THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

ESTONIA

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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 principles of human dignity and welfare state have been stated in § 10 of the Constitution of the Estonian Republic[1] as the basic principles of the Constitution. These are the most important rules of the legal system and the core of our country's constitutional order. The Constitution determines the basic elements of the status of people, providing for the general right to freedom and personality rights. According to § 19 (2) of the Constitution, everyone has the right to free self-realisation. This paragraph contains a general right of freedom pursuant to which everyone has the right to free self-realisation, giving a more concrete expression to the principle of the protection of human dignity.[2] Free self-realisation includes the right of self-determination, inter alia. Free self-realisation as an expression of human dignity essentially covers the whole spectrum of thinkable human activity. The elements of the freedom of self-realisation are free self-realisation, free self-expression and self-design and the freedom of action, that is, freedom to do or not to do what one wants.[3]

Estonian law uses the term 'restricted active legal capacity' or 'limited active legal capacity' which is defined in the General Part of the Civil Code Act (GPCCA).[4] According to § 8 (2) GPCCA, persons under 18 years of age (minors) and persons who due to mental illness, mental disability or other mental disorder

1 Eesti Vabariigi Põhiseadus (Constitution of the Estonian Republic). Riigi Teataja (in the following RT) (The State Gazette) 1992, No. 26, Art. 349. Last amendment RT I, 15.05.2015, 2. In English: https://www.riigiteataja.ee/en/eli/530122020003/consolide

2 See Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne ((Constitution of the Estonian Republic. Annotated Edition). 5. edition, Ü. Madise et al. (Ed). (2020), § 19 comment 3 (H. Vallikivi).

3 See Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne ((Constitution of the Estonian Republic. Annotated Edition). 5. edition, Ü. Madise et al. (Ed). (2020), § 19, comment 4 (H. Vallikivi).

4 Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). RT I 2002, No. 35, Art. 216. Last amendment RT I, 22.03.2021, 8. In English https://www.riigiteataja.ee/en/eli/501042021006/consolide

are permanently unable to understand or direct their actions, have limited active legal capacity.

The limited active legal capacity of an adult affects the validity of the transactions entered into by that person only to the extent in which he or she is unable to understand or direct his or her actions. Due to their limited active legal capacity, persons with limited ability to understand their actions are not able to participate fully on their own responsibility in making arrangements pertaining to their life and legal relations according to their will. Although the terms 'mental illness' and 'mental deficiency' are not used in medicine today, mental illness has been defined in legal literature as a profound disorder of mental functioning. It may persist in itself for a shorter or longer period. Mental deficiency, on the other hand, is mental retardation, which is a permanent condition.[5] On both occasions, the person is not able to understand and direct his or her actions, i.e. to act judiciously.

In current medicine the umbrella term 'mental disorder' is used while only a subset of mental disorders is called mental illness – psychosis. [6] According to § 2 (1) of the Mental Health Act [7] 'mental disorder' means a mental state or behavioural disorder according to the current international classification of mental and behavioural disorders. The term 'mental disorder' is likewise used in the Social Welfare Act. [8] In Estonia, diagnosis of diseases and establishing persons' ability to understand their actions should be based on the list of mental and behavioral disorders having lasting effect on individual's ability to understand as provided in the WHO International Classification of Diseases (ICD-10). [9]

In Estonian law the court merely identifies the existence of the limited active legal capacity of a person. According to § 207 of the Family Law Act, a guardian is the legal representative of a person with limited ability to understand, who can also participate in legal proceedings on their behalf. In addition, under § 206 a guardian shall protect the proprietary and personal rights and interests of a ward within the scope of its duties, that is, the guardian can also decide on the living arrangement etc of a person with limited ability to understand.

Nevertheless, in the context of the right to vote, the Code of Civil Procedure[10] still uses the term "deemed to be without active legal capacity with regard to the

5 P. VARUL et al. Tsiviilõiguse üldosa, Juura 2012, p. 96.

6 S. LIND. K. EINO. 'Isikult vabaduse võtmine põhjendusel, et ta on psüühikahäire tõttu endale või teistele ohtlik' (Depriving a person of liberty on the grounds of being dangerous to himself or herself or other people due to a mental disorder). Juridica 2014, No. 7, pp. 528-539.

7 Psühhiaatrilise abi seadus (Mental Health Act). RT I 1997, No.16, Art. 260. Last amendment RT I 24.03.2021, 6. In English https://www.riigiteataja.ee/en/eli/501042021005/consolide

8 Sotsiaalhoolekande seadus (Social Welfare Act). RT I, 30.12.2015, 5. Last amendment RT I, 28.04.2022, 1. In English https://www.riigiteataja.ee/en/eli/509052022004/consolide, see also decision No. 5-18-7 of the Constitutional Chamber of the Supreme Court (CCSCd) 09.12.2019, para 122.

9 See Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2018), 53. ptk sissejuhatus, komm. 3 (T. Uusen-Nacke, T. Göttig).

10 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure). RT I, 22.12.2021, 15. Last amendment RT I, 11.03.2023, 32. In English https://www.riigiteataja.ee/en/eli/516012019001/consolide

right to vote", and § 57 of the Constitution has the phrase "Estonian citizens who have been divested of legal capacity by a court shall not have the right to vote".

The General Part of the Civil Code Act which came into force on 1 July 2002 does not provide for divesting of active legal capacity, and the persons deemed to be without active legal capacity at the time of developing the Family Law Act have limited active legal capacity in private law relationships. Thus it results from the rules of the Code of Civil Procedure that a person with limited active legal capacity can be deprived of the right to vote.

At the same time, the notion 'be without active legal capacity' can be found in the legislation. Subsection 526 (5) of the Code of Civil Procedure provides that where a court establishes guardianship for managing all the affairs of a ward or if the scope of duties of a guardian is extended in such manner, the ward is also deemed to be without active legal capacity with regard to the right to vote, and loses their right to vote. Within the meaning of that provision the right to vote is the right to participate in a referendum and parliamentary elections both as a voter and as a candidate. According to that provision it is unnecessary to separately provide the limitation of voting rights in a court decision, as this happens automatically by law.[11] § 57 of the Constitution states that Estonian citizens who have been divested of legal capacity by a court shall not have the right to vote.

In order to modernize and harmonize the terminology of the Code of Criminal Procedure and the Code of Civil Procedure, the Ministry of Justice has initiated an intention for the development of a draft law, one of the objectives of which is that the terminology regarding severe mental disorder is harmonized in the Code of Criminal Procedure and the Code of Civil Procedure so that the terms used are uniform, up-to-date and unambiguous for experts in the field.[12]

Following § 8 (3) of the General Part of the Civil Code Act (GPCCA) a person's scope of active legal capacity is presumed to be limited insofar as they have been appointed a guardian. Thus the appointment of a guardian does not automatically mean the person's limited active legal capacity, being only a presumption of this, which can be overturned in the proceedings in one direction or another. As a consequence, persons with limited ability to understand their actions may on certain occasions need the consent or ratification from another person, i.e. their guardian, in their relations with third persons according to § 10 and § 11 GPCCA. Guardianship is not required if the interests of an adult can be protected by granting authorisation and by family members or other assistants.

In Estonia a system of substituted decision-making is in place. A guardian is the legal representative of the ward within the scope of its duties according to § 207 (1) of the Family Law Act and § 526 (4) of the Code of Civil Procedure. As a

11 Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne ((Constitution of the Estonian Republic. An notated Edition). 5. edition, Ü. Madise et al. (Ed). (2020), § 57 komm. 12 (H. Kalmo, O. Kask).

12 Kriminaalmenetluse seadustiku, tsiviilkohtumenetluse seadustiku ja teiste seaduste eelnõu väljatöötamise kavatsus (kohtupsühhiaatria valdkonna korrastamine) (Intention for the development of a draft law of Criminal Procedure, of Civil Procedure and other laws (harmonisation in the field of forensic psychiatry)). See https://eelnoud.valitsus.ee/main#m3pnAZrI

representative the guardian can enter into transactions on behalf of the ward given that these fall within the scope of the right of representation for the purposes of § 117 (1) GPCCA. The limits of the guardian's authority of representation for the purposes of § 120 (1) GPCCA are determined by the scope of duties of the guardian[13].

The Estonian Family Law Act[14] entered into force on 1 July 2010 and sets out prerequisites for the establishment of guardianship to persons with restricted active legal capacity. The Family Law Act gave the court an active role in appointing the guardian and also put the supervision of the guardian under the control of the court. If the court appoints a guardian, the court also conducts supervision over this person. A court shall verify at least once every five years whether the continuation of guardianship over a ward is necessary for the protection of the interests of the ward and whether grounds exist for extension or restriction of the duties of the guardian by making a respective ruling (§ 203 (4) Family Law Act).

The Social Code regulates the organisation of social protection and the ensuring of social protection by public authority.[15]

The local authority of a person's residence entered in the population register is required to organise the provision of social services, social benefits, emergency social assistance and other assistance to the person (§ 5 (1) Social Welfare Act[16]).

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: *опека - opeka*].

"Restricted active legal capacity/limited active legal capacity" (Estonia: *piiratud teovõime*) - persons who are under 18 years of age (minors) and persons who, due to mental illness, mental retardation or any other mental disorder, are permanently unable to understand or direct their actions, have limited active legal capacity.[17]

"Deemed to be without active legal capacity with regard to the right to vote" (Estonia: *valimisõiguse osas teovõimetu*) - where the court establishes a legal

13 CCSCd 2-17-1453, para 12.

14 Perekonnaseadus (Family Law Act). RT I 2009, No. 60, Art. 395. Last amendment RT I, 28.04.2022, 1. In English https://www.riigiteataja.ee/en/eli/510052022004/consolide

15 Sotsiaalseadustiku üldosa seadus (General Part of the Social Code Act). RT I 2015, No 3. Last amendment RT I, 28.04.2022, 1. In English https://www.riigiteataja.ee/en/eli/509052022001/consolide (15.06.2022)

16Sotsiaalhoolekande seadus (Social Welfare Act). RT I, 30.12.2015, 5. Last amendment RT I, 28.04.2022, 1. In English https://www.riigiteataja.ee/en/eli/509052022004/consolide

17 Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). RT I 2002, No. 35, Art. 216. Last amendment RT I, 20.06.2022, 33.
In English https://www.riigiteataja.ee/en/eli/501042021006/consolide

guardianship for managing all affairs of the ward or where the scope of the guardian's duties is extended accordingly, the ward is, additionally, deemed to have been declared not to have active legal capacity for the purposes of the right to vote, and loses the right to vote (Code of Civil Procedure § 526 (5)).[18] According to § 57 (2) Constitution of the Estonian Republic Estonian citizens who have been divested of legal capacity by a court shall not have the right to vote.[19]

"Guardian" (Estonia: *eestkostja*) - according to § 207 (1) of Family Law Act a guardian is the legal representative of a ward within the scope of its duties.[20] A natural person who is suitable to protect the interests of the ward taking account of his or her personal characteristics and abilities shall be appointed guardian. Upon appointing a guardian the relationship between him or her and the ward shall be taken into account (§ 204 (1) of Family Law Act). If a suitable natural person is not found to be appointed guardian a legal person may be appointed guardian with its consent. If a suitable legal person cannot be appointed as a guardian, the rural municipality or city government with which the adult is most closely connected shall be appointed as a guardian (§ 205 (1; 3) of Family Law Act).

According to § 207 of Family Law Act, a guardian is the legal representative of a person with limited ability to understand, who can also participate in legal proceedings on their behalf. In addition, under § 206 of Family Law Act a guardian shall protect the proprietary and personal rights and interests of a ward within the scope of its duties, that is, the guardian can also decide on the living arrangement etc of a person with limited ability to understand. A guardian shall be an adult natural person with full active legal capacity (§ 174 (1) of Family Law Act).

"Person under guardianship/ward" (Estonia: *eestkostetav*) - if an adult person is permanently unable to understand or direct his or her actions due to mental illness, mental disability or other mental disorder, a court shall appoint a guardian to him or her on the basis of an application of the person, his or her parent, spouse or adult child or rural municipality or city government or on its own initiative. A guardian shall be appointed only for the performance of the functions for which guardianship is required (§ 203 (1; 2) of Family Law Act).

"Legal representative" (Estonia: *seaduslik esindaja*) - according to § 207 (1) of Family Law Act a guardian is the legal representative of a ward within the scope of its duties.[21]

18 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure). RT I, 22.12.2021, 15. Last amendment RT I,11.03.2023. In English https://www.riigiteataja.ee/en/eli/516012019001/consolide;

19 Eesti Vabariigi Põhiseadus. (The Constitution of the Republic of Estonia). RT 1992, 26, 349; Last amendment RT I 15.05.2015, 2. In English https://www.riigiteataja.ee/en/eli/530122020003/consolide.

20 Perekonnaseadus (Family Law Act). RT I 2009, No. 60, Art. 395. Last amendment RT I, 11.01.2023, 12. In English https://www.riigiteataja.ee/en/eli/510052022004/consolide

21 Perekonnaseadus (Family Law Act). RT I 2009, No. 60, Art. 395. Last amendment RT I, 11.01.2023, 12. In English https://www.riigiteataja.ee/en/eli/510052022004/consolide

"Guardianship for managing all the affairs of a person under guardianship" (Estonia: *eestkoste eestkostetava kõigi asjade ajamiseks*) - where the court establishes a legal guardianship for managing all affairs of the ward or where the scope of the guardian's duties is extended accordingly, the ward is, additionally, deemed to have been declared not to have active legal capacity for the purposes of the right to vote, and loses the right to vote (Code of Civil Procedure § 526 (5).[22]

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.

According to Statistics Estonia,[23] on 31.12.2021 the population of Estonia was 1,328,439. The share of the elderly (65+) in the total population was 20 %. According to the data of the Social Insurance Board[24] there were 133 007 persons with disabilities in Estonia on 31.12.2021. The share of disabled persons was about 10 % of the total population. Division of the number of disabled persons by the degree of disability is as follows: 14,679 persons with profound disability (11 % of the total number of persons with disabilities); 70,058 persons with severe disability (53 % of persons with disabilities); 48,270 persons with moderate disability (36 % of persons with disabilities). The elderly (age group 63,5+) account for 55 % of the number of disabled persons, people of working age (age group 16-63,5) 39 % and children (age group 0-16) 6 %. In 2022, there were a total of 123,377 people with speech, hearing, movement, vision or other disability, mental disability, psychic disorder or multiple disabilities in Estonia, including 8,852 children (0-16), 46,156 persons of working age (16-64,25) and 68,369 elderly (64,25+). This does not mean that all disabled persons were under guardianship.[25]

Trends: According to Statistics Estonia,[26] the population of Estonia has been declining in the last 20 years. From 2002 to 2021 the population declined by 3.86 %. Natural population change has been steadily negative since 2011, when deaths first outnumbered births. The population growth of the last years results

22 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure). RT I, 22.12.2021, 15. Last amendment RT I,11.03.2023. In English https://www.riigiteataja.ee/en/eli/516012019001/consolide;

23Population. Statistics Estonia <https://www.stat.ee/et/avasta-statistikat/valdkonnad/rahvtik/rahvaarv> accessed 09.02.2022.

24 Statistics on disabled people by local governments. Social Insurance Board <https://www.sotsiaalkindlustusamet.ee/et/organisatsioon-kontaktid/statistika-ja-aruandlus#Puudega_inimesed_KOV> accessed 09.02.2022.

25 Statistics on disabled people by local governments. Social Insurance Board <https://www.sotsiaalkindlustusamet.ee/et/organisatsioon-kontaktid/statistika-ja-aruandlus#Puudega_inimesed_KOV> accessed 04.08.2023.

26 Statistics Estonia, <https://www.stat.ee/et/uudised/esialgne-rahvaarv-1-jaanuar-2021> accessed 15.06.2022.

from positive migration balance. The percentage of the elderly (65+) in the population has grown by four percentage points in the last 20 years (from 16 % in 2001 to 20 % in 2021). According to the population projections of Statistics Estonia[27] the total fertility rate will rise, mortality in age groups will decrease and migration balance will remain positive in the years to come. The proportion of the elderly in the total population is estimated to rise to 23 % in 10 years and to 26 % in 20 years.

According to the 2022 procedural statistics of the courts,[28] there were a total of 6,319 supervisory proceedings in the county courts over the activities of guardians of an adult with limited active legal capacity.

Special care services are provided for people with severe, profound or permanent mental health disorder. The arrangement and principles of special care services are set up in the Social Welfare Act.[29] The Social Insurance Board estimates whether a person applying for special care services needs these services or can be helped by other means of assistance, including services provided by the local authority. In estimating the need for services, the Social Insurance Board takes into consideration the person's ability to cope, act and participate in social life, as well as the person's health status, while following the purpose of the special care services.

According to the Social Insurance Board[30] in total 5870 persons were receiving special care services on 01.01.2022, with 1712 persons being on the waitlist.

According to the statistics of the Ministry of Justice,[31] victim support was provided to 4129 new victims in 2021, 8.9 % of whom were over 65 years old. In the last five years (2017-2021) the proportion of the elderly (65+) among the victims remained stable, amounting to around 8-9 % of the victims who received victim support.

27 Population pyramid. Statistics Estonia, <https://www.stat.ee/rahvastikupyramiid/> accessed 15.06.2022.

28Statistics of courts <https://www.kohus.ee/sites/default/files/dokumendid/I%20ja%20II%20astme%20kohtute%202022.a%20menetlusstatistika.pdf> accessed 04.08.2023.

29 Sotsiaalhoolekande seadus (Social Welfare Act). RT I, 30.12.2015, 5. Last amendment RT I, 28.04.2022, 1. In English https://www.riigiteataja.ee/en/eli/509052022004/consolide

30 Social Insurance Board <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fsotsiaalkindlustusamet.ee%2Fsites%2Fdefault%2Ffiles%2Fcontent-editors%2FStatistika%2FKOV%2Fehk.xlsx&wdOrigin=BROWSELINK> accessed 15.06.2022.

31 Ministry of Justice. Crime in Estonia 2021 <https://www.kriminaalpoliitika.ee/kuritegevus2021/kuriteoohvrid.html> accessed 15.06.2022.

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.

Estonia ratified the CRPD and the Optional Protocol in 2012.[32] Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system.[33] Estonia's declaration states that considering Estonia's interpretation, article 12 does not prevent restricting a person's legal capacity "when such need arises from the person's ability to understand and direct his or her actions". The restriction of the rights of persons with restricted active legal capacity will be executed in accordance with Estonian national law.

The Hague Convention entered into force in Estonia in 2011.[34] After adoption of the CRPD no changes or legislative reforms have taken place in the field of family law. At the moment there is no law draft in the Estonian Parliament concerning adult protection.

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

The Estonian Family Law Act entered into force on 1 July 2010[35] and sets out the conditions for establishment of guardianship to persons with restricted active legal capacity. The regulation of guardianship followed the model of the corresponding German regulation of the late 1990s and early 2000s. As an alternative to a guardian appointed by the court, a close person chosen and authorised by a person with limited ability to understand his or her actions may make arrangements pertaining to the life of such person and act as his or her representative in relations with third parties. In particular, this option is considered where a person has lost the ability to understand his or her actions in the course of life, but has made the necessary arrangements and granted authorisation for acting as his or her representative according to § 118 (1) GPCCA before losing the ability to understand. The current law does not provide for any other means of equivalent legal effect to protect the interests of persons except for a court-ordered guardianship or power of attorney.

32 Puuetega inimeste õiguste konventsiooni ratifitseerimise seadus (Law on the Ratification of the Convention on the Rights of Persons with Disabilities). RT I 2012, 5.

33 Eesti Vabariigi Põhiseadus (Constitution of the Estonian Republic). RT 1992, No. 26, Art. 349. Last amendment RT I, 15.05.2015, 2. In English: https://www.riigiteataja.ee/en/eli/530122020003/consolide

34 Täiskasvanute rahvusvahelise kaitse konventsiooniga ühinemise seadus. (Law on accession to the Convention on the International Protection of Adults). RT II 2010, 1.

35 Perekonnaseadus (Family Law Act). RT I 2009, No. 60, Art. 395. Last amendment RT I, 11.01.2023, 12, 1. In English https://www.riigiteataja.ee/en/eli/510052022004/consolide

Procedural rules regarding the appointment of a guardian for an adult with restricted active legal capacity are set out in the Code of Civil Procedure.

Estonian Chamber of Disabled People[36] (EPIKoda) is an independent and professional former of disability policies and societal opinion, which has been active in Estonia for 25 years. EPIKoda is an umbrella organisation for different disability organisations in Estonia and a member of the European Disability Forum and the European Patients' Forum. It acts as the state's partner in making decisions concerning persons with disabilities. A representative of EPIKoda is among the Estonian members of the European Economic and Social Committee. Estonia has seven members in the committee, who are nominated by the government following the proposal of the Minister of Social Affairs for five years.[37]

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.

There has been no significant paradigm change regarding the supported autonomy of vulnerable adults after the ratification of the CRPD, although the necessity for the guardianship reform in Estonia was pointed out in legal literature shortly after Estonia became a party to the convention.[38] Unfortunately, the supporting system has not been reformed for years and has come under criticism.

The shadow report prepared by Estonian Chamber of Disabled People[39] with the later comments[40] draws attention to the shortcomings in the implementation of the UN Convention on the Rights of Persons with Disabilities, relying on real life experience of people with disabilities in Estonia. The shadow report makes the following recommendations:

- Establish pre-conditions (legislation, operational voluntary guidelines) for moving from the substituted judgement model towards supported decision-making model.

36 Estonian Chamber of Disabled People. In English <https://epikoda.ee/en/about-us/about-the-chamber> accessed 15.06.2022.

37 Sotsiaalministeerium. See <https://www.sm.ee/uudised/valitsus-kinnitas-euroopa-majandus-ja-sotsiaalkomitee-liikmete-kandidaadid> accessed 15.06.2022.

38 N. PARREST, K. MULLER, 'ÜRO puuetega inimeste konventsioon lõhkumas eestkostesüsteemi', Sotsiaaltöö 2015/1, p. 51–54.

39 ÜRO puuetega inimeste õiguste konventsiooni täitmise variraport. Eesti Puuetega Inimeste Koda. See <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fICO%2fEST%2f33965&Lang=en> accessed 15.06.2022.

40 ÜRO puuetega inimeste õiguste konventsiooni täitmise variraport. Eesti Puuetega Inimeste Koda. See <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fEST%2f41440&Lang=en>accessed 15.06.2022.

- Consider withdrawal of the declaration issued when the UN CRPD was ratified.
- Regularly gather and publish data on establishing guardianship (including number of guardianships set, scope of legal capacity of guardianship, timeframe on how long the guardianship lasts and who are the persons appointed as guardians).
- Conduct awareness raising on mental health and intellectual disabilities, promoting tolerance in the society on the participation of people with mental health issues and behavioral problems in the community.

In the end of 2021 Estonian Human Rights Centre published the report "Human rights in Estonia",[41] concerning developments in the years 2020-2021. The Estonian Human Rights Centre is an independent, non-governmental organisation that advocates for human rights. It was founded in December 2009 and has quickly become the most well-known human rights NGO in Estonia.[42] In the chapter dedicated to the situation of disabled people, one of the key issues is the capacity limitation system that needs to be modernised. The absence of a mechanism for supported decision making in cases of limited active legal capacity has drawn criticism as this means that people who due to intellectual disability or mental disorder need support in making decisions and managing their affairs are mostly submitted to guardianship with respect to all activities and therefore thousands of adults lose their right to vote, without the court considering the actual abilities of those people. The human rights report recommends to consider withdrawing the declaration concerning Article 12 of the UNCRPD, and moving from substituted decision-making to supported decision-making.[43]

On 2 May 2021 Riigikogu (the Parliament of Estonia) adopted the national long-term development strategy "Estonia 2035".[44] It can be pointed out as a positive development that for the first time, the topic of the inclusion of people with disabilities has expanded across sectors.

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

On 13 April 2022 Riigikogu accepted the Act on Amendments to the Social Welfare Act and Other Acts.[45] These amendments contribute to the provision of better welfare assistance and relieve grandchildren of the obligation to maintain

41 Human Rights in Estonia 2022. Inimõiguste Keskus. See <https://humanrights.ee/materjalid/inimoigused-eestis-2022/> accessed 15.06.2022.

42 Inimõiguste Keskus. See <https://humanrights.ee/en/activity/about-us/> accessed 04.08.2023.

43 Human Rights in Estonia 2022. Inimõiguste Keskus. See <https://humanrights.ee/materjalid/inimoigused-eestis-2022/puuetega-inimeste-olukord/> accessed 15.06.2022.

44 See <https://valitsus.ee/strateegia-eesti-2035-arengukavad-ja-planeering/strateegia/materjalid> accessed 15.06.2022.

45 Sotsiaalhoolekande seaduse ja teiste seaduste muutmise seadus. RT I 2022, 1.

their grandparents, as well as grandparents of the obligation to maintain their adult grandchildren.

The Act of Amendments to the Law on Equal Treatment[46] is still pending in Riigikogu, as has also been sharply noted by the United Nations. According to the current law, the protection of persons against discrimination is wider on grounds of nationality (ethnic origin), race and colour, and narrower on grounds of religion or other beliefs, age, disability or sexual orientation. People with disabilities need protection against discrimination also in the sphere of education, social welfare, healthcare and social security, as well as access to goods and services which are available to the public, including housing. Equally unjustified is the omission of disability in the features listed in the article on discrimination in the Penal Code (§ 152).

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?

Estonian law uses the term 'restricted active legal capacity' or 'limited active legal capacity' which is defined in the General Part of the Civil Code Act (GPCCA).[47] According to § 8 (2) GPCCA, persons who due to mental illness, mental disability or other mental disorder are permanently unable to understand or direct their actions have limited active legal capacity. Thus, adults with limited ability to understand their actions are considered persons with passive legal capacity under § 7 GPCCA, i.e. legal personalities having rights and obligations, whereas according to § 8 (2) GPCCA they have limited active legal capacity, i.e. limited capacity to enter independently into valid transactions.

The Code of Civil Procedure[48] also uses the term 'person without active civil procedural legal capacity'. If an adult with active civil procedural legal capacity is represented in proceedings by their guardian, the represented person is deemed to be without active civil procedural legal capacity (§ 202 (3) Code of Civil Procedure).

46 See <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/e5167b69-71f1-4f00-8c8b-948fa16df645/V%C3%B5rdse%20kohtlemise%20seaduse%20ning%20kiirikute%20ja%20koguduste%20seadusemuutmise%20seadus> accessed 15.06.2022.

47 Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). RT I 2002, No. 35, Art. 216. Last amendment RT I, 20.06.2022, 33.

48 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure). RT I, 22.12.2021, 15. Last amendment RT I, 11.03.2023. In English https://www.riigiteataja.ee/en/eli/516012019001/consolide

§ 57 of the Constitution states that Estonian citizens who have been divested of legal capacity by a court shall not have the right to vote.

The General Part of the Civil Code Act which came into force on 1 July 2002 does not provide divesting of active legal capacity, and the persons deemed to be without active legal capacity at the time of developing the Family Law Act have restricted active legal capacity in private law relationships. Thus it results from the rules of the Code of Civil Procedure that a person with restricted active legal capacity can be deprived of the right to vote. § 526 (5) of the Code of Civil Procedure provides that where a court establishes guardianship for managing all the affairs of a ward or if the scope of duties of a guardian is extended in such manner, the ward is also deemed to be without active legal capacity with regard to the right to vote, and loses their right to vote. Within the meaning of that provision the right to vote is the right to participate in a referendum and Riigikogu elections both as a voter and as a candidate. According to the provision it is unnecessary to separately provide the limitation of voting rights in a court decision, as this happens automatically by law.[49]

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

In Estonian law the court merely identifies the existence of limited active legal capacity of a person. The identification of a person's limited active legal capacity is carried out by the court either in the proceedings for appointing a guardian to an adult or in the proceedings where the identification of a person's limited active legal capacity is related to a legal dispute over the validity of a declaration of intent made by the person.

Where the court identifies a person's limited active legal capacity in guardianship proceedings, this is aimed to offer protection from the binding legal effects rising from declarations of intent to such adult persons who are unable to cope with activities of daily living due to a persistent mental or psychiatric condition and do not understand the consequences of their declarations of intent and decisions.[50] Establishment of guardianship is governed by the Estonian Family Law Act.[51] The Family Law Act gave the court an active role by appointing the guardian, and also put the supervision of the guardian under the control of court.

According to § 203 (1) Family Law Act, if an adult person is permanently unable to understand or direct his or her actions due to mental illness, mental disability or other mental disorder, a court shall appoint a guardian to him or her on the basis of an application of the person, their parent, spouse or adult child or rural

49 Eesti Vabariigi põhiseadus (Constitution of the Estonian Republic). Kommenteeritud väljaanne. 5. edition, Ü. MADISE et al. (Ed). (2020), § 57 komm. 12 (H. Kalmo, O. Kask).

50 See Decision of the Civil Chamber of the Supreme Court (CCSCd) 3-2-1-141-05 para 8.

51 Perekonnaseadus (Family Law Act). RT I 2009, No. 60, Art. 395. Last amendment RT I, 11.01.2023, 12. In English https://www.riigiteataja.ee/en/eli/510052022004/consolide

municipality or city government or on its own initiative. A guardian shall be appointed only for the performance of the functions for which guardianship is required.

Procedural rules regarding the appointment of a guardian for an adult with limited active legal capacity are set out in the Code of Civil Procedure.[52]

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

According to § 526 of the Code of Civil Procedure a court appoints a guardian for an adult with limited active legal capacity by an order, and the scope of the guardian's duties follows from the guardianship order.

Thus, the limitation of active legal capacity means that the court has established the existence of a person's limited legal capacity to the extent determined by it, and to that extent they need a legal representative to make declarations of will. Where a person's limited active legal capacity is identified at the time of making one specific declaration of intent, it will be valid only for this transaction.

According to § 8 (3) of the General Part of the Civil Code Act if a guardian is appointed by a court to a person who due to mental illness, mental disability or other mental disorder is permanently unable to understand or direct his or her actions, the person is presumed to have limited active legal capacity to the extent in which the guardian has been appointed to him or her. Thus the appointment of a guardian does not automatically mean the person’s limited active legal capacity, being only a presumption of this, which can be overturned in the proceedings in one direction or another.

An order sets out the person for whom a guardian is appointed; the person or agency appointed as a guardian; the duties of the guardian; whether the person with limited active legal capacity is permitted to perform transactions without the consent of the guardian, and which transactions are permitted; the period at the end of which at the latest the court decides on the termination or extension of the guardianship. If it does not follow clearly from a guardianship order which types of transactions can the ward perform independently without the consent of the guardian, the order does not comply with the requirements in § 526 (2) (4) of the Code of Civil Procedure.[53] The court has to specify the guardian's duties so that these are as appropriate and justified as possible, i.e. in a way that the condition, situation and needs of the ward are considered the most.[54] According to § 203 (2) of the Family Law Act, a guardian shall be appointed only for the performance of the functions for which guardianship is required, thus the law does not contain

52 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure). RT I, 22.12.2021, 15. Last amendment RT I, 11.03.2023. In English https://www.riigiteataja.ee/en/eli/516012019001/consolide

53 Order of the Civil Chamber of the Supreme Court (CCSCo) 3-2-1-32-17, para 13.

54 CCSCo 2-12-18265, para 19.

abstract establishment of guardianship. The extent of the limitation of active legal capacity can be determined following the guardianship order which reflects in compliance with subsections 3 and 4 of § 526 (2) of the Code of Civil Procedure both the duties of the guardian and the transactions that the ward can perform independently without the consent of the guardian.[55] Where the guardian has been appointed for managing all the affairs, this has to be specified in the court order. Where the order does not specify the scope of the guardian's duties, it cannot be concluded that the guardian has been appointed to manage all the affairs of a person. Specifications regarding a person's right to arrange care, residence and treatment are common.[56] These include, above all, the guardian's general rights and obligations arising from the Family Law Act (i.e. § 206 FLA), as well as from other laws.

According to Population Register Act[57] (§ 21 (1) p. 12) data on guardianship has to be entered in the population register.

Upon establishment of guardianship, a court shall assess the person's ability to understand the legal consequences of contraction of marriage, acknowledgement of paternity and other transactions concerning family law. The subsidiarity of guardianship has also been pointed out in several judgements of the Supreme Court,[58] stating that even where a court declares a person's active legal capacity limited, the person does not need guardianship to the extent in which his or her rights and interests are protected by other means, including where the person has authorised someone to manage his or her affairs and/or the family members or other assistants ensure the person's coping and welfare.

As a ward's active legal capacity is not presumed to be limited outside the extent of the guardian's duties,[59] the person's active legal capacity is to be separately assessed for each transaction not covered by the guardianship order. There is no general rule for deciding upon the validity of a transaction as the scope and content of transactions can vary widely and the assessment of a person's ability to understand requires specialist training. A ward's ability to understand and direct their actions according to § 8 (2) of the General Part of the Civil Code Act has to be determined on a case-by-case basis based on facts and evidence.

According to § 73 of the General Part of the Civil Code Act the validity of a manifestation of intention remains unaffected by the fact that the person who made the manifestation died, or suffered a limitation of their active legal capacity, after having made it. Thus, if the person becomes of restricted active legal capacity after giving the power of attorney, this does not affect the validity of the power of attorney granted at the time of unrestricted active legal capacity. The Supreme Court

55 CCSCd 2-17-5110, para 12

56 See Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2018), § 526 p 3.1.2 (T. Uusen-Nacke, T. Göttig).

57 Rahvastikuregistri seadus (Population Register Act). RT I 2017, 1. Last amendment RT I 12.03.2022, 1. In English https://www.riigiteataja.ee/en/eli/524032022003/consolide

58 CCSCd 3-2-1-87-11, para 21; CCSCo 2-19-8577, para 14.

59 CCSCo 2-13-70131, para 15; CCSCd 2-17-1453, para 16.

has found that in a situation where a person has been placed under guardianship and there is a partial or total overlap in the scope of the powers of representation of the guardian and the authorised representative, the guardian has the right to revoke the authorisation validly granted by the ward at any time, in accordance with General Part of the Civil Code Act 126 (1).[60] A ward's ability to understand and direct their actions has to be assessed as regards the time of entering into transaction. Nevertheless, the facts examined in the guardianship procedure can be taken as a starting point in estimating the active legal capacity of a ward.[61]

d. can the limited legal capacity be restored, can the limitation of legal capacity be reversed and full capacity restored and, if so, on what grounds?

Where guardianship has been established for a person, it follows from § 529 of the Code of Civil Procedure that the court terminates the guardianship, restricts the scope of duties of a guardian or extends the rights of the person under guardianship to perform transactions independently if the bases for appointing a guardian cease to exist in whole or in part. The court may order an expert assessment in order to ascertain that such bases have ceased to exist, hear the person (§ 524 Code of Civil Procedure) or collect other relevant evidence. The court may exceptionally decide the case solely on the basis of what is presented in the application, if the establishment of guardianship is recent and nothing in the application gives reason to expect any change in the person's need for guardianship compared to the time of the establishment of guardianship.

These are the cases where a ward recovers either entirely or partly.[62]

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

Where a person’s limited active legal capacity is identified by the court only in respect of a single transaction, it only applies to this transaction. Accordingly, to the extent in which a guardian has not been appointed, the person’s active legal capacity is not limited and they can validly enter into transactions. The guardianship results in a limitation of legal capacity within the scope of the mandate of the guardian.

Following § 8 (3) of the General Part of the Civil Code Act the person’s scope of active legal capacity is presumed to be limited insofar as they have been appointed the guardian.

60 See CCSCo 2-19-8577, para 18.
61 CCSCd 2-17-5110, para 14.
62 CCSCo 3-2-1-73-15, para 15.

f. are there any other legal instruments,[63] besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

No.

Guardianship is not required if the interests of an adult can be protected by granting authorisation and by family members or other assistants.

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

Where limited active legal capacity is identified in the procedure concerning the performance of a single transaction, the person has not made a valid declaration of intent as regards this transaction. In the case of a transaction subject to the personal performance requirement, it is deemed that the person has not made a valid declaration of intent. If this is not the case, rules on the validity of transactions performed by persons with limited active legal capacity are applied to the transaction. Unilateral transactions made by a person with limited active legal capacity without the prior consent of their legal representative are void. The general rule for the validity multiparty transactions of persons with limited active legal capacity is that there must be a prior consent of the legal representative or the legal representative must later ratify the transaction.

A transaction entered into by a person with limited active legal capacity without the prior consent or subsequent ratification of their legal representative is valid if: 1) no direct civil obligations arise from the transaction for the person; 2) the person performed the transaction by means which their legal representative or a third person with the consent of the legal representative had granted to him or her for such purpose or for free use.

In the case of adults with limited active legal capacity, it is necessary to find out for each person which transactions are in the scope of the limitation of their legal capacity. Where a person's limited active legal capacity is identified together with establishing guardianship over the person, the order of establishing guardianship sets out which are the duties of the guardian; whether the person with limited active legal capacity is permitted to perform transactions without the consent of the guardian, and which transactions are permitted; the period at the end of which at the latest the court decides on the termination or extension of the guardianship.

63 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

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

Where a guardian has been appointed to a person in the capacity of his or her legal representative, the representative cannot conduct any transactions which have to be made in person according to law, including transactions with the formal requirement of entering into in person (e.g. most of the transactions under Family Law Act; exercising the right to vote).

Upon establishment of guardianship, a court shall assess the person's capability to understand the legal consequences of contraction of marriage, acknowledgement of paternity and other transactions concerning family law. A guardian's duties may include exercise of the ward's rights against third persons (§ 203 (2) Family Law Act).

According to § 222 (2) of the Code of Civil Procedure the representative of a spouse who has no active civil procedural legal capacity has the right to submit a petition for divorce or annulment of marriage only with the consent of the guardianship authority.

As the current Family Law Act does not provide the concept of guardianship authority, and the duties which were earlier performed by local authorities have been transferred to courts, this provision is to be understood as referring to the consent of a court.

c. medical matters;

Subsections 766 (1) and (3) of the Law of Obligations Act[64] provide for the duty to inform the patient and obtain his or her consent. In the case of a patient with limited active legal capacity, the legal representative of the patient has the rights in so far as the patient is unable to consider the pros and cons responsibly. If the decision of the legal representative appears to damage the interests of the patient, the provider of health care services shall not comply with the decision. The patient shall be informed of the circumstances and information specified in § 766 (1) of the Law of Obligations Act to a reasonable extent. Subsection 766 (4) of the Law of Obligations Act shall be applied upon the provision of psychiatric care to a person with limited active legal capacity (§ 3 (2) Mental Health Act).

According to § 19 (2) of the Termination of Pregnancy and Sterilisation Act,[65] the sterilisation of a person with limited active legal capacity shall be decided by

64 Võlaõigusseadus (Law of Obligations Act). RT I 2001, No. 81, Art. 487. Last amendment RT I 15.03.2022, 2. In English https://www.riigiteataja.ee/en/eli/505042022001/consolide

65 Raseduse katkestamise ja steriliseerimise seadus (Termination of Pregnancy and Sterilisation Act). RT I 1998, No. 107, Art. 1766. Last amendment RT I 13.03.2019, 2. In English https://www.riigiteataja.ee/en/eli/502042019003/consolide

a county court in proceedings on petition of the persons's guardian. The Committee on the Rights of Persons with Disabilities has observed with concern that women with disabilities under guardianship can be subjected to sterilization or abortion without their consent. Committee also notes with concern that women with disabilities subject to guardianship face greater barriers in gaining access to sexual and reproductive health-related services and to expressing their free and informed consent concerning health treatments.[66]

d. donations and wills;

The validity of each will has to be assessed on a case-by-case basis, if contested, as the guardian's duties according to § 526 (2) (3) of the Code of Civil Procedure cannot include representation of a ward in making a will or giving consent to making a will. According to § 19 (2) of the Law of Succession Act a will must be made in person. The General Part of the Civil Code Act provides in § 115 (2) that a transaction which by law or mutual agreement must be carried out in person may not be carried out through a representative. This prohibition prevents the guardian from representing the ward in making a will. Thus, as a guardian may not represent the ward in making a will, making a will cannot be included among the guardian's duties as set out in § 526 (2) (3) Code of Civil Procedure. Likewise, neither giving prior consent to making a will (§ 10 General Part of the Civil Code Act) nor the ratification of a will (§ 10 General Part of the Civil Code Act) can be included among the duties of a guardian.[67]

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

According to § 202 (1) of the Code of Civil Procedure, active civil procedural legal capacity is the capacity of a person to exercise civil procedural rights and perform civil procedural obligations in court. Persons with restricted active legal capacity do not have active civil procedural legal capacity, except if the restriction of active legal capacity of an adult does not relate to the exercise of civil procedural rights and performance of civil procedural obligations. The active civil procedural legal capacity of an adult with limited active legal capacity depends upon the extent to which the person's active legal capacity is limited.

If an adult with active civil procedural legal capacity is represented in proceedings by a guardian, the represented person is deemed to have no active civil procedural legal capacity. In proceedings for the establishment of guardianship for

66 UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Estonia' (2021) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/EST/CO/1&Lang=En> accessed 15.06.2022.

67 CCSCd 2-17-5110 para 12; CCSCd 2-17-1453, para 15.

an adult with restricted active legal capacity, the person with respect to whom the establishment of guardianship is requested has active civil procedural legal capacity. In proceedings for placing a person in a closed institution, the person has active civil procedural legal capacity regardless of whether he or she has active legal capacity, provided he or she is at least fourteen years of age (§ 202 (2,3,4) Code of Civil Procedure).

Thus it is not possible to speak about limited active civil procedural legal capacity in the civil procedure. Persons with limited active legal capacity cannot participate in proceedings as parties or validly perform procedural actions even with the consent of the legal representative (except if the limitation of active legal capacity of an adult does not relate to the exercise of civil procedural rights and performance of civil procedural obligations).[68]

According to § 219 of the Code of Civile Procedure if a petition is filed by a person without active civil procedural legal capacity or a court claim is made against a person without active civil procedural legal capacity who has no legal representative, the court appoints a temporary representative to them until the legal representative enters proceedings if prevention of the participation of the party in proceedings endangers an essential interest of the party. In a family matter, the court may appoint a representative to a person without active civil procedural legal capacity in a proceeding which concerns that person if this is necessary for protection of the interests of the person without active civil procedural legal capacity. A representative must be appointed if: 1) the interests of the person without active civil procedural legal capacity are contrary, to a significant extent, to the interests of his or her legal representative; 2) the court conducts proceedings in a matter of placement of a person without active civil procedural legal capacity under guardianship; 3) the court conducts proceedings in a matter of applying measures in order to ensure the well-being of a child which involve separating the child from his or her family or deprivation of the right of custody over the person in full; 4) the court conducts proceedings in a matter of removal of a child from a foster family, a spouse or another person entitled to access the child.

A representative need not be appointed to a person without active civil procedural legal capacity and an order made for appointment of a representative to such person may be set aside if the person is represented by an attorney or another appropriate representative.

The court appoints, in accordance with the rules provided by the State Legal Aid Act[69], an attorney to represent the person in order to protect his or her interests. The name of the attorney is specified to the court by the Estonian Bar Association which also guarantees his or her attendance at proceedings. Upon appointment of

68 See Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2017), § 202 p 3.67(A. Hussar).

69 Riigi õigusabi seadus (State Legal Aid Act). RT I 2004, No. 56, Art. 403. Last amendment RT I 22.12.2020, 34. In English https://www.riigiteataja.ee/en/eli/531052021004/consolide

an attorney, the court does not additionally check the existence of the prerequisites for the receipt of state legal aid.

The court verifies the existence of the passive civil procedural legal capacity and active civil procedural legal capacity of the parties to proceedings and if these are absent does not permit the person to participate in the proceedings. If the court has doubts regarding the active civil procedural legal capacity of a party to proceedings who is a natural person, the court may either demand that the person provide a doctor's opinion, or order an expert assessment. If the person refuses to comply with the directions of the court or the documents submitted fail to remove the doubts of the court, the court initiates proceedings for appointing a guardian for the party to proceedings. If initiation of proceedings for appointment of a guardian for a claimant, petitioner or appellant is impossible, the court dismisses the petition or appeal. The court may also permit a party to proceedings with no active civil procedural legal capacity to participate in proceedings if prevention of participation in proceedings endangers an essential interest of the party to proceedings. In such event, the court sets the person a time limit for appointment of a representative. A judicial disposition on termination of proceedings shall not be made in proceedings before the expiry of such time limit.

If the court has doubts regarding the active legal capacity of a party to proceedings, the court shall without delay notify this to the rural municipality or city government of the party's residence. Where legal proceedings are independently brought by a person with limited active legal capacity for whom a guardian has been appointed, the court may refuse to accept the action or application under § 371 (1) (9) of the Code of Civil Procedure if the action or application has not been signed by the guardian. The court can inform the guardian about the action or application submitted and, if necessary, set a term for the elimination of deficiencies under § 340^1 (1) of the Code of Civil Procedure.[70]

If the guardianship established for a person includes, for instance, making a declaration of intent at a public agency, the guardian will act as the person's legal representative. According to § 12 (1) of the Administrative Procedure Act[71] the provisions of the General Part of the Civil Code Act apply to passive and active legal capacity in administrative procedure.

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

Persons' ability to understand and direct their actions is assessed by the court as regards the time of entering into transaction. If at the time of entering into transaction a person has a guardian, the person's active legal capacity is presumed to be limited according to § 8 (3) of the General Part of the Civil Code Act in respect

70 CCSCo 2-16-17142, para 8.

71 Haldusmenetluse seadus (Administrative Procedure Act). RT I 2001, No. 58, Art. 354. Last amendment RT I 13.03.2019, 2. In English https://www.riigiteataja.ee/en/eli/527032019002/consolide

of the acts for which the guardian has been appointed, that is, which are included among the duties of the guardian. Thus the appointment of a guardian does not automatically mean the person's limited active legal capacity, being only a presumption thereof, which can be overturned in the proceedings in one direction or another.

By contrast, a ward's active legal capacity is not presumed to be limited outside the extent of the guardian's duties, and the person's active legal capacity has to be separately assessed for each transaction not covered by the guardianship order; this may happen also in judicial proceedings after the person's death. There is no general rule for deciding upon the validity of a transaction. A ward's ability to understand and direct their actions according to § 8 (2) of the General Part of the Civil Code Act has to be determined on a case-by-case basis drawing on facts and evidence.

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

The court identifies person's limited active legal capacity at the time of entering into individual transactions. The court appoints a guardian and controls the activities of the guardian.

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

If an adult person is permanently unable to understand or direct their actions due to mental illness, mental disability or other mental disorder, a court shall appoint a guardian to that person on the basis of an application of the person, their parent, spouse or adult child or rural municipality or city government or on its own initiative (§ 203 (1) Family Law Act).

Where the identification of a person's limited active legal capacity is related to a legal dispute over the validity of a declaration of intent made by the person, the person entitled is the one who has the right to apply to the court for the protection of his or her presumed and legally protected right or interest.

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;

If a person is found to have limited active legal capacity in respect of one transaction, then as a general rule, natural persons without active civil procedural legal capacity cannot be parties to proceedings without their legal representative.

Should the court doubt the active legal capacity of the party who is a natural person, § 204 (3) of the Code of Civil Procedure applies, whereby the court may also permit a party to proceedings with no active civil procedural legal capacity to participate in proceedings if prevention of participation in the proceedings endangers an essential interest of the party to proceedings. In such case, the court sets the person a time limit for appointment of a representative. A judicial disposition on termination of proceedings shall not be made before the expiry of such time limit. Second, the presumption for permitting a person without active civil procedural legal capacity to temporarily enter proceedings is that without granting the permission the obstacle to participation in the proceedings would jeopardize substantive legal interests of the party concerned. This could be justified for instance by the desire to stop the expiration by filing an action.[72] With the temporary admission to the proceedings the court sets a deadline for the person concerned for appointing a representative.

Where the identification of a person's limited active legal capacity is carried out in the proceedings for appointing a guardian the court shall follow the provisions concerning this specific type of proceedings. According to § 520 of the Code of Civil Procedure, for the purposes of the proceedings for appointment of a guardian, the court appoints a representative to an adult with restricted active legal capacity if this is necessary in the interests of the person (*Please see answer 21 a*).

In proceedings that significantly limit the rights of a person, the person's rights arising from the status of a party to the proceedings are guaranteed notwithstanding whether the person is capable to independently exercise these rights due to the limited active legal capacity or not. These are the proceedings for establishing guardianship to a person on the grounds of limited active legal capacity, for placement in a secure care institution, and for granting permission to terminate a pregnancy without a person's will or against her will.[73]

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

Where the identification of a person's limited active legal capacity is carried out in the course of identification of the validity of a declaration of intent made by the person, the court assesses the facts and evidence presented by the parties to the proceedings, which may also include statements given by family members as evidence in civil proceedings.

Where guardianship is established for a person and in the course of this procedure the person's limited active legal capacity is identified, then according to § 525 (2) of the Code of Civil Procedure, as a rule, the court also requests in the

72 See Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne (Code of Civil Procedure I. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2017), § 204 p 3.4. 2 (A. Hussar).

73 See Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne (Code of Civil Procedure I. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2017), § 202 p 3.6 (A. Hussar).

course of proceedings the opinion of the person whose placement under guardianship the court is considering, his or her spouse, parents, foster parents, children and members of the rehabilitation team, unless the person objects to this and the court does not deem it necessary to request an opinion. At the request of the person in need of guardianship, the opinion of other persons close to them may be requested, unless this significantly delays proceedings. The opinion of persons who are closely related to the person concerned has major importance for the proceedings, and if the court deters from requesting the opinion of the persons close to the person in need of guardianship on the grounds given in the said section, the court shall provide the reasons in the order of closing the proceedings. It is the information received from the closely related persons that gives the best insight into a person's health, social environment and the feasibility of substituting guardianship with some other means to support the person.[74]

c. requirement of a specific medical expertise / statement;

Where the identification of a person's limited active legal capacity is carried out during an assessment of the validity of a declaration of intent made by the person, the evidence needed to demonstrate the limitations of a person's active legal capacity (e.g in disputes concerning the validity of a will) may include also an expert opinion given by a forensic psychiatrist in any other proceedings. For assessing the active legal capacity of a person, also postmortem forensic psychiatric and/or forensic psychological complex examination can be used.[75]

According to § 522 of the Code of Civil Procedure, if the court has information or doubt that a person has a mental illness or mental disability, the court orders an expert assessment in order to determine the need for appointing a guardian to such person.

d. hearing of the adult by the competent authority;

According to § 524 (1) of the Code of Civil Procedure the person whose placement under guardianship the court is considering is personally heard by the court.

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

In general, natural persons without active civil procedural legal capacity cannot be parties to proceedings without their legal representative; this applies also

74 See Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2018), § 525 p 3.2 (T. Uusen-Nacke, T. Göttig).

75 CCSCd 2-17-14.

where a person's active legal capacity is found to be limited in respect of performing one transaction.

According to § 202 (4) of the General Part of the Civil Code Act, in proceedings for establishment of guardianship for an adult with limited active legal capacity, the person for whom the establishment of guardianship is requested has active civil procedural legal capacity. Acknowledgement of such exceptional active civil procedural legal capacity also means that the participation of the representative is without prejudice to the personal participation of the party to the proceedings who is without active civil procedural legal capacity. The affected persons can perform procedural acts in person even if they have been appointed a representative at the expense of the state. Thus, a representative and an affected person are able to exercise procedural rights independently of each other (being both able to lodge appeal).[76]

According to § 532 (1) of the Code of Civil Procedure the order by which the court appoints a legal guardian or denies the corresponding petition or terminates the legal guardianship or varies the scope of the guardian's duties or refuses to terminate the guardianship or releases the guardian from their duties or appoints a new guardian, or determines the costs of the guardianship may be appealed by the person to whom a guardian was to be appointed, by the person who was appointed as the guardian, by the spouse or direct blood relative of the person to whom a guardian was to be appointed, by a close person designated by the person to whom a guardian was to be appointed (trusted representative) or by the executive of the municipality in which the person has their residence.

In proceedings for placing a person in a closed institution, the person has active civil procedural legal capacity regardless of whether he or she has active legal capacity, provided he or she is at least fourteen years of age. This covers also the right to lodge an appeal. The Supreme Court has ruled that a person with limited active legal capacity who submits application for termination of coercive psychiatric treatment has active civil procedural legal capacity and independent right of action by analogy to § 202 (4) of the Code of Civil Procedure which provides a person's active civil procedural legal capacity in proceedings concerning their placement in a closed institution, irrespective of the person's active legal capacity.[77]

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

a. property and financial matters;

76 See Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne (Code of Civil Procedure I. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2017), § 202 p 3.6 (A. Hussar).

77 CCSCo 2-16-17142, para 9.

According to § 11 of the Notarisation Act[78] if a notary is convinced that a party lacks the necessary active legal capacity or the capacity to exercise will, the notary shall refuse from authentication. A notary shall indicate his or her doubt in a party's necessary active legal capacity or capacity to exercise will in the notarial instrument. If a party is seriously ill, a notary shall indicate such fact together with his or her observations on the party's active legal capacity and capacity to exercise will in the notarial instrument.

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

A court may annul a marriage by an action if at the time of entering into marriage, at least one spouse had a temporary mental disorder or was incapable of exercising his or her will for any other reason (§ 9 (4) Family Law Act). A vital statistics official shall not certify the contraction of marriage if there is reason to presume that grounds for annulment or nullity of the marriage exist (§ 5 Family Law Act).

c. medical matters;

If a patient is unconscious or incapable of exercising his or her will for any other reason (a patient without the capacity to exercise his or her will) and if he or she does not have a legal representative or the legal representative cannot be reached, the provision of health care services is permitted without the consent of the patient if this is in the interests of the patient and corresponds either to the intentions expressed by him or her earlier or to his or her presumed intentions and if failure to provide health care services promptly would put the life of the patient at risk or significantly damage his or her health. The intentions expressed earlier by a patient or his or her presumed intentions shall, if possible, be ascertained using the help of his or her immediate family. The immediate family of the patient shall be informed of his or her state of health, the provision of health care services and the associated risks if this is possible in the circumstances (§ 767 (1) Law of Obligations Act).

Although the Estonian law does not specifically provide for the legal institution of living will it can be used under the existing law. More specifically, the rules concerning living will can be concluded from the provisions on the contract for provision of health care services as set out in the Law of Obligations Act.[79] § 766

78 Tõestamisseadus (Notarisation Act). RT I 2001 No. 93, Art. 564. Last amendment RT I, 22.12.2020, 34. In English https://www.riigiteataja.ee/en/eli/529122020008/consolide

79 M. KRUUS, R. INT, A. NÕMPER, 'Patsienditestament: milleks ja kellele? Vormid, vormistamine ja rakendamise probleemid' (2017) Juridica 5/2017, pp. 332–339.

(3) and § 767 (1) of the Law of Obligations Act[80] are the provisions that govern, among other things, the living will. While § 767 (1) Law of Obligations Act permits under certain circumstances the provision of health care services in a situation where the patient is unable to express their will, the living will enables to prohibit the provision of health care in these situations. On the basis of these provisions, the living will can be relied upon to exclude provision of healthcare services on the condition that the following criteria are met: a) the provision of healthcare services would in itself be in the interest of the patient, i.e., indicated for the patient; b) the patient is unconscious or otherwise unable to express their will; c) the decision to provide health care services cannot be postponed (not providing the health care service immediately would be life-threatening or cause serious harm to health or the patient is permanently unable to make decisions; d) the decision is not taken by the legal representative of the patient; e) the wish to exclude the provision of healthcare services has been expressed by the patient while fully capable of decision.

Nevertheless, the use of the living will is considerably impeded by lack of clarity on its legal meaning and other questions.[81]

d. donations and wills;

Where the court has found that the testator did not have capacity at the time of making the declaration of intent, it is considered that the person had made no valid will.

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

According to § 204 of the Code of Civil Procedure the court has the obligation to verify the passive civil procedural legal capacity and active civil procedural legal capacity of the parties to proceedings and if these are absent the court does not permit the person to participate in the proceedings. If the court has doubts regarding the active civil procedural legal capacity of a party to proceedings who is a natural person, the court may either demand that the person provide a doctor's opinion, or order an expert assessment. If the person refuses to comply with the directions of the court or the documents submitted fail to remove the doubts of the court, the court initiates proceedings for appointing a guardian for the party to proceedings. If initiation of proceedings for appointment of a guardian for a claimant, petitioner or appellant is impossible, the court dismisses the petition or appeal.

80 Võlaõigusseadus (Law of Obligations Act). RT I 2001, No. 81, Art. 487. Last amendment RT I 08.12. 2021, 11

81 A. KIVIOJA, 'Patsienditestament aitab arvestada inimese ravialaste soovidega', Sotsiaaltöö, juuni 2018.

The court may also permit a party to proceedings with no active civil procedural legal capacity to participate in proceedings if prevention of participation in proceedings endangers an essential interest of a party to proceedings. In such case, the court sets the person a time limit for the appointment of a representative. A judicial disposition on termination of proceedings shall not be made in proceedings before the expiry of such time limit.

According to § 218 of the Code of Civil Procedure, if the court finds that a natural person who is a party to proceedings is unable to personally protect his or her rights or that his or her essential interests may be insufficiently protected without the assistance of an attorney, the court explains to such person the possibility of receiving state legal aid. So the Supreme Court has found that the court of appeal should have explained the circumstances surrounding the defendant's application for state legal aid just because it is obvious from the nature and gravity of the mental disability that the defendant's interest can remain unprotected in the sense of § 217 (8) Code of Civil Procedure.[82]

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?

The critical conclusion to be drawn is that despite paradigm shifts in society, the Estonian regulation of guardianship which was developed following the example of the corresponding German regulation of the late 1990s, early 2000s has remained unchanged since the adoption of the Family Law Act in 2010 and would need a thorough reform. Committee on the Rights of Persons with Disabilities notes with concern the interpretative declaration made by the State party, upon ratification, to article 12 of the Convention on the Rights of Persons with Disabilities, as well as the provisions set out in the Civil Code maintaining guardianship and substituted decision-making regime and limiting the active capacity of persons with disabilities on the basis of psychosocial and intellectual impairment. The Committee also notes the absence of supported decision-making mechanisms for persons with disabilities to exercise their legal capacity on an equal basis with others.[83]

SECTION III – STATE-ORDERED MEASURES

Overview

82 CCSCo 2-12-44594, para 19.

83UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Estonia' (2021) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/EST/CO/1&Lang=En> accessed 15.06.2022.

16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.[84] 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?

According to § 8 (2) of the General Part of the Civil Code Act as well as § 203 (1) of the Family Law Act adults who due to mental illness, mental retardation or any other mental disorder are permanently unable to understand or direct their actions are considered to be persons needing protection due to their limited ability to understand. The court shall appoint a guardian on the basis of an application of the person, his or her parent, spouse or adult child or rural municipality or city government or on its own initiative.

According to current law, Estonia has one state-ordered measure, guardianship.

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.

According to § 8 (2) of the General Part of the Civil Code Act, persons who due to mental illness, mental disability or other mental disorder are permanently unable to understand or direct their actions, have limited active legal capacity. The court establishes existence of limited active legal capacity on the basis of what was submitted in the proceedings for establishing guardianship, based on the grounds given in § 8 (2) of the General Part of the Civil Code Act. Mental disability or other mental disorder are not legal terms, and there is no scientific basis for these terms and they are not used in medicine at present.[85] It has been stated in

84 Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

85A. LEHTMETS, 'Kinnisesse asutusse paigutamine psühhiaatrilisel näidustusel' Kohtute aastaraamat 2011. Riigikohus 2012, p. 103.

legal literature that mental illness is a profound disorder of mental functioning.[86] It may persist in itself for a shorter or longer period. Mental deficiency, on the other hand, is mental retardation, which is a permanent condition. On either occasions, the person is not able to understand and direct his or her actions, i.e. to act judiciously. In current medicine the umbrella term 'mental disorder' is used while only a subset of mental disorders is called mental illness – psychosis.[87] According to § 2 (1) of the Mental Health Act[88] 'mental disorder' means a mental state or behavioural disorder according to the current international classification of mental and behavioural disorders. The term 'mental disorder' is likewise used in the Social Welfare Act. Thus, establishing persons' ability to understand their actions should be based on mental and behavioural disorders having lasting effect on individual's ability to understand, as listed in the WHO International Classification of Diseases (ICD-10).[89]

The extent of the limited active legal capacity of adults emerges primarily from the particular mental condition that gives rise to the limitation of active legal capacity.

According to § 203 (1) of the Estonian Family Law Act[90], if an adult person is permanently unable to understand or direct their actions due to mental illness, mental disability or other mental disorder, a court shall appoint a guardian to them on the basis of an application of the person, their parent, spouse or adult child or rural municipality or city government or on its own initiative. A guardian shall be appointed only for the performance of the functions for which guardianship is required. Guardianship is not required if the interests of an adult can be protected by granting authorisation and by family members or other assistants, thus guardianship should be a subsidiary measure. Where the family members have not been authorised by the person to manage his or her affairs, then the possibilities of the family members to protect the interests of the person whose active legal capacity has changed are limited to taking care of them and ensuring their daily needs.

The Family Law Act gave the court an active role in appointing the guardian and also put the supervision of the guardian under the control of court. If the court appoints a guardian, the court also conducts supervision over this person. A court shall verify at least once every five years whether the continuation of guardianship over a ward is necessary for the protection of the interests of the ward and whether

86 Karistusseadustik (Penal Code). P. Pikamäe et al. (Ed.). Kommenteeritud väljaanne, (2021)§ 34 komm 4.1 ja 4.3

87 S. LIND, K. EINO, 'Isikult vabaduse võtmine põhjendusel, et ta on psüühikahäire tõttu endale või teistele ohtlik' ('Depriving a person of liberty on the grounds of being dangerous to himself or herself or other people due to a mental disorder'). Juridica 2014, No. 7, pp. 528-539.

88 Psühhiaatrilise abi seadus (Mental Health Act). RT I 1997, No.16, Art. 260. Last amendment RT I 24.03.2021, 6. In English https://www.riigiteataja.ee/en/eli/501042021005/consolide

89 See Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2018), 53. ptk sissejuhatus, komm. 3 (T. Uusen-Nacke, T. Göttig).

90 Perekonnaseadus (Family Law Act). RT I 2009, No. 60, Art. 395. Last amendment RT I, 11.01.2023, 12. In English https://www.riigiteataja.ee/en/eli/510052022004/consolide

grounds exist for extension or restriction of the duties of the guardian by making a respective ruling (§ 203 (4) Family Law Act).

18. Which authority is competent to order the measure?

A guardian is appointed by the court.

19. Who is entitled to apply for the measure?

The court shall appoint a guardian on the basis of an application of a person, their parent, spouse or adult child or rural municipality or city government or on its own initiative. The court initiates proceedings for the appointment of a guardian of its own motion in particular where no entitled person under § 203 (1) Family Law Act has applied for the appointment of a guardian but the court is informed by other means about a person in need of guardianship.[91]

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?

The appointment of a guardian does not depend upon the person's will. The Supreme Court has found that initiating a proceedings for the appointment of a guardian of the court's own motion may be reasoned even where the person does not think they need a guardian. The proceedings for the appointment of a guardian is initiated to check whether the person has limited active legal capacity, i.e., whether the person is able to understand or direct their actions or not and whether they need guardianship because of the limited active legal capacity. A person with limited active legal capacity might be unable to adequately estimate the need for guardianship.[92] A natural person who is suitable to protect the interests of the ward taking account of his or her personal characteristics and abilities shall be appointed guardian. Upon appointing a guardian the relationship between him or her and the ward shall be taken into account. If an adult makes or has made a proposal concerning the person of a guardian, the proposal shall be taken into account unless it is in conflict with his or her interests. (§ 204 (1, 3) Family Law Act).

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;

91 CCSCo 3-2-1-87-11, para 17.
92 CCSCo 3-2-1-87-11, para 17.

According to § 520 of the Code of Civil Procedure, for the purposes of proceedings for appointment of a guardian, the court appoints a representative to an adult with restricted active legal capacity if this is necessary in the interests of the person. The court appoints a representative to a person particularly in the case where the person is not represented by a person with active civil procedural legal capacity in proceedings and:

1) the court is not required to hear the person himself or herself in the proceedings;
2) there is intention to establish guardianship for managing all or most of the affairs of the person;
3) the guardian's competence is to be extended;
4) the object of proceedings is obtaining the guardian's consent for sterilisation of the person.

The representative must, among other things, personally meet the person whose placement under guardianship the court is considering and hear him or her without the presence of the judge.

The court could refrain from appointing a representative only where it can be ascertained unambiguously in the matter that the person involved is able to present objections in the procedure in a sufficiently comprehensible manner; the court does not need to appoint a representative also where it is clear from the file that appointment of a guardian is of no avail to the person (e.g., the conditions of § 8 (2) of the General Part of the Civil Code Act are obviously not met where the person has only physical disability).[93] Where the person concerned is represented in the proceedings by a contractual representative from the onset, the court has, according to the Supreme Court, to assess whether the person understands the meaning and consequences of the authority given to this representative. If a person has validly authorized a contractual representative to protect their rights and interests in court proceedings, the court may also repeal the order of appointing a representative.[94] According to § 219 (4) of the Code of Civil Procedure the right of representation of a representative appointed by the court ends at the time of the entry into force of the decision terminating the proceedings, or at the time of discharge of proceedings in another manner, if the court has not already terminated the right of representation. As a general rule, after the appointment of a representative the court sets a term within which the representative has to submit its positions. The legislator has not provided the form for submitting the representative's opinion.

According to § 219 (5) of the Code of Civil Procedure the court appoints in accordance with the rules provided by the State Legal Aid Act an attorney to represent the person in order to protect their interests. In principle, § 219 (7) of that act permits to appoint a person other than an attorney to act as the representative

93 See CCSCd 3-2-1-141-05, para 10.
94 CCSCd 3-2-1-87-11, para 23.

protecting the interests of a party to the proceedings, if the court considers that the person to be appointed has sufficient competence for such duty and if the person agrees to act as the representative. Even though it is namely in proceedings on petition that such representative could be considered sufficiently competent, it is still to be decided according to the court's discretion, and as the second sentence of § 219 (7) provides that the representative other than attorney is not paid any remuneration, the courts prefer appointment of an attorney to act as a representative in the proceedings in accordance with the rules provided by the State Legal Aid Act.[95]

b. availability of legal aid;

In the proceedings for the establishment of guardianship the court appoints a representative to a person. According to § 172 (3) of the Code of Civile Procedure the court may decide that all or part of the costs of proceedings for the appointment of a guardian for a person or for revocation of such an appointment, or of proceedings for the application of measures related to guardianship, as well as of proceedings in a family matter dealt with under the rules for actions by petition and proceedings concerning imposition of a restraining order or other similar measure to protect personality rights must be borne by the state.

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

According to § 525 (2) of the Code of Civil Procedure, as a rule, the court also requests, in the course of proceedings, the opinion of the person whose placement under guardianship the court is considering, his or her spouse, parents, foster parents, children and members of the rehabilitation team, unless the person objects to it and the court does not deem it necessary to request an opinion. At the request of the person in need of guardianship, the opinion of other persons close to them may be requested, unless this significantly delays proceedings. The opinion of persons who are closely related to the person concerned has major importance for the proceedings, and if the court deters from requesting the opinion of the persons close to the person in need of guardianship on the grounds given in the said section, the court shall provide the reasons in the order closing the proceedings. It is the information received from the closely related persons that gives the best insight

95 See Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne (Code of Civil Procedure I. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2017), § 220 p 3.6 (J. Lints, V. Kõve).

into a person's health status, social environment and the feasibility of substituting guardianship with some other means to support the person.[96]

d. requirement of a specific medical expertise / statement;

According to § 522 of the Code of Civil Procedure if the court has information or doubt that a person has a mental illness or mental disability, the court orders an expert assessment in order to determine the need for appointment of a guardian for such person.

The expert shall personally examine the person or question him or her before preparing an expert opinion. The court assigns the task of conducting an expert assessment to one expert, except in the case of an expert assessment conducted by an expert committee or a complex expert assessment. Only a psychiatrist may be used as an expert. Another person with specific expertise may also participate as an expert in the case of an expert assessment conducted by an expert committee or a complex expert assessment. This can be a psychiatrist or other competent doctor.[97] According to § 294 (6) of the Code of Civil Procedure the court may also appoint a forensic institution or another person conducting expert assessments, which shall designate the particular expert.

If, in the opinion of an expert, appointment of a guardian is to be considered, the expert shall indicate in the expert opinion the estimated scope of duties of the guardian and the estimated period for which the person needs guardianship.

In certain cases it is possible to conduct an expert assessment only after the person concerned has been monitored for a longer period of time by the experts. For that reason, § 522 (3) of the Code of Civil Procedure provides that after hearing an expert, the court may order placement of the person in a closed institution for observation for up to one month if this is necessary for conducting an expert assessment. However, this measure is of extreme nature and the placement of a person in a closed institution for observation cannot be justified by the fact the forensic institution has failed to conduct the assessment in due time. An expert assessment need not be ordered if: 1) the petition for appointment of a guardian was submitted by the person in need of guardianship and the documents reflecting his or her state of health are appended to the petition; and 2) the person waives the right to undergo expert assessment; and 3) conduct of the expert assessment is,

96 See Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2018), § 525 p 3.2 (T. Uusen-Nacke, T. Göttig).

97 Seletuskiri kohtueksperti isiseaduse ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõule (teine lugemine, 202 SE II), lk 3. See <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/a1404746-e1ec-4720-87a8-0f1550237bea/Kohtueksperti isiseaduse%20ja%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise%20seadus> accesed 15.06.2022

considering the volume of the guardian's duties, unreasonably costly or labour intensive. As a rule, the costs related to the expert assessment are borne by the State. According to § 172 (3) of the Code of Civil Procedure the court may decide that the entirety or a part of the costs of proceedings to appoint a legal guardian to a person or to revoke the appointment, or of proceedings for the application of measures related to legal guardianship must be borne by the State.

If the court does not order an expert assessment, it has to be convinced that the content and effects of his or her declaration are clear to the person.

An expert identifies during the assessment the person's psychiatric disorder or illness as well as the resulting need of guardianship. At the same time, an expert opinion is merely one instance of evidence provided in § 229 (2) of the Code of Civil Procedure and the court cannot base the identification of the need for guardianship solely on expert opinions.[98] The main question that an expert needs to answer is whether the person concerned is ill in the medical sense, and which kind of illness does the person suffer from.[99] In addition, the court needs expert advice as to what is the prognosis of the medical condition of the person, how does this affect the person's individual abilities and which are the possibilities for care or rehabilitation of the person.

e. hearing of the adult by the competent authority;

The aim of getting a personal and immediate impression and hearing the person is to ensure that guardianship is not established unjustified.[100] This is an imperative prescription to the court, which restricts the freedom of the court to choose the way and extent of collecting evidence in proceedings on petition. During the hearing the court establishes personal contact with the person concerned, which is crucial for the proceedings.[101]

The court hears the person in his or her usual environment if the person so requests or if, in the opinion of the court, this is necessary in the interests of the matter and the person does not object. The course of proceedings shall be explained to the person. The court may involve a psychiatrist, psychologist or social worker in the hearing. If the person so requests, the trustee of the person shall be allowed to be present. The court may permit other persons to be present at the hearing of the person in need of guardianship unless the latter objects to this (§ 524 (2) Code of Civil Procedure).

98 CCSCd 3-2-1-87-11, para 20.

99 See Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2018), § 522 p 3.4 (T. Uusen-Nacke, T. Göttig).

100 CCSC, 3-2-1-127-14, paras 15 etc.

101 See Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2018), § 524 p 3.1 (T. Uusen-Nacke, T. Göttig).

In principle, the person has to be heard by the judge making the final decision in the case. The court may transfer the task of hearing a person to a court acting based on a letter of request only if it is evident that the court will be able to evaluate the information obtained from the hearing even without having directly experienced the hearing. Where necessary, the court may apply compulsory attendance on the person in need of guardianship in order to hear the person. The court need not hear a person in need of guardianship in person, if: 1) this could result in harmful consequences to the health of the person according to the documents reflecting his or her state of health or in the opinion of a competent doctor; the court is convinced, based on a direct impression, that the person is clearly unable to express his or her will. Not forming a direct impression may be justified only in exceptional cases (e.g. when the person is in a coma). Thus the court personally checks compliance with the requirements of § 524 (5) (2) of the Code of Civil Procedure and develops direct position on the possibility of hearing the person concerned; relying on the file alone is not enough.[102] Unjustified non-hearing of a person is a gross infringement of a procedural rule, which can lead to annulment of the decision of a county court.[103] Consequently, the court hears the person in the proceedings or at least meets with the person in order to ascertain that the conditions of his place of stay are reasonable.

f. the possibility for the adult to appeal the order

According to § 202 (4) of the General Part of the Civil Code Act, in proceedings for establishment of guardianship for an adult with limited active legal capacity, the person for whom the establishment of guardianship is requested has active civil procedural legal capacity. In proceedings for placing a person in a closed institution, the person has active civil procedural legal capacity regardless of whether he or she has active legal capacity, provided he or she is at least fourteen years of age. This covers also the right to lodge appeal.

The Supreme Court has ruled that a person with limited active legal capacity who submits application for termination of coercive psychiatric treatment has active civil procedural legal capacity and independent right of action by analogy to § 202 (4) of the Code of Civil Procedure which provides a person's active civil procedural legal capacity in proceedings concerning their placement in a closed institution, irrespective of the person's active legal capacity.[104]

The first sentence of § 202 (4) of the Code of Civil Procedure explicitly provides active civil procedural legal capacity for a ward only in proceedings for establishment of guardianship on grounds of restricted active legal capacity. The Supreme Court has found that reading these provisions in conjunction enables to consider a ward as having active civil procedural legal capacity also in processing

102 CCSCd 3-2-1-127-14 para 16.
103 CCSCd 3-2-1-127-14 para 15; CCSCo 2-12-18265, para 18.
104 CCSCo 2-16-17142, para 9.

an application for the termination or change of guardianship, as the object of such proceeding is the verification of the person's need for guardianship and the establishment of the guardian's duties. Thus, a person with limited active legal capacity has in principle the right to submit an application to the court to terminate the guardianship set over him or her, or to change the guardian's duties. Likewise, under § 532 (1) of the Code of Civil Procedure a ward has the right to submit an appeal on the order on changing the scope of duties of a guardian or on refusal to terminate guardianship.[105]

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

According to Population Register Act § 21 (1) p. 12 data on guardianship is to be entered in the population register.[106]

Appointment of representatives/support persons

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.)?

According to § 204 of the Family Law Act a natural person who is suitable to protect the interests of the ward taking account of his or her personal characteristics and abilities shall be appointed guardian. Upon appointing a guardian the relationship between him or her and the ward shall be taken into account. An employee of the health care, social welfare or educational institution where an adult resides shall not be appointed guardian of the adult. If an adult makes or has made a proposal concerning the person of a guardian, the proposal shall be taken into account unless it is in conflict with his or her interests.

If a suitable natural person is not found to be appointed guardian a legal person may be appointed guardian with its consent. If a legal person becomes aware that it is possible to appoint a guardian who is a natural person to an adult, the legal person shall immediately notify a court and the rural municipality or city government thereof.

If a suitable legal person cannot be appointed as a guardian, the rural municipality or city government with which the adult is most closely connected shall be appointed as a guardian. An adult is most closely connected with the rural municipality or city government, *inter alia*, where the adult is from, where the adult has

105 CCSCo 3-2-1-73-15, para 17.

106 Rahvastikuregistri seadus (Population Register Act). RT I 2017, 1. Last amendment RT I 12.03.2022, 1. In English https://www.riigiteataja.ee/en/eli/524032022003/consolide

lived for most part of the time, with which the adult has preserved essential ties, where the adult's close persons or assets are located or which is the adult's residence according to the population register. The health care or social welfare institution where the adult is staying shall not be appointed guardian which is a legal person (§ 205 Family Law Act). The Supreme Court has emphasized in several decisions that when appointing a guardian, a natural person should be preferred to a legal person, and both of them to the municipal or city government.[107]

An employee of a city or municipality government agency can also be appointed as a guardian, but it must be assessed whether this is in the interests of the ward and whether the natural person who is ready to perform the duty of guardianship is suitable as a guardian.

In assessing the suitability of a natural person as a guardian for the purposes of § 204 (1) of the Family Law Act, it is important that the natural person voluntarily decides (either for a fee or free of charge) to become the guardian of the person under guardianship, wants to protect the interests of the person under guardianship and and is able to do so, bases his actions solely on the interests of the person under guardianship and understands the obligations and consequences of becoming a guardian.[108]

b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?

According to the first sentence of § 525 (2) of the Code of Civil Procedure, the court generally also asks the opinion of the persons closely related to the person concerned (spouse, parents, step-parents and children) and those conducting rehabilitation about the person's need for guardianship and its extent.[109]

Although the person concerned may object to the collection of information from the closely related persons, the court may deter from the hearing only on the condition that the court, too, does not consider the hearing of the said persons to be important. The opinion of persons who are closely related to the person concerned has major importance for the proceedings, and if the court deters from requesting the opinion of the persons close to the person in need of guardianship on the grounds given in the said section, the court shall provide the reasons in the order of closing the proceedings. It is the information received from the closely related persons that gives the best insight into a person's health status, social environment and the feasibility of substituting guardianship with some other means to support the person. According to the second sentence of § 203 (2) of the Family Law Act guardianship is not required if the interests of an adult can be protected by granting authorisation and through family members or other assistants.

107 CCSCo 2-12-16865, para 11.
108 CCSCo 2-12-16865, para 12.2.
109 CCSCd 3-2-1-127-14, para 18.

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?

No

d. what are the safeguards as to conflicts of interests at the time of appointment?

The court supervises the activities of the guardian, which also includes checking whether the guardian acts in the interests of the ward and what their relationship is like. If the relationship between the ward and the guardian is poor, this is not in the interests of the ward.[110]

e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?

The rules concerning the appointment of a guardian for a minor directly provide for the possibility of appointing several guardians. According to § 178 of the Family Law Act a court shall appoint one guardian to a child; spouses may also be appointed joint guardians. If possible, one guardian shall be appointed to the brothers and sisters in need of guardianship. A court may appoint several guardians if this is reasonable under the circumstances of the specific case. In such case it is presumed that the guardians have a joint right of representation. A court may specify the duties and the scope of the right of representation of each guardian. By way of exception, the court can appoint the local government as the child's guardian together with a natural person, if this is in the best interests of the child considering the circumstances of the case.[111]

According to § 202 of the Family Law Act the provisions regulating guardianship over a child shall apply to guardianship over an adult unless otherwise provided in this chapter of the act or the content of guardianship over the adult. According to § 178 (2) a court may appoint several guardians to a child if this is reasonable under the given circumstances. In such case it is presumed that the guardians have a joint right of representation. A court may specify the duties and the scope of the right of representation of each guardian.

110 Decision of the Tartu Circuit Court 2-15-13665.
111 CCSCo 3-2-1-98-11, para 26.

In the case of appointing a guardian for an adult, the choice of the guardian's person is governed by § 204 Family Law Act which does not directly provide for the possibility of appointing several guardians. It is questionable, however, whether the possibility of appointing multiple guardians for a minor could by way of analogy be applied to an adult.

f. is a person obliged to accept appointment as representative/support person?

A person may be appointed guardian only with his or her consent. If a suitable natural person is not found a legal person may be appointed guardian with its consent.

During the measure

Legal effects of the measure

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

In Estonia a system of substituted decision-making is in place. A guardian is the legal representative of the ward within the scope of its duties according to § 207 (1) of the Family Law Act and § 526 (4) of the Code of Civil Procedure. As a representative the guardian can enter into transactions on behalf of the ward given that these fall within the scope of the right of representation for the purposes of § 117 (1) of the General Part of the Civil Code Act (GPCCA). The limits of the guardian's authority of representation for the purposes of § 120 (1) GPCCA are determined by the scope of duties of the guardian.[112]

Unilateral transactions made by persons with limited active legal capacity without the prior consent of their legal representative are void (§ 10 GPCCA). A multilateral transaction entered into by a person with limited active legal capacity without the prior consent of their legal representative is void unless the legal representative subsequently ratifies the transaction. A transaction entered into by a person with limited active legal capacity without the prior consent or subsequent ratification of their legal representative is valid if: 1) no direct civil obligations arise from the transaction for the person; 2) the person performed the transaction by means which his or her legal representative or a third person with the consent of the legal representative had granted to him or her for such purpose or for free use (§ 11 (3) GPCCA).

112 CCSCd 2-17-1453, para 12.

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:

b. property and financial matters;

A guardian is the legal representative of the ward within the scope of its duties according to § 207 (1) of the Family Law Act (FLA) and § 526 (4) of the Code of Civil Procedure. (*See answer 24*)

According to § 186 FLA if a ward's money is not required for maintaining him or her, the administration of property or for covering other current expenses, a guardian shall invest it in a credit institution of Estonia or another contracting state separately from his or her own property. A notation shall be made upon investment that the consent of a court is required for the disposal of the account. A court may grant consent for investment of a ward's money in another manner. The consent of a court for the disposal of an account belonging to a ward by a guardian is required only in the case specified in subsection 186 (1).

A guardian shall not perform transactions specified in §§ 187-188 FLA without the prior consent of a court, while the guardian of an adult person with restricted active legal capacity needs the consent of a court also for transactions specified in § 207 (2) FLA. The consent is needed in particular for entry into transactions with respect to immovable property, investment of ward's money, administration of property acquired by succession or as gift, etc.

Thus, a guardian shall not, for instance, dispose of an immovable or a real right in immovable property belonging to the ward; enter into a contract directed at acquisition for charge of an immovable or a real right in immovable property on behalf of the ward; grant the use of an immovable belonging to the ward; renounce a succession, legacy or compulsory portion or enter into a contract for division of an estate; take a loan, acquire or transfer securities, enter into an agreement for the division of common ownership or the preclusion or postponement thereof, on behalf of a ward. A guardian of an adult needs the consent of a court for cancellation or termination of a residential lease contract of a ward, as well as for termination of long-term contracts with the term of more than four years. A unilateral transaction entered into without the prior consent of a court is void (§ 190 FLA), while a multilateral transaction entered into without the prior consent of a court is void unless a court ratifies the transaction later. If a ward has acquired active legal capacity, he or she may ratify the transaction himself or herself (§ 189 (1) FLA).

In exceptional cases a court may grant a guardian a general consent for performing all or certain kinds of transactions which require the consent of a court. The consent of a court is required also for investing a ward's money in a manner different from that specified in § 186 (1) FLA.

c. personal and family matters;

A representative cannot conduct a transaction which has to be made in person according to law, including transactions with the formal requirement of entering into in person (e.g. most of the transactions under Family Law Act; exercising the right to vote). If a court appoints a guardian to manage all the affairs of a person with disabilities, the ward is considered lacking active legal capacity also with regard to the right to vote. Where a guardian has not been appointed (thus the person has not been established to have limited legal capacity), the person has the right to vote.

Upon establishment of guardianship, a court shall assess the person's capability to understand the legal consequences of contraction of marriage, acknowledgement of paternity and other transactions concerning family law. A guardian's duties may include exercise of the ward's rights against third persons (§ 203 (2) Family Law Act).

According to § 222 (2) of the Code of Civil Procedure the representative of a spouse who has no active civil procedural legal capacity has the right to submit a petition for divorce or annulment of marriage only with the consent of the guardianship authority. As the current Family Law Act does not provide the concept of guardianship authority, and the duties which were earlier performed by local authorities have been transferred to courts, this provision is to be understood as referring to the consent of a court.

d. care and medical matters;

(*See answer 9 c*)

Subsections 766 (1) and (3) of the Law of Obligations Act[113] provide for the duty to inform the patient and obtain his or her consent. In the case of a patient with limited active legal capacity, the legal representative of the patient has the rights in so far as the patient is unable to consider the pros and cons responsibly. If the decision of the legal representative appears to damage the interests of the patient, the provider of health care services shall not comply with the decision. The patient shall be informed of the circumstances and information specified in § 766 (1) of the Law of Obligations Act to a reasonable extent. Subsection 766 (4) of the Law of Obligations Act shall be applied upon the provision of psychiatric care to a person with limited active legal capacity (§ 3 (2) Mental Health Act).

113 Võlaõigusseadus (Law of Obligations Act). RT I 2001, No. 81, Art. 487. Last amendment RT I 15.03.2022, 2. In English https://www.riigiteataja.ee/en/eli/505042022001/consolide

According to § 19 (2) of the Termination of Pregnancy and Sterilisation Act,[114] the sterilisation of a person with limited active legal capacity shall be decided by a county court in proceedings on petition of the persons's guardian. The Committee on the Rights of Persons with Disabilities has observed with concern that women with disabilities under guardianship can be subjected to sterilization or abortion without their consent. Committee also notes with concern that women with disabilities subject to guardianship face greater barriers in gaining access to sexual and reproductive health-related services and to expressing their free and informed consent concerning health treatments.

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

A guardian shall administer the ward's property with the due diligence of a guardian. A guardian shall be liable for causing damage by wrongful violation of his or her obligations (§ 179 (4,5) Family Law Act).

f. 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?

It is not directly regulated by the law, and there is currently no case law.

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

It is not directly regulated by the law.

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

As a rule, guardianship shall be performed free of charge. A court may order that a guardian receive remuneration for the performance of his or her duties If payment of the remuneration is reasonable taking into account the financial situation of the ward and the relationship between the parties.

114 Raseduse katkestamise ja steriliseerimise seadus (Termination of Pregnancy and Sterilisation Act). RT I 1998, No. 107, Art. 1766. Last amendment RT I 13.03.2019, 2. In English https://www.riigiteataja.ee/en/eli/502042019003/consolide

A guardian has the right to receive compensation for the expenses incurred upon the performance of guardianship, including for securing his or her liability arising from guardianship out of ward's assets. Guardianship shall be performed unless otherwise specified by the court.

A guardian may demand compensation for the expenses made for guardianship from the ward pursuant to the provisions concerning mandates.

It can be decided on a case-by-case basis which expenses can be considered as expenses related to the exercise of guardianship, based on the duties of a particular guardian. Likewise, the necessity and reasonableness of expenses can be decided in each individual case, inter alia on the basis of the extent of the need to protect the interests of the ward and the property status of the ward. Under § 191 (1) Family Law Act a guardian may demand compensation from the ward in proceedings on petition for the expenses made for guardianship.[115]

According to § 527 of the Code of Civil Procedure, if a guardian or a person under guardianship so requests or the court deems it necessary, the court also determines the following at the time of establishment of guardianship or thereafter the size of remuneration payable and the costs to be compensated to the guardian at the expense of the person under guardianship and the extent of possible advance payment thereof; the costs to be compensated and the size of the remuneration payable to the guardian at the expense of the state and the extent of possible advance payment thereof if, pursuant to law, payment thereof by the state may be demanded; the time limit for payment and the size of payments which the person under guardianship must pay to the state in order to cover for the amounts payable to the guardian by the state.

The person under guardianship may apply for the grant of financial aid for covering the costs.

Before making an order on costs, the court shall hear the person under guardianship.

In the practice of establishing the guardianship there are cases, albeit rare, where the court has to determine the size of remuneration payable and the costs to be compensated to the guardian at the expense of the ward and the extent of possible advance payment thereof (§ 527 (1) (1) Code of Civil Procedure), mainly where a legal entity whose field of activity is the provision of the corresponding service is appointed as the guardian.[116]

115 CCSCo 2-15-11546, para 14.

116 See Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne (Code of Civil Procedure III. Annotated edition. In Estonian). V. Kõve et al. (Ed). (2018), § 527 p 3.1 (T. Uusen-Nacke, T. Göttig).

A rural municipality or city government shall not demand compensation for the expenses (§ 191 (2) Family Law Act).

The law provides the possibility that a guardian or a ward may apply for state legal aid in order to pay for the expenses and the remuneration. The state may prescribe supplementary financial support for the performance of guardianship through the Ministry of Justice. At the moment, this procedure is not in place. In a situation where the state has failed to establish additional financial resources for guardianship, it is possible for the courts to award the guardian a fee for his activities in the form of procedural aid. According to the provisions of § 192 (4) of the Family Law Act the state funding to cover the remuneration and the expenses is "supplementary financial support" additional to procedural aid.

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)?**

According to § 178 of the Family Law Act (FLA) a court shall appoint one guardian to a child; spouses may also be appointed joint guardians. If possible, one guardian shall be appointed to the brothers and sisters in need of guardianship. A court may appoint several guardians if this is reasonable under the circumstances of the specific case. In such case it is presumed that the guardians have a joint right of representation. A court may specify the duties and the scope of the right of representation of each guardian. By way of exception, the court can appoint the local government as the child's guardian together with a natural person, if this is in the best interests of the child considering the circumstances of the particular case.[117]

According to § 202 FLA the provisions governing guardianship over a child shall apply to guardianship over an adult unless otherwise provided in this chapter of the act or the content of guardianship over the adult. In the case of appointing a guardian for an adult, the choice of the guardian's person is governed by § 204 FLA which does not directly provide for the possibility of appointing several guardians. It is questionable, however, whether the possibility of appointing multiple guardians for a minor could by way of analogy be applied to an adult.

117 CCSCo 3-2-1-98-11, para 26.

Safeguards and supervision

27. Describe the organisation of supervision of state-ordered measures. Pay attention to:

a. what competent authority is responsible for the supervision?

The Family Law Act (FLA) gave the court an active role in appointing a guardian and also put the supervision of the guardian under the control of court.

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

If the court appoints a guardian, the court also conducts supervision over this person. The consent of the court is required to carry out certain transactions on behalf of the ward.

According to § 193 FLA courts shall exercise supervision over the activities of guardians. A guardian shall notify a court if he or she changes residence. A court may issue precepts to a guardian for the performance of his or her duties. Upon failure to adhere to the precepts a court has the right to dismiss the guardian. A court may remove a guardian from performance of his or her duties in the interests of a ward until a decision is made concerning the dismissal of the guardian.

A court may require a guardian to submit information concerning the performance of his or her duties at any time. A guardian shall submit an annual written report to the court concerning administration of the ward's property and performance of his or her other duties. The expenses incurred shall be indicated separately in the report and documents certifying the expenses shall be included. The report shall set out the amount of money spent each month on an average as expenses incurred for everyday maintenance and no documents shall be added to certify these expenses. A court shall verify the contents of the report, assess whether the expenses incurred were justified and, if necessary, request explanations or the correction and amendment of the report. The written reports of guardians shall be stored in court (§ 194 of FLA).

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

The grounds for dismissing a guardian are set out in § 197 FLA, whereby a court may dismiss a guardian if the guardian fails to comply with the requirements established for guardians due to material violation of his or her obligations or

due to any other reason or if continuation of the performance of the guardian's duties would damage the interests of a ward. A court shall dismiss a guardian on its own initiative or on the basis of an application of a person with a legitimate interest. A court may dismiss a guardian on the basis of an application of the guardian.

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

A guardian shall administer the ward's property with the due diligence of a guardian. A guardian shall be liable for causing damage by wrongful violation of his or her obligations (§ 179 (5), § 202 FLA).

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 provisions governing the liability of a guardian concern the delict committed by a ward. According to § 1053 (5) of the Law of Obligations Act the guardian of a person with restricted active legal capacity who has been placed under guardianship due to mental disability shall be liable for damage unlawfully caused by the ward to another person, unless the guardian proves that he or she has done everything which could be reasonably expected in order to prevent the ward from causing damage. In the relationship between a ward and the guardian, the guardian is presumed to be liable even if the ward himself or herself is liable for the causing of damage.

In the event of a violation of the requirement of the court's prior consent (*See answer 28. a*) the provisions on liability of a person lacking authority of representation (§ 130 of the General Part of the Civil Code Act) apply. A person without the right of representation who enters into a transaction on behalf of another person shall compensate the other party for the expenses incurred upon preparation for the transaction and for any other damage which the other party has incurred in connection with the transaction because the party believed the person to have had the right of representation, unless the person on whose behalf the transaction was entered into ratifies the transaction. If a person who enters into a transaction on behalf of another person knows or should know that he or she does not have the right of representation, the person shall, in addition to the damage, compensate the other party for the damage incurred due to failure to perform the transaction. A person without the right of representation shall not be liable if the other party to the transaction knew or should have known of the absence of the right of repre-

sentation or if the active legal capacity of the person without the right of representation was limited and he or she acted without the consent of his or her legal representative.

28. Describe any safeguards related to:

a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;

A guardian shall not perform transactions specified in §§ 187-188 of the Family Law Act (FLA) without the prior consent of a court, while the guardian of an adult person with restricted active legal capacity needs the consent of a court also for transactions specified in § 207 (2) FLA.

According to § 187 FLA a guardian shall not do the following on behalf of a ward without prior consent of the court: dispose of an immovable or a real right in immovable property belonging to the ward; dispose of a claim belonging to the ward and directed at transfer of immovable property ownership or creation, transfer or termination of a real right in immovable property; assume an obligation to perform the disposals specified in clauses 1 and 2 of this subsection; enter into a contract directed at acquisition for charge of an immovable or a real right in immovable property on behalf of the ward; grant the use of an immovable belonging to the ward. The provisions apply correspondingly also to ships entered in the ships register. According to § 188 FLA a guardian shall not do the following on behalf of a ward without prior consent of the court: enter into a transaction by which the ward assumes an obligation to dispose of all of his or her property, estate, future legal share of an estate or future compulsory portion; renounce a succession, legacy or compulsory portion or enter into a contract for division of an estate; enter into a contract directed at acquisition or transfer of an enterprise or an organisationally independent part thereof or a contract of partnership directed at operation of an enterprise; lease an enterprise; acquire a holding in a legal person or join membership thereof; enter into a residential lease contract, commercial lease contract, insurance contract or any other long-term contract which does not terminate or which cannot be cancelled within one year after the ward becomes an adult; take a loan; acquire or transfer securities; enter into a transaction by which the liability of the ward arises for the obligation of another person or a transaction by which the ward's property is encumbered in order to secure an obligation of another person; enter into an agreement for the division of common ownership or the preclusion or postponement thereof; enter into a transaction which terminates the ward's claim, reduces it or the security thereof or creates such an obligation, except in the cases provided for in § 186 (4) FLA. If a ward's money is not required for maintaining him or her, for the administration of property or for covering other current expenses, a guardian shall invest it in a credit institution of Estonia or another contracting state separately from his or her own property. A notation shall be made upon investment that the consent of a court is required for the disposal of

the account (§ 186 (1) FLA). The consent of a court is required also for investing a ward's money in a manner different from that specified in § 186 (1) FLA.

If a guardian acquires securities specified in clauses 1–5 and 7 of subsection 1 of § 2 of the Securities Market Act on behalf of a ward, but on account of his or her own funds, the consent of the court is not required for the acquisition and transfer of these securities provided that the proceeds of the sale remain in the ownership of the ward. The provisions of the first sentence also apply to further transactions in the securities specified in the first sentence on account of the proceeds of the sale.

In exceptional cases a court may grant a guardian a general consent for performing all or certain kinds of transactions which require the consent of a court. If the consent of a court is required for the transfer of an object, a guardian shall not grant it to a ward for the performance of a contract entered into or for free disposal without the consent of a court.

A guardian requires the consent of a court also for cancellation or termination of a residential lease contract of a ward and termination of long-term contracts with the term of more than four years (§ 207 (2) FLA).

b. unauthorised acts of the adult and of the representative/support person;

A multilateral transaction entered into without the prior written consent of a court is void unless a court ratifies the transaction later. Ratification is valid when the guardian notifies the other party thereof. If a ward has acquired active legal capacity, he or she may ratify the transaction himself or herself. The other party may make a proposal to the guardian to notify him or her of grant of ratification. If a guardian does not grant ratification within two weeks as of the receipt of the abovementioned proposal, ratification is deemed to be refused.

If a guardian was required to obtain the prior consent of a court in order to enter into a transaction, the other party to the transaction may withdraw the declaration of intention to enter into the transaction in the case the guardian had not obtained the prior consent of a court for entry into the transaction and the other party did not know and should not have known that consent had not been granted. In such case, the declaration of intention is deemed not to have been made. The other party shall not withdraw his or her declaration of intention after the guardian has notified the other party of grant of ratification.

A unilateral transaction entered into without the prior consent of a court is void.

In the event of a violation of the requirement of the court's prior consent the provisions on liability of a person lacking authority of representation (§ 130 of the General Part of the Civil Code Act) apply. A person without the right of representation who enters into a transaction on behalf of another person shall compensate the other party for the expenses incurred upon preparation for the transaction and for any other damage which the other party has incurred in connection with the transaction because the party believed the person to have had the right of representation, unless the person on whose behalf the transaction was entered into ratifies the transaction. If a person who enters into a transaction on behalf of another person knows or should know that he or she does not have the right of representation, the person shall, in addition to the damage, compensate the other party for the damage incurred due to failure to perform the transaction. A person without the right of representation shall not be liable if the other party to the transaction knew or should have known of the absence of the right of representation or if the active legal capacity of the person without the right of representation was limited and he or she acted without the consent of his or her legal representative.

c. ill-conceived acts of the adult and of the representative/support person;

(*See answer a and b*)

d. conflicts of interests

Please consider the position of the adult, contractual parties and third parties.

A guardian is the legal representative of a ward. According to § 180 and § 202 of the Family Law Act (FLA) a guardian shall not represent a ward in transactions where one party is the ward and the other party is the guardian, the spouse of the guardian, a direct relative, brother or sister of the guardian unless no direct civil liabilities arise to the ward from the transaction; in transactions where the ward discharges his or her pledge or claim secured by suretyship against the guardian, encumbers such a claim, terminates security of a claim or decreases the security or assumes the obligation to enter into such a transaction; in legal disputes between the ward and the persons specified.

The legal consequences of the violation of this prohibition derive from the General Part of the Civil Law Act[118], which provides in § 131 that a principal may cancel a transaction entered into by a representative if the representative entered

118 Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). RT I 2002, 35, 216. Last amendment RT I, 22.03.2021, 1. In English https://www.riigiteataja.ee/en/eli/501042021006/consolide

into the transaction in violation of the obligations arising from the legal relationship on which the representation was based and entry into the transaction was contrary to the interests of the principal, and the other party knew or should have known of the violation of the obligations. If the representative also acted as the representative of the other party or engaged in self-dealing, the representative is presumed to have violated the obligations arising from the legal relationship on which the representation was based upon entry into the transaction.

A guardian shall not make gifts at the expense of the ward while representing the ward. As an exception, it is permitted to make gifts in order to perform a moral obligation or adhere to etiquette. These restrictions apply also to rural municipality or city government officials acting as guardians and employees of a guardian who is a legal person.

A court may deprive a guardian of the right to represent a ward in certain transactions or in a certain area if the interests of the ward are in significant conflict with the interests of the guardian or a third person represented by the guardian or a person (§ 181 FLA).

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.

According to § 529 (1) of the Code of Civil Procedure the court terminates the guardianship, restricts the scope of duties of a guardian or extends the rights of the person under guardianship to perform transactions independently if the bases for appointing a guardian cease to exist in whole or in part.

The court may order an expert assessment in order to ascertain that such bases have ceased to exist.

According to § 193 (1) and § 202 of the Family Law Act (FLA) the court exercises supervision over the activities of guardians. This supervisory obligation of the court includes also control of the person's need for guardianship under the second sentence of § 206 (2) FLA whereby the court decides on termination, restriction or extension of guardianship on its own initiative or on the basis of an application of the guardian, rural municipality or city government or ward. According to the said provision a ward can file such application to the court without the legal representative, that is, the ward. The first sentence of § 206 (2) FLA provides that if a guardian becomes aware of circumstances which enable to terminate the guardianship, the guardian is obliged to notify a court or rural municipality or city government. The same applies in circumstances enabling to restrict or extend the duties of a guardian. As provided in § 529 (1) of the General Part of the Civil Code Act the basis for terminating the guardianship or restricting the

scope of duties of a guardian lies in the fact that the grounds for appointing a guardian are no longer present, in full or in part, i.e., the state of health of the person under guardianship has improved compared to the time of establishing the guardianship and the need for guardianship has decreased or disappeared.[119]

Reflection

30. Provide statistical data if available.

According to the data published on the website of Estonian courts[120] there were 6524 supervision proceedings in county courts on 31.12.2021 as regards the activity of a guardian of an adult with limited active legal capacity. In the last years the number of judicial supervision proceedings has been rising (6307 in 2020, 5976 in 2019).

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?

The Estonian Chamber of Disabled People has expressed concern that the lack of legal capacity can violate the rights and interests of an individual.[121] They consider that guardianship is often assigned too broadly, to cover all the decision-making for the individual, and not only in the extent strictly necessary. Legal provisions for supported decision making are still not in place in Estonia. So far, no analysis has been carried out regarding the extent to which supported decision-making could be used. The overview of statistics on legal capacity should be much more detailed and include comparison of different years, the nature of guardianship (partial, full), information on who is the legal guardian (a physical person/private person/legal person), for how long the guardianship is set, is it a renewal or first time decision. The provided statistics cannot enable analysis and evaluation of the situation.

SECTION IV – VOLUNTARY MEASURES

Overview

119 CCSCo 3-2-1-73-15, para 17.

120 Estonian courts. Proceedings statistics for 2021. See <https://www.kohus.ee/sites/default/files/dokumendid/I%20ja%20II%20astme%20kohtute%202021.a%20menetlusstatistika_1.pdf> accessed 15.06.2022.

121 ÜRO puuetega inimeste õiguste konventsiooni täitmise variraport. Eesti Puuetega Inimeste Koda. See <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fICO%2fEST%2f33965&Lang=en> accessed 15.06.2022.

32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.[122]

An alternative to a guardian appointed by the court is a closely related person chosen and authorized by the person with reduced ability of understanding to act as an organizer of his or her life and as his or her representative in relations with third parties. Where the law prescribes a certain form for a transaction and failure to follow such a form would render the transaction void, the authority to represent the principal in carrying out the transaction takes the same form as provided in § 118 (3) of the General Part of the Civil Code Act. As a result, general powers of attorney for managing all affairs are usually in the notarized form. In particular, this comes into question in cases where a person has lost the ability of understanding in the course of life but has made necessary arrangements beforehand while still having full comprehension, giving an authority of representation within the meaning of § 118 (1) of the General Part of the Civil Code Act. On the other hand, it is possible that a person with reduced ability of understanding does comprehend the meaning of authorisation and is capable of granting a valid authority of representation in spite of reduced ability of understanding. In practice such arrangements and authorisations are not common in Estonia whereas the necessity for using and developing this type of authorisation has been recognised.[123] The results of a survey commissioned by the Ministry of Social Affairs show that as regards provision of health care services to a person in a state of inability to make decisions, most respondents prefer that the consent to the provision of such service be granted by a person they have appointed earlier. One of the suggested solutions is recording such declaration of intent in the uniform electronic health information system (e-health system).[124]

For the authorisation to be valid, an adult investing another person to act on his or her part must understand the meaning and consequences of the authorisation, i.e. the person must have active legal capacity in so far as granting the authorisation is concerned.[125] Under current law, there is no separate registration system for granting this type of right of representation. Where a person has validly granted an authorisation to someone to manage his or her affairs, the court must take this

122 Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

123 M. KRUUS, R. INT, A: NÕMPER, 'Patsienditestament: milleks ja kellele? Vormid, vormistamine ja rakendamise probleemid' (2017) Juridica 5/2017, pp. 332–339.

124 L. ALAND, S. ANSPAL, J. JÄRVE, V, VAINU, 'Inimeste hoiakud otsustusvõimetus seisundis oleva patsiendi eest teavitatud nõusoleku andmisel tervishoiuteenuse osutamiseks ning rakkude, kudede ja elundite doonorluse suhtes', Eesti Rakendusuuringute Keskus Centar (2019) pp. 7–8, 81-84. <https://www.sm.ee/media/2291/download> accessed 23.08.2022.

125 L. ARRAK, T. UUSEN-NACKE, 'Piiratud arusaamisvõimega täisealise isiku eneseteostusvabadus ja kaitse: kas piiratud teovõime ja eestkoste regulatsioon vajab ümberhindamist?' ('Freedom of Self-Realisation and Protection of an Adult with Limited Comprehension: Does the Regulation of Restricted Active Legal Capacity and Guardianship Need To Be Re-evaluated?'), Juridica 2020 No. 6, pp. 482-492.

into consideration in determining the duties of the guardian.[126] Thus it is possible that a person gives a power of attorney over his or her affairs should he or she suffer a change in the ability to understand his or her actions in the future. If the person becomes of restricted active legal capacity after giving the power of attorney, this does not affect the validity of the power of attorney granted at the time of unrestricted active legal capacity.

The Supreme Court has found that in a situation where a person has been placed under guardianship and there is a partial or total overlap in the scope of the powers of representation of the guardian and the authorised representative, the guardian has the right to revoke the authorisation validly granted by the ward at any time, in accordance with General Part of the Civil Code Act 126 (1).[127] This position of the Supreme Court should be viewed with a critical eye, however, as it directly violates the fundamental rights of the individual, including the right to free self-realisation, and directly undermines the principle of private autonomy. In a situation where a person has clearly indicated who should represent him or her in legal relations in the event of change in his or her ability to understand, and that person does not wish to perform the statutory duties of a guardian, but only to exercise the rights granted to him or her on the basis of a (general) power of attorney, the position of the Supreme Court according to which this right of representation can be revoked at any time would render meaningless the person's expression of free will which is the appointment of a representative, and is contrary to the principle of private autonomy.

33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measure. 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

126 See CCSCo. 3-2-1-87-11, para 21; CCSCo 2-19-8577, para 14.
127 See CCSCo 2-19-8577, para 18.

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)?

The current law of Estonia does not provide such voluntary measures with legal consequences.

Start of the measure

Legal grounds and procedure

36. Who has the capacity to grant the 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 the voluntary measure enters into force. Please consider:
- **a. the circumstances under which voluntary measure enters 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 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.)? Please consider:
- **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 is 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

Safeguards and supervision

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 the voluntary measure. 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 measures 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? If so, please answer questions 51 - 64 if not proceed with question 65.

Estonia has no specific provisions for *ex lege* representation of vulnerable adults. Some provisions are found in the Law of Obligations Act[128]regarding the rights of patients with restricted active legal capacity. Subsections 766 (1) and (3) of the Law of Obligations Act provide for the duty to inform the patient and obtain his or her consent. In the case of a patient with limited active legal capacity, the legal representative of the patient has the rights in so far as the patient is unable to consider the pros and cons responsibly. If the decision of the legal representative appears to damage the interests of the patient, the provider of health care services shall not comply with the decision. The patient shall be informed of the circumstances and information specified in § 766 (1) of the Law of Obligations Act to a reasonable extent. Subsection 766 (4) of the Law of Obligations Act shall be applied upon the provision of psychiatric care to a person with limited active legal capacity (§ 3 (2) Mental Health Act).

According to § 19 (2) of the Termination of Pregnancy and Sterilisation Act, the sterilisation of a person with restricted active legal capacity shall be decided by a county court in proceedings on petition of the persons's guardian. The Committee on the Rights of Persons with Disabilities has observed with concern that

128 Võlaõigusseadus (Law of Obligations Act). RT I 2001, No. 81, Art. 487. Last amendment RT I 08.12. 2021, 11. In English https://www.riigiteataja.ee/en/eli/508012022001/consolide

women with disabilities under guardianship can be subjected to sterilization or abortion without their consent. Committee also notes with concern that women with disabilities subject to guardianship face greater barriers in gaining access to sexual and reproductive health-related services and to expressing their free and informed consent concerning health treatments.[129]

Start of the ex-lege representation

Legal grounds and procedure

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 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

During the ex-lege representation

Powers and duties of the representatives/support person

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.

129 UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Estonia' (2021) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/EST/CO/1&Lang=En> accessed 23.08.2022.

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

End of the ex-lege representation

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?

If spouses exercise the community of property (which is the statutory property relationship in Estonia, unless the parties decide otherwise by concluding a marital property agreement), then as a general rule the spouses jointly exercise the rights and perform the obligations related to joint property according to § 28 (1) of the Family Law Act (FLA). In general, according to the first sentence of § 29 (1) FLA the spouses may enter into transactions with respect to the joint property and conduct legal disputes relating to the property only jointly or with the consent of the other spouse.[130] Consent may be granted by a court on the basis of an application of a spouse for entering into a transaction for the administration of joint property if the conditions provided in § 29 (3) FLA are met.

A spouse may dispose of an object of joint property without the consent of the other spouse, if the spouses have agreed on this in the marital property agreement or if the consent of the other spouse is not required according to the special regulation provided by law. A spouse can enter into a transaction independently, e.g. because it has been agreed in the marital property agreement that only one of the spouses administers the joint property or that the consent of the other spouse is not required for transactions entered into in independent economic activities of a spouse (§ 28 (2), § 29 (2), § 59 (1) (3) FLA). Special rule A special rule is provided in the second sentence of § 29 (1) FLA stating that if one spouse disposes of a movable or a right which forms part of the joint property of the spouses, consent of the other spouse is presumed. A special rule is also provided in the third sentence of § 29 (1) FLA whereby a spouse may, without the consent of the other spouse, enter into transactions with respect to joint property for the satisfaction of everyday needs of himself or herself and the family. A spouse may independently enter into these transactions also in the case of joint administration of joint property.

130 CCSCd 2-20-13586, para 12.

A marital property contract may prescribe that consent of a spouse is not required in the case of transactions entered into in independent economic activities of the other spouse.

If it is not possible to obtain consent from one spouse primarily due to illness or absence of the spouse or he or she refuses without adequate reason to grant consent required for entry into a transaction with respect to joint property, consent may be granted by a court in proceedings on petition on the basis of an application of the other spouse if failure to enter into the transaction or delay in entry into the transaction causes risk of damage.

Spouses may transfer the right to administer joint property to one of the spouses by a marital property contract.

If a spouse's ability to understand undergoes changes and this spouse has by the terms of marital property agreement granted the other spouse the right to conduct certain transactions or the right of representation of the other spouse arises from the law, the situation is comparable to that where the represented person who granted the right of representation to a third party has suffered from changes in understanding.

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 so, 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?

No

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?

As regards a minor child, § 177 of the Family Law Act (FLA) applies, which governs the parent's right to appoint a guardian. The person whom a parent has appointed legal representative of the child in his or her will or succession contract shall be appointed guardian if suitable. If parents have appointed different persons in their wills or succession contracts, the person who is the most suitable as a guardian shall be appointed guardian. A person whose guardianship as a legal representative of the child has been precluded by a parent in his or her will or succession contract shall not be appointed guardian. If parents have made contradictory dispositions, the disposition of the parent who died later shall apply. A rural municipality or city government shall not be appointed guardian by a will or succession contract and shall not be precluded as a guardian. According to § 202 FLA the provisions regulating guardianship over a child shall apply to guardianship over an adult unless otherwise provided. As regards an adult, the special rule concerning the person of a guardian is provided in § 204 FLA. It is questionable and has to be established by case-law whether in a situation where the parents of a disabled child have made a testamentary arrangement regarding the person of the child's guardian the court would take this into account when appointing a guardian to the child who has already reached the age of majority.

SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM IN TERMS OF PROTECTION AND EMPOWERMENT

67. 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. 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.**

Estonia uses a system of substituted decision-making and the concept of the best interests whereby the guardian appointed by the court makes decisions on behalf of the ward, which must pursue the interests of the ward.

The critical conclusion to be drawn is that despite paradigm shifts in society, the Estonian regulation of guardianship which was developed following the example of the corresponding German regulation of the late 1990s, early 2000s has remained unchanged since the adoption of the Family Law Act in 2010 and would need a thorough reform. Committee on the Rights of Persons with Disabilities notes with concern the interpretative declaration made by the State party, upon ratification, to article 12 of the Convention on the Rights of Persons with Disabilities, as well as the provisions set out in the Civil Code maintaining guardianship and the substituted decision-making regime and limiting the active capacity of persons with disabilities on the basis of psychosocial and intellectual impairment. The Committee also notes the absence of supported decision-making mechanisms for persons with disabilities to exercise their legal capacity on an equal basis with others.[131]

Special mention should also be made of the divestment of the right to vote of people with limited ability to understand their actions, as directly provided for by law. If a court appoints a guardian to manage all the affairs of a person with disabilities, the ward is considered lacking active legal capacity also with regard to the right to vote. In such cases, persons with disabilities are essentially deprived of the right to vote which is contrary to the CRPD. Many polling stations are inaccessible, sometimes physically, but even more often due to lack of information in alternative formats.[132]

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;

§ 521 of the Code of Civil Procedure provides that in proceedings for establishment of guardianship the court may make an order on application of interim protection of a right and, among other things, appoint a temporary guardian if: 1) it may be clearly presumed that the conditions for appointment of a guardian are complied with and a delay would endanger the interests of the person in need of guardianship; and 2) a representative has been appointed to the person in proceedings; and 3) the person has been personally heard. If a delay could endanger the interests of the person in need of guardianship, the court may apply interim protection of a right even before hearing the person himself or herself and appointing a representative to him or her. In such case the specified acts must be performed

131 UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initia report of Estonia' (2021) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/EST/CO/1&Lang=En> accessed 23.08.2022.

132 Inimõiguste Keskus, 'Inimõigused Eestis' (2022) <https://humanrights.ee/app/uploads/2021/12/Inimoiguste-aruanne-2022.pdf> accessed 23.08.2022.

retroactively at the earliest opportunity. A temporary guardian is the legal representative of the person concerned. Upon selection of a temporary guardian, the wishes of the petitioner and the legal requirements set for guardians need not be considered. A temporary guardian cannot be appointed for a period longer than six months. After obtaining an expert opinion concerning the mental state of an adult, such time limit may be extended to up to one year (§ 521 (5) Code of Civil Procedure).

b. protection during a procedure resulting in the application, alteration or termination of adult support measures;

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.**