sup> Julija N. Argunova, *Vsegda li advokat vprave obžalovat' priznanie svoego doveritelja nedeeposobnym?* [Does a Lawyer Always Have a Right to Appeal Against the Declaration of His Client as Incapacitated?] 2 (2020) *Nezavisimyj psixiatricheskij žurnal* [Independent Psychiatric Journal] 44 – 50, 50; Aleksandr T. Bonner, 'Vsegda li bessporny dela osobogo proizvodstva?' [Are the Non-Contentious Proceedings Always Non-Contentious?], in: id., *Problemy administrativnoj justicii, osobogo proizvodstva, graždanskogo i medicinskogo prava. Juridičeskaja publicistika* [Problems of Administrative Justice, Special Proceedings, Civil, and Medical Law. Legal Journalism], vol. VI (Moscow: Prospekt, 2017) 257 (first published in 2008); Aleksandr T. Bonner, 'Oxrana interesov duševnabol'nyx i slaboumnyx graždan' [Protection of the Interests of Mentally Ill and Feeble-Minded Persons] 11 (1986) *Sovetskoe gosudarstvo i pravo* [Soviet State and Law] 99 – 105, 104.

<sup>295</sup> Vsevolod V. Argunov, A.T. Bonner – teoretik, praktik, politik prava – ob osobom proizvodstve [A.T. Bonner – A Theorist, A Practitioner, and A Legal Politician – On Special Proceedings], 4 (2022) *Vestnik graždanskogo processa* [Herald of Civil Procedure] 183 – 224, 206 – 207.

like (Art. 54(2),(3) and (4), Art. 277(5) and (6) of the said Code)<sup>296</sup>. Obviously, the introduction of this requirement says little about the way it is applied in practice. There is evidence that the participation of court-appointed attorneys is often perfunctory and that they do not necessarily act in their clients' interest<sup>297</sup>.

Second, in its Resolution No. 3-P dated 21 January 2020, the Constitutional Court emphasized the paramount importance of counsel being involved in incapacitation proceedings on behalf of the adult<sup>298</sup>. In particular, the Court stressed that participation of the adult themselves is not sufficient to safeguard procedural fairness, much less when the hearing takes place at the medical institution due to the adult's mental condition. Though not legally binding as such, this *ratio decidendi* is nevertheless an important step in the Constitutional Court's commitment to ensuring fair treatment of adults in incapacitation proceedings and is a clear signal to all sorts of agents of legal development. After the Constitutional Court spelled out the fundamental nature of the adult's right to participate in incapacitation proceedings (including through representatives of their choosing) in its seminal Resolution No. 4-P of 27 February 2009, which was subsequently implemented in a legislative reform, the Constitutional Court this time approached the issue of legal representation from another angle. After reiterating that there is no legal requirement that an attorney participate in first-instance incapacitation proceedings, the Court indicated that the lack of attorney from the outset has drawbacks in at least two contexts. For one, an unrepresented adult is structurally more likely to miss the deadline for appeal, especially as their mental condition may prevent them from properly understanding the legal consequences of being declared incapacitated and from grasping the deadline to appeal. For another, it is considered that in case of personal attendance the adult has been given opportunity to present their position even if they have been unable to explain themselves as regards the substance matter. This is relevant for the procedural safeguards introduced into Russian law after the judgements of the ECtHR and the Constitutional Court, which consist in allowing the incapacitated adult to appeal against the respective decision if they were not given an opportunity to present their position personally or through representatives of their choosing. The Constitutional Court

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<sup>296</sup> For discussion see, e.g., Andrej A. Solov'ev, *Obščie položenija o predstavitel'stve v administrativnom sudoproizvodstve Rossijskoj Federacii* [General Provisions on Representation in Administrative Proceedings in the Russian Federation], 3 (2017) *Vestnik graždanskogo processa* [Herald of Civil Procedure] 51 – 73.

<sup>297</sup> See, e.g., Ljubov' N. Vinogradova, V.M. Gefter (eds), *Obespečenie prav pacientov stacionarnyx psixiatričeskix lečebnyx i ekspertnyx organizacij. Doklad po rezul'tatam raboty členov obščestvennyx nabljudatel'nyx komissij v 2020–2021 gg.* [Ensuring the Rights of Patients of the Residential Therapeutic and Forensic Psychiatric Institutions. Report on the Results of the Work of Members of Public Supervisory Commissions in 2020–2021] (Moscow: Grifon, 2022) 43, 82; Elena S. Smagina, Dmitriј A. Čupilin, *Problems of Ensuring Adversarial Proceedings in Administrative Cases of Involuntary Hospitalization of a Citizen into a Medical Institution Providing Residential Psychiatric Care* (n. 241), *passim*; Paras 26, 36 – 40 of *V.K. v Russia* [2017] ECtHR 9139/08 dated 04.04.2017.

<sup>298</sup> Resolution of the Constitutional Court No. 3-P dated 21.01.2020.

emphasizes that the adult's personal attendance at the first-instance court forecloses the possibility of appeal even if they were effectively unable to explain themselves and "an attorney who could defend his [or her] interests was absent". The critical tenor of this kind of reasoning is apparent.

**b. participation of family members and/or of vulnerable adults' organisations or other CSO's;**

Family members, vulnerable adults' rights organizations and other CSO's as such have no right to participate in proceedings on limitation or restoration of legal capacity.

It should be noted, however, that family members and close relatives are entitled to file incapacitation requests, and where incapacitation proceedings are initiated on such a request, the respective family member or close relative (but only this particular family member or close relative) participates as applicant. As already mentioned<sup>299</sup>, the cases in which limitation of legal capacity was applied for by a family member or close relative account for roughly 80% of full incapacitation adjudications.

**c. requirement of a specific medical expertise / statement;**

Forensic psychiatric expertise is required by law in any proceeding on full incapacitation (provided that there is sufficient prima facie evidence that the adult suffers from a mental disorder), as well as in proceedings to restore the legal capacity of a fully incapacitated adult<sup>300</sup>. No such requirement applies to partial incapacitation due to substance abuse. Here again, so far no amendments have been introduced in connection with partial incapacitation due to mental disorder. But the requirement stipulated in respect of full incapacitation cases meanwhile applies to partial incapacitation on these grounds by virtue of the Supreme Court's explanations<sup>301</sup>, and probably also to restoration of full legal capacity to an adult declared partially incapacitated due to mental disorder.

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<sup>299</sup> See Q12.

<sup>300</sup> Art. 283 and 286(2) of the Code of Civil Procedure. See also the third paragraph of Para 13 of the Plenum's Resolution of the Supreme Court No. 11 dated 24.06.2008 (as amended) and, previously, the third paragraph of Para 18 of the Plenum's Resolution of the Supreme Court No. 2 dated 14.04.1988 (as amended) in force until 24.06.2008. In light of the referenced explanations of the Supreme Court there seems to be no sound reason to question the mandatory nature of this requirement (raising the question in respect of full incapacitation proceedings, see Elena R. Rossinskaja, in: ead. (ed.), *Sudebnaja ekspertiza v civilističeskix processax* [Forensic Expertise in Civil Proceedings] (Moscow: Prospekt, 2018) 54 – 55; on the mandatory nature of this requirement see, in the same book, Tat'jana V. Klimenko, 665, 674 – 675, 677).

<sup>301</sup> Fifth paragraph of Para 19 of the Plenum's Resolution of the Supreme Court No. 25 dated 23.06.2015.

This procedural requirement is interconnected with the substantive provisions in regard to full and partial incapacitation due to mental disorder, which, as set out above<sup>302</sup>, refer (only) to the mental condition of the adult. The substantive rule that incapacitation decisions must depend only on the mental condition of the adult and the procedural rule that the court must involve a forensic psychiatric expert in every incapacitation case combine almost inevitably to result in a shift of decision-making from the judge to the expert<sup>303</sup>. Quite symptomatically, when it emphasizes that no legal questions may be addressed to forensic experts, the Supreme Court, in its instructions to the lower courts, traditionally<sup>304</sup> invokes incapacitation cases as a prominent example:

“It should be borne in mind that [...] only those questions may be submitted for expert examination that require specialised knowledge in various fields of science, technology, art or craft. It is inadmissible to put before the expert or experts questions of legal nature, the resolution of which falls within the competence of the court (for example, the question about the legal capacity of a citizen, rather than the nature of his disease)”<sup>305</sup>.

In view of the referenced interplay of substantive and procedural rules, it comes as little surprise that the Supreme Court feels the need to draw attention to the separate roles of judge and expert in this type of case. Arguably, it would not be too far-fetched to regard these explanations as a response to the courts’ tendency to give in to temptation and fully delegate decision-making responsibility to the experts.

#### **d. hearing of the adult by the competent authority;**

The adult has an unconditional right to participate in proceedings on full or partial incapacitation or to restore legal capacity, either personally and/or through legal representatives of their choosing<sup>306</sup>.

In full incapacitation cases, the adult must be summoned to the courtroom if their presence in the hearing would not endanger their life or health or the life or health of others<sup>307</sup>. Where such a danger exists, the adult must be given an opportunity to participate in the hearing at the place of their location, for

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<sup>302</sup> See Q8.

<sup>303</sup> See also Q11 *in fine*.

<sup>304</sup> See the second paragraph of Para 18 of the Plenum’s Resolution of the Russian Supreme Court No 2 dated 14.04.1988 (as amended) in force until 24.06.2008.

<sup>305</sup> Second paragraph of Para 13 of the Plenum’s Resolution of the Supreme Court No. 11 dated 24.06.2008 (as amended).

<sup>306</sup> Art. 284(1) and (3) and 286(3) of the Code of Civil Procedure. On legal representation of the adult see Q13 a.

<sup>307</sup> Second sentence of the first paragraph of Art. 284(1) of the Code of Civil Procedure.

instance at a medical institution providing psychiatric care or a residential social service institution for persons suffering from mental disorders<sup>308</sup>.

If (despite due notice and without a valid excuse) the adult does not appear, the hearing can proceed in their absence, and the decision can be made without a personal hearing of the adult. But based on the language of the recently introduced provision concerning hearings at medical institutions, it may be argued that in the latter case the adult's personal participation is still required.

The referenced statutory framework regarding full incapacitation is the result of a reform triggered by the judgements of the ECtHR and the Constitutional Court effective as of 8 April 2011<sup>309</sup>. Prior law, found unsatisfactory by the high courts, stipulated that in full incapacitation cases the adult was to be summoned to the hearing only if this was possible in view of their health condition<sup>310</sup>. Courts tended to conclude all too easily and frequently that the adult's health condition justified foregoing the summons<sup>311</sup>.

There is some evidence that the above novel rules are being complied with by the courts, at least to a certain extent<sup>312</sup>. However, I am not aware of any representative assessment of the case law in this regard.

#### **e. the possibility for the adult to appeal the decision limiting legal capacity.**

Adults have an unconditional right to appeal the first-instance court decision before it enters into force, because not until the respective decision becomes effective does the adult's legal capacity become limited. Accordingly, the general rules<sup>313</sup> apply, and the adult can challenge the decision personally or through/with help of a representative of their choosing before it enters into force one month after it is rendered<sup>314</sup>.

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<sup>308</sup> Second paragraph of Art. 284(1) of the Code of Civil Procedure.

<sup>309</sup> See Paras 71 – 73 of *Shtukaturov v Russia* [2008] ECHR 44009/05 dated 27.03.2008; Para 1 of the operative part of the Resolution of the Constitutional Court of Russia No. 4-P dated 27.02.2009; Explanatory Note to the respective draft amendments to the Code of Civil Procedure (<<https://sozd.duma.gov.ru/download/76D21E5C-3FD4-4C28-A699-1AA99EE5AAEC>>).

<sup>310</sup> Second sentence of Art. 284(1) of the Code of Civil Procedure as in force until 7.04.2011.

<sup>311</sup> See Paras 3.2 and 3.5 of the reasoning, Para 1 of the operative part of the Resolution of the Constitutional Court of Russia No. 4-P dated 27.02.2009; Explanatory Note to the respective draft amendments to the Code of Civil Procedure (<<https://sozd.duma.gov.ru/download/76D21E5C-3FD4-4C28-A699-1AA99EE5AAEC>>). See also Paras 82, 89 and 93 of *Lashin v Russia* [2013] ECHR 33117/02 dated 22.01.2013 and Paras 7, 24, 27, 30, 33, 35, 48, 49 and 63 of *Shakulina and Others v Russia* [2018] ECHR 24688/05 dated 05.06.2018.

<sup>312</sup> See Note Based on the Results of Review of the Case Law on Involuntary Hospitalization of Citizens in Psychiatric Hospitals and on Full Incapacitation (prepared by the Samara Oblast Court on 27.09.2016) <[https://obsud.sam.sudrf.ru/modules.php?id=379&name=docum\\_sud](https://obsud.sam.sudrf.ru/modules.php?id=379&name=docum_sud)> (Samara Oblast), Ol'ga A. Rybalova, Public Procurator's Participation in Judicial Proceedings on Partial or Full Incapacitation (n. 260) 15 (Saint Petersburg).

<sup>313</sup> Art. 320(1) and (2), 34, 35(1), 37(1), 48(1), 263(2), first sentence of the first paragraph of Art. 284(1), of the Code of Civil Procedure.

<sup>314</sup> Art. 321(2) of the Code of Civil Procedure.

As soon as the incapacitation order enters into force, the adult's procedural legal capacity is limited, and as a rule they can appeal the decision through the guardian<sup>315</sup>, but not personally<sup>316</sup>. However, a recent interpretation by the Constitutional Court seems to suggest – contrary to the previously dominant view – that the adult must also have the right to challenge an effective incapacitation decision through a representative of their choosing<sup>317</sup>.

A reform of civil procedure triggered by landmark judgements of the ECtHR<sup>318</sup> and the Constitutional Court<sup>319</sup> recognized the adult's right to appeal the incapacitation order, personally or through/with help of representatives of their choosing, even after it enters into force if the adult was not given an opportunity to present their case before the first-instance court personally or through/with the help of a representative of their choosing<sup>320</sup>. The introduced provision gave adults the procedural means to appeal the decision after its entry into force in this type of case, which is to say, regardless of their effective incapacitation at the time of their motion, which normally would prevent them from making any submissions. Obviously (and as explicitly mentioned in the provision under consideration), the adult in such cases can avail themselves of a representative of their choosing.

Whether the described legal framework ensures (or is even sufficient to ensure) due respect for the adult's right to appeal remains highly doubtful given the specific challenges of this type of case. The referenced cases vividly illustrate the multifarious obstacles to properly upholding the adult's right to appeal that existed before the respective judgements and subsequent reform of the Code of Civil Procedure and that essentially deprived the adult of the opportunity<sup>321</sup>. The reform touched upon the adult's right to appeal only in a very specific aspect: enabling them to challenge personally or through a representative of their choosing an incapacitation order that came into force where the adult had no opportunity to present their case before the first-instance court. In all other aspects, the regulatory situation remains unchanged. Moreover, the newly introduced challenge to the first-instance decision is not available where the adult participated in the proceedings even if they failed to appoint a representative and were in fact unable to present their case properly. Same as before, the standard appeal is frequently flawed by the structurally inherent conflict of interest in this type of case, given that the applicant who

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<sup>315</sup> Art. 37(3) and (5), 52(1) of the Code of Civil Procedure.

<sup>316</sup> For a brief restatement of the regime of the adult's right to appeal see, e.g., Para 4.1 of the reasoning of the Resolution of the Constitutional Court No. 4-P dated 27.02.2009 and third paragraph of Para 3 of the reasoning of the Resolution of the Constitutional Court No. 3-P dated 21.01.2020.

<sup>317</sup> Third paragraph of Para 3, third paragraph of Para 3.1, third and fourth paragraphs of Para 5 of the reasoning and Para 1 of the operative part of the Resolution of the Constitutional Court No. 3-P dated 21.01.2020.

<sup>318</sup> Paras 75 – 76 of *Shtukaturov v Russia* [2008] ECtHR 44009/05 dated 27.03.2008.

<sup>319</sup> Para 2 of the operative part of the Resolution of the Constitutional Court of Russia No. 4-P dated 27.02.2009.

<sup>320</sup> Art. 284(3) of the Code of Civil Procedure as in force from 8.04.2011.

<sup>321</sup> *Shtukaturov v Russia* [2008] ECtHR 44009/05 dated 27.03.2008; Resolution of the Constitutional Court No. 4-P dated 27.02.2009.

initiated incapacitation proceedings and will thus tend to oppose the appeal is usually identical with the person or institution most likely to be appointed guardian and as such is the only person entitled to appeal on behalf of the incapacitated adult<sup>322</sup>. These and some other persistent deficits were addressed, and to a certain extent remedied, by the Constitutional Court in 2020<sup>323</sup>. However, the practical impact of this resolution remains to be seen.

The most recent statistical data on appeals against incapacitation decisions<sup>324</sup> is no less alarming than before. The number of appeals being sought is negligible, and only a negligible portion of those are being granted.

Table 7. Incapacitation orders and appeals.

	2023/1 325	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007
Decisions in full incapacitation cases	17,542	30,267	27,414	27,621	33,206	31,626	30,872	29,781	29,475	28,087	27,242	27,663	30,490	35,645	36,254	35,901	32,354
Full incapacitation applications satisfied in full	17,204	29,610	26,794	26,998	32,375	30,770	30,053	28,860	28,570	27,114	26,276	26,734	29,492	34,498	35,214	35,021	31,605
Motions for appeal filed	147	222	212	238	274	230	249	247	234	214	213	184	231	238	254	175	125
Motions for appeal granted <sup>326</sup>	27	46	38	47	59	36	34	42	44	45	43	46	60	73	72	55	39
Decisions in partial incapacitation cases	371	774	719	837	818	602	581	471	395	404	397	374	363	421	444	519	1,992
Partial incapacitation applications satisfied in full	283	527	483	570	524	424	433	342	302	322	308	284	275	326	344	447	1,873
Motions for appeal filed	18	38	34	29	40	37	37	28	24	29	27	48	54	46	52	21	17
Motions for appeal granted	1	2	4	8	5	5	2	3	4	7	2	6	4	7	11	4	3

<sup>322</sup> Second paragraph of Para 3.1 of the reasoning of the Resolution of the Constitutional Court of Russia No. 3-P dated 21.01.2020.

<sup>323</sup> Resolution of the Constitutional Court No. 3-P dated 21.01.2020.

<sup>324</sup> As provided by the Judicial Department at the Supreme Court of the Russian Federation (<<http://www.cdep.ru/?id=79>>).

<sup>325</sup> First half-year.

<sup>326</sup> The numbers in the “Motions for appeal granted” rows represent the total of the motions of appeal granted in respective year regardless of when they were filed and when the challenged decision had been rendered.



#### - Availability of legal aid

As a general rule<sup>327</sup>, adults are entitled to legal aid in incapacitation cases, subject to a means test<sup>328</sup>. Exempt from the means test are inter alia adults suffering from officially recognized major disabilities (which include various forms of mental disorder)<sup>329</sup>, the elderly and persons with officially recognized disabilities living in residential social service institutions<sup>330</sup>, and those receiving psychiatric care<sup>331</sup>. Beyond that, once an adult has been declared incapacitated, legal aid becomes available to them and their guardians without a means test<sup>332</sup>.

Legal aid encompasses representation in judicial proceedings as regards full incapacitation cases<sup>333</sup>. In the context of partial incapacitation, oral and written advice as well as the drafting of legal submissions is covered, but representation in court proceedings is not<sup>334</sup>. The unavailability of legal representation in live proceedings might be due to the fact that when the original, and insofar unamended, version of the Law on legal aid was adopted, partial incapacitation was only provided in cases of substance abuse. Arguably, partial incapacitation in cases of minor mental disorder calls for a different approach.

#### **14. Give a brief account of the general legal rules with regard to *mental capacity* in respect of:**

Deficits of mental capacity are grounds for full or partial incapacitation. As soon as a person is declared fully incapacitated, their factual mental capacities are generally deemed immaterial. Such adults are denied almost any legally relevant mental capacity regardless of their actual condition at any given point of time. A minor exception pursuant to recently introduced

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<sup>327</sup> The present account reflects only the federal regulations that set the common minimal standards for legal aid. Constituent entities of the Russian Federation may introduce additional safeguards of the right to legal aid (Art. 3(4) of the Federal law No. 324-FZ dated 21.11.2011 “On Legal Aid in the Russian Federation” (as amended; hereinafter – Law on legal aid) but not narrow the scope of the federal rules (see in particular Ruling of the Supreme Court of the Russian Federation No. 74-APG12-22 dated 28.11.2012).

<sup>328</sup> Art. 20(1)(1) of the Law on legal aid.

<sup>329</sup> Art. 20(1)(2) of the Law on legal aid.

<sup>330</sup> Art. 20(1)(5) of the Law on legal aid.

<sup>331</sup> Art. 20(1)(7) of the Law on legal aid in connection with Art. 7(3) of the Law on Psychiatric Care.

<sup>332</sup> Art. 20(1)(8) of the Law on legal aid.

<sup>333</sup> 20(3)(3) of the Law on legal aid. The Russian Law on legal aid makes the availability of legal aid contingent on categories of persons, types of issues at stake, and forms of assistance. For a summary, see, e.g., Paras 10, 29, and 46 of *Yevdokimov and Others v Russia* [2016] 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12, and 67481/12 dated 16.02.2016.

<sup>334</sup> 20(2)(12) of the Law on legal aid.

provisions is where the guardian must consider the adult's opinion, or if such opinion cannot be established, their preferences<sup>335</sup>.

Whether amounting to grounds of full or partial incapacitation or not, factual deficits of mental capacity may become legally relevant in an array of contexts – provided, obviously, that they exist in persons not deprived of active legal capacity or in persons partially incapacitated to an extent that they are still capable of performing juridical acts and the like.

#### **a. property and financial matters;**

Two key points in which factual deficits of mental capacity attain legal relevance in property and financial matters are the provisions on the validity of juridical acts and liability for torts. First, a juridical act performed by one who at the time was not able to understand the meaning of their actions and/or direct them can be invalidated upon a claim raised by this person or by others who were wronged as a result of this act<sup>336</sup>. Where courts have granted invalidation claims, mental disorder is among the typical grounds<sup>337</sup>. Second, someone who causes damage in a state of mind that does not allow them to understand the meaning of their actions and/or direct them is, as a general rule, not liable in tort unless the tortfeasor induced their state of mental incapacity by consuming alcohol or drugs or in any other way<sup>338</sup>.

#### **b. family matters and personal rights (e.g. marriage, divorce, contraception);**

Mutual voluntary consent is one of the necessary conditions of entering into marriage<sup>339</sup>. Rules of the Civil Code on defects of consent and the like do not apply, since marriage is not considered a juridical act of civil law<sup>340</sup>. However, family law arrives at results similar to those that would follow from the general part of the Civil Code<sup>341</sup>. Failure to comply with the conditions of

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<sup>335</sup> Art. 29(2), Art. 37(4) and fourth paragraph of Art. 36(3) of the Civil Code. See Q9 a) and b).

<sup>336</sup> Art. 177 of the Civil Code.

<sup>337</sup> For an overview, cf. Andrej A. Pavlov, in: Artëm G. Karapetov (ed.), *Sdelki, predstavitel'stvo, iskovaja davnost': postatejnyj kommentarij k stat'jam 153 – 208 Graždanskogo kodeksa Rossijskoj Federacii* [Juridical Acts, Representation, Prescription: An Article-by-Article Commentary to Articles 153 – 208 of the Civil Code of the Russian Federation] (Moscow: M-Logos, 2018) 722.

<sup>338</sup> Art. 1078 of the Civil Code. Importantly, unlike where incapacitated adults have caused harm, deficits of mental capacity leading to exemption from tort liability must be established specifically for the time of the harmful event. In particular, the mere fact that the alleged tortfeasor generally suffers from a mental disorder by itself is not sufficient grounds for exemption, and lucid intervals need to be considered (Ruling of the Judicial Panel for Economic Disputes of the Supreme Court No. 305-ES18-6680(28-30) in case No. A40-200773/2016 dated 27.11.2023).

<sup>339</sup> Art. 12(1) of the Family Code.

<sup>340</sup> For a critical discussion of this popular view, see Marija V. Antokol'skaja, *Semejnoe pravo* [Family Law] (Moscow: Norma, 2013) 70 – 72.

<sup>341</sup> Ol'ga A. Ruzakova, in: Pavel V. Krašeninnikov (ed.), *Semejnoe pravo* [Family Law] 3<sup>rd</sup> ed. (Moscow: Statut, 2016) 40, 61.

marriage, including mutual voluntary consent, is grounds for judicial invalidation of marriage<sup>342</sup>. “Inability, due to one’s condition at the time of the state registration of marriage, to understand the meaning of one’s actions and to direct them”, is listed (alongside coercion, deceit, and mistake) among the defects that refute voluntary consent<sup>343</sup>. Mental incapacity due to a mental disorder is a rather frequently used ground for invalidating a marriage<sup>344</sup>. Invalidation of such marriage can be claimed by the spouse “whose rights were violated by the conclusion of marriage” as well as by a public procurator<sup>345</sup>.

The validity of alimony agreements, unlike that of marriage, is governed by the above-referenced civil law provisions on invalidity of juridical acts<sup>346</sup>.

Chronic alcohol or drug addiction is a ground for deprivation<sup>347</sup>, and mental disorder a ground for limitation, of parental rights<sup>348</sup>. Similarly, adoption may be revoked if the adoptive parent suffers from a chronic alcohol or drug addiction<sup>349</sup>.

An ECtHR case from 2016, *Kocherov and Sergeyeva v Russia*<sup>350</sup>, gives insight into the sad realities of how things stand with the family rights of vulnerable adults<sup>351</sup>. The Court found a violation of Art. 8 of the European Convention on Human Rights protecting family life from interference by public authorities. According to the ECtHR, to prevent the child’s transfer into the father’s care, the Russian courts relied on reasons insufficient to justify the restriction of the father’s parental authority<sup>352</sup>. In particular,

“[...] it does not appear that [the domestic courts] made any meaningful attempt to analyse the [father’s] emotional and mental maturity and ability to care for his daughter in the light of the adduced evidence and with due regard to all of the elements it revealed. [...] T]he domestic courts limited their finding in that regard to a mere reference to the [father’s] very prolonged residence in a specialist institution. In the Court’s view, that fact alone cannot be regarded as a sufficient ground to justify the domestic courts’ decision to restrict his parental authority over [his daughter] and to prolong her time in

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<sup>342</sup> Art. 27(1) and (2) of the Family Code.

<sup>343</sup> Third paragraph of Art. 28(1) of the Family Code; Paras 5 and 6 of the Survey of Case Law on Invalidation of Marriage adopted by the Presidium of the Supreme Court on 14.12.2022.

<sup>344</sup> See, e.g., Paras 5 and 6 of the Survey of Case Law on Invalidation of Marriage adopted by the Presidium of the Supreme Court on 14.12.2022.

<sup>345</sup> See n. 343.

<sup>346</sup> Art. 101(1) of the Family Code.

<sup>347</sup> Sixth paragraph of Art. 69 of the Family Code.

<sup>348</sup> First paragraph of Art. 73(2) of the Family Code.

<sup>349</sup> Art. 141(1) of the Family Code. See also Q9 b. Whether these conditions impact the adult’s capacity to perform legal acts regarding family matters is to be decided pursuant to the rules of the Family Code or Civil Code on defects of will.

<sup>350</sup> *Kocherov and Sergeyeva v Russia* [2016] ECtHR 16899/13 dated 29.3.2016.

<sup>351</sup> See also *Antonyuk v Russia* [2013] ECtHR 47721/10 dated 01.08.2013.

<sup>352</sup> Paras 120 and 121 *Kocherov and Sergeyeva v Russia* [2016] ECtHR 16899/13 dated 29.3.2016.

care”<sup>353</sup>. “The Court further turns to the domestic courts’ finding that ‘there [was] no reliable evidence that the girl living with [the father] would be safe [...] in view of his diagnosis’. [...] In such circumstances, the Court fails to see the basis for the domestic courts’ aforementioned finding, and more importantly what evidence, in the domestic courts’ view, the [father] was required to adduce to prove that his mental condition posed no danger to [his daughter’s] safety. The Court therefore finds that the domestic courts’ reference to the [father’s] diagnosis was not a ‘sufficient’ reason to justify a restriction of his parental authority”<sup>354</sup>. “The domestic courts also referred to the fact that the [...] mother [of the child] had been deprived of her legal capacity in view of her mental illness, and to the fact that she would have free access to the [daughter] if she were transferred into the [father’s] care, which, in their opinion, could put the [child] at risk. [...] In [the given] circumstances, the Court is not convinced that the domestic courts’ reference to [mother’s] legal status was a sufficient ground for restricting the [father’s] parental authority”<sup>355</sup>.

### **c. medical matters;**

The general principle is that medical interventions require the patient’s informed consent<sup>356</sup>. Yet it is a pressing concern that informed consent to psychiatric hospitalization is reportedly often given under pressure exerted by the respective institutions<sup>357</sup>.

Obviously, deficits of mental capacity should be material here (as elsewhere) to the extent that they vitiate such consent. Whether the rules of the Civil Code on defects of will<sup>358</sup> are in one way or another applicable to informed consent to a medical intervention is not settled. Given Russian law’s general reluctance to stretch the scope of application of the rules too far as well as the patient’s right to refuse or discontinue a medical intervention at any time (producing the same practical result as invalidation based on defects of will), the actual application of these rules does not appear likely. A medical law practitioner employed at a private hospital explained to me in an interview that doctors are perfectly aware of and have to cope with these issues every now and then. Mindful of the delicacy of the matter and of the frequent involvement

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<sup>353</sup> Para 108 of *Kocherov and Sergeyeva v Russia* [2016] ECtHR 16899/13 dated 29.3.2016.

<sup>354</sup> Paras 109, 111 and 112 of *Kocherov and Sergeyeva v Russia* [2016] ECtHR 16899/13 dated 29.3.2016. See also Para 9 of the Dissenting Opinion of Judge Keller annexed to the judgement: “[...] I cannot but regard the rulings of the domestic courts as biased. To my mind, it is evident that the stereotyped line of reasoning employed by the domestic authorities was based on the underlying assumption that a handicapped person is, by definition, less or not at all capable of properly caring for a child”.

<sup>355</sup> Paras 113 and 117 of *Kocherov and Sergeyeva v Russia* [2016] ECtHR 16899/13 dated 29.3.2016.

<sup>356</sup> For more detail see Q9 c.

<sup>357</sup> Ljubov’ N. Vinogradova, V.M. Gefter (eds), *Ensuring the Rights of Patients of the Residential Therapeutic and Forensic Psychiatric Institutions* [...] (n 297) 42 – 43, 82.

<sup>358</sup> See Q14 a.

of a person exerting influence on the patient's decision-making, doctors tend to handle such situations in an informal manner without recourse to legal machinery.

Some exceptions from the informed consent principle are entrenched in legislation; these concern situations of temporary or continuous deficits of the patient's mental capacity. Thus, medical intervention without the patient's consent is permitted where urgently necessary to eliminate a threat to the person's life, or where palliative care is being provided and the person's condition does not allow them to express their will<sup>359</sup>, or in respect of persons suffering from severe mental disorders<sup>360</sup>.

Involuntary psychiatric hospitalization may be ordered only by a court<sup>361</sup> and only when certain statutory prerequisites are met<sup>362</sup>. A person suffering from a mental disorder can be hospitalized against their will if psychiatric examination or treatment is only possible in residential care and the mental disorder is severe and causes:

- a) the person's immediate danger to themselves or others, or
- b) the person's helplessness, i.e., inability to independently fulfil basic vital needs, or
- c) substantial harm to the person's health due to deterioration of their mental state if they were left without psychiatric care.

Based on the case law of the Supreme Court<sup>363</sup>, the ECtHR<sup>364</sup> and assessments of the lower courts' judgements<sup>365</sup>, there are reasons to believe that the courts' failure to critically assess the arguments of the administrative claimants seeking involuntary hospitalization and to establish that the grounds for such hospitalization in the given case are supported by sound proof amount to structural flaws of the system. Insufficient respect of the patient's right to participate in the proceedings personally and/or through representatives of their choosing seems, here again, to be a further deficit of the law in action<sup>366</sup>.

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<sup>359</sup> Art. 20(9)(1) and (6) of the Law on Citizens' Health.

<sup>360</sup> Art. 20(9)(3) of the Law on Citizens' Health.

<sup>361</sup> Art. 11(4), 32(2) and 33(1) of the Law on Psychiatric Care.

<sup>362</sup> Art. 29 of the Law on Psychiatric Care. For a reiteration of this rule, see Para 3 of the Survey of the Supreme Court's Case Law No. 4 (2015) adopted by the Presidium of the Court on 23.12.2015 (based on the Ruling of the Judicial Panel for Administrative Cases No. 46-KG15-17 dated 30.09.2015).

<sup>363</sup> Ruling of the Supreme Court 72-KADPR21-3-K8 included in the Survey of the Supreme Court's Case Law No. 3 (2021) adopted by its Presidium on 10.11.2021 under Para 59; Ruling of the Supreme Court 5-KAD20-21-K2 included in the Survey of the Case Law No. 1 (2021) adopted by the Presidium on 07.04.2021 under Para 54.

<sup>364</sup> *X v Russia* [2018] ECtHR 3150/15 dated 20.02.2018; *Zagidulina v Russia* [2013] ECtHR 11737/06 dated 02.05.2013.

<sup>365</sup> Julija N. Argunova, Predstavitel'stvo medicinskoj organizacii v sudebnom zasedanii po delam o nedobrovol'noj gospositalizacii [Representation of a Medical Institution in a Court Hearing in Cases on Involuntary Hospitalization] 1 (2021) *Nezavisimyj psixiatričeskij žurnal* [Independent Psychiatric Journal] 56 – 59, 57 – 58.

<sup>366</sup> *Shakulina and Others v Russia* [2018] ECtHR 24688/05 dated 05.06.2018; *V.K. v Russia* [2017] ECtHR 9139/08 dated 04.04.2017; *Mifobova v Russia* [2015] ECtHR 5525/11 dated 05.02.2015; *Zagidulina v Russia* [2013] ECtHR 11737/06 dated 02.05.2013. On these and some other flaws of the law in action in this sphere, see Ljubov' N. Vinogradova, V.M. Gefter (eds), Ensuring the Rights of Patients of the Residential Therapeutic and Forensic Psychiatric Institutions [...] (n 297)

**d. donations and wills;**

Rules on juridical acts apply to wills, and so in particular do the above-referenced provisions on the invalidation of juridical acts performed by a person factually incapable of understanding the meaning of their actions and/or directing them at that moment<sup>367</sup>, which is the typical ground for invalidation of wills. Potential heirs often challenge wills disadvantageous to them, and the courts, perhaps all too easily, rely on post-mortem psychiatric examination by forensic experts in granting such claims<sup>368</sup>.

**e. civil proceedings and administrative matters (e.g. applying for a passport).**

N/A

**15. What are the problems which have arisen in practice in respect of your system on legal capacity (e.g. significant court cases, political debate, proposals for improvement)? Has the system been evaluated and, if so, what are the outcomes?**

Salient problems in respect of legal capacity are discussed throughout this section in the answers to specific questions.

**SECTION III – STATE-ORDERED MEASURES**

As the appointment of a full or partial guardian is inseparably linked to full or partial incapacitation, a large portion of the questions included in this section are covered in the previous section.

***Overview***

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43, 86, 89 – 90; Elena S. Smagina, Dmitrij A. Čupilin, Problemy obespečenija sostjazatel'nosti po administrativnym delam o gospitalizacii graždanina v medicinskuju organizaciju, okazyvajuščuju psixiatričeskiju pomošč' v stacionarnyx uslovijax, v nedobrovol'nom porjadke [Problems of Ensuring Adversarial Proceedings in Administrative Cases of Involuntary Hospitalization of a Citizen into a Medical Institution Providing Residential Psychiatric Care], 3 and 4 (2021) *Administrator suda* [Court's Administrator].

<sup>367</sup> Art. 177 of the Civil Code. See Q9 a above.

<sup>368</sup> For an overview and critical discussion, see Evgenij Ju. Petrov, in: id. (ed.) *Succession Law: An Article-by-Article Commentary to Art. 1110 – 1185, 1224 of the Civil Code of the Russian Federation* (n. 207) 202 – 203. See also Andrej A. Pavlov, in: Artëm G. Karapetov (ed.), *Juridical Acts, Representation, Prescription: An Article-by-Article Commentary to Articles 153 – 208 of the Civil Code of the Russian Federation* (n. 337) 720.

- 16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure. Pay attention to:**
- a. can different types of state-ordered measures be applied simultaneously to the same adult?**
  - b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;**
  - c. does your system provide for interim or ad-hoc state-ordered measures?**

N/A

*Start of the measure*

*Legal grounds and procedure*

- 17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.**

N/A

- 18. Which authority is competent to order the measure?**

N/A

- 19. Who is entitled to apply for the measure?**

N/A

- 20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?**

N/A

- 21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:**
- a. a requirement of legal representation of the adult;**
  - b. availability of legal aid;**

- c. participation of family members and/or of vulnerable adults' organisations or other CSO's;
- d. requirement of a specific medical expertise / statement;
- e. hearing of the adult by the competent authority;
- f. the possibility for the adult to appeal the order.

N/A

## 22. Is it necessary to register, give publicity or any other kind of notice of the measure?

Neither full nor partial incapacitation needs to be registered or otherwise given publicity to become effective. There is no specialized registry of incapacitated persons. The literature<sup>369</sup> and the legislator<sup>370</sup> have repeatedly considered the idea of introducing a special registration system in one form or another, but none of the proposals has ever come to fruition.

At the same time, a peculiar form of registration of incapacitation decisions has emerged under the umbrella of land registration. Thus, the courts are required to submit to the land registry a copy of any incapacitation decision within three days after its entry into force<sup>371</sup>. The measure, i.e., full or partial incapacitation, must be entered into the register<sup>372</sup>, and the respective data can be provided to certain categories of persons as determined by law<sup>373</sup>. Although admittedly somewhat arbitrary in scope (given that incapacitation entries in the register are only possible where the adult has a right in rem to real property) and despite its institutional allocation to the land registry, this source of information seems to be intensively relied upon<sup>374</sup>.

Another official source of information concerning legal capacity is the recently established database “Integrated State Information System for Social Security”, which has become part of the “Integrated Centralised Digital Platform in the Social Sphere”. Guardianship Authorities are required to submit extensive data on incapacitated persons, forms of incapacitation, and

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<sup>369</sup> Elena A. Ostanina, Institut nedeesposobnosti s točki zrenija zaštity stabil'nosti graždanskogo oborota [The Institution of Legal Incapacity Revisited from the Point of View of Protecting the Civil Turnover], 2 (2021) *Zakon* [The Statute] 150 – 161, 161; Nikolaj A. Rjabinin, Ksenija Ju. Kazanceva, Improving the Legislation Governing the Legal Status of the Partially Incapacitated Person (n. 245) 53 – 60.

<sup>370</sup> <<https://sozd.duma.gov.ru/bill/925889-7>> (2020 – 2021).

<sup>371</sup> Art. 32(12) of the Federal Law No. 218-FZ dated 13.07.2015 “On State Registration of Immovables” (as amended; hereinafter the ‘Law on Registration of Immovables’).

<sup>372</sup> Art. 9(3)(1), 38(4) of the Law on Registration of Immovables.

<sup>373</sup> Art. 62(13) of the Law on Registration of Immovables.

<sup>374</sup> An Explanatory Note to an unsuccessful legislative reform proposal in this field from the year 2020 reports that alone in January 2018, public notaries filed about 210 000 requests to the land registry regarding eventual incapacitation orders (<<https://sozd.duma.gov.ru/download/B596DCDC-159A-4FC2-8B7E-ECD826ADC6C2>>).



any review of the respective measures as well as on the full and partial guardians<sup>375</sup>.

Queries to the land registry or to the said information system regarding eventual incapacitation entries are now standard procedure in verification of legal capacity by notaries when contracts are concluded before them<sup>376</sup>.

**23. Who can be appointed as representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider the following:**

- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**
- b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?**
- c. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?**
- d. what are the safeguards as to conflicts of interests at the time of appointment?**
- e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?**
- f. is a person obliged to accept appointment as representative/support person?**

A full or partial guardian of a fully or partially incapacitated adult is appointed by the local Guardianship Authority<sup>377</sup>. If the incapacitated adult resides in a neuropsychiatric residential institution or a similar residential institution, no full or partial guardian is appointed, and the institution itself performs the duties of either<sup>378</sup>. If the incapacitated adult, who has a guardian, is placed into an institution, the guardian is dismissed unless it would be contrary to the ward's interests<sup>379</sup>. If no representative has been appointed to the incapacitated adult within a month of incapacitation, and the adult has not

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<sup>375</sup> Art. 6.12(4)(z) and 6.13(6)(4) of the Federal Law No. 178-FZ dated 17.07.1999 "On State Social Assistance" (as amended); Para 35 and Section 8 of Annex No. 2 of the Resolution of Government of Russia No. 2386 dated 29.12.2023.

<sup>376</sup> Para 32 of the Order of the Ministry of Justice of Russia No. 156 dated 30.08.2017 (as amended); Art. 39(1) of the "Fundamentals of Legislation of the Russian Federation on Notarial System" (approved by the Supreme Soviet of the Russian Federation on 11.02.1993 under No. 4462-1) (as amended).

<sup>377</sup> First and second sentences of the first paragraph of Art. 35 of the Civil Code.

<sup>378</sup> Art. 35(4) of the Civil Code and Art. 11(5) of the Law on Full and Partial Guardianship.

<sup>379</sup> Second paragraph of Art. 39(1) of the Civil Code.

been placed in a residential institution, a Guardianship Authority itself shall perform such duties<sup>380</sup>.

Only a natural person<sup>381</sup> of full age and full legal capacity can be appointed as a full or partial guardian<sup>382</sup>. As a rule a sole person is to be appointed<sup>383</sup>, but the authority may appoint multiple guardians if this is deemed necessary to protect the interests of the adult<sup>384</sup>. The (admittedly scarce) reported judgements as well as the debate that surrounded the rejected bill on the appointment of multiple plenary or partial guardians<sup>385</sup> suggest that multiple guardians are hardly ever appointed to incapacitated adults. Previously appointed guardians are usually dismissed as soon as the adult is placed into an institution so that the option to keep the guardian despite hospitalization<sup>386</sup> does not seem to be used frequently<sup>387</sup>.

When selecting the individual to be appointed as full or partial guardian, the Guardianship Authorities must follow a set of rules<sup>388</sup>. No person who has been deprived of parental rights and/or has a criminal record for an intentional offence against life or health is eligible<sup>389</sup>. Grandparents, parents, spouses, adult children, adult grandchildren, brothers, and sisters enjoy priority over other persons<sup>390</sup>. When choosing a guardian, the Guardianship Authorities must consider the candidate's "moral and other personal qualities, his [or her] ability to fulfil the duties of a full or partial guardian<sup>391</sup>, the relationship existing between him [or her] and the person in need of guardianship, and, if possible, the wishes of the ward"<sup>392</sup>. Neither primary nor secondary legislation requires the opinion of close relatives to be considered, and my survey of the case law suggests it is not done in practice.

No one can be appointed as full or partial guardian without their consent<sup>393</sup>.

It is difficult to assess the extent to which the above-referenced statutory framework is complied with in practice and in particular to tell how the authorities weigh the various legal criteria (such as the relationship with and the wishes of the adult). The government's detailed instructions for selection

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<sup>380</sup> Third sentence of the first paragraph of Art. 35 of the Civil Code and first sentence of Art. 11(3) of the Law on Full and Partial Guardianship.

<sup>381</sup> On a (stalled) reform proposal that envisages allowing certain kinds of entities to be appointed as full or partial guardians, see Q7.

<sup>382</sup> First sentence of Art. 35(2) of the Civil Code.

<sup>383</sup> First sentence of Art. 10(6) of the Law on Full and Partial Guardianship.

<sup>384</sup> First sentence of Art. 10(7) of the Law on Full and Partial Guardianship.

<sup>385</sup> See Q7.

<sup>386</sup> Second paragraph of Art. 39(1) of the Civil Code.

<sup>387</sup> Ruling of the Third Cassation Court of General Jurisdiction in case No. 88-14437/2020 dated 23.09.2020.

<sup>388</sup> Art. 10(1) of the Law on Full and Partial Guardianship.

<sup>389</sup> Second sentence of Art. 35(2) of the Civil Code.

<sup>390</sup> Art. 10(5) of the Law on Full and Partial Guardianship.

<sup>391</sup> See also Art. 10(2) of the Law on Full and Partial Guardianship.

<sup>392</sup> Second sentence of Art. 35(3) of the Civil Code.

<sup>393</sup> First sentence of Art. 35(3) of the Civil Code and first sentence of Art. 11(2) of the Law on Full and Partial Guardianship.

and appointment of guardians<sup>394</sup> make no mention of the adult's wishes as a factor to be taken into account. Under these circumstances, it is rather unlikely that the Guardianship Authorities would systematically consider such wishes. I was able to find several cases in which an appointment<sup>395</sup>, a refusal to appoint<sup>396</sup> or a dismissal<sup>397</sup> of a guardian by the Guardianship Authority has been challenged in court. In an overwhelming majority of cases, courts fail to expressly consider the wishes of the adult, even where the person seeking appointment or resisting dismissal invoked a good personal relationship with the ward<sup>398</sup>. Instead, the courts reviewed the Guardianship Authorities' decisions concerning appointment or dismissal of the guardians on the basis of the seemingly objective test of the adult's best interest. These judgements also suggest that the same holds true for decision-making by the Guardianship Authorities<sup>399</sup>.

The Russian law of vulnerable adults is no stranger to the concept of conflicts of interest. Where such a conflict arises between the interests of the ward and those of the full or partial guardian, the Guardianship Authorities can dismiss or suspend the guardian<sup>400</sup>. However, the law as it stands provides no safeguards against conflicts of interests at the time of appointment. Based on my survey of the case law, literature, and journalists' investigations, conflicts between the interests of the ward and the guardian, who as a rule is a close relative of the ward, appear to be a severe structural problem<sup>401</sup>. In many cases the guardian's interest in a dwelling of the ward (that the guardian perhaps jointly uses) can affect the decision-making of the guardian or even be the motivation behind the initiation of incapacitation proceedings by the would-be guardian<sup>402</sup>. The same holds true where an inheritance is due to the ward or to both the guardian and the ward.

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<sup>394</sup> Rules for the Selection, Record Keeping and Training of Citizens Who Have Expressed a Wish to Become Full or Partial Guardians of Fully or Partially Incapacitated Adults adopted by the Resolution of the Government No. 927 dated 17.11.2010 (as amended).

<sup>395</sup> Ruling of the Second Court of Cassation of General Jurisdiction No. 88-13363/2020 dated 02.07.2020; Appellate rulings of the Moscow City Court dated 20.12.2021 in case No. 33-51101/2021 and dated 16.08.2018 in case No. 33-35897/2018.

<sup>396</sup> Appellate rulings of the Moscow City Court dated 06.09.2019 in case No. 33-40868/2019 and dated 16.03.2016 in case No. 33-9137/2016; Appellate ruling of the Altai Krai Court dated 06.02.2019 in case No. 33-1058/2019; Ruling of the Primorsky Krai Court of Appeal dated 13.11.2014 in case No. 33-10087.

<sup>397</sup> Cassation rulings of the First Cassation Court of General Jurisdiction No. 88a-17906/2023 dated 13.06.2023 in case No. 2a-6569/2022 and No. 88a-33782/2023 dated 07.11.2023; Appellate ruling of the Lipetsk Oblast Court dated 14.08.2017 in case No. 33a-2963/2017; Appellate ruling of the St. Petersburg City Court No. 33-8627/2015 dated 01.06.2015 in case No. 2-30/2015.

<sup>398</sup> Ruling of the Eighth Cassation Court of General Jurisdiction No. 88-22087/2021 dated 21.12.2021 (challenge of a refusal to appoint as a full guardian).

<sup>399</sup> For rare exceptions where the courts explicitly approved of taking the fully incapacitated adult's opinion into account by the Guardianship Authority, see: Ruling of the Ninth Cassation Court of General Jurisdiction No. 88-8105/2022 dated 08.09.2022; Appellate Ruling of the Kemerovo Oblast Court in case No. 33A-7831 dated 30.07.2014.

<sup>400</sup> Second paragraph of Art. 39(2) of the Civil Code and Art. 29(4) of the Law on Full and Partial Guardianship. See also Q28 d.

<sup>401</sup> See also Q13 introduction, a, and e.

<sup>402</sup> See also Q13 b.

*During the measure*

*Legal effects of the measure*

**24. How does the measure affect the legal capacity of the adult?**

N/A

*Powers and duties of the representatives/support person*

**25. Describe the powers and duties of the representative/support person:**

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
- **property and financial matters;**
  - **personal and family matters;**
  - **care and medical matters;**

Full guardians act in place of the fully incapacitated adult in virtually all matters and all respects. Most if not all exceptions to this rule are recent reforms in the fields of civil procedure and medical intervention<sup>403</sup>.

The partial guardian's role has been traditionally limited to consenting to the ward's legal acts in property and financial matters<sup>404</sup>. In addition, when introducing partial incapacitation due to mental disorder, the legislature extended a rule, previously applicable only to minors between 14 and 18, to guardians of adults partially incapacitated due to mental disorder: "[p]artial guardians of minors and citizens whose legal capacity has been limited due to a mental disorder shall assist their wards in exercising their rights and fulfilling their obligations, and shall protect them from abuse by third parties"<sup>405</sup>. Read together with the language used to describe this new ground for partial incapacitation ("[a] citizen who, due to a mental disorder, can understand the meaning of his [or her] actions or direct them only with the assistance of other persons"<sup>406</sup>), this provision might theoretically be seen as a statutory acknowledgement of supported decision-making for adults partially incapacitated due to mental disorder. However, I see no evidence that these provisions are indeed perceived this way.

In the Combined second, third and fourth periodic reports on the implementation of the CRPD filed on 5 October 2022, Russia makes clear that

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<sup>403</sup> See Q12, Q13 d and Q9 b and c.

<sup>404</sup> See Q8b and Q9a.

<sup>405</sup> Second paragraph of Art. 33(2) of the Civil Code.

<sup>406</sup> First sentence of the first paragraph of Art. 30(2) of the Civil Code. See also first paragraph of Art. 29(3) of the Civil Code.

it prefers the substituted decision-making approach and is not willing to adopt substituted decision-making.

**b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**

Since 2015, full and partial guardians must act in consideration of the adult's opinion or, where such opinion cannot be established, the adult's preferences<sup>407</sup> under a new standard entrenched in the Civil Code both specifically for property matters and in general for performance of the guardians' overall duties. There is no express mention of this new approach specifically in family, medical or other matters<sup>408</sup>. I could find no data on how or whether the opinion or preferences standard applies in practice or whether it extends beyond property matters.

**c. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?**

The guardian of the fully incapacitated adult is under a duty to submit reports on property management to the Guardianship Authority yearly unless another period is agreed upon<sup>409</sup>. The general provisions on medical matters stipulate only one scenario in which the guardian must immediately notify the Guardianship Authority: when acting on the ward's behalf to refuse a medical intervention necessary to save the ward's life<sup>410</sup>. By contrast, the Law on Psychiatric Care contains numerous provisions on the guardian's duty to immediately notify the Guardianship Authority regarding consent or refusal of all sorts of interventions<sup>411</sup>.

Russian law does not impose any specific duties of the guardian towards the adult ward in terms of reporting or the like. This should be seen in a broader context: except as regards psychiatric medical information<sup>412</sup>, the statutory framework makes virtually no mention of the fully incapacitated adult's right to know in respect of any person or authorities, which is blatantly at odds with three ground-breaking developments from the last fifteen years that various sections of this report discuss. Most certainly, the fully incapacitated adult whose opinion (unlike before) must enter into the guardian's decision-making,

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<sup>407</sup> Fourth paragraph of Art. 29(2), Art. 36(3) and Art. 37(4) of the Civil Code.

<sup>408</sup> See also Q9 a and b.

<sup>409</sup> Art. 25 of the Law on Full and Partial Guardianship, Para 3(u) and Para 4 of the Rules for the Keeping of Personal Files of Fully and Partially Incapacitated Adults adopted by the Resolution of the Government No. 927 dated 17.11.2010 (as amended) with Annexes to this Resolution. See also Q27 b.

<sup>410</sup> Second sentence of Art. 20(5) of the Law on the Citizens' Health.

<sup>411</sup> Second sentence of Art. 11(3), second sentence of Art. 12(1), fourth sentence of Art. 23(2) and third sentence of Art. 28(4.1) of the Law on Psychiatric Care.

<sup>412</sup> Art. 11(2) and (3) of the Law on Psychiatric Care.

whose informed consent is needed for medical interventions, and who enjoys procedural capacity in some contexts, must necessarily enjoy broad rights to be informed. First, it is hardly possible to form an opinion on an upcoming decision without the available information. Second, the language of the Law on the Citizens' Health is obviously self-contradictory when it requires the incapacitated adult's informed consent unless their condition does not allow them to give it, while also stipulating that the respective medical information must be provided to the guardian in any event<sup>413</sup>. Although there can be no doubt that the correct way to resolve this inconsistency is to conclude that the adult themselves shall enjoy the same right to know<sup>414</sup>, an express provision to that effect would be preferable. Third, the adult, litigating on their own and/or with help of representatives of their choosing, will undoubtedly need all sorts of information, documents and the like from the guardian, the Guardianship Authority and others.

**d. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?**

The law defines the duties of full and partial guardians in very general terms. "Full and partial guardians [of adults fully or partially incapacitated due to mental disorder]<sup>415</sup> shall take care of maintenance of their wards, provide them with care and treatment and protect their rights and interests. [...] Full and partial guardians shall take care of the development (restoration) of the ability of [such adults], to understand the meaning of their actions or to direct them"<sup>416</sup>. The Guardianship Authority may, "in order to take into account the ward's individual characteristics", issue mandatory requirements for the performance of the guardian's rights and duties<sup>417</sup>.

If circumstances change, the guardians are under a duty to apply for restoration of full legal capacity of the ward or for a declaration of full incapacitation of the partially incapacitated adult<sup>418</sup>.

**e. is there any right to receive remuneration (how and by whom is it provided)?**

As a general rule, the guardian performs their duties without remuneration<sup>419</sup>. The Law on Full and Partial Guardianship provides: "The guardianship authority has the right to conclude with the full or partial guardian, in the interests of the ward, an agreement on the exercise of full or

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<sup>413</sup> Art. 20(1) and (2)(1) and second sentence of Art. 22(2)(2) of the Law on the Citizens' Health.

<sup>414</sup> Julija N. Argunova, Taking into Account the Will of the Incapacitated Patient in General Medical Practice (n. 192) 59 – 60.

<sup>415</sup> Art. 36(4) of the Civil Code.

<sup>416</sup> First and third paragraphs of Art. 36(3) of the Civil Code.

<sup>417</sup> Art. 15(4) of the Law on Full and Partial Guardianship.

<sup>418</sup> Art. 36(5) of the Civil Code.

<sup>419</sup> Art. 36(1) of the Civil Code and Art. 16(1) of the Law on Full and Partial Guardianship.

partial guardianship remuneration. Remuneration to the full or partial guardian may be paid from income of the ward's property, third party funds, and from the budget of the constituent entity of the Russian Federation<sup>420</sup>. Secondary legislation sets the maximum amount of remuneration payable from income from the ward's property at five per cent of such income<sup>421</sup>.

Whether, in what form or from which source the guardian actually receives remuneration or social benefits depends on local legislation and the practices of the respective Guardianship Authority. Thus no paid guardianship is provided for in many regions<sup>422</sup>. Some constituent entities of the Russian Federation offer a monthly allowance to full guardians in an amount ranging from approximately 60 to 150 EUR<sup>423</sup>. I am not aware of any comprehensive assessment of this issue.

**26. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:**

- a. if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**
- b. if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

N/A

**27. Describe the organisation of supervision of state-ordered measures.**

**Pay attention to:**

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<sup>420</sup> First and second sentences of Art. 16(2) of the Law on Full and Partial Guardianship.

<sup>421</sup> Para 4 of the Rules for the Conclusion of the Contract on the Exercise of Full or Partial Guardianship in Respect of a Fully or Partially Incapacitated Adult adopted by the Resolution of the Government No. 927 dated 17.11.2010 (as amended).

<sup>422</sup> E.g., in Moscow (<<https://www.mos.ru/otvet-semya-i-deti/kak-oformit-opeku-popechitelstvo-nad-vzroslym/>>) and in the municipal entity "Demidovsky District" of the Smolensk Oblast (<<https://demidov.admin-smolensk.ru/opeka-i-popechitelstvo/opeka-nad-sovershennoletnimi-nedeеспособными-grazhdanami/>>).

<sup>423</sup> See, for instance, Khanty-Mansiysk Autonomous Okrug-Yugra (Law of Khanty-Mansiysk Autonomous Okrug-Yugra No. 39-oz "On Monthly Allowance to Guardians of Adult Incompetent Citizens" dated 16.06.2021 (as amended), Article 42.1 of the Law of the Omsk Oblast No. 1061-OZ "Code of the Omsk Oblast on Social Protection of Certain Categories of Citizens" dated 4.07.2008 (as amended), Art. 46.4 of the Social Code of the Volgograd Oblast as introduced by the Law of the Volgograd Oblast No. 104-OD dated 12.11.2021 and Law "On Monthly Allowance to the Full Guardians of Fully Incapacitated Adults" adopted by the Legislative Assembly Yamalo-Nenets Autonomous Okrug on 15.12.2016).

**a. what competent authority is responsible for the supervision?**

Supervision of full and partial guardians is vested in the Guardianship Authority for the place of residence of the ward or, in certain cases, the guardian<sup>424</sup>. The Guardianship Authority's acts or omissions are in turn subject to review and supervision by other state agencies<sup>425</sup> and by the public procuracy<sup>426</sup>, and to judicial review<sup>427</sup>.

**b. what are the duties of the supervisory authority in this respect?**

The responsible Guardianship Authority must monitor and supervise the guardian's activities in various respects and in a number of ways. The Guardianship Authorities have an overarching duty to monitor the guardians' performance<sup>428</sup>. The primary and secondary legislation discusses two distinct subject areas in particular detail<sup>429</sup>: supervision of the ward's living conditions<sup>430</sup> and oversight and control over property matters<sup>431</sup>.

Scheduled and unscheduled inspections are the principal tool<sup>432</sup>. The scope of these inspections differs for fully versus partially incapacitated adults. In respect of fully incapacitated adults<sup>433</sup>, inspections cover all aspects of the guardian's performance, defined as follows: "[i]n order to supervise the activities of full and partial guardians, the Guardianship Authority at the place of residence of adult wards carries out scheduled and unscheduled inspections of: a) the living conditions of the incapacitated adult, the guardian's observance of his rights and legitimate interests, and the safeguarding of his property; b) the fulfilment by the guardian or custodian of the requirements for the exercise of his or her rights and the performance of his or her duties"<sup>434</sup>. In particular, it is provided that

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<sup>424</sup> Art. 34(3) of the Civil Code; Art. 8(1)(4) and 24(1) of the Law on Full and Partial Guardianship.

<sup>425</sup> Art. 27 of the Law on Full and Partial Guardianship.

<sup>426</sup> See, e.g., Lidija Ju. Mixeeva, in: Pavel V. Krašennikov (ed.) *An Article-by-Article Commentary on the Family Code of the Russian Federation* [...] (n. 52) 514.

<sup>427</sup> Art. 8(3), 11(7), third sentence of Art. 21(3) and Art. 29(7) of the Law on Full and Partial Guardianship.

<sup>428</sup> Art. 34(3) of the Civil Code, Art. 7(1)(2), 8(1)(4) and 24(2) of the Law on Full and Partial Guardianship.

<sup>429</sup> Rules for Inspection by Guardianship Authorities of the Living Conditions of Incapacitated Adults, Observance by Guardians of the Rights and Legal Interests of Incapacitated Adults, Safeguarding of Their Property, and Fulfilment by Full and Partial Guardians of Requirements for the Exercise of Their Rights and Performance of Their Duties with Respect to Fully or Partially Incapacitated Adults adopted by the Resolution of the Government No. 927 dated 17.11.2010 (as amended) (hereinafter 'Rules for Inspection').

<sup>430</sup> Art. 8(1)(11), 24(2) of the Law on Full and Partial Guardianship; Paras 2(a) and 5 of the Rules for Inspection.

<sup>431</sup> Art. 7(1)(3), 8(1)(11) and 24(2) of the Law on Full and Partial Guardianship.

<sup>432</sup> Paras 2 – 6 of the Rules for Inspection.

<sup>433</sup> Para 5 of the Rules for Inspection.

<sup>434</sup> Para 2 of the Rules for Inspection.



“[i]n carrying out these inspections, the housing and living conditions of the incapacitated adult shall be assessed, as well as his or her state of health, appearance and hygiene, emotional and physical condition, relationship with the guardian, and the guardian’s ability to meet the needs of the incapacitated adult, including the implementation of rehabilitation measures contained in the individual rehabilitation or habilitation programme for the disabled person”<sup>435</sup>.

Inspections regarding partially incapacitated adults<sup>436</sup> embrace only point b) above.

The frequency of scheduled inspections differs. After a certain initial period with more frequent checks, inspections are to take place every six months. Where the guardian is a close relative who lived together with the ward for at least ten years before the application for appointment as guardian was filed, inspections are to take place every three years<sup>437</sup>.

Upon every inspection, any breach of the guardian’s duties is to be indicated and recommendations made. It is to be further considered whether the guardian should be held liable for the breach<sup>438</sup>. The inspection report is to be provided to the guardian<sup>439</sup> (but not to the ward).

Any significant property dispositions by the full guardian and any consent to such dispositions by the partial guardian are subject to prior authorization by the Guardianship Authority<sup>440</sup>. Full guardians<sup>441</sup> are under a duty to file reports on their management of the ward’s property with the Guardianship Authority on a yearly basis unless another period has been agreed upon<sup>442</sup>.

The Guardianship Authorities must consider complaints filed by wards regarding their guardians’ actions or omissions<sup>443</sup> and must also consider notices concerning any violation of the ward’s rights or interests by anyone<sup>444</sup>. Based on such notice, the Guardianship Authority may carry out an unscheduled inspection<sup>445</sup>.

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<sup>435</sup> Second paragraph of Para 5 of the Rules for Inspection.

<sup>436</sup> Para 6 of the Rules for Inspection.

<sup>437</sup> Para 4 of the Rules for Inspection.

<sup>438</sup> Paras 10 and 11 of the Rules for Inspection.

<sup>439</sup> Second paragraph of Para 12 of the Rules for Inspection.

<sup>440</sup> See Q9 a and d.

<sup>441</sup> Partial guardians’ duties in respect of adults do not extend to property management and accordingly they are not expected to submit such reports (Lidija Ju. Mixeeva, in: Pavel V. Krašeninnikov (ed.) *An Article-by-Article Commentary on the Family Code of the Russian Federation* [...] (n. 52) 509).

<sup>442</sup> Art. 25 of the Law on Full and Partial Guardianship.

<sup>443</sup> Art. 24(3) of the Law on Full and Partial Guardianship.

<sup>444</sup> Art. 24(4) of the Law on Full and Partial Guardianship.

<sup>445</sup> Para 7 of the Rules for Inspection. It has been argued that the Guardianship Authority should be under a duty to do so: Lidija Ju. Mixeeva, in: Pavel V. Krašeninnikov (ed.) *An Article-by-Article Commentary on the Family Code of the Russian Federation* [...] (n. 52) 338.

**c. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;**

In case the guardianship is malfunctioning – described in most general terms that allow for the broadest discretion – the Guardianship Authority may dismiss the guardian<sup>446</sup>.

If the Guardianship Authority establishes a violation of the ward’s rights in property matters, it must document such violation in a report and lodge a claim for damages inflicted on the ward<sup>447</sup>. If the Guardianship Authority establishes that a contract has been concluded on behalf of the ward without the Authority’s prior authorization, the Authority must immediately file a claim on behalf of the ward for termination of the contract unless the contract is to the ward’s benefit<sup>448</sup>.

Immediately after the termination of guardianship, i.e. within three days of receiving knowledge thereof, the guardian must file a report on management of the ward’s property with the Guardianship Authority. If the report suggests that the guardian should bear “administrative, criminal or other kind of liability”, the Guardianship Authorities must take the called-for measures<sup>449</sup>.

Obviously, misdeeds of the guardian could be sanctioned by administrative or criminal liability<sup>450</sup>. Unlike in case of minors<sup>451</sup>, however, current Russian law provides no administrative or criminal offences specifically in regard to violations of the rights and interests of incapacitated adults.

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<sup>446</sup> Art. 39(3) of the Civil Code; Art. 29(5) of the Law on Full and Partial Guardianship. See also Para 14(a) of the Rules for Inspection. For a case of dismissal based on an unscheduled inspection see, e.g., Appellate ruling of the Lipetsk Oblast Court dated 14.08.2017 in case No. 33a-2963/2017.

<sup>447</sup> Art. 26(3) of the Law on Full and Partial Guardianship.

<sup>448</sup> Art. 21(4) of the Law on Full and Partial Guardianship. The Law speaks of termination of contract, and the courts have often applied this provision as it stands. Alternatively, one could give prevalence to the general rules of the Civil Code providing for invalidation in such cases (Art. 173.1(1) of the Civil Code; see, e.g., Ruling of the Judicial Panel for Civil Cases of the Supreme Court No. 48-KG18-1 dated 27.02.2018; Resolution of the Arbitrazh (Commercial) Court of the West Siberian District No. F04-4717/2021 dated 08.07.2022 in case No. A27-19033/2018). For a discussion of see, e.g. Svetlana Ju. Čaškova, *Predvaritel’noe razrešenie organa opeki i popečitel’sтва kak sposob zaščity prav podopečnyx i ego značenie pri udostoverenii sdelki po otčuzhdeniju nedvizimogo imuščestva podopečnyx* [Prior Authorisation by the Guardianship Authority as a Means of Protecting the Rights of Wards and its Significance in Certifying Transactions on Alienation of Immovable Property of Wards] 4 (2021) *Notarial’nyj vestnik* [Notarial Herald] 40 – 55; Jurij S. Povarov, *Posledstvija soveršenija juridičeskix dejstvij bez predvaritel’nogo razrešenija organa opeki i popečitel’sтва* [Consequences of Performing Legal Actions without Prior Authorisation by the Guardianship Authority] 2(2021) *Notarius* [Notary] 18 – 23).

<sup>449</sup> Art. 30(1) and (2) of the Law on Full and Partial Guardianship.

<sup>450</sup> Art. 26(4) of the Law on Full and Partial Guardianship.

<sup>451</sup> Art. 5.35 of the Code of the Russian Federation on Administrative Offences No. 195-FZ dated 30.12.2001 (as amended) and Art. 156 of the Criminal Code of the Russian Federation No. 63-FZ dated 13.06.1996 (as amended).

**d. describe the financial liability of the representative/support person for damages caused to the adult;**

“Full and Partial Guardians shall be liable for damage caused by their fault to the ward’s person or property in accordance with the rules on liability for damages provided for in the civil legislation”<sup>452</sup>. The same would arguably hold true by virtue of the respective general provisions of the Civil Code even without this specific clarification in the Law on Full and Partial Guardianship; nevertheless, introduction of such language expressly addressing the guardian’s liability was considered advisable to avoid any doubt in practice<sup>453</sup>.

Theoretically, the above rule can cover all sorts of damages, including such as inflicted on the ward by third persons if the guardian is at fault<sup>454</sup>. However, neither the available case law nor the legal literature gives reason to believe that this general clause effectively fostered the emergence of the law surrounding guardians’ financial liability. The reported cases are scarce, and all of them deal with a few similar kinds of basic situation. The few disputes I found concerned allegedly unjustified withdrawal of money from the ward’s account and the like; one case was initiated by the Guardianship Authority against the guardian<sup>455</sup>. In a couple of cases, a newly appointed guardian raised a claim against their predecessor<sup>456</sup>. Two disputes were initiated by coheirs, in each case alleging that another coheir who previously had been the guardian of the deceased wrongfully drew down an account of the ward’s that should have been part of the estate<sup>457</sup>.

Regardless of how representative these findings might be, they are a good illustration of scenarios in which claims of guardians’ financial liability can potentially be raised. From this brief survey and the nature of the whole matter, a guardian can be held liable for damages upon the initiative of another representative of the adult, including, in the broadest sense, their heirs – or by the adult themselves after restoration of legal capacity<sup>458</sup>. Consequently, claims

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<sup>452</sup> Art. 26(2) of the Law on Full and Partial Guardianship.

<sup>453</sup> Lidija Ju. Mixeeva, in: Pavel V. Krašeninnikov (ed.) *An Article-by-Article Commentary on the Family Code of the Russian Federation* [...] (n. 52) 512.

<sup>454</sup> For speculative examples, see Lidija Ju. Mixeeva, in: Pavel V. Krašeninnikov (ed.) *An Article-by-Article Commentary on the Family Code of the Russian Federation* [...] (n. 52) 512.

<sup>455</sup> Appellate ruling of the Stavropol Krai Court dated 11.09.2019 in case No. 33-7088/2019.

<sup>456</sup> Appellate ruling of the Novosibirsk Oblast Court dated 01.08.2017 in case No. 33-7316/2017 (one close relative appointed after another one); Appellate ruling of the Supreme Court of the Republic of Mordovia dated 15.11.2016 in case No. 33-2657/2016 (neuropsychiatric residential institution after a close relative).

<sup>457</sup> Appellate ruling of the Omsk Oblast Court No. 33-7288/2022(2-3631/2022) dated 22.12.2022; Appellate ruling of the St. Petersburg City Court No. 33-16233/2021 dated 13.07.2021 in case No. 2-2727/2020.

<sup>458</sup> See also the third paragraph of Para 2 of the Plenum’s Resolution of the Supreme Court No. 43 dated 29.09.2015 (as amended): “If the violation of the rights of the said persons [i.e. “natural persons who do not have full civil or civil procedural capacity (e.g. young children, incapacitated citizens)”] was committed by their legal representative, the limitation period for claims against the latter, including for the recovery of damages, shall be calculated either from the moment when the

for damages may arise either upon replacement of the guardian or where (extraordinarily) multiple guardians have been appointed. Further, heirs to the ward's estate would be generally able to proceed against the former guardian. Guardianship Authorities always enjoy the right to file such claims regardless of the current position of the guardian who is to be held liable, i.e., whether the guardianship is still valid or terminated. Each type of claimant, however, is likely to have a distinct deficit in regard to incentives, information, expertise or resources needed to pursue such claims. Cases in which the adult themselves comes to litigate on their own against a former guardian seem to be a rare exception.

**e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

The Law on Full and Partial Guardianship provides that “[f]ull guardians shall be liable under transactions made on behalf of their wards in accordance with the procedure established by civil legislation”<sup>459</sup>. This language was meant to extend the approach previously entrenched in the Civil Code in respect to minors to fully incapacitated adults<sup>460</sup>. The exact meaning of this provision, in particular its interplay with the rules of the Code to which it expressly refers, is far from clear<sup>461</sup>. The few reported judgements in which this provision has been applied have not brought greater clarity in this regard.

The above rule does not apply to partial guardians. Partially incapacitated adults bear full responsibility by themselves under their contracts<sup>462</sup>.

**28. Describe any safeguards related to:**

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other legal representative, acting in good faith, became aware or should have become aware of such violation, or from the moment when the principal became aware or should have become aware of the violation of his or her rights and became capable of defending the violated right in court, i.e. from the moment of the emergence or restoration of full civil or civil procedural legal capacity [...]”.

<sup>459</sup> Art. 26(1).

<sup>460</sup> Lidija Ju. Mixeeva, in: Pavel V. Krašeninnikov (ed.) *An Article-by-Article Commentary on the Family Code of the Russian Federation* [...] (n. 52) 512.

<sup>461</sup> Thus, it is noteworthy that contrary to what the wording of the provision might suggest, the civil legislation stipulates no “procedures” or “ways” in which full guardians are to be held liable in such cases, and even less so as regards fully incapacitated adults. The first sentence of Art. 28(3) of the Civil Code makes legal representatives (including guardians where applicable) of minors under 14 years of age liable under any contracts to which such minors are parties: “[t]he parents, adoptive parents or guardians of a minor shall be liable under the minor’s transactions, including transactions made by him [or her] on his [or her] own, unless they prove that the obligation was breached through no fault of theirs”. By contrast, the Code contains no comparable provision concerning fully incapacitated adults. Among other things, this leaves it open whether the rebuttable presumption of fault should apply to guardians of adults as well.

<sup>462</sup> Second sentence of the third paragraph of Art. 30(1) and first sentence of the fifth paragraph of Art. 30(2) of the Civil Code.

**a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;**

Prior authorization by the Guardianship Authority is needed for most legal acts in property matters, including those to be performed in court proceedings. This requirement concerns both the legal acts performed by the full guardian on behalf of the ward and the partial guardian's consent to such legal acts performed by the partially incapacitated adults themselves<sup>463</sup>.

**b. unauthorised acts of the adult and of the representative/support person;**

An adjudicated fully incapacitated adult's legal actions are null and void<sup>464</sup>. Except for a narrow group of cases in which the ward is free to act on their own, partially incapacitated adults need their guardian's consent to transact in property matters. Legal acts performed by the partially incapacitated adult without the guardian's consent are voidable and can be invalidated upon the partial guardian's claim.

Where the required authorization by the Guardianship Authority was not obtained for a legal act to be performed by the full guardian or by the partially incapacitated adult with the guardian's consent, such legal act can be terminated by court order upon a claim by the Guardianship Authority on the ward's behalf<sup>465</sup>.

**c. ill-conceived acts of the adult and of the representative/support person;**

As set out in the previous section, unauthorized legal acts by or on behalf of the adult are void, voidable or the like, regardless of whether they are detrimental to the adult<sup>466</sup>. If the legal act complies with the specific prerequisites for transactions by or on behalf of fully or partially incapacitated adults and has been duly authorized in particular, it can be challenged only pursuant to general rules on the validity of legal acts. These include a number of grounds for nullity or voidability of ill-conceived acts.

**d. conflicts of interests**

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<sup>463</sup> See Q9 a.

<sup>464</sup> For a majority of issues relevant for this section see Q8 b and Q9 a and d.

<sup>465</sup> See Q27 c.

<sup>466</sup> See, e.g., the second sentence of the second paragraph of Para 71 of the Plenum's Resolution of the Supreme Court No. 25 dated 23.06.2015; Andrej M. Širvindt, in: Evgenij A. Suxanov, *Graždanskoe pravo* [Civil Law] (Moscow: Statut, 2023) Vol. I, 454–455, 474.

The priority of close relatives in the appointment of guardians<sup>467</sup>, the rarity of multiple guardianship, and the exclusive powers of residential institutions to represent their clients all create fertile grounds for all sorts of conflicts of interest between the ward and the guardian. Besides these, the supervision and authorization functions of the Guardianship Authorities may also conflict with their powers to represent the adult – most obviously (but not solely) where there is no other representative<sup>468</sup>.

As already mentioned<sup>469</sup>, such conflicts are a key structural problem in this area of law<sup>470</sup>. In a majority of the high-court decisions discussed in this report – i.e., decisions of the ECtHR, the Constitutional Court and the Supreme Court<sup>471</sup> – and in a large portion of lower court judgements and in all types of disputes studied during the preparation of this report, conflicts of interest were an important issue. However, unlike the high courts, the lower courts have hardly ever expressly considered the ramifications of such a conflict in the case at hand.

The issue of conflicts of interest is specifically addressed in a number of statutory provisions. The Guardianship Authority may dismiss or suspend the guardian in the event of a conflict between the interests of the ward and those of the guardian<sup>472</sup>. Additionally, it is stipulated that the guardian can be dismissed if they violate rights and legitimate interests of the ward, including when the guardianship is exercised for selfish purposes<sup>473</sup>. The guardian as well as their spouse and close relatives cannot conclude any legal acts with the ward save for donations and gratuitous loans for use in the ward's favour<sup>474</sup>.

I found no court cases in which dismissal or suspension of a guardian by a Guardianship Authority on grounds of a conflict of interest was expressly mentioned. Nor does there seem to be any relevant discussion in the literature.

An array of conflicts of interest issues must be dealt with in the context of authorization by the Guardianship Authority of legal acts in property matters

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<sup>467</sup> See Q23.

<sup>468</sup> On the conflict between supervision and representation, see Rulings of the Judicial Panel for Civil Cases of the Supreme Court No. 53-KG21-14-K8 dated 16.05.2022 and No. 53-KG21-13-K8 dated 25.04.2022: “[The] incapacitated [adult] has no natural person as a guardian, and the duties of the guardian have been assigned to the guardianship authority [...], i.e. in respect of the incapacitated adult [...], there is a situation where the guardianship authority, which by virtue of the law shall supervise activities of the guardian, has been concurrently performing the duties of the guardian [...] since 2014. [...] [T]he Judicial Collegium for Civil Cases [...] has reason to believe that the incapacitated [adult], by personally filing a lawsuit with the court against the pension authority to restore his pension and arguing that he has not received pension funds since 2015 and has no means to buy food, thereby raised the issue of improper performance by the guardianship authority of its duties to maintain his livelihood out of the pension due to him”. On conflict between authorisation and representation, alongside a conflict with the guardian, see Ruling of the Judicial Panel for Civil Cases of the Supreme Court No. 78-KG14-36 dated 25.11.2014.

<sup>469</sup> See Q23.

<sup>470</sup> See also Q13 introduction, a, b and e.

<sup>471</sup> See additionally Ruling of the Judicial Panel for Civil Cases of the Supreme Court No. 18-KG24-9-K4 dated 02.04.2024.

<sup>472</sup> Second paragraph of Art. 39(2) of the Civil Code and Art. 29(4) of the Law on Full and Partial Guardianship.

<sup>473</sup> Art. 39(3) of the Civil Code and Art. 29(5)(2) of the Law on Full and Partial Guardianship.

<sup>474</sup> Art. 37(3) of the Civil Code.

performed or approved by the guardian. However, decision-making in this field is not transparent and is difficult to assess in a systematic manner.

A further remedy against conflicts of interest, repeatedly identified as such by high courts, is the newly acknowledged (and constantly broadening) right of the incapacitated adult to present their case before the court personally and/or with help of representatives of their choosing<sup>475</sup>.

### *End of the measure*

**29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.**

N/A

### *Reflection*

**30. Provide statistical data if available.**

N/A

**31. What are the problems which have arisen in practice in respect of the state-ordered measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so what are the outcomes?**

Salient problems in respect of state-ordered measures are discussed in the answers to specific questions throughout this section and to some extent throughout section II.

## **SECTION IV – VOLUNTARY MEASURES**

### *Overview*

**32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.**

N/A

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<sup>475</sup> See Q5 and Q13 introduction, a, d and e.

- 33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measures. Please consider, among others:**
- a. the existence of specific provisions regulating voluntary measures;**
  - b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

N/A

- 34. If applicable, please describe the relation or distinction that is made in your legal system between the appointment of self-chosen representatives/support persons on the one hand and advance directives on the other hand.**

N/A

- 35. Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?**

N/A

*Start of the measure*

*Legal grounds and procedure*

- 36. Who has the capacity to grant a voluntary measure?**

N/A

- 37. Please describe the formalities (public deed; notarial deed; official registration or homologation by court or any other competent authority; etc.) for the creation of the voluntary measure.**

N/A

- 38. Describe when and how voluntary measures enter into force.**
- a. the circumstances under which voluntary measures enter into force;**



- b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?**
- c. who is entitled to initiate the measure entering into force?**
- d. is it necessary to register, give publicity or to any other kind of notice of the entry into force of the measure?**

N/A

*Appointment of representatives/support persons*

- 39. Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)?**
  - a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?**
  - b. what are the safeguards as to conflicts of interests?**
  - c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?**

N/A

*During the measure*

*Legal effects of the measure*

- 40. To what extent are the voluntary measure and the wishes expressed within it legally binding?**

N/A

- 41. How does the entry into force of the voluntary measure affect the legal capacity of the grantor?**

N/A

*Powers and duties of the representative/support person*

- 42. Describe the powers and duties of the representative/support person:**
  - a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:**
    - property and financial matters;**

- personal and family matters;
  - care and medical matters?
- b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?
  - c. is there a duty of the representative/support person to inform and consult the adult?
  - d. is there a right to receive remuneration (how and by whom is it provided)?

N/A

43. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:
  - a. if several voluntary measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?
  - b. if several representatives/support persons can be appointed in the framework of the same voluntary measure how is the authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?

N/A

44. Describe the interaction with other measures. Please consider:
  - a. if other measures (state-ordered measures; *ex lege* representation) can be simultaneously applied to the same adult, how do the representatives/support persons, acting in the framework of these measures, coordinate their activities?
  - b. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?

N/A

45. Describe the safeguards against:
  - a. unauthorised acts of the adult and of the representative/support person;
  - b. ill-conceived acts of the adult and of the representative/support person;

**c. conflicts of interests**

**Please consider the position of the adult, contractual parties and third parties.**

N/A

- 46. Describe the system of supervision, if any, of voluntary measures. Specify the legal sources. Please specify:**
- a. is supervision conducted:**
    - by competent authorities;
    - by person(s) appointed by the voluntary measure.
  - b. in each case, what is the nature of the supervision and how is it carried out?**
  - c. the existence of measures that fall outside the scope of official supervision.**

N/A

***End of the measure***

- 47. Provide a general description of the termination of each measure. Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.**

N/A

***Reflection***

- 48. Provide statistical data if available.**

N/A

- 49. What are the problems which have arisen in practice in respect of the voluntary measures (e.g. significant court cases, political debate, proposals for improvement)? Has the measure been evaluated, if so what are the outcomes?**

N/A

## **SECTION V – EX LEGE REPRESENTATION**

### *Overview*

**50. Does your system have specific provisions for *ex lege* representation of vulnerable adults?**

N/A

**51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?**

N/A

**52. Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?**

N/A

**53. Is it necessary to register, give publicity or to give any other kind of notice of the *ex-lege* representation?**

N/A

### *Representatives/support persons*

**54. Who can act as *ex lege* representative and in what order? Think of a partner/spouse or other family member, or other persons.**

N/A

**55. What kind of legal or other acts are covered: (i) property and financial matters; (ii) personal and family matters; (iii) care and medical matters. Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.**

N/A

**56. What are the legal effects of the representative's acts?**

**Can an adult, while still mentally capable, exclude or opt out of such ex-lege representation (a) in general or (b) as to certain persons and/or acts?**

N/A

**57. Describe how this ex lege representation interacts with other measures? Think of subsidiarity**

N/A

*Safeguards and supervision*

**58. Are there any safeguards or supervision regarding ex lege representation?**

N/A

**59. Provide a general description of the end of each instance of ex-lege representation.**

N/A

*Reflection*

**60. Provide statistical data if available.**

N/A

**61. What are the problems which have arisen in practice in respect of ex lege representation (e.g. significant court cases, political debate, proposals for improvement)?**

N/A

*Specific cases of ex lege representation*

*Ex lege representation resulting from marital law and/or matrimonial property law*

**62. Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then (also) legally bind the other spouse?**

N/A

**63. Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.**

N/A

*Ex lege representation resulting from negotiorum gestio and other private law provisions*

**64. Does the private law instrument *negotiorum gestio* or a similar instrument exist in your jurisdiction? If yes, does this instrument have any practical significance in cases involving vulnerable adults?**

N/A

## **SECTION VI – OTHER PRIVATE LAW PROVISIONS**

**65. Do you have any other private law instruments allowing for representation besides *negotiorum gestio*?**

N/A

**66. Are there provisions regarding the advance planning by third parties on behalf of adults with limited capacity (e.g. provisions from parents for a child with a disability)? Can third parties make advance arrangements?**

N/A

## **SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM IN TERMS OF PROTECTION AND EMPOWERMENT**

- 67. Provide an assessment of your system in terms of *empowerment* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
- a. the transition from substituted to supported decision-making;**
  - b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;**
  - c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;**
  - d. effect of the measures on the legal capacity of vulnerable adults;**
  - e. the possibility to provide tailor-made solutions;**
  - f. transition from the best interest principle to the will and preferences principle.**

The situation with empowerment of vulnerable adults in Russia continues to be utterly desolate. As a matter of fact, empowerment of persons suffering from mental disorders is neither officially recognized nor generally thought of as an overarching purpose of this field of law<sup>476</sup>. Most of the ameliorative changes to the traditional approaches, which date back to the mid-twentieth century, were introduced into Russian law ten to fifteen years ago through a number of benchmark decisions by the ECtHR and the Constitutional Court and in subsequent legislative reforms. Yet even these modest improvements seem to have occurred predominately on paper, without significant implementation in real life. Deinstitutionalization remains a pressing challenge for which no solution is in sight.

A transition from substituted to supported decision-making has not been launched. In the Combined second, third and fourth periodic reports on the implementation of the CRPD filed on 5 October 2022, Russia explains moreover that it does not even intend to replace traditional substituted decision-making with supported decision-making<sup>477</sup>.

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<sup>476</sup> Thus, Art. 4 and 5 of the Law on Full and Partial Guardianship, setting out tasks and principles of state policies regarding guardianship, make no mention of empowerment of wards.

<sup>477</sup> Paras 96 – 107 of the Combined second, third and fourth periodic reports. See also Q4. The text of these paras constitutes a verbatim reproduction of the following paper with only a couple of insignificant changes: Roman N. Žavoronkov, Problemy tolkovaniya Konvencii OON o pravax invalidov: pravosub"ektnost' lic s psixičeskimi rasstrojstvami [Problems of Interpretation of the UN Convention on the Rights of Persons with Disabilities: Legal Personhood of Persons with Mental Disorders] 4 (2019) *Žurnal rossijskogo prava* [Journal of Russian Law] 135–145. Regardless of whether the author himself was entrusted with the preparation of (this part of) the report or whether there were other persons in charge who copied and pasted his text into the report, it should be noted that the publication's argument is poor and is based on virtually no relevant sources on supported decision-making.

A first step toward adopting the proportionality principle was taken when partial incapacitation due to mental disorder was introduced into the statutory framework to replace full incapacitation where appropriate. At present, two measures for adults suffering from mental disorder are available: full or partial incapacitation. In respect of partially incapacitated adults, the court may order more or less far-reaching limitations of legal capacity. Yet the measure to which the court may deviate from the standard is insignificant.

The subsidiarity principle has been entrenched in the statutory provisions in respect of medical matters only. Thus, medical interventions require the informed consent of the fully incapacitated adult and not that of their guardian unless the former's condition does not allow them to give it. Full incapacitation, by far the most frequently applied measure, still deprives the adult of active legal capacity in virtually every respect. The main exceptions for several years have related to civil procedure (on which see the next section) and medical matters. As per the statutory provisions, the guardian is to take the adult's opinions or preferences into account.

There has been no sufficient political will to carry out full-fledged reforms in this area. So far, the legislature has been reactive rather than proactive and has only introduced punctual amendments when forced to do so by the ECtHR and/or the Constitutional Court. Moreover, the amendments in such cases rarely (if at all) go beyond the absolutely necessary to comply with the directives of the high courts. A good example is the introduction of partial incapacitation due to mental disorder by a few concise amendments to the Civil Code. As this report repeatedly points out, the legislature ignored numerous ramifications of this step for other matters addressed in the Civil Code itself, much less in other statutes that still urgently need to be adjusted to embrace the new type of partial incapacitation.

Throughout the last three decades, the presidential expert bodies responsible for codification of civil law<sup>478</sup> have repeatedly faced initiatives to revisit the traditional statutory framework, most tangibly during the preparation of the first part of the Civil Code<sup>479</sup> and also in the context of the draft reform to end the neuropsychiatric institutions' guardianship monopoly<sup>480</sup>. Yet they were reluctant to support any of the reform proposals and in turn were inactive on their own reform agenda, notwithstanding that the two bodies themselves as well as their members have now and then vaguely acknowledged the need for amendments<sup>481</sup>. The Combined second, third and fourth periodic reports on the implementation of the CRPD filed by Russia on 5.10.2022<sup>482</sup> only confirms this conservative attitude.

Even where the statutory framework has been amended toward greater empowerment of vulnerable adults, the practical implementation of the new

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<sup>478</sup> Council on the Codification and Improvement of Civil Legislation and the Sergej Alekseev Research Centre for Private Law.

<sup>479</sup> See n. 43.

<sup>480</sup> See Q7.

<sup>481</sup> See n. 65. See also Andrej E. Šerstobitov, in: Evgenij A. Suxanov, *Graždanskoe pravo* [Civil Law] (Moscow: Statut, 2023) Vol. I, 145.

<sup>482</sup> See Q4.



rules usually leaves much to be desired. No noticeable effort has been made to raise public awareness of the sometimes dramatic changes to the regulatory framework or to ensure a reorientation of those in charge of its application. This is evidenced by the reports on the implementation of the CRPD and by a review of the case law, legal literature and general media debate as well as by interviews conducted for the present study. Thus contrary to expectation, the introduction of partial incapacitation due to mental disorder at best produced an insignificant effect on the number of full and partial incapacitation cases. As evidenced by the official statistics of the Supreme Court<sup>483</sup>, the introduction of partial incapacitation due to mental disorder, effective starting in 2015, has not dramatically changed the number of incapacitation cases; in particular, it resulted neither in a significant decrease in the number of full incapacitation cases nor in a noticeable increase in partial incapacitation cases. This suggests that the real-life ramifications of partial incapacitation due to mental disorder have been modest so far. For one, absent this category of partial incapacitation, full incapacitation used to be (and perhaps remains) overinclusive and was seemingly sometimes applied where its prerequisites were not properly met, for instance because those involved (the court, the relatives, the public procurator, the Guardianship Authority, the medical institution etc.) thought that the adult's interests (and/or probably other interests as well) would be better served if the adult were declared incapacitated despite having only a minor mental disorder<sup>484</sup>. Accordingly, a systematic review of previous full incapacitation orders and their replacement with partial incapacitation orders where appropriate would be a natural consequence of the reform<sup>485</sup>. Yet no such development is apparent in the statistics. Another factor affecting the number of partial incapacitation cases may be that obviously, many adults suffering from minor mental disorders had not been declared incapacitated before the reform, so that there are many more adults to whom the new measure could apply than there would have been if partial incapacitation already existed. This also suggests a natural increase in the number of partial incapacitation cases following the reform.

There is no evidence of noteworthy steps to ensure implementation of the new requirement that the adult's opinion or preferences must be considered in decisions on their behalf; the same holds true for the new rule that the adult must give informed consent to medical intervention themselves unless their condition does not allow them to do so. Not surprisingly, these groundbreaking changes in the statutory framework seem to have had hardly any impact on the law in action.

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<sup>483</sup> See Table 7.

<sup>484</sup> Aleksandra I. Pergament, in: Sergej N. Bratus' (ed.), *Sovetskoe graždanskoe pravo. Sub'ekty graždanskogo prava* [Soviet Civil Law. Subjects of Civil Law] (Moscow: Juridičeskaja literatura, 1984) 44; Ol'ga A. Rybalova, Public Procurator's Participation in Judicial Proceedings on Partial or Full Incapacitation (n. 260) 13; Resolution of the Constitutional Court No. 15-P dated 27.06.2012.

<sup>485</sup> Ol'ga A. Rybalova, Public Procurator's Participation in Judicial Proceedings on Partial or Full Incapacitation (n. 260) 12 – 13.

**68. Provide an assessment of your system in terms of *protection of vulnerable adults* (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**

**a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;**

The legislative design of the procedures for incapacitation, restoration of full legal capacity and replacement of full with partial incapacitation provides a number of safeguards to protect the adult. Only the court may order and review such measures. Forensic psychiatric expertise is mandatorily required for full incapacitation and for restoration of legal capacity of the fully incapacitated adult; arguably, it is also required for partial incapacitation due to mental disorder and for restoration of legal capacity of the adult partially incapacitated on these grounds. Additionally, the law requires that both a public procurator and a representative of the Guardianship Authority participate in the proceedings. The adult's rights to participate in the proceedings, to present their case personally and to avail themselves of a representative of their choosing have been reinforced and broadened in recent years through the case law of the ECtHR and the Constitutional Court and subsequent legislative reform.

However, the present system of procedural safeguards is unsatisfactory in many respects. First, the overall design of a procedure tailored to non-contentious matters fails to do full justice to the controversies and conflicts of interest that typify proceedings on incapacitation or restoration of legal capacity. Second, the participants' roles differ in practice from what one might expect in theory and may not be particularly beneficial to the adult's rights. Courts seem to rely too uncritically on the expert reports of forensic psychiatrists, to the great diminishment of the genuinely legal component of the decision, for which the procedure is entrusted to courts in the first place. The participation of both public procurators and Guardianship Authorities tends to be merely perfunctory, and it may be doubted that these agencies have resources and incentives enough to effectively vindicate the rights of adults, much less at the cost of sacrificing friendly cooperation with each other. Moreover, there is no sign that these agencies have fully internalized the human-rights-based approach to mental disorders. Third, although the situation has improved with the adult's right to present their case personally and/or with the help of representatives of their choosing, there is still a long way to go to properly safeguard this right both in terms of the legal framework and the law in action.

Finally, the separation of the court's power to order full or partial incapacitation from the Guardianship Authority's power to appoint a guardian is not unproblematic. The court considering incapacitation has no insight into and no say in the guardianship arrangements to be applied in the case at hand.

**b. protection during a procedure resulting in the application, alteration or termination of adult support measures;**

Appointment and dismissal of full and partial guardians is entrusted to the Guardianship Authorities. Every Guardianship Authority is a public agency, either of a municipality or of one of the constituent entities of the Russian Federation, so each is subject to different regulations and realities of operation. I am not aware of any comprehensive assessment of the procedures applied by different Guardianship Authorities, but it is not particularly likely that elaborate sets of procedural rules are in place to safeguard the protection of the adult's rights.

Actions and omissions of the Guardianship Authorities are subject to judicial review.

**c. protection during the operation of adult support measures:**

- **protection of the vulnerable adult against his/her own acts;**
- **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**
- **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;**
- **protection of the privacy of the vulnerable adult.**

Until recently, full incapacitation had been the legal system's only response to securing the needs of persons with major mental disorders. Accordingly, vulnerable adults were protected against their own actions to the greatest possible extent, such that most of the concerns about the adequacy of this response have related to overprotection and lack of empowerment.

The main safeguard protecting incapacitated adults against any kind of malfunctioning guardianship lies with the Guardianship Authority, which is in turn subject to oversight by other agencies and to judicial review. I am not aware of any comprehensive assessment of whether this machinery effectively safeguards the rights of wards.

Particular doubts exist regarding the adequacy of the adult's protection against malperformance by the neuropsychiatric and other similar residential care institutions<sup>486</sup>. The gap between the level of protection

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<sup>486</sup> It should be noted that the original intention of the legislature to create a service independent from the health authorities to protect the rights of patients residing in psychiatric institutions has not been implemented. Article 38 of the Law on Psychiatric Care that provided for establishment of such service since 1992 has been abolished with effect as of 1.09.2024. For a brief history of the failed efforts to establish such a service, see Ljubov' N. Vinogradova, GosDuma poroxonila srazu dva zakonoproekta, razrabotannyyx obščestvennymi organizacijami. Mnenie graždanskogo

guaranteed by the legislative framework and the effective enjoyment of the rights by the adults residing in such institutions appears to be significant. Thus, the patients' right to receive professional legal aid or to file complaints both within the institution and to state agencies are rarely duly respected in practice<sup>487</sup>. Inhuman and degrading treatment, disrespect of privacy and correspondence have too often been reported as typical of mental institutions<sup>488</sup>.

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obščestva, kak i mnenie professionalov, ničego ne značat [The State Duma Has Buried Two Draft Laws Developed by Public Organisations at Once. The Opinion of the Civil Society, As Well As the Opinion of Professionals, Means Nothing] 3 (2023) *Nezavisimyj psixiatričeskij žurnal* [Independent Psychiatric Journal] 73 – 74, 73 (see also the editorial note at p. 89).

<sup>487</sup> See, e.g., Ljubov' N. Vinogradova, V.M. Gefter (eds), Ensuring the Rights of Patients of the Residential Therapeutic and Forensic Psychiatric Institutions [...] (n 297) passim.

<sup>488</sup> See, e.g., Ljubov' N. Vinogradova, V.M. Gefter (eds), Ensuring the Rights of Patients of the Residential Therapeutic and Forensic Psychiatric Institutions [...] (n 297) passim; *Koroviny v Russia* [2014] ECtHR 31974/11 dated 27.02.2014 with Dmitrij G. Bartenev, Postanovlenie Evropejskogo Suda po pravam čeloveka po delu Korovinyx: uslovija soderžanija pacienta v psixiatričeskoi bol'nice v pervye priznany besčelovečnym obraščeniem [Judgment of the European Court of Human Rights in the Koroviny Case: Conditions of Detention of a Patient in a Psychiatric Hospital Have for the First Time Been Recognized as Inhuman Treatment] 1 (2014) *Nezavisimyj psixiatričeskij žurnal* [Independent Psychiatric Journal] 67 – 69. See also Q4 and n 175.