THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

POLAND

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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.

Polish legislation does not include the term "vulnerable adult" or any other general term covering an adult with impaired or insufficient personal abilities[1]. In many countries, such a definition includes a person aged 18 or older who may need care or support due to a disability (mental or other), age or illness. For the purposes of this study, a "vulnerable adult" should be understood as an adult who, on the basis of an impairment or insufficiency of his or her personal capacity, is unable to protect his or her interests.

In Polish law there are plenty of acts regulating different legal aspects of life of the vulnerable persons, among the most important should be mentioned:

- The 1964 Civil Code[2],
- The 1964 Family and Guardianship Code[3],
- The 1997 Constitution of the Republic of Poland[4].

[1] K. Kurosz, "Protection of the Adult and Respect for Their Autonomy: the Polish Perspective", in D. Skupień, B. Lewaszkiewicz-Petrykowska (ed.), *Rapports Polonais. XXIe Congres International de Droit Comparé. Asunción 23-28 X 2022*, Łódź, 2022, 27-55.
[2] Ustawa z dnia 23 czerwca 1964 r. – Kodeks cywilny [The Act of 23 June 1964 – The Civil Code], consolidated text: Journal of Laws 2022, item 1360.
[3] Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy [The Act of 25 February 1964 – The Family and Guardianship Code], consolidated text: Journal of Laws 2020, item 1359.
[4] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [The Constitution of the Republic of Poland of 2 April 1997], Journal of Laws 1997, item 483.

The following legislation is also relevant:

- The 1964 Code of Civil Procedure[5],
- The 1974 Labour Code[6],
- The 1994 Act on the Protection of Mental Health[7],
- The 1996 Act on the Professions of Physician and Dentist[8],
- The 1997 Code of Criminal Procedure[9],
- The 2004 Act on Social Assistants[10],
- The 2008 Act on Patients' Rights and Patients' Ombudsman[11].

Legislative acts relevant to legal support for the elderly are also[12]:

- The 1991 Act on Combatants and Certain Persons Who Are Victims of War and Post-War Repressions[13],
- The 1998 Act on Old-Age and Disability Pensions from the Social Insurance Fund[14],
- The 2004 Act on Family Benefits[15],
- The 2004 Act on Health Care Services Financed from Public Funds[16],
- The 2015 Act on Elderly Persons[17].

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[5] Ustawa z dnia 27 listopada 1964 r. – Kodeks postępowania cywilnego [The Act of 27 November 1964 – Code of Civil Procedure], consolidated text: Journal of Laws 2021, item 1805.
[6] Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy [Act of 26 June 1974 Labour Code], consolidated text: Journal of Laws 2022, item 1510.
[7] Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego [Act of 19 August 1994 on the Protection of Mental Health], consolidated text: Journal of Laws 2022, item 2123
[8] Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty [Act of 5 December 1996 on the Professions of Physician and Dentist], consolidated text: Journal of Laws 2022, item 1731.
[9] Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego [Act of 6 June 1997 Code of Criminal Procedure], consolidated text: Journal of Laws 2022, item 1375.
[10] Ustawa z dnia 12 marca 2004 r. o pomocy społecznej [The Act of 12 March 2004 on Social Assis tants], consolidated text: Journal of Laws 2021, item 2268.
[11] Ustawa z dnia 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta [Act of 6 November 2008 on Patients' Rights and Patients' Ombudsman], consolidated text: Journal of Laws 2022, item 1876.
[12] A. Malarewicz-Jakubów, *Wsparcie prawne osób starszych* [*Legal Support for the Elderly*], Warszawa, 2017, 109.
[13] Ustawa z dnia 24 stycznia 1991 r. o kombatantach oraz niektórych osobach będących ofiarami represji wojennych i okresu powojennego [Act of 24 January 1991 on Combatants and Certain Persons Who Are Victims of War and Post-War Repressions], consolidated text: Journal of Laws 2022, item 2039.
[14] Ustawa z dnia 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych [Act of 17 December 1998 on Old-Age and Disability Pensions from the Social Insurance Fund], con solidated text: Journal of Laws 2022, item 504.
[15] Ustawa z dnia 28 listopada 2003 r. o świadczeniach rodzinnych [Act of 28 November 2003 on Family Benefits], consolidated text: Journal of Laws 2023, item 390.
[16] Ustawa z dnia 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych [Act of 27 August 2004 on Health Care Services Financed from Public Funds], console dated text: Journal of Laws 2022, item 2561
[17] Ustawa z dnia 11 września 2015 r. o osobach starszych [The Act of 11 September 2015 on Elderly Persons], Journal of Laws 2015, item 1705.

Financial help is the most important. Polish Constitution of 1997 deals with the problem of vulnerable persons in Art. 30 ("The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities") and Art. 69 ("Public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication").

The right to health care is guaranteed by Art. 68 of the Constitution, according to which everyone has the right to health care[18]. Citizens, irrespective of their material situation, shall be given equal access to health care services financed from public funds by public authorities. The Constitution imposes a specific obligation on public authorities to provide health care to, inter alia, persons with disabilities and the elderly. In the latter case, treatment cannot be denied on the grounds of age alone.

In the Polish legal system, the way to legally protect vulnerable adults is to limit their capacity for legal acts. The 1964 Civil Code regulates passive legal capacity (*zdolność prawna*) – the ability to hold rights and obligations which depends on formal factors (age and incapacitation) – and active legal capacity (*zdolność do czynności prawnych*) – capacity for legal acts. In the Civil Code we can find provisions both on state-ordered measures and voluntary measures. State-ordered measures include:

- full (legal) incapacitation (*ubezwłasnowolnienie całkowite*) of a person who has reached the age of 13, if, as a result of mental illness, mental retardation or other mental disorder (especially drunkenness or drug addiction), he or she is unable to direct his or her own proceedings); followed by the appointment by the court of a legal representative – guardian (*opiekun*) – who acts for the adult (Art. 13),
- partial (legal) incapacitation (*ubezwłasnowolnienie częściowe*) followed by the appointment by the court of a curator (*kurator*) who can act for the adult or give consent for the adult to act independently Art. 16).

The legal regime of incapacitation has been the same, not counting details, from 1946, so it's over 70 years now. Guardianship (*opieka*) implied almost total lack of capacity (comparable to minority) and representation by a guardian. Curatorship (*kuratela*) allowed the circle of capacity to be judicially tailored, but it demanded lack of capacity for *inter vivos* acts of disposal. As a rule, the curator would control through authorization the acts that were performed by the person under protection (assistance). In both cases, not only is legal capacity to act restricted but also legal capacity to entitle some personal rights (right to marry, right to acknowledge paternity, right to exercise parental responsibilities or to write a will).

[18] A. Malarewicz-Jakubów (n 19), 110.

The Family and Guardianship Code from 1964 regulates an institution of guardian and curator for the incapacitated persons. Curator can be appointed also for a person with disability who is not incapacitated (*kurator dla osoby niepełnosprawnej*, Art. 183)[19], but he or she is not a statutory representative[20] of that person but *de facto* his or her assistant, a support person for some specific matters[21].

The 1964 Civil Code also regulates voluntary measures. A power of attorney (*pełnomocnictwo*) can be used in the event of a state of disorder or insufficiency of one's personal faculties. In Polish law, there is no continuing power of attorney or a similar solution that would remain valid in the case of the measure ordered by the state, i.e. incapacitation (it is not possible to appoint a legal representative in case of incapacitation). The Civil Code also regulates the issue of validity of legal transactions in relation to the mental state of the person making a declaration of will. It is not one of the protection measures, but a statutory representative (guardian or curator) may lead to certain past acts of such an adult being declared invalid.

The 1964 Family and Guardianship Code regulates the *ex lege* measure – substitution of one spouse by the other in the event of a temporary impediment (which

[19] K. Góralczyk, *Sytuacja osób z zaburzeniami psychicznymi. Analiza w ujęciu prywatnoprawnym* [*The Situation of People with Mental Disorders. An Analysis in Private Law Terms*], rozprawa doktorska [doctoral thesis], Wydział Prawa Uniwersytetu w Białymstoku [Faculty of Law of the University in Bialystok], Białystok, 2023, 248-255.

[20] In the Polish legal system, a statutory representative is a person performing a legal action on behalf of someone else, whose source of empowerment is a legal event other than the legal action of the represented person, i.e. the granting of a power of attorney by the represented person. Statutory repr esentaties may be natural persons who have full capacity to perform legal acts. "Acting on someone else's behalf" means that someone performs a legal act with a third party that is intended to have a direct effect in someone else's legal sphere, in this case in the sphere of the represented person. In order for the action of the statutory representative to achieve the intended result, i.e. to produce a direct legal effect between the represented person and the third party, a statutory representative must have appropriate authorization. Statutory representatives include:
1) parents – pursuant to Art. 98 of the 1964 Family and Guardianship Code: parents are the statutory representatives of the child under their parental authority;
2) a guardian – pursuant to Art. 98 in conjunction with Art. 155 § 2 and Art. 175 of the 1964 Family and Guardianship Code: on the basis of the decision of the guardianship court a guardian is a statutory representative of a minor if there are legal reasons for doing so, as well as of a person who is fully incapacitated;
3) a curator – pursuant to Art. 99 and Art. 98 in conjunction with Art. 155 §2 and Art. 178 of the 1964 Family and Guardianship Code: a curator is a statutory representative of a child under parental autho rity who cannot be represented by either of the parents. A curator is also appointed in other cases provided for by the law (inter alia, to guard the future rights of a child conceived but not yet born; for a person who is partially incapacitated when the guardianship court so decides; to protect the rights of a person who cannot manage his or her affairs due to absence, and who does not have an attorney);
4) one of the spouses – in the event that he or she represents the other spouse within the limits indicated in Art. 29 of the 1964 Family and Guardianship Code;
5) a partner of a civil law partnership – in the case where this partner performs legal actions in the representation of the other partners of the civil partnership.

[21] Broadly about the situation of carers of people with disabilities and forms of support in Poland: M. Borski, *Publiczne formy wspierania opiekunów osób z niepełnosprawnościami* [*Public Forms of Su pport for Carers of People with Disabilities*], Sosnowiec 2018.

may also be related to the impairment/insufficiency of personal faculties). The Code also determines how a guardian and curator are appointed, their duties and control of the court.

The 1994 Act on the Protection of Mental Health and the 2004 Act on Social Assistants regulate the placement in psychiatric hospitals or residential care homes of persons whose personal faculties are impaired or insufficient.

As a curiosity we should mention the 2015 Act on Elderly Persons, which does not regulate legal status of the elderly persons (over 60), but says only about the ways monitoring the situation of these people. According to the government this is the first step to regulate legal status of the elder persons in a complex way.

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*]. As explained in the General Instructions above, please briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.

List of the key terms:

- passive legal capacity (*zdolność prawna*),
- active legal capacity – capacity for legal acts (*zdolność do czynności prawnych*),
- curatorship (*kuratela*),
- curator (*kurator*),
- curator for the disabled person (*kurator dla osoby niepełnosprawnej*),
- guardianship (*opieka*),
- guardian (*opiekun*),
- full incapacitation (*ubezwłasnowolnienie całkowite*),
- partial incapacitation (*ubezwłasnowolnienie częściowe*),
- power of attorney (*pełnomocnictwo*),
- Government Plenipotentiary for Equal Treatment (*Pełnomocnik Rządu ds. Równego Traktowania*),
- Ombudsman (*Rzecznik Praw Obywatelskich*),
- district court (*sąd rejonowy*)[22],
- regional court (*sąd okręgowy*)[23] .

[22] District court (*sąd rejonowy*) – in the Polish justice system, one of the common courts established to hear all cases belonging to the common courts, with the exception of cases reserved for higher courts. The appeal instance against the decisions of the district court is the regional court.
[23] Regional court (*sąd okręgowy*) – in Poland, a court of general jurisdiction adjudicating in both first and second instance. In the Polish justice system, it is the rule that the district court decides in first instance and the regional court decides in second instance on appeals and complaints against judgments

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.

In Poland, there are no publicly available registers containing comprehensive statistical data on various protection measures applicable to adults, including the elderly. We can use partial data – regarding incapacitation – which reveal the following picture of the situation. In 1985, almost 24,000 people were incapacitated, in 1995 – almost 30,000, in 2005 – 54,500, in 2009 – 65,000, in 2012 – 74,000, and in 2019 – 90,000.

Statistical data regarding incapacitation:

Year	Number of applications	Together	including							
			taken into account in whole or in part			dismissed	returned	rejected	discontinued	dealt with by other means
			in total	of which incapacitation has been declared						
				full	partial					
2004	10593	11372	-	-	-	465	1000	149	-	258
2005	9179	9425	-	-	-	513	933	169	-	390
2006	9104	9149	6067	5497	692	461	1020	151	1025	154
2007	9822	9698	6447	5725	751	430	991	168	1326	171
2008	9985	9179	5819	5170	635	405	990	180	1412	234
2009	10725	10720	6963	6184	767	435	1043	173	1675	264
2010	11293	10986	7336	6494	810	394	982	163	1690	237
2011	11681	11598	7521	6817	694	388	989	176	1948	574

rendered in first instance by the district court. However, there are a number of exceptions; the regional court rules, inter alia, on incapacitation in non-litigious proceedings,.

2012	12983	12420	8220	7456	763	366	998	193	1995	648
2013	12999	12684	8494	7776	718	385	938	173	2156	538
2014	13528	12845	8551	7728	823	317	956	140	2318	563
2015	13600	13303	8946	8194	752	362	899	132	2383	581
2016	13979	13971	9470	8641	829	316	802	144	2578	661
2017	14691	14161	9515	8751	764	347	771	130	2793	605
2018	15521	14971	10018	9177	841	345	798	153	3015	642
2019	16310	15261	10121	9423	698	311	809	148	3244	628
2020	12816	13163	7834	7322	512	266	889	159	3243	772
2021	15337	14878	9286	8688	598	251	979	161	3384	817

Source: S. Kotas-Turoboyska, *Postępowania sądowe dotyczące opieki nad osobą ubezwłasnowolnioną całkowicie* [*Court proceedings regarding the guardianship of a fully incapacitated person*], Warszawa, 2021, s. 7; wyciąg z tabeli *Ewidencja spraw o ubezwłasnowolnienie w sądach okręgowych – I instancja w latach 2004–2021* zamieszczonej w Informatorze Statystycznym Wymiaru Sprawiedliwości [excerpt from the table *Registration of Guardianship Cases in the District Courts – First Instance from 2004 to 2021* provided in the Statistical Guide of the Judiciary], *Ubezwłasnowolnienia w latach 2004-2021* [*Incapacitations 2004-2021*], https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ [access: 16.04.2023]

The analysis of the above data leads to the conclusion that, as a rule, the number of incapacitation cases filed with the court increased steadily from 2006 to 2019[24], only to fall quite significantly from 16,310 new cases in 2019 to 12,816 cases in 2020. In 2021, there was a renewed increase, although it did not reach the result of 2019, as the number of applications amounted to 15,337. In 2022, there were approximately 100,000 incapacitated persons living in Poland[25]. The vast

[24] K. Nowakowska, *Dla seniora śmierć cywilna. Lawinowo rośnie liczba ubezwłasnowolnień* [*Civil Death for Seniors. The Number of Incapacitations is Growing Exponentially*], https://prawo.gazetaprawna.pl/artykuly/1438186,liczba-ubezwlasnowolnien-dla-seniorow-2019.html[access: 16.04.2023].

[25] M. Kubalski, *Ubezwłasnowolnienie – uwarunkowania reformy archaicznej instytucji* [*Incapacitation – Determinants of Reform of an Archaic Institution*], https://www.temidium.pl/artykul/ubezwlasnowolnienie_uwarunkowania_reformy_archaicznej_instytucji-6951.html#sdfootnote2sym [access: 16.04.2023].

majority (approximately 90%) of them were fully incapacitated– that is, they were completely deprived of capacity for legal acts.

According to information from the Ministry of Justice, in 2017, among full incapacitations, judgements relating to the elderly accounted for 54.7%, 68% of full incapacitated persons were women[26]. Also in 2017, among applications for incapacitations by spouses, 60.7% were applications for the incapacitation of an elderly person, this mainly concerned men – 61.2%.

It is estimated that in Poland (as of 2020) over 500,000 people live with dementia, often without a diagnosis, and among them there are 310,000 people with Alzheimer's disease (also most often without a diagnosis)[27].

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.

The Hague Protection of Adults Convention of 13 January 2000 has been signed by Poland on 18 September 2008, but has not been ratified yet[28].

The Convention on the Rights of Persons with Disabilities was signed by the representatives of the Republic of Poland on 30 March 2007 and was ratified on 6 September 2012[29]. It is in power since 25 October 2015. Poland has not ratified the Optional Protocol of the Convention under which victims of violations of any of the rights listed in this act can report to the Committee on the Rights of Persons with Disabilities. In 2016, the Ombudsman appealed to the Prime Minister to ratify

[26] *Pełny zapis przebiegu posiedzenia Komisji Polityki Senioralnej (nr 60) z dnia 2 lipca 2018 r.* [*Full Transcript of the Proceedings of the Meeting of the Committee on Senior Policy (No 60) of 2 July 2018*], Kancelaria Sejmu – Biuro Komisji Sejmowych [Chancellery of the Sejm – Office of the Sejm Committees], 11. About the legal guardian of an elderly person, see: *Opiekun prawny osoby starszej – kiedy będzie konieczny?* [*Legal Guardian of an Elderly Person – When Will It Be Necessary?*], https://dobryadwokat.pl/artykul/opiekun-prawny-osoby-starszej-kiedy-bedzie-konieczny,110 [access: 16.04.2023]. On the incapacitation of the elderly see: A. Malarewicz-Jakubów (n 19), 215-222.

[27] M. Wojciechowska-Szepczyńska, *Otępienie (demencja). Najczęściej zadawane pytania* [*Dementia. Frequently Asked Questions*], Biuletyn RPO – Materiały nr 88 [The Ombudsman's Bulletin – Materials No. 88], Warszawa, 2020, 4.

[28] Z. Skórzewski, *Węzłowe zagadnienia Konwencji haskiej z 2000 r. o międzynarodowej ochronie dorosłych* [*Key Issues of the Hague Convention on the International Protection of Adults from 2000*], praca magisterska [master's thesis], Wydział Prawa i Administracji Uniwersytetu Jagiellońskiego [Faculty of Law and Administration of the Jagiellonian University], Kraków, 2017.

[29] Konwencja o prawach osób niepełnosprawnych, sporządzona w Nowym Jorku dnia 13 grudnia 2006 r. [Convention on the Rights of Disabled People, drawn up in New York on 13 December 2006], Jou rnal of Laws 2012, item 1169. Oświadczenie rządowe z dnia 25 września 2012 r. w sprawie mocy obowiązującej Konwencji o prawach osób niepełnosprawnych, sporządzonej w Nowym Jorku dnia 13 grudnia 2006 r. [Government statement of 25 September 2012 on the binding force of the Convention on the Rights of Disabled People, drawn up in New York on 13 December 2006], Journal of Laws 2012, item 1170.

the Optional Protocol to the Convention, and he pointed out that the direct application of the provisions of the Convention by the courts was hindered. This appeal was supported by 170 organisations working to support persons with disabilities, protection of human rights and equal treatment[30].

It should be noted that the publication in the Journal of Laws, where the text of the Convention used by Polish lawyers can be found, is fraught with serious translation errors. This concerns the title itself (in the Journal of Laws as "*Konwencja o prawach osób niepełnosprawnych*" – "Convention on the Rights of Disabled People"), as well as the key Article 12[31]. This provision in the original English text contains the phrase "legal capacity". This term is understood, depending on the context, as passive capacity (equivalent to Polish "*zdolność prawna*" – the ability to be the subject of rights and obligations) or as active capacity (equivalent to Polish "*zdolność do czynności prawnych*" – the ability to act in the sphere of rights and obligations). Meanwhile, the Journal of Laws found a translation of this concept as "*zdolność prawna*" – which is inconsistent with the intention of the

[30] *RPO apeluje: Ratyfikujmy Protokół fakultatywny do Konwencji o prawach osób z niepełnosprawnościami* [*Ombudsman appeals: Ratify the Optional Protocol to the Convention on the Rights of Persons with Disabilities*], https://bip.brpo.gov.pl/pl/content/ratyfikujmy-protokol-fakultatywny-do-konwencji-o-prawach-osob-niepelnosprawnych-apel-rpo [access: 16.04.2023].

[31] M. Zima-Parjaszewska, "*Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce" ["Article 12 of the UN Convention on the Rights of Persons with Disabilities and Incapacitation in Poland"],* in D. Pudzianowska (ed.), *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka [Rights of Persons with Intellectual or Mental Disabilities in the Light of International Human Rights Instruments]*, Warszawa, 2014.

Convention's drafters[32] and which was pointed out to Poland by the UN Committee on the Rights of Persons with Disabilities[33]– and added an "Interpretative Statement" to the Convention, according to which the Republic of Poland "interprets Art. 12 of the Convention in such a way as to permit the use of incapacitation, in the circumstances and in the manner prescribed by national law, as a measure referred to in Article 12(4), in a situation where, as a result of mental illness, mental retardation or other mental disorder, a person is incapable of directing his or her behavior". Consequently, the Polish legislator "*de facto* excludes their application with regard to the equal capacity of persons with disabilities", with the result that "the interpretative statement (reservation) made by Poland to Art. 12 of the CRPD should be regarded as inadmissible. This is because there is no doubt that it is incompatible with the object of the Convention and contradicts its objectives, which include ensuring equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities[34]". By submitting this "interpretative statement", Poland somehow admitted that the translation of "legal capacity" in Art. 12 as "*zdolność prawna*" is incorrect, because incapacitation does not affect

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[32] *Rekomendacje dla Polski Komitetu ONZ ds. Praw Osób z Niepełnosprawnościami* [*Recommendations to Poland of the UN Committee on the Rights of Persons with Disabilities*], https://bip.brpo.gov.pl/pl/content/rekomendacje-dla-polski-komitetu-onz-komitetu-ds-praw-osob-z-niepe%C5%82nosprawnosciami [access: 16.04.2023]. M. Szeroczyńska, "Ubezwłasnowolnienie i alternatywne formy pomocy w realizowaniu zdolności do czynności prawnych osób z niepełnosprawnością intelektualną, w regulacjach międzynarodowych oraz w prawie obcym, na przykładzie Estonii, Niemiec, Szwecji, Wielkiej Brytanii I Kanady (stanu Manitoba)" ["Incapacitation and Alternative Forms of Legal Aid For Persons With Intellectual Disabilities In International Regulations And In Foreign Law, With Examples From Estonia, Germany, Sweden, Great Britain and Canada (State of Manitoba)"], in K. Kędziora (ed.), *Jeśli nie ubezwłasnowolnienie, to co? Prawne formy wsparcia osób z niepełnosprawnością intelektualną [If Not Incapacitation, Then What? Legal Forms of Support For People With Intellectual Disabilities]*, Warszawa, 2012, 24-25. M. Zima-Parjaszewska, "Równość osób z niepełnosprawnościami wobec prawa – sytuacja prawna osób ubezwłasnowolnionych" ["Equality Before the Law for Persons with Disabilities – the Legal Position of Incapacitated Persons"], in A. Błaszczak (ed.), *Najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych* [*Key Challenges Following Poland's Ratification of the UN Convention on the Rights of Persons with Disabilities*], Warszawa, 2012, 19-20, 24. M. Zima-Parjaszewska, *Ubezwłasnowolnienie w świetle Konstytucji RP oraz Konwencji o Prawach Osób z Niepełnosprawnościami* [*Incapacitation in the Light of the Constitution of the Republic of Poland and the Convention on the Rights of Persons with Disabilities*], Biuletyn Polskiego Towarzystwa Prawa Antydyskryminacyjnego [Bulletin of the Polish Society of Anti-Discrimination Law], Poznań, 2012, 15-16. K.M. Zoń, "O potrzebie nowelizacji przepisów Kodeksu cywilnego w zakresie instytucji ubezwłasnowolnienia" ["A Few Remarks on Legislation Changes in the Civil Code in Respect to Incapacitation"], in P. Stec and M. Załucki (ed.), *Wokół rekodyfikacji prawa cywilnego* [*On the Recodification of Civil Law*], Kraków, 2015, 141-142.

[33] *Convention on the Rights of Persons with Disabilities. Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Poland*, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsnLFjcXmd8Ilx1hLUlxYOlolNx89NMrEyKDrTPKg7T8aUMAwDVPc/x6/d5Qg%2BJxRYV2Gi33mW2TralO6fd4KvKjXpOp0ORybDYY4RQBf5HB9 [access: 16.04.2023].

[34] A. Błaszczak, "*Zastrzeżenia i oświadczenie interpretacyjne Polski do Konwencji o prawach osób z niepełnosprawnościami" ["Poland's Reservations and Interpretative Statement to the Convention on the Rights of Persons with Disabilities"],* in D. Pudzianowska (ed.), *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka [Rights of Persons with Intellectual or Mental Disabilities in the Light of International Human Rights Instruments]*, Warszawa, 2014.

the passive legal capacity of the incapacitated person, but only their active legal capacity.

The Committee on the Rights of Persons with Disabilities, when considering Poland's first report on the implementation of the Convention in 2018, recommended that Poland withdraw its "interpretative statement" in relation to Art. 12 of the Convention and referred to its General Comment No. 1 of 2014[35], referring precisely to the content and proper understanding of Art. 12 of the Convention. Consequently, the Committee recommended that Poland eliminate all discriminatory provisions in the Civil Code and other legal acts allowing the deprivation of capacity for legal acts of persons with disabilities, establish a procedure to enable persons with disabilities to regain their deprived capacity for legal acts, and develop a mechanism for supported decision-making that respects the autonomy, will and preferences of persons with disabilities. The Committee stressed in its recommendations to Poland that "legal capacity" includes both the ability to be a subject of rights and the ability to perform legal actions. Poland should also change the language of legal texts to get rid of pejorative and outdated terms ("mental retardation")[36]. This means that incapacitation is not an institution that can be reconciled with a Convention ratified with prior statutory consent.

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

14 September 1929 – accession of the Republic of Poland to the Convention on Incapacitation and Similar Guardianship Orders, signed in The Hague on 17 July 1905[37].

1 January 1946 – entry into force of the Decree of 29 August 1945 Personal Law[38]. The decree provided for both full and partial incapacitation, and was the first modern Polish act to regulate these issues. In interwar Poland, the civil codes of the various partitioning powers were continuously in force – the Russian Digest

[35] *General Comment No. 1 - Article 12 : Equal recognition before the law (Adopted 11 April 2014) - Plain English version*, https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1 [access: 16.04.2023].

[36] K. Góralczyk (n 26), 40-41, 44-48.

[37] Ustawa z dnia 13 lutego 1929 r. w sprawie przystąpienia Rzeczypospolitej Polskiej do konwencji, dotyczącej ubezwłasnowolnienia i analogicznych zarządzeń opiekuńczych, podpisanej w Hadze dnia 17 lipca 1905 r. [Act of 13 February 1929 on the Accession of the Republic of Poland to the Convention on Incapacitation and Similar Guardianship Orders, Signed in The Hague on 17 July 1905], Journal of Laws 1929 no. 23, item 228. Oświadczenie rządowe z dnia 14 września 1929 r. w sprawie przystąpienia Rzeczypospolitej Polskiej do Konwencji, dotyczącej ubezwłasnowolnienia i analogicznych zarządzeń opiekuńczych, podpisanej w Hadze dnia 17 lipca 1905 r. [Government Declaration of 14 September 1929 on the Accession of the Republic of Poland to the Convention on Incapacitation and Similar Guardianship Orders, Signed in The Hague on 17 July 1905], Journal of Laws 1929 no. 80, item 598.

[38] Dekret z dnia 29 sierpnia 1945 r. Prawo osobowe [Decree of 29 August 1945 Personal Law], Journal of Laws 1945 no. 40, item 223.

of Laws, the Austrian ABGB and the German BGB – as well as the Civil Code of the Kingdom of Poland of 1825.

According to Art. 1 and 2, everyone had legal capacity, within the limits of the law he or she could have legal rights and obligations, and legal capacity began at birth. Pursuant to Art. 5, the court could fully incapacitate a person who had reached the age of seven if, as a result of mental illness or mental retardation, he or she was incapable of managing his affairs. A person who was fully incapacitated did not have the capacity to take legal action, his legal representative was the guardian. According to Art. 6, the court could partially incapacitate an adult who required protection due to mental illness or mental retardation, but not to such an extent that there was a need for full incapacitation. The court could also partially incapacitate an adult who: by reason of wastefulness placed himself or his family in danger of privation; by reason of compulsive drunkenness or drug addiction placed himself or his family in danger of privation or required assistance to manage his affairs or endangered the safety of others. The partially incapacitated person had limited capacity to act legally, his legal representative was the curator. According to Art. 9, a person with limited capacity to act in law could dispose of his or her earnings and property given to him or her for free use without the consent of the legal representative, but the guardianship authority could deprive the partially incapacitated person of these powers.

The Decree of 1 January 1946 was repealed by the Act of 18 July 1950 Provisions Introducing General Provisions of Civil Law[39].

1 October 1950 – entry into force of the Act of 18 July 1950 General Provisions of Civil Law[40]. According to Art. 6, every person from the moment of birth could have rights and duties (legal capacity) in the field of civil law. Gender, race, nationality, religion or origin were to have no influence in this regard. Art. 9 established full incapacitation and Art. 10 partial incapacitation. A person over the age of thirteen could be fully incapacitated if, as a result of mental illness or mental retardation, he or she was incapable of directing his or her conduct. A fully incapacitated person who was not under parental authority was subject to guardianship. If the incapacitation was revoked, the guardianship ceased by operation of law. Those exercising parental authority over an incapacitated person were subject to the restrictions to which a guardian was subject. The provisions of the Family Code on the guardianship of a minor applied *mutatis mutandis* to the guardianship of a fully incapacitated adult. The spouse of the incapacitated person was appointed as guardian in the first place, or in the absence of the latter, his or her father or mother, unless the welfare of the incapacitated person precluded this. An adult could be partially incapacitated due to: mental illness or mental retardation, if his or her condition did not require full incapacitation; wasting; compulsive

[39] Ustawa z dnia 18 lipca 1950 r. Przepisy wprowadzające przepisy ogólne prawa cywilnego [Act of 18 July 1950 Provisions Introducing General Provisions of Civil Law], Journal of Laws 1950 no. 34, item 312.

[40] Ustawa z dnia 18 lipca 1950 r. Przepisy ogólne prawa cywilnego. [Act of 18 July 1950 General Provisions of Civil Law], Journal of Laws 1950 no. 34, item 311.

drunkenness or drug addiction. A partially incapacitated person was subject to curatorship. If the curatorship was revoked, the curatorship ceased by operation of law. The curator of a partially incapacitated person was appointed to represent him or her and to manage his or her property only if the guardianship authority so decided.

According to Art. 49, persons under the age of thirteen and persons who were fully incapacitated did not have capacity for legal acts. A legal act made by a person without capacity for legal acts was void. On the basis of Art. 50, minors over the age of thirteen and persons under partial incapacitation had limited capacity for legal acts. Subject to the exceptions provided for by the law, the consent of the statutory representative was required for the validity of a legal transaction by which a person with limited capacity for legal acts incurred a liability or disposed of his or her right.

The Act of 18 July 1950 was repealed by the Act of 23 April 1964 – Provisions Introducing the Civil Code[41].

1 January 1965 – entry into force of the Act of 23 April 1964 Civil Code. The Code contains still valid provisions on full incapacitation (Art. 13) and partial incapacitation (Art. 16).

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.

Among the voices in the discussion on the further fate of the institution of incapacitation in Poland, we can find both numerous calls for its abolition and its

[41] Ustawa z dnia 23 kwietnia 1964 r. - Przepisy wprowadzające kodeks cywilny [Act of 23 April 1964 – Provisions Introducing the Civil Code], Journal of Laws 1964 no. 16, item 94.

replacement by a system of adult support[42], as well as rarer opinions on the necessity of its continuation, inter alia, due to the protective character with regard to the property of an adult[43] or for the sake of the welfare of the elderly[44].

An example of this second approach can be found in the solutions contained in the draft Civil Code developed by the Civil Law Codification Commission under the Minister of Justice [*Komisja Kodyfikacyjna Prawa Cywilnego przy Ministrze Sprawiedliwości*]. Work on it had been going on since 2006[45], with book one [*ksiega pierwsza*] completed in 2008 and published a year later[46]. Art. 18 of the draft provides for a single institution of incapacitation, in its design corresponding to the currently functioning full incapacitation, while completely omitting partial incapacitation. The changes were intended to simplify the regulation, on the other hand, to reduce the number of incapacitations pronounced by tightening its application and moving towards more frequent use of other protection measures, such as the construction of defects in a declaration of will and curatorship for a disabled person[47]. The proposed solutions raised doubts among researchers and practitioners, and it was emphasised that the submitted draft distanced the

[42] M. Pilich, „Art. 13", in J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Tom I. Część ogólna, cz. 1 (art. 1–55(4))* [*Civil Code. Commentary. Volume I. General Part, Part 1 (Articles 1-55(4))*], Warszawa, 2021. M. Domański, „Ubezwłasnowolnienie w prawie polskim a wybrane standardy międzynarodowej ochrony praw człowieka" [„Incapacitation in Polish law and Selected Standards of International Protection of Human Rights"], in E. Holewińska-Łapińska (ed.), *Prawo w działaniu*, t. 17 [*Law in Action*, vol. 17], Warszawa, 2014, 24, 26-28; I. Markiewicz, J. Heitzman and A. Pilszyk, „Ubezwłasnowolnienie – instytucja wciąż potrzebna?" ["Incapacitation – an Institution Still Needed?"], *Psychiatria* [*Psychiatry*], 2014, vol. 11, no 4, 206-209; M. Zima-Parjaszewska, „Równość osób…" (n 39), 127-163; L. Kociucki, "Niektóre problemy nowelizacji polskiego prawa o ubezwłasnowolnieniu" ["Some Problems of the Amendment of the Polish Law on Incapacitation"], *Studia Prawnicze* [*Legal Studies*], 2013, no. 2, 77-95; L. Kociucki, *Zdolność do czynności prawnych osób dorosłych i jej ograniczenia* [*Legal Capacity of Adults and its Limitations*], Warszawa, 2011, 288-291.

[43] D. Mróz, "Krytycznie wobec postulatu zniesienia ubezwłasnowolnienia w kontekście harmonizacji polskiego prawa cywilnego z Konwencją ONZ o prawach osób niepełnosprawnych" ["Critical View of the Abolition of Incapacitation in the Context of the Harmonisation of Polish Civil Law with the UN Convention on the Rights of Persons with Disabilities"], *Acta Iuris Stetinensis*, 2018, no 4, 36. L. Ludwiczak, *Ubezwłasnowolnienie w prawie polskim* [*Incapacitation in Polish Law*], Warszawa, 2012, 192.

[44] A. Malarewicz-Jakubów (n 19), 222.

[45] The assumptions of the new codification of civil law were published in 2006 under the title "Green Book". See: Z. Radwański (ed.), *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej* [*The Green Book. The Optimal Vision of the Civil Code in the Republic of Poland*], Warszawa, 2006. Available at: https://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj1w7-5pev-AhWSxIsHXcwAxEQFnoECA0QAQ&url=https%3A%2F%2Fwww.gov.pl%2Fattachment%2F2fe6fb2e-4b35-469b-a0d1c6860612131b&usg=AOvVaw25ynaUp0zGMg25J63qoLGh [access: 16.04.2023].

[46] *Komisja Kodyfikacyjna Prawa Cywilnego działająca przy Ministrze Sprawiedliwości, Księga pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem* [*Civil Law Codification Commission under the Minister of Justice, Book One of the Civil Code. Draft with Explanatory Memorandum*], Warszawa, 2009.

[47] U. Ernst, "Ubezwłasnowolnienie" ["Incapacitation"], *Transformacje Prawa Prywatnego* [*Transformations of Private Law*], 2010, vol. 4, 23-24.

Polish system from more recent foreign solutions[48], as well as did not realise the prevailing trends in the context of supporting people with disabilities[49]. Such voices, among others, resulted in the present draft never becoming law.

The result of many years of discussion on the legal framework for the legal protection of vulnerable adults, as well as on the direction of its changes, was the draft amendment of the Civil Code, the Family and Guardianship Code, the Civil Procedure Code, the Act on Family Support and the System of Foster Care and some other acts[50]. The Civil Law Codification Committee has prepared the draft in 2012 in accordance with the Convention on the Rights of Persons with Disabilities. The draft in 2014-2015 was on a first stage of the government legislation proceedings, but new right-wing government in 2015 blocked it and the legislative process was stopped. The draft discusses the ways of the possible regulation by studying examples from EU countries laws. The primary aim of the project was to protect people with disabilities, and the planned changes were motivated by changing social conditions, developments in medical and social sciences and the dynamic development of human rights. The legal provisions for such protection were to be brought into line with the standards set by acts of international law.
One of the basic proposals was to replace incapacitation by other measures, a direction in line with the recommendations of a number of international documents[51]. The problem of inadequate protection of incapacitated persons was noted by the Constitutional Tribunal, which in its judgment of 7 March 2007 (ref. K 28/05)[52] clearly suggested the need for changes to the institution of incapacitation in Polish law[53]. The Tribunal noted that in most countries there has been a move

[48] U. Ernst (n 54), 31-32. M. Zima-Parjaszewska, *Ubezwłasnowolnienie*… (n 39), 3, 17-19.
[49] K.M. Zoń (n 39), 143-144.
[50] *Projekt założeń projektu ustawy o zmianie ustawy – Kodeks cywilny, ustawy - Kodeks rodzinny i opiekuńczy, ustawy - Kodeks postępowania cywilnego, ustawy o wspieraniu rodziny i systemie pieczy zastępczej oraz niektórych innych ustaw* [*Draft of Assumptions of the Bill on the Amendment of the Civil Code, the Family and Guardianship Code, the Civil Procedure Code, the Act on Family Support and the System of Foster Care and some other acts*], https://legislacja.rcl.gov.pl/projekt/208000/katalog/208031#208031 [access: 16.04.2023].

[51] These include the Recommendation of the Committee of Ministers of the Council of Europe No. 99(4) of 23 February 1999 on Principles Concerning the Legal Protection of Incapable Adults, as well as the Recommendation of the Committee of Ministers of the Council of Europe No. (2206)5 of 5 April 2006. - Council of Europe Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of Persons with Disabilities in Europe 2006-2015. See: L. Kociucki, *Zdolność*... (n 49), 249-251; K.M. Zoń (n 39), 140. In Poland, the discussion on the directions of necessary changes has intensified especially in connection with the ratification of the UN Convention on the Rights of Persons with Disabilities of 13 December 2006 (Journal of Laws 2012, item 1169), in particular in relation to its Article 12 and Article 23(1a).
[52] Wyrok Trybunału Konstytucyjnego z dnia 7 marca 2007 r. sygn. akt K 28/05 [Judgment of the Constitutional Tribunal of March 7, 2007, file ref. no. K 28/05], Journal of Laws 2007 no. 47, item 319.
[53] I. Kleniewska, M. Szeroczyńska, "Założenia uregulowania w polskim prawie instytucji asystenta prawnego osoby z niepełnosprawnością intelektualną lub psychospołeczną" ["Assumptions For Regulating In Polish Law The Institution of a Legal Assistant For a Person With Intellectual Or Psychosocial Disabilities"], in *Jeśli nie ubezwłasnowolnienie, to co? Prawne formy wsparcia osób z niepełnosprawnością intelektualną [If Not Incapacitation, Then What? Legal Forms of Support For*

away from rigid restrictions on the rights and freedoms of mentally ill, handicapped or addicted persons towards more flexible regulations, tailored to specific situations by the court deciding the case. French, German and Austrian solutions were cited in this regard, where it was possible for the court to individually designate the types of activities that a person under guardianship could perform on his or her own without the consent of the legal representative.

The abandonment of the institution of incapacitation was to be followed by the abandonment of the terminology of "mental illness" and "mental retardation", which did not correspond to the standards of international law, as well as a change in the capacity of persons with mental disorders to marry. Objections to the marriage ban and the way in which its prerequisites were defined were raised not only by NGOs and the medical community, but also by the Government Plenipotentiary for Equal Treatment (*Pełnomocnik Rządu ds. Równego Traktowania*) and the Ombudsman (*Rzecznik Praw Obywatelskich*).

Following the above considerations, the proposed amendment was to move away from the model in which a court decision deprived a person of his or her capacity for legal acts to an extent defined in an abstract manner and only loosely related to the mental state of that person. The principle of full capacity for legal acts of an adult was to be adopted, an exception to which was to be a limitation of capacity when this was necessary due to the condition of the person affected. The extent of such limitations was to be determined on an individual basis taking into account the situation of the particular person. It was also proposed to change the function of guardianship and the relationship between guardianship and capacity. Interference with capacity for legal acts in the form of partial or full incapacitation would be removed, to be replaced by a guardianship established to assist the person with a disability to manage his or her affairs, and the scope of the guardian's duties and competences would be made dependent on the mental state of the ward. It would mainly involve personal contact, support, assistance, but representation only when necessary.

Consequently, it was assumed that several institutions currently in place (guardianship for persons under full incapacitation, curatorship for persons under partial incapacitation, curatorship for a disabled person) would be abandoned and replaced by a single institution of guardianship. The amendment was to have regard only to states of mental disability, which were to be defined synthetically, without referring to individual types of disability (mental illnesses, intellectual disabilities, diseases of old age), as it was considered that this issue should be decided in each case by doctors, not lawyers. The general term "mental disorder" was used, indicating that it referred to mental conditions of any kind, characterised

People With Intellectual Disabilities], K. Kędziora (ed.), Warszawa, 2012, 111. M. Zima-Parjaszewska (n 26), 24. M. Zima-Parjaszewska, *Ubezwłasnowolnienie*… (n 39), 7. R. Pudlo, „Ubezwłasnowolnienie – doktryna, wątpliwości, alternatywy" [„Incapacitation – Doctrine, Doubts, Alternatives"], *Psychiatria Po Dyplomie* [*Psychiatry After Diploma*], 2012, vol. 9, no. 3, 45. K.M. Zoń (n 39), 142.

by permanence, which exclude or limit the understanding of a freely made decision and its consequences[54]. The individual and consequential control of legal actions from persons with mental disabilities was maintained, consisting of the possibility for the court to declare the will declarations made by such persons invalid.

When adjudicating the appointment of a guardian, the court would have to take into account the medical premise, i.e. the mental state of the person with a mental disorder, as well as the social premise, i.e. the need for intervention limiting his or her freedom of decision-making. The guardianship and any limitation of capacity would, as a general rule, be adjudicated for a limited period of time, unless the disability was irreversible. In declaring a guardianship, the court would have to determine the scope of the guardian's activities, which could take one or more of the following forms, taking into account the mental state of the ward and the guardian's qualifications:

- assisted guardianship (*opieka asystencyjna*) – providing the guardian with support in decision-making while leaving the guardian with full capacity for legal acts,
- guardianship with "parallel" representation (*opieka z reprezentacją „równoległą"*) – representing the ward to a limited extent while leaving them with full capacity for legal acts,
- guardianship with co-decision-making power (*opieka z kompetencją do współdecydowania*) – reserving the guardian's consent or confirmation for the validity of certain types of legal action by the protected person,
- guardianship combined with power of exclusive substitution (*opieka połączona z umocowaniem do wyłącznego zastępstwa*) – the guardian would have the right to take legal actions within a specified scope only.

The guardian's competence to act as a substitute for the mentally disturbed person was to continue to exclude legal actions in matters of personal importance, in particular marriage, acknowledgement of paternity, disposition of property in the event of death. In these matters, the decisive factor would be to assess whether the person making the acts acted freely and with an understanding of their meaning and legal consequences; in case of doubt, these facts would have to be decided in court proceedings. The registration of judgments interfering with an individual's autonomy was also not envisaged, on the assumption that such a measure would create more risks for individual rights than benefits in terms of legal certainty. The entirety of adult protection proceedings would be entrusted to specialised units in the district courts (family and guardianship courts)[55].

The draft provides for a new institution found in foreign legal systems – a guardianship power of attorney – whereby an adult and mentally fit person could appoint a proxy who would be authorised to perform certain acts on his or her behalf, including those of a personal nature, should the principal suffer a mental disorder in the future. Such a power of attorney would have to be in the form of a

[54] K.M. Zoń (n 39), 144.
[55] See footnote n 29.

notarial deed, specify the person of the attorney, indicate the specific manner in which the existence of a mental disorder in the principal would be established, and resolve the forms and extent of supervision of the exercise of the guardianship power of attorney and the conditions for its replacement by guardianship.

Changes are also envisaged for the marriage of persons affected by mental disorders (in the current state of the law, a mentally ill person, if fully incapacitated, does not have the possibility to obtain a marriage licence). A person with a mental disorder would not be able to enter into a marriage if it would not allow him or her to direct his or her conduct and to realise the meaning and consequences of the obligations of marriage. This issue would be decided by the court after compulsory consultation of experts – a psychiatrist and a psychologist. In the new terminology, terms such as "mental illness" and "mental retardation" would be replaced by the more capacious and less stigmatising term "mental disorder".

At the time of entry into force of the new provisions, full or partial incapacitation would change into guardianship combined with power of exclusive substitution or guardianship with co-decision-making power. According to the authors of the draft, a change in the regulations concerning the occurrence of persons with mental disabilities in civil law transactions could have required the amendment of thirty-six legal acts.

An important solution was also to increase the effectiveness of the execution of a decision to take away a person subject to forced removal, which in many cases was to be physically prevented when the curator was not allowed to enter the place (premises) where he or she was supposed to carry out the removal. A measure to increase the effectiveness of the curator was to be the granting of powers to the police to search premises where persons subject to forced removal could be hidden.

At the meeting of the Council of Ministers on 10 March 2015, the draft proposals were presented by Minister of Justice Cezary Grabarczyk[56] After a discussion, the Council of Ministers adopted the indicated proposals, deciding that the issues concerning the source of funding for the remuneration of legal guardians will be re-examined at the stage of work on the bill. Unfortunately the draft was abandoned after the change of government in autumn 2015. However, the assessments, diagnoses and proposals contained in this draft can be a very valuable source for further discussion and work on system change.

Also the Ombudsman was questioning the wording of Art. 12 of Family and Guardianship Code, according to which "no one who is suffering from a psychological illness or mental retardation can marry. However, if the psychological or physical state of the person does not endanger the marriage or the health of any future offspring, and if the person is not totally incapacitated, the court may authorize the marriage." The Ombudsman claimed that the notions of "psychological

[56] *Rząd przyjął projekt nowelizacji prawa rodzinnego* [*The Government Has Adopted a Draft Amend ment to the Family Law*], https://www.arch.ms.gov.pl/pl/archiwum-informacji/news,6881,10,rzad-przyjal-projekt-nowelizacji-prawa-rodzinnego.html [access: 16.04.2023].

illness" and "mental retardation" are not precise enough, according to the present state of knowledge. As a consequence, they may limit the constitutional right to marry. This touches bigger issue, of whether persons with mental afflictions may marry at all. The problem was important because of ratifying the UN Convention of the Rights of the Persons with Disabilities of 13 Dec. 2006, signed in New York. The Constitutional Tribunal decided that Art. 12 of the Family Code is in accordance with Polish Constitution, especially Art. 18, which protects marriage and family (Judgment of the Constitutional Tribunal 22 Nov. 2016 , K 13/15).

In terms of ongoing discussions and research, it is worth mentioning the project "Private Law Aspects of Crime Prevention and Assistance to Crime Victims", which is being implemented from 1 May 2020 to 30 April 2023 by the School of Justice [*Szkoła Wyższa Wymiaru Sprawiedliwości*] and is funded by the Fund for Victims' Assistance and Post-Penitentiary Assistance – the Justice Fund [*Fundusz Pomocy Pokrzywdzonym oraz Pomocy Postpenitencjarnej – Fundusz Sprawiedliwości*][57]. The project envisages the identification and analysis of the functioning of institutions and normative solutions of private law, which are related to the issues of counteracting crime and assisting victims of crime. Two main research areas have been identified, to which the tasks carried out under the project correspond. These include the problem of parental authority and the problem of capacity for legal acts of natural persons. The latter is primarily of a protective nature and consists in preventing actions that infringe on the interests of civil law subjects. The recipients of the project are both representatives of law academia (family, civil, constitutional and international law) and practitioners: judges, prosecutors, court experts, attorneys or legal counsels. The results of the implementation of the project should be of significant importance for state authorities and should allow for the correct interpretation of the regulations in force and the formulation of draft amendments to the law in force, as well as should make it possible to popularise the results of the research, which should translate into the dissemination of appropriate models for the implementation of the disposition of legal norms.

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

The current Polish right-wing government seems to be slowly coming to the conclusion that incapacitation is not an institution that can be reconciled with the Convention of the Rights of the Persons with Disabilities[58]. In a speech to the

[57] *Prywatnoprawne aspekty przeciwdziałania przestępczości i pomocy ofiarom przestępstw* [*Private Law Aspects of Crime Prevention and Assistance to Crime* Victims], https://swws.edu.pl/prywatnoprawne-aspekty-przeciwdzialania-przestepczosci-i-pomocy-ofiarom-przestepstw/ [access: 16.04.2023].

[58] M. Kubalski (n 32). *Ocena wykonania przez Polskę Konwencji praw osób z niepełnosprawnościami – zakończona. Rząd zapowiada zmiany ws. Ubezwłasnowolnienia* [*Evaluation of Poland's Implementation of the Convention on the Rights of Persons with Disabilities – Completed. Government Announces Changes to Incapacitation*], https://bip.brpo.gov.pl/pl/content/komitet-onz-zakonczyl-ocene-wykonania-przez-polske-konwencji-praw-osob-z-niepelnosprawnosciami [access: 16.04.2023].

Committee in 2018, a government representative announced that legislative work would be undertaken "to change the law as to incapacitation", and the Government Plenipotentiary for Persons with Disabilities (*Pełnomocnik Rządu ds. Osób Niepełnosprawnych*) has made similar statements[59]. In the Constitutional Tribunal, a case from a constitutional complaint by a citizen who alleged that Article 13 § 1 of the Civil Code is incompatible with the Constitution of the Republic of Poland has been pending since February 2017. This case (SK 23/18) was joined by the Ombudsman by letter of 25 September 2018, supporting the position of the complainant and citing arguments in support of the position on the incompatibility of the provision of Article 13 § 1 of the Civil Code (that is, the *de facto* institution of full incapacitation) with Article 30, with Article 31(1) in connection with Article 31(3) and with Article 47 in connection with Article 31(3) of the Polish Constitution[60]. Unfortunately, the case still (in April 2023) has not been assigned a panel or a trial date.

The Ministry of Justice has been working on the draft changes to the legal regulation of the institution of incapacitation at least since 2019[61]. A team of ministerial staff has been set up for this purpose, including in particular judges delegated to the Ministry; a subpage has also been created on the Ministry website, entitled "Supported Decision-Making Model – Abolition of Incapacitation"[62]. Through this page, it is still possible to take part in the public consultation and submit comments and proposals on "what support in social functioning is needed and expected by people with disabilities, which will consequently enable the introduction, instead of incapacitation, of a model of supported decision-making in a form corresponding to these needs and expectations"[63]. Unfortunately, no results of the work of this team have been published so far, nor have these results or even outlines of the project been made available to the social partners. Therefore, it is not known in which direction the project under development is going and when it can be expected to be implemented.

Parallel to the ministerial work, work is being carried out by civic organisations bringing together people with disabilities and their families and guardians, including Polish Association for Persons with Intellectual Disability (*Polskie*

[59] *Rząd odpowiedział na uwagi RPO do projektu Strategii na rzecz Osób z Niepełnosprawnościami 2020-2030* [*The Government Responded to the Ombudsman's Comments to the Draft Strategy for People with Disabilities 2020-2030*], https://bip.brpo.gov.pl/pl/content/odpowiedz-rzadu-na-uwagi-rpo-do-projektu-strategii-na-rzecz-osob-z-niepelnosprawnosciami [access: 16.04.2023].

[60] *Metryka SK 23/18* [*Record SK 23/18*], https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=SK%2023/18 [access: 16.04.2023].

[61] *Ministerstwo Sprawiedliwości nadal analizuje, jak zmienić instytucję ubezwłasnowolnienia* [*Ministry of Justice Continues to Study How to Change the Institution of Incapacitation*], https://bip.brpo.gov.pl/pl/content/ms-nadal-analizuje-jak-zmienic-instytucje-ubezwlasnowolnienia [access: 16.04.2023].

[62] *Model wspieranego podejmowania decyzji – likwidacja ubezwłasnowolnienia* [*Supported Decision-Making Model – Removal of Incapacitation*], https://www.gov.pl/web/sprawiedliwosc/model-wspieranego-podejmowania-decyzji [access: 16.04.2023].

[63] *Konsultacje publiczne* [*Public Consultation*], https://www.gov.pl/web/sprawiedliwosc/konsultacje-publiczne3 [access: 16.04.2023].

Stowarzyszenie na rzecz Osób z Niepełnosprawnością Intelektualną), Institute for Independent Living (*Instytut Niezależnego Życia*), St. Jadwiga Queen of Poland Foundation (*Fundacja im. Królowej Polski św. Jadwigi*) – in cooperation with the Government Plenipotentiary for Persons with Disabilities and the Ministry of Family and Social Policy. This work is going in the direction of developing preliminary proposals for some instruments of the planned system of supported decision-making, including, above all, legal assistance to replace the institution of legal guardianship and incapacitation. The basic premise of the proposed system is to preserve the capacity for legal acts of each person, while offering support in legal decision-making to anyone who may need such support. The ability to make decisions for another person would only be left in extreme cases, such as a comatose state, total paralysis resulting in an inability to communicate with the person, or profound intellectual disability resulting in an inability to make any decision at all. The possibility of basing this system on existing systems is discussed: free legal aid, social assistance, probation services, as well as the use of informal support networks: family and circle of friends.

Other elements of the system include a system of support for people with special communication needs requiring assistive and alternative communication methods (AAC) or a standard for personal assistance. The planned solutions are extensively consulted with representatives of various legal (judges, notaries, advocates and legal advisers) and non-legal professions, representatives of the Ministry of Justice and the Justice Institute.

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?**
- **b) how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**
- **c) does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?**
- **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?**
- **e) does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?**

f) are there any other legal instruments,[64] besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

In the Polish legal system there are three statuses with regard to capacity for legal acts: lack of capacity for legal acts, limited capacity for legal acts and full capacity for legal acts. Full capacity for legal acts is acquired upon reaching the age of 18. Limited capacity for legal acts is acquired by persons who have reached the age of 13 or are partially incapacitated. Persons under the age of 13 or who are completely incapacitated have no capacity for legal acts. An adult who has full capacity for legal acts may lose this status upon a final decision of full or partial incapacitation.

Full incapacitation of an adult, in the light of Art. 13 of the Civil Code, distinguishes two premises of full incapacitation that require cumulative occurrence: the premise of age (at least 13 years of age) and the premise of inability to direct one's own actions caused by mental illness, mental retardation or other mental disorders, in particular drunkenness and drug addiction. The purpose of the institution of full incapacitation is to protect not only a person's property rights, but also his or her non-property rights, including personal rights, e.g. health, as, among other things, it allows a person to undergo medical treatment.

The prerequisites for partial incapacitation are similar, but not identical, to the prerequisites for full incapacitation. The difference concerns, firstly, the age condition, as only a person of full age can be incapacitated. Secondly, the decision must be justified by the need to assist the person concerned in managing his or her affairs due to mental illness, mental retardation or other disorder, if his or her condition does not justify full incapacitation.

The effects of a decision on full incapacitation are far-reaching. A person who is completely incapacitated does not have capacity for legal acts and therefore cannot effectively participate in civil law transactions. Legal transactions performed by a person without capacity for legal acts are, as a rule, absolutely invalid. Contracts belonging to contracts commonly concluded in minor day-to-day matters are an exception to this rule; such a contract becomes valid as soon as it is executed, unless it entails a gross disadvantage for the incapacitated person. In addition, a person who is fully incapacitated cannot be a proxy, but may act as a messenger.

The effects of partial incapacitation are not as far-reaching as those of full incapacitation. Under Polish law, a person who is partially incapacitated has a limited capacity to perform legal acts. This is characterised by the fact that such a person does not have the competence to perform certain legal acts (e.g. drawing up a will), for certain acts he or she needs the consent of the guardian/statutory representative, and for legal acts of the highest order he or she needs the consent of the guardianship court. A partially incapacitated person may, as a general rule,

[64] 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

perform legal acts by which he or she incurs obligations or disposes of his or her rights, with the consent of his or her legal representative (curator). In addition, he or she may perform acts for the validity of which the consent of the representative is not required by law. For example, a person who is partially incapacitated may enter into contracts belonging to contracts commonly concluded in minor, day-to-day matters of everyday life (e.g. enter into contracts of sale during everyday shopping) and dispose of his or her earnings, unless the guardianship court decides otherwise for important reasons.

The revocation of the incapacitation may take place *ex officio* or on application of:

- the incapacitated person,
- the statutory representative/guardian/curator of the fully or partially incapacitated person,
- the spouse of the incapacitated person,
- the public prosecutor,
- the Ombudsman.

The legitimacy of relatives to file an application is excluded if the incapacitated person has a legal representative. Such a view was expressed in the decision of the Supreme Court of 2 December 1987 (IV CZ 168/87, OSPiKA 1989/7-12, item 147). However, a request for the annulment of the incapacitation coming from an unauthorised person may cause the court to initiate proceedings *ex officio*. There may also be a change of incapacitation from full to partial and from partial to full only upon request (decision of the Supreme Court of 26 January 2012, III CSK 169/11, OSNC 2012/7-8, item 97). An application may be filed at any time after the decision declaring full or partial incapacitation becomes final.

Making decisions on behalf of an adult who lacks capacity for legal acts or whose capacity is limited does not automatically result in a loss of capacity for legal acts. In Polish law there are no other instruments of deprivation or limitation of capacity for legal acts other than a final court decision.

9. Briefly describe the effects of a limitation of legal capacity on:

a. property and financial matters;

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

c. medical matters;

d. donations and wills;

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

A person who is fully incapacitated may own property. Legal acts performed by a person lacking capacity for legal acts are, as a rule, absolutely invalid. Contracts belonging to contracts commonly concluded in minor day-to-day matters are an exception to this rule.

A partially incapacitated person may also own property. He or she is not competent to make purchase contracts of large value. He or she has full competence to perform other legal acts (conclude contracts belonging to contracts commonly concluded in minor everyday matters; dispose of his or her earnings, unless the guardianship court decides otherwise for important reasons; freely dispose of property put to his or her free use, unless the act requires the consent of the curator or the guardianship court). He or she needs the consent of his or her legal representative in order to perform certain legal acts, with the court's permission being required in the cases indicated by the law to effectively grant this consent (e.g. rejection of an inheritance, sale of a minor's property).

A person who is fully incapacitated does not have the possibility to marry. It is possible to annul a marriage that is ongoing at the time the incapacitation decision becomes final, or to create *ex lege* a forced separation of property between the fully incapacitated person and his or her spouse.

A partially incapacitated person may marry. Such a person's marriage may be dissolved by divorce, or one of the spouses may apply for annulment of the marriage on the grounds of mental illness or mental retardation of the other spouse.

The guardian/curator/statutory representative decides on behalf of a person who lacks capacity for legal acts or has limited capacity for legal acts in all medical matters. However, if the guardian of the incapacitated person does not agree with the doctor's performance of actions in the form of: surgery or the application of methods of treatment or diagnosis that pose an increased risk for the patient, but are necessary to remove the danger of the patient's loss of life or serious bodily injury or serious disorder of health, the doctor may perform such actions after obtaining the consent of the guardianship court.

In medical matters, it is also worth mentioning the statutory right of representation of an adult without full capacity for legal acts, which is most commonly referred to in Polish law as "*de facto* guardianship". The statutory definition of a *de facto* guardian is contained in the Act of 6 November 2008 on Patients' Rights and Patient Ombudsman (Art. 3(1)). According to this Act, a *de facto* guardian is a person who, without a statutory obligation, provides permanent care for a patient who, due to age, health or medical condition, required such care. He or she is authorised to give surrogate consent for a patient who is a minor, fully incapacitated or incapable of giving informed consent, in the absence of a statutory representative, for the examination of the patient. In a separate way, the institution of the *de facto* guardian is regulated by the Act of 19 August 1994 on the Protection of Mental Health, although it does not contain a corresponding definition, as well as a reference to the Act on Patients' Rights and Patient Ombudsman. Due to the

similarity of the functions performed, it has been accepted in practice that the definition contained in the latter act applies in both cases[65]. Under the Act on the Protection of Mental Health, the scope of authority of the *de facto* guardian includes: the right to assist in protecting the rights of the ward; the authority to apply to the family court for a ruling on the admission of the ward to a psychiatric hospital in emergency situations; the authority to request the discharge of a mentally ill ward from a psychiatric hospital. The definition of *de facto* guardian is also contained in the Code of Criminal Procedure, according to which it is the person under whose custody the victim or the accused remains.

A person who lacks capacity for legal acts or is limited in capacity for legal acts cannot make a will[66]. He or she may be the beneficiary of a donation under the care of a guardian/curator. The court in a decision on full or partial incapacitation indicates that the guardian/curator should file annual asset reports of the incapacitated person's assets in order to prevent embezzlement of his or her funds, so all inheritances and donations should be indicated in such reports. In addition, incapacitated persons or those limited in their capacity for legal acts cannot themselves reject/accept an inheritance without the guardian/curator first obtaining permission to do so.

A person fully or partially incapacitated may have passive and active legal standing, but a guardian/curator acts on his or her behalf. He or she may also be a party to administrative proceedings, make applications to administrative authorities, but the guardian/curator also acts on his or her behalf (e.g. an application for a passport for an incapacitated person is made by a court-appointed guardian/curator; the presence of the incapacitated person is required when applying for the passport, but the passport is collected for him or her by the guardian/curator; the presence of the incapacitated person is not required when collecting the passport for him or her). Having the status of a fully or partially incapacitated person does not prejudge the fact that a person cannot testify as a witness in civil or criminal proceedings. This is because it all depends on the mental state of the particular person at the time.

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

No, a decision on full or partial incapacitation is not retroactive.

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

[65] L. Kociucki, *Zdolność*... (n 49), 280-282.
[66] A. Malarewicz-Jakubów (n 19), 225-226.

All proceedings relating to full or partial incapacitation shall be brought before the regional court [*sąd okręgowy*][67] having jurisdiction over the place of residence of the person who is the subject of the application for full/partial incapacitation or, if there is no residence, before the court of the place of temporary stay of such person. The case is heard by three judges.

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

A request for incapacitation may be submitted by the person's spouse, a relative in the direct line (e.g. a parent), a sibling or a statutory representative. The revocation/amendment of full/partial incapacitation may take place *ex officio* or at the request of: the incapacitated person, the statutory representative/guardian/curator of the fully or partially incapacitated person, the spouse of the fully or partially incapacitated person, the public prosecutor, the Ombudsman.

The issue of the admissibility of an application for so-called self-incapacitation remains unregulated in Polish law. In the doctrine, one can encounter the view that this fact indicates that the legislator has taken a negative stance on this issue[68].

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

There is no requirement to represent a person who may be declared incapacitated. During the proceedings, the person may appoint an attorney to represent his or her interests. There is also the possibility of appointing an interim counsel during the proceedings, whose purpose is to protect the person affected by the application for incapacitation or his or her property. The institution of interim counsel is a quasi-security measure. A person who is the subject of an application for incapacitation in the event of the appointment of an interim counsel has limited capacity for legal acts on an equal footing with a person who is partially incapacitated. The application for the revocation of the incapacitation can be made by the incapacitated person himself or herself, there is no requirement for specific representation.

[67] See footnote n 30.
[68] L. Ludwiczak (n 50), 187.

The participants in the proceedings for incapacitation are, by law, in addition to the applicant: the person who is the subject of the application, his or her statutory representative, the spouse of the person who is the subject of the application for incapacitation, the public prosecutor. In addition, non-governmental organisations whose statutory tasks include the protection of the rights of persons with disabilities, the provision of assistance to such persons or the protection of human rights may join the proceedings at any stage.

If, according to the application, the incapacitation is to be declared due to mental illness or mental retardation, the court, before ordering the delivery of the application, shall require, within the prescribed period, the presentation of a medical certificate issued by a psychiatrist on the mental state of the person who is the subject of the application for incapacitation, or a psychologist's opinion on the degree of mental retardation of that person. If the person is to be incapacitated due to drunkenness, the court shall also require a certificate from an alcohol counselling centre, and if the person is to be incapacitated due to drug addiction, a certificate from an addiction treatment centre. The court shall reject the application for incapacitation if the content of the application or the documents attached to the application do not substantiate the existence of a mental illness, mental retardation or the existence of any other mental disorder of the person who is the subject of the application for incapacitation, or if the requested certificate, opinion or certification is not submitted, unless submission of such documents is not possible.

If the application is granted then the person who is the subject of the application for incapacitation must be examined by an expert psychiatrist or neurologist as well as a psychologist. The expert's opinion, in addition to an assessment of the mental health or mental disorders or mental development of the person who is the subject of the application for incapacitation, should include a reasoned assessment of the extent of his or her capacity to manage his or her own conduct and affairs, taking into account the person's conduct and behaviour. Optionally, the court may (if it considers it necessary on the basis of the opinion of two medical experts) order that the person who is the subject of the application for incapacitation be placed under observation in a medical facility for a period not exceeding six weeks. In exceptional cases, the court may extend this period to three months.

The person who is the subject of an application for incapacitation must be heard as soon as the proceedings are initiated; the hearing must take place in the presence of an expert psychologist and, depending on the state of health of the person to be heard, an expert psychiatrist or neurologist. In order to hear the person who is the subject of the application for incapacitation, the court may order that the person be forcibly brought to the hearing or be heard by a designated judge. If there is an inability to communicate with the person who is the subject of the application for incapacitation, this shall be stated in the minutes after hearing the medical expert and the psychologist participating in the hearing.

The incapacitated person himself or herself is entitled to appeal the order even if an interim counsel or curator has been appointed. The formal requirements for a legal remedy shall not apply to a legal remedy brought by a person who is the subject of an application for incapacitation. Such an appeal by a person who is the

subject of an application for incapacitation shall not be rejected for failure to remedy formal deficiencies.

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

a. property and financial matters;
b. family matters
c. and personal rights (e.g. marriage, divorce, contraception);
d. medical matters;
e. donations and wills;
f. civil proceedings and administrative matters (e.g. applying for a passport).

A mentally ill person with full capacity for legal acts can have full ownership rights. Issues related to defects in declarations of will are regulated by Art. 82 and subsequent articles of the Civil Code. Pursuant to Art. 82 a declaration of will made by a person who, for any reason, was in a state preventing him or her from making a conscious or free decision and expressing his or her will is invalid. This applies, in particular, to mental illness, mental retardation or other, even temporary, disturbance of mental functions. It follows from the wording of the cited provision that it formulates two groups of factual conditions causing the declaration of will to be invalid, namely: a condition effecting the cognitive aspect of decision-making (consciousness); a condition effecting the wills aspect of decision-making (free-will). What is irrelevant, however, are the reasons which led to these conditions. Each of these conditions may exist independently and this is sufficient to establish a defect in the declaration of will. In this case, it is the state described in Art. 82 of the Civil Code that is decisive, not the reason that caused it. Moreover, the state excluding conscious decision-making and expression of will cannot be understood in such a way that it requires total lack of consciousness, at the occurrence of which total inability to act appears and the declaration of will cannot occur at all. In the state that excludes the conscious decision and expression of the will, there does not have to be a complete lack of consciousness and cessation of brain function. It is sufficient for such a state to exist, which implies lack of discernment, inability to understand one's own actions and the actions of others and inability to realise the meaning and consequences of one's own actions (judgment of the Supreme Court of 7 February 2006, IV CSK 7/05, Lex No 180191; justification of the decision of the Supreme Court of 30 April 1976, III CRN 25/76, OSP 1977/4/78).

A person suffering from mental illness or mental retardation may not enter into marriage[69]. However, if the state of health or mind of such a person does not jeopardise the marriage or the health of future offspring and if the person is not fully incapacitated, the court may allow him or her to enter into marriage. It is possible to annul a marriage already concluded due to mental illness or mental retardation of one of the spouses. Such a request may be made by either spouse. It

[69] K. Góralczyk (n 26), 165-173.

is not possible to annul a marriage due to mental illness of one of the spouses after the cessation of this illness.

An examination or the provision of other health services to a patient without his or her consent is permissible if he or she requires immediate medical attention and, due to his or her state of health or age, cannot give consent and it is not possible to communicate with his or her statutory representative or actual guardian (Art. 33 of the Act of 5 December 1996 on the Professions of Physician and Dentist). However, if the patient, who has full capacity for legal acts, has no next of kin to decide on the subject of the surgical procedure or the application of methods of treatment or diagnosis posing an increased risk to the patient, and which are necessary to remove the danger of the patient's loss of life or grievous bodily injury or serious health disorder, the doctor may perform such actions after obtaining the consent of the guardianship court (Art. 34 of the Act of 5 December 1996 on the Professions of Physician and Dentist), a situation common in social welfare homes.

As a general rule, a person who has been diagnosed with a mental illness cannot make a valid will, but when such a person is in a period where the illness has regressed, then the will he or she has made will be valid. To establish these circumstances, an expert is appointed to analyse the history and treatment of the illness and, on the basis of this opinion, a decision is taken by the court on the validity of the will if it is opened. In the literature, however, we can find opinions that people with mental disorders have the capacity both to make and revoke a will, and that they can only be deprived of this capacity by full or partial incapacitation[70].

Mentally ill persons may have passive and active legal standing[71]. In criminal proceedings, the regulations explicitly state that an accused must have a defence counsel if there is a reasonable doubt as to whether his or her capacity to recognise the meaning of the act or to direct his or her proceedings was not excluded or significantly impaired at the time the act was committed and there is a reasonable doubt as to whether his or her mental health condition allows him or her to participate in the proceedings or to conduct the defence in an independent and reasonable manner. In the case of civil proceedings, there is no such regulation explicitly and it has been discussed on several occasions. The Supreme Court in its resolution of 26 February 2015 (ref. III CZP 102/14) answered the question of how mental illness and procedural capacity relate to each other – and accepted that a person with a mental disorder who has procedural capacity may grant a power of attorney.

Mentally ill persons may also be a party to administrative proceedings, as indicated by the Supreme Administrative Court. The assessment of whether a person has the capacity to act in proceedings takes place on the basis of the provisions of the Civil Code, which defines the concept of procedural capacity in Art. 11, Art. 12, Art. 13 and Art. 15. Since the procedural capacity of an individual is derived from his or her legal status, it is this factor alone, and not his or her psychophysical

[70] K. Góralczyk (n 26), 158-161.
[71] K. Góralczyk (n 26), 183-185.

characteristics, that determines whether he or she has procedural capacity. The mere existence of the prerequisites for incapacitation does not affect an individual's procedural capacity until an incapacitation order is made. A person who is mentally ill but not incapacitated has procedural capacity. Mental disorder is not a sufficient condition for assuming the lack of procedural capacity of a party (participant). Without incapacitation by the ordinary court, this effect does not occur (Judgment of the Supreme Administrative Court of 19 April 2018. II FSK 1171/16).

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?

In Poland, the issue of capacity for legal acts and its limitation or deprivation is inextricably linked to the issue of incapacitation. Evaluations of individual solutions and discussions on changes in this area are conducted jointly, as further discussed in the following responses.

SECTION III – STATE-ORDERED MEASURES

Overview

16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.[72] 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?**

In the Polish legal system, state-ordered measures in the form of the establishment of guardianship and curatorship institutions for a person, which are applied to vulnerable adults, are inextricably linked to incapacitation, with guardianship relating to full incapacitation and curatorship to partial incapacitation. Consequently, both forms of incapacitation, guardianship and curatorship in many respects should be discussed together.

[72] 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]).

There are two types of incapacitation in Polish law. According to Art. 13 of the Civil Code, a person over the age of thirteen may be fully incapacitated as a result of mental illness, mental retardation or other mental disorder, in particular drunkenness or drug addiction or if he or she is unable to direct his or her own proceedings. Therefore, two conditions are necessary – the condition of age (attaining the age of 13) and the condition of inability to direct one's own proceedings, caused by one of the reasons indicated in the law[73]. A guardianship shall be established for a person who is fully incapacitated, unless he or she is still under parental authority.

On the other hand, according to Art. 16 of the Civil Code, an adult may be partially incapacitated due to mental illness, mental retardation or other mental disorders, in particular drunkenness or drug addiction, if the person's condition does not justify full incapacitation, but assistance is needed to manage his or her affairs. It should be pointed out that, in contrast to full incapacitation, only a person of full age may be partially incapacitated. The effects of such incapacitation are not so far-reaching because the justification for such a decision is only the need in managing the affairs of such a person[74]. It is therefore obvious, due to the differences in the prerequisites, that the same person cannot be partially and fully incapacitated at the same time. A minor who has reached the age of 13 cannot be partially incapacitated at all because he or she does not have full capacity for legal acts. A curatorship shall be established for a partially incapacitated person. Therefore, the legal institutions of guardianship and curatorship cannot be applied to the same person at the same time.

Bearing in mind that full incapacitation is more far-reaching than partial incapacitation (because in the first case the person requiring assistance is not able to direct his or her behaviour at all), it should be noted that both institutions constitute a measure of last resort. The Supreme Court in its decision of 8 January 1966, II CR 412/65, OSNC 1966, no. 10, item 170 indicated that even if both prerequisites for full incapacitation are met, the court is not obliged to pronounce that measure. The court ruling in such a case should consider all the circumstances of the case, and above all take into account the interests of the person who is the subject of the application for incapacitation. This applies all the more so to partial incapacitation, which does not interfere so much in the sphere of individual freedom.

With regard to temporary interference in the sphere of individual freedom, it is necessary to point to the institution provided for in Articles 548-551 of the Code of Civil Procedure, which is interim counsel [*doradca tymczasowy*][75]. Pursuant to Art. 548 § 1 of the Code of Civil Procedure, if the application for incapacitation

[73] M. Balwicka-Szczyrba and A. Sylwestrzak, „Art. 13, teza II. 2" [„Art. 13, thesis II"], in M. Balwicka-Szczyrba and A. Sylwestrzak (ed.), *Kodeks cywilny. Komentarz* [*Civil Code. Commentary*], Warszawa, 2022.

[74] M. Balwicka-Szczyrba and A. Sylwestrzak (ed.), „Art. 16, teza I" [„Art. 16, thesis I"], in M. Balw icka-Szczyrba and A. Sylwestrzak (ed.), *Kodeks cywilny. Komentarz* [*Civil Code. Commentary*], War szawa, 2022.

[75] L. Ludwiczak (n 50), 111-119.

concerns an adult, the court may, at the request of a participant in the proceedings or *ex officio*, at the commencement or in the course of the proceedings, appoint an interim counsel for such a person, when it considers it necessary for the protection of that person or property. Before appointing an interim counsel, the person who is the subject of the application for incapacitation must be heard. Pursuant to Art. 549 § 1 of the Code of Civil Procedure, a person for whom an interim counsel has been appointed has limited capacity for legal acts in the same way as a person who is partially incapacitated. The provisions on the curatorship of a partially incapacitated person apply to the interim counsel. The order appointing an interim counsel ceases to have effect as soon as the application for guardianship is resolved in any way: dismissed, rejected, the proceedings are discontinued, or a guardian or curator is appointed for such person as a result of the granting of the application. The court is also obliged to remove interim counsel if the need to further protect the person who is the subject of the application for incapacitation or his or her property has ceased.

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.

When discussing the legal grounds for full incapacitation and the related legal institution of guardianship in more detail, it is necessary to indicate the condition of age (attaining 13 years of age) and the condition of mental illness, mental retardation or other mental disorders, in particular drunkenness or drug addiction. The condition of illness should in turn result in an inability to direct one's own conduct. The indication of other mental disorders "in particular drunkenness and drug addiction" leads to the conclusion that the statutory list in this respect is not closed[76]. It is important to emphasise the close connection between the premise of specific disorders and the effect of being unable to direct one's own conduct. Not every mental illness or other disorder results in such an inability, on the other hand not every incapacity to manage one's own conduct (e.g. wasting money) results from an illness, mental retardation or other disorder. Such an assessment must be made by the adjudicating court, having regard to the individual circumstances of each case[77].

Partial incapacitation and the related legal institution of curatorship, taking into account the condition of age (it may apply only to an adult), essentially differs only in the intensity of the grounds necessary for its adjudication. It is certain that such illness, retardation or other disorders will have a lighter course, as they will

[76] Postanowienie SN z 7.05.1970 r., I CR 176/70, LEX nr 6731 [Order of the Supreme Court of 7.05.1970, I CR 176/70, LEX No. 6731.].

[77] M. Pilich, „Art. 13, teza 6" [„Art. 13, thesis 6"], in J. Gudowski (ed.), *Kodeks cywilny. Komentarz, Tom I. Część ogólna* [*Kodeks cywilny. Komentarz, Tom I. Część ogólna*], Warszawa, 2021.

not lead to a complete inability to direct one's own actions, but only to the necessity for such a person to have assistance in directing one's own actions.

18. Which authority is competent to order the measure?

According to Art. 544 of the Code of Civil Procedure, incapacitation cases fall within the jurisdiction of the regional courts[78] [*sądy okręgowe*], which hear them in a panel of three professional judges. The court of the place of residence of the person who is the subject of the application for incapacitation has jurisdiction in these cases, and in the absence of a place of residence – the court of the place of his or her residence.

It should be pointed out that the jurisdiction of the regional court is one of the few exceptions to the principle of the regional court's jurisdiction in non-court proceedings[79]. Both the jurisdiction of the district court[80] and the composition of three professional judges is certainly justified by the importance of the incapacitation cases, so far reaching into the sphere of citizens' rights and freedoms.

19. Who is entitled to apply for the measure?

Pursuant to Art. 545 § 1 of the Code of Civil Procedure, an application for incapacitation may be submitted by the spouse of the person who is the subject of the application, his or her relatives in a straight line and siblings, as well as his or her statutory representative. In addition, the legitimacy to submit such a request is also held by:

- the public prosecutor, who, pursuant to Art. 7 of the Code of Civil Procedure, may request the initiation of proceedings in any case if, in his or her opinion, the protection of the rule of law, citizens' rights or the public interest so requires;
- The Ombudsman, who, according to Art. 14 (4) of the Law on the Ombudsman[81], may, after examining the case, demand the initiation of proceedings in civil cases under the rights of the public prosecutor.

[78] See footnote n 30.

[79] P. Pruś, „Art. 544, teza 1" [„Art. 544, thesis 1"], in M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom II, art. 478-1217* [*Code of Civil Procedure. Commentary Updated. Volume II, Articles 478-1217*], Warszawa, 2022.

[80] See footnote n 29.

[81] Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich [The Act of 15 July 1987 on the Ombudsman], consolidated text: Journal of Laws 2020, item 627.

The literature rightly emphasizes the importance of the decision of the Supreme Court of June 7, 1965, II CR 148/65, according to which in cases of incapacitation, the person concerned within the meaning of Art. 510 of the Code of Civil Procedure has no legitimacy to apply for incapacitation if he or she does not belong to the group of persons listed in Art. 545 of the Code of Civil Procedure[82].

The law indicates that relatives of the person affected by the application for incapacitation cannot make this application if the person has a statutory representative [*przedstawiciel ustawowy*]. An application for partial incapacitation can be made as early as one year before the person affected by the application for incapacitation comes of age. The submission of a request for incapacitation in bad faith or recklessly is punishable by a fine.

It should be emphasised that there is no doubt in the case law that an application for incapacitation may also be filed by the person who is to be incapacitated. The opinion on the admissibility of such a motion was expressed by the Supreme Court in the decision of 25 May 2018, ref: I CZ 51/18, OSNC 2019/5/61 and in the resolution of 28 September 2016, III CZP 38/16, OSNC 2018/7-8/66.

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?

Pursuant to Art. 547 of the Code of Civil Procedure, the person who is the subject of an application for incapacitation must be heard immediately after the commencement of the proceedings. The hearing should take place in the presence of an expert psychologist and, depending on the state of health of the person to be heard, an expert psychiatrist or neurologist. In order to hear such a person, the court may order that the person be compulsorily brought to the hearing or be heard by a designated judge. The inability to communicate with the person concerned by the application for incapacitation shall be stated in the minutes after hearing the medical expert and the psychologist attending the hearing.

It is pointed out that this provision, introduced in 2007, is an expression of the introduction of greater procedural guarantees and respect for the rights of persons affected by incapacitation cases[83].

The hearing according to the provision is mandatory and should take place immediately after the commencement of the proceedings. The absence of such a

[82] P. Pruś, „Art. 545, teza 1" [„Art. 545, thesis 1"], in M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom II, art. 478-1217* [*Code of Civil Procedure. Commentary Updated. Volume II, Articles 478-1217*], Warszawa, 2022.

[83] A. Górski, „Art. 547, teza 1" [„Art. 547, thesis 1"], in T. Wiśniewski (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom III, art. 506-729* [*Code of Civil Procedure. Commentary. Vol. III, Articles 506-729*], Warszawa, 2021.

hearing constitutes a qualified legal defect and results in the invalidity of the proceedings.

It should also be pointed out that in accordance with Art. 555 of the Code of Civil Procedure, a decision on incapacitation may be made only after a hearing. As indicated in the doctrine, this is justified by the importance of the incapacitation proceedings – the holding of a hearing ensures that the court is directly acquainted with all the evidence before issuing a ruling resolving the merits of the case[84].

21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:

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

The appointment of a guardian or curator for the vulnerable adult precedes a decision in his or her case of full or partial incapacitation. Proceedings in incapacitation cases are governed by the provisions from Art. 552 to Art. 560^1 of the Code of Civil Procedure. First of all, it should be pointed out that if, according to the application, incapacitation is to be declared due to mental illness or mental retardation, the court, even before ordering the delivery of the application, is obliged to request the presentation of a medical certificate issued by a psychiatrist about the mental state of the person who is the subject of the application or a psychologist's opinion about the degree of mental disability of that person.

If the content of the application or the documents attached to it do not substantiate the existence of a mental illness, mental retardation or other mental disorder, the court shall reject the application. Failure to submit the requested certificate, opinion or attestation shall have the same effect, unless it is not possible to submit such documents. By the impossibility of submitting such documents is meant, for example, a situation in which the requested person refuses to undergo any examination[85]. At the same time, it is pointed out that in order to substantiate the existence of grounds for initiating proceedings it is sufficient to present any documents making it possible to assess the grounds constituting the grounds for

[84] A. Partyk and T. Partyk, „Art. 555, teza 2" [„Art. 555, thesis 2"], in O.M. Piaskowska (ed.), *Kodeks postępowania cywilnego. Postępowanie nieprocesowe. Postępowanie w razie zaginięcia lub zniszczenia akt. Postępowanie zabezpieczające. Komentarz* [*Code of Civil Procedure. Non-Procedural Proceedings. Proceedings in Case of Lost or Destroyed Files. Collateral Proceedings. Commentary*], Warszawa, 2022.

[85] P. Pruś, "Art. 552, teza 5" [„Art. 552, thesis 5"], in M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom II, art. 478-1217* [*Code of Civil Procedure. Commentary Updated. Volume II, Articles 478-1217*], Warszawa, 2022.

the application, it is not required that they be drawn up by a medical expert (see decision of the Supreme Court of 5.11.1970, II CZ 431/70, LEX no. 6815).

Another obligatory element of the incapacitation proceedings is an examination of the requested person by an expert psychiatrist or neurologist, as well as a psychologist. The opinion, in addition to assessing the state of mental health, mental disorders or mental development of the examined person, should include an assessment of the contractual ability of the requested person's, his or her ability to independently manage his or her own proceedings and conduct his or her affairs, taking into account the conduct and behaviour of that person (Art. 553 of the Code of Civil Procedure).

If, on the basis of the opinion of two medical experts, the court deems it necessary, it may order that the requested person be placed under observation in a medical facility for a period of no more than six weeks. In exceptional cases, this period may be extended to three months. The decision ordering the placement may be appealed against. Before issuing it, the court is obliged to hear the participants in the proceedings.

Article 554^1 of the Code of Civil Procedure sets out the general purpose of the evidentiary proceedings, which should be to establish the health, personal, professional and property situation of the requested person, as well as to establish the type of affairs that need to be managed by that person and the manner in which his or her living needs are met. The court may oblige persons in property cohabitation with the person to submit a list of property belonging to that person and to make a promise.

A hearing is mandatory in an incapacitation case. The court may, however, dispense with service of court letters and summonses on the person concerned or with a hearing of that person if it considers it inadvisable in view of that person's state of health as determined by expert opinions. There is thus a clear exception to the obligation to hear the person who is the subject of an application for incapacitation, but it must be on the basis of expert opinions indicating that it is not possible to hear the person or that there is a risk that the person's health may deteriorate. In this case, however, the court must appoint a curator to protect the rights of the requested person during the proceedings. Refraining from hearing the person affected by the application for incapacitation does not include an obligatory hearing referred to in Art. 547 of the Code of Civil Procedure.

Pursuant to Art. 557 of the Code of Civil Procedure, in the order on incapacitation the court shall decide whether the incapacitation is full or partial and for what reason it is ordered.

The court will revoke the incapacitation when the reasons for which it was pronounced cease to exist. It may also be revoked *ex officio*. If the ward's state of health improves, full incapacitation may also be changed to partial incapacitation and, conversely, if the state of health deteriorates, partial incapacitation may be changed to full incapacitation (Art. 559 of the Code of Civil Procedure).

An application for the revocation or modification of the incapacitation may be submitted by the incapacitated person. He or she is also entitled to appeal against orders on incapacitation, also when an interim counsel or curator has been appointed for him or her during the proceedings.

It should also be pointed out that according to Art. 560^1 of the Code of Civil Procedure, in cases of incapacitation, revocation and modification of incapacitation, the court may appoint an advocate [*adwokat*] or an attorney at law [*radca prawny*] *ex officio* for the person who is the subject of the application for incapacitation or the incapacitated person, even without the person's application, if the person is incapable of filing an application due to his or her mental health condition and the court deems the participation of an advocate or an attorney at law in the case necessary. It is worth noting the decision of the Supreme Court of 9 October 2014, ref. no. IV CSK 296/14, LEX no. 1521321 according to which the mere fact of mental illness of a person who is the subject of an application for incapacitation is not sufficient to determine the court's obligation to appoint an advocate or attorney at law *ex officio*. A case-by-case assessment taking into account the premises set out in Article 560^1 of the Code of Civil Procedure is necessary.

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

There is no register of incapacitated persons in the Polish legal system, so it is possible for such a person to enter into a civil law contract. However, such a contract will of course be legally ineffective.

In order to find out whether incapacitation proceedings are pending against a person, it is possible to ask the district court[86] of the person's place of residence. If you know the case number, you can also request a copy of the decision.

Notwithstanding the above, it is worth noting that pursuant to Art. 558 of the Code of Civil Procedure, the court that has ruled on incapacitation is obliged to send *ex officio* to the guardianship court a copy of the final decision in which it ruled on incapacitation. If, on the other hand, the application for incapacitation is dismissed, the court notifies the guardianship court of the need to appoint a curator for the disabled person.

The court with the aforementioned duty will be the court which has decided the case. Thus, it may be the regional court[87] in the event that the decision of that court becomes final, or the court of appeal in the event that the appeal of a party to the proceedings is decided. Finally, it may also be the Supreme Court, in the

[86] See footnote n 29.
[87] See footnote n 30.

case of resolving a cassation appeal pursuant to Art. 398^{16} of the Code of Civil Procedure (substantive law violation grounds).

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

Both guardian and curator are appointed not by the court that issued the fully or the partial incapacitation order, but by the guardianship court. From this follows the previously mentioned obligation of the court deciding on the merits of the incapacitation to send a final copy of the order to the guardianship court.

When discussing the issue of a guardian appointed for a person who is completely incapacitated, it is necessary to refer to Art. 175 of the Family and Guardianship Code, according to which the provisions on the guardianship of a minor shall apply to the guardianship of a person who is completely incapacitated, subject to the provisions of Section II of the Family and Guardianship Code.

Bearing in mind the abovementioned rule, it is necessary to refer to Art. 176 of the Family and Guardianship Code, according to which, if the welfare of the person under guardianship does not prevent it, the guardian of an incapacitated person should be appointed first and foremost his or her spouse, and in the absence of the latter – his or her father or mother.

It is possible that the persons appointed as guardians in the first instance, i.e. the spouse or parents, cannot become guardians due to the occurrence of one of the reasons set out in Art. 148 of Family and Guardianship Code excluding the capacity to be a guardian. In the first instance, a person who does not have full capacity for legal acts or who has been deprived of public rights cannot be appointed a guardian (Art. 148 § 1 of the Family and Guardianship Code). In addition

to the aforementioned obstacle, a person who has been deprived of parental authority or has been convicted of an offence against sexual freedom or decency or an intentional offence involving violence against a person or an offence committed to the detriment of a minor or in cooperation with a minor cannot be appointed a guardian of a minor, or a person who has been ordered to refrain from carrying out activities related to the upbringing, treatment, education or care of minors, or an obligation to refrain from residing in specific environments or places, a prohibition on contacting specific persons or a prohibition on leaving a specific place of residence without the court's consent (Art. 148 § 1a of the Family and Guardianship Code). Finally, a guardian may also not be appointed in respect of whom there is a probability that he or she will not properly fulfil the duties of a guardian (Art. 148 § 2 of the Family and Guardianship Code).

If the spouse or parents of the incapacitated person are subject to the obstacles described in Art. 148 of the Family and Guardianship Code, then pursuant to Art. 149 § 2 of the Family and Guardianship Code the guardian should come from the circle of relatives or other persons close to the ward or his or her parents (Art. 149 § 2 of the Family and Guardianship Code).

When the persons indicated in Art. 149 § 2 of the Family and Guardianship Code are also missing pursuant to Art. 149 § 3 of the Family and Guardianship Code the guardianship court shall request the designation of a person to whom guardianship could be entrusted to the competent organisational unit of social assistance or to the social organisation to which the custody of minors belongs, and if the person under care is in an educational institution or another similar institution, in a correctional institution or in a shelter for minors, the court may also request this institution or this institution or shelter.

It should be pointed out that pursuant to Art. 146 of the Family and Guardianship Code, joint custody of a child may be entrusted by the court only to spouses. Bearing in mind the aforementioned rule, it should be concluded that joint custody of a fully incapacitated adult is not possible.

On the other hand, pursuant to Art. 152 of the Family and Guardianship Code, anyone whom the guardianship court appoints as guardian is obliged to take custody. For important reasons, the guardianship court may exempt from this obligation. Assumption of guardianship is effected by taking an oath before the guardianship court. The guardian should assume his or her duties immediately. The principle of the duty to assume guardianship is an expression of a civil and legal obligation triggered by a constitutive court decision.

It is argued in the case law that the state of health is not a reason justifying releasing a legal guardian from exercising his or her function in a situation where the assessment of the totality of the factual circumstances leads to the conclusion that the illness does not prevent the guardian from functioning properly and performing activities related to work or caring for the fully incapacitated person (decision of the District Court in Człuchów of 3 March 2020 ref. no.: III RNs 63/19, LEX no. 3007767). A different view is presented in the literature, where a sudden illness, an accident or even the occurrence of special circumstances in which the

person appointed as a guardian expresses a definite unwillingness to undertake care are indicated as special circumstances justifying the release of the guardian from the duty of care[88].

A partially incapacitated person shall be appointed a curator. Pursuant to Art. 178 § 2 of the Family and Guardianship Code, to the extent not regulated by the provisions of Section III of the Family and Guardianship Code, the provisions on guardianship shall apply to curatorship accordingly. Given the fundamental differences between the two institutions, as a rule, the provisions on absolute and relative obstacles to the appointment of a person as guardian will therefore apply.

Pursuant to the regulation contained in Art. 181 of the Code of Civil Procedure, the curator of an incapacitated person is appointed to represent him or her and to manage his or her property only if the guardianship court so decides.

Pursuant to Art. 604 of the Code of Civil Procedure, the scope of the curator's powers shall be determined by the court in a certificate issued. It should be pointed out that there is a legal doubt – if the guardianship court does not authorise the curator to represent the incapacitated person or to manage his or her property, whether the curator is authorised to consent to the execution of a legal act by a person limited in capacity for legal acts and whether he or she is authorised to represent such a person in court proceedings on the aforementioned issues. The Supreme Court has resolved both of these issues. In the decision of the Supreme Court of 30.09.1977, III CRN 132/77, OSNC 1978/11, item 204 it was indicated that the curator is authorised to consent to the incapacitated person's assumption of obligations or to the disposition of his or her right, even if the guardianship court's decision does not contain authorisation for the above-mentioned matters. As the Supreme Court pointed out: "To take a different position would lead to a situation where, on the one hand, a partially incapacitated person could not independently incur obligations or dispose of his or her right and, on the other hand, there would be no person who could consent to these actions". Also in the same decision, the Supreme Court indicated that if the certificate for the curator does not contain the authority to represent the incapacitated person before the court in matters arising from actions that the person cannot perform independently, the curator is entitled to represent the person before the court.

Finally, it should be pointed out that the guardianship court exercises supervision over the exercise of the guardianship by familiarising itself on an ongoing basis with the guardian's activities and giving him or her instructions and directions. It may also demand explanations from the guardian on all matters falling within the scope of the guardianship and the production of documents relating to the guardianship (Art. 156 of the Family and Guardianship Code). Pursuant to Art. 169 § 2 of the Family and Guardianship Code, the guardianship court will dismiss

[88] L. Kociucki, "Art. 152, teza 22" [„Art. 152, thesis 22"], in K. Osajda, M. Domański and J. Słyk (ed.), *Kodeks Rodzinny i Opiekuńczy. Komentarz* [*Family and Guardianship Code. Commentary*], Warszawa, 2022.

the guardian for, inter alia, committing acts or negligence by the guardian which violate the welfare of the person under guardianship.

During the measure

Legal effects of the measure

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

The 1964 Civil Code[89]

Article 12
Individuals who have not attained thirteen years of age and persons fully legally incapacitated do not have capacity for legal acts.

Article 13
§ 2. A guardian is appointed for a fully incapacitated person unless the person is still under parental authority.

Article 14
§ 1. A legal act performed by a person who does not have capacity for legal acts is invalid.
§ 2. However, if a person who does not have capacity for legal acts executes a contract of a type commonly executed in minor current day-to-day matters, this contract becomes valid the moment it is performed unless it causes serious harm to the person who does not have capacity for legal acts.

Article 15
Minors who have attained thirteen years of age and persons partially legally incapacitated have limited capacity for legal acts.

Article 16
§ 2. A curator is appointed for an individual partially legally incapacitated.

Article 17
Subject to the exceptions provided for by the law, to be valid, a legal act whereby a person with limited capacity for legal acts assumes an obligation or disposes of his right requires the consent of his statutory representative.

Article 18
§ 1. The validity of a contract executed by a person with limited capacity for legal acts without the required consent of his statutory representative depends on the contract being ratified by that representative.

[89] Translation of individual articles in accordance with: *The Civil Code. Kodeks cywilny (Bilingual Edition. Wydanie dwujęzyczne)*, transl. E. Kucharska, Warszawa, 2015.

§ 2. A person with limited capacity for legal acts may ratify the contract himself upon acquiring full capacity for legal acts.
§ 3. A party who has executed a contact with a person with limited capacity for legal acts cannot plead lack of consent of the statutory representative. It may, however, set that representative an appropriate date by which to ratify the contract; it becomes free when this date passes to no effect.

Article 19
If a person with limited capacity for legal acts performs a unilateral legal act for which the law requires the consent of the statutory representative, such act is invalid.

Adults under guardianship [*opieka*] do not have the right to conclude any legal acts and any legal action they take is invalid[90]. This applies to unilateral and bilateral legal acts, disposing and binding. They are absolutely invalid as they cannot be validated under any circumstances. Only transactions of everyday life are valid, if they are not harmful for the ward, such as buying basic food products. It is possible for a person without capacity for legal acts to conclude certain uncomplicated contracts which are of the basic nature of everyday life. Actions in this scope performed by a person without capacity for legal acts become valid if four conditions are met jointly, namely:

- a person without capacity for legal acts has concluded a contract,
- this contract belongs to contracts commonly concluded in minor everyday matters,
- the contract has been performed,
- there is no case of gross harm to an incapable person.

With regard to an incapacitated person, the criterion of gross harm should be understood broadly, because such a person does not develop his or her skills and does not gain more experience through unsuccessful transactions, on the contrary – he or she is an easy victim of an unreliable contractor. For this reason, it is necessary to support the broad protection of the financial interest of such a person, and the greater comfort of his or her existence obtained in this way is also the personal good of such a person, worthy of protection.

Legally, the ward under guardianship cannot make any personal decisions. Loss of capacity for legal acts, caused by complete incapacitation, continues despite regaining mental capacity, until the court revokes that incapacitation. A person without capacity for legal acts also lacks procedural capacity. The ward is deemed incompetent to sign an employment contract, but the law does not prohibit a person under guardianship from becoming an employee. It seems that the guardian [*opiekun*] can sign the employment contract on behalf of the ward, although opinions on this issue are divided. Also if an employee is placed under guardianship the employment contract is still valid, but it is unclear how the employer can enforce the fulfilment of the employee's duties.

[90] L. Ludwiczak (n 50), 44-47.

The fact of incapacitation is not public, because it is not subject to e.g. disclosure in the personal data of the incapacitated person, contained in the ID card, or it is not subject to entry in the land and mortgage register of real estate owned by such a person. This causes many times to harm the potential contractors of such a person, who has no knowledge about it. It is, however, a consequence of the principle adopted in the jurisprudence that the sole purpose of incapacitation is not the possible protection of other persons, but only the incapacitated person himself.

Article 20
A person with limited capacity for legal acts may, without the consent of his statutory representative, execute contracts of a type commonly executed in minor day-to-day matters.

Article 21
A person with limited capacity for legal acts may, without the consent of his statutory representative, dispose of his earnings unless the guardianship court rules otherwise for good cause.

Article 22
If the statutory representative of a person with limited capacity for legal acts gives him certain specific property items for unrestricted use, that person acquires full capacity for legal acts concerning these property items. Legal acts for which the consent of the statutory representative is, according to the law, insufficient constitute an exception.

A person under curatorship [*kuratela*] can carry out certain transactions relating to everyday life and administer his or her property and income without the agreement of the curator [*kurator*][91]. The person has the right to be employed and to sign an employment contract. However, if employment is harmful for the ward, the curator with the agreement of the guardianship court [*sąd opiekuńczy*] has the right to terminate employment.

Article 100
The fact that the proxy is limited in capacity for legal acts does not affect the validity of the act performed by him on behalf of the principal. A person with limited capacity for legal acts may be appointed as a proxy and then the actions performed by him or her on behalf of the principal are valid and effective.

A person without capacity for legal acts may not be a proxy, however, a person with limited capacity for legal acts may become a proxy.

Article 122
§ 1. The limitation period in relation to a person who does not have full capacity for legal acts may not end earlier than two years from the appointment of a legal representative for it or the cessation of the cause of its establishment.

[91] L. Ludwiczak (n 50), 51-54.

§ 2. If the limitation period is less than two years, its period shall run from the date of appointment of the legal representative or from the date on which the cause of its establishment ceased to exist.
§ 3. The above provisions shall apply mutatis mutandis to the limitation period against a person for whom there is a basis for his full incapacitation.

The institution of suspending the end of the limitation [*przedawnienie*] period protects a person deprived of capacity for legal acts or limited in it, without a statutory representative, against the limitation of the claim, when he cannot take legal or procedural steps in a timely manner that will interrupt the limitation period, and thus prevent the above-mentioned effect resulting from under the law.

Article 944
§ 1. Only a person with full capacity for legal acts can make and revoke a will.
§ 2. A will cannot be made or revoked by a representative.

Lack of capacity for legal acts results in the inability to draw up or revoke a will, and such action may not be performed by a statutory representative.

Article 1032
§ 2. An heir who has accepted an inheritance with the benefit of inventory and who, when paying certain inheritance debts, knew or, with due diligence, could have known of the existence of other inheritance debts, is liable for those debts over and above the value of the active state of the inheritance, but only to the extent that he would have been obliged to satisfy them if he had duly paid all the inheritance debts. This shall not apply to an heir lacking full capacity for legal acts or to an heir in respect of whom there are grounds for his incapacitation.

It does not seem appropriate to assume that the lack of full capacity for legal acts or the existence of grounds for a ruling of incapacitation should occur at the time of opening the estate. Although the moment of the testator's death is of decisive importance for the emergence of many significant legal consequences (such as the determination of the circle of heirs or determination of the value of inherited assets), the purposeful interpretation of Art. 1032 § 2 supports the assumption that the lack of full capacity for legal acts or the existence of grounds for incapacitation of the heir should occur at the time of payment of his inheritance debts.

The 1974 Labour Code

Article 22
§ 3. A person with limited capacity for legal acts may enter into an employment relationship and perform legal actions relating to this relationship without the consent of the statutory representative. However, if the employment relationship is contrary to the good of that person, the statutory representative may terminate the employment relationship with the consent of the guardianship court.

The dominant view is that people who do not have capacity for legal acts cannot be employees because they do not have capacity for legal acts. According

to the arguments cited by the Supreme Court (Order of the Supreme Court of November 22, 1979, III PZ 7/79), a contract concluded by a person who does not have capacity for legal acts is absolutely invalid and, despite appearances, consequently does not have the intended legal effect.

The dominant view is also that a person with limited capacity for legal acts may enter into an employment relationship and perform legal actions relating to this relationship without the consent of the statutory representative. With regard to the obligating act, which is the conclusion of an employment relationship, the law does not require the consent of the statutory representative, while the declaration of will of a person with limited capacity for legal acts under labour law is treated as a complete act. The limitation of the abilities of this person becomes apparent only in the possibility of termination of the employment relationship by their statutory representative with the permission of the guardianship court, if further employment is contrary to the employee's welfare. Therefore, this limitation does not include the modification of the content of the employment relationship.

The 1964 Family and Guardianship Code

Article 11
§ 1. A fully incapacitated person may not enter into marriage.
§ 2. Annulment of marriage due to incapacitation may be requested by either of the spouses.
§ 3. A marriage cannot be annulled due to incapacitation if the incapacitation has been revoked.

Article 12
§ 1. A person suffering from mental illness or mental retardation may not enter into marriage. However, if the state of health or mind of such a person does not threaten the marriage or the health of future offspring and if the person has not been fully incapacitated, the court may allow him to enter into marriage.
§ 2. Annulment of the marriage due to mental illness or mental retardation of one of the spouses may be requested by either of the spouses.
§ 3. The marriage cannot be annulled due to the mental illness of one of the spouses after the illness has ceased.

A person with full legal incapacity for legal acts may not marry. If, however, the psychological or physical condition of the person does not jeopardise the marriage or the health of any future offspring, the court may authorise the marriage. A disabled person of marriageable age whose disability has been caused by mental illness or mental retardation may not marry unless the court authorises the marriage by concluding that the health or mental condition of the person concerned does not endanger either the marriage or the health of any future offspring and provided that the person has not been fully legally incapacitated.

Article 53
§ 1. Separation of property arises by the power of law, in the event of incapacitation or bankruptcy of one of the spouses.

§ 2. In the event of the revocation of incapacitation or the bankruptcy proceedings are discontinued, completed or revoked, a statutory property regime arises between the spouses.

If the legally incapacitated person is married, the result of the incapacitation (full or partial) is the creation of an *ex lege* separation of property [*rozdzielność majątkowa*] between him and the spouse.

Article 94
§ 1. If one of the parents is dead or does not have full capacity for legal acts, the other parent is entitled to parental authority. The same applies when one of the parents has been deprived of parental authority or when his parental authority has been suspended.
§ 3. If neither of the parents has parental authority or if the parents are unknown, guardianship is established for the child.

Parents with limited capacity for legal acts do not have parental authority [*władza rodzicielska*].

Article 114[1]
§ 1. A person with full capacity for legal acts may adopt if his or her personal qualifications justify the belief that he or she will duly fulfil the duties of an adopter and he or she has a qualifying opinion and a certificate of completion of a training course organised by an adoption centre referred to in the provisions on family support and the foster care system, unless this obligation does not apply to him/her

An incapacitated person (fully or partially) cannot adopt a child.

Article 119
§ 1. Adoption requires the consent of the adoptee's parents, unless they have been deprived of parental authority or are unknown, or communication with them encounters obstacles that are difficult to overcome.
§ 2. The guardianship court may, due to special circumstances, order adoption despite the lack of consent of parents whose capacity for legal acts is limited, if the refusal to consent to adoption is obviously contrary to the best interests of the child.

The Supreme Court assumes that consent of the adoptee's parents is a purely personal act and may be expressed by a parent with limited capacity for legal acts, regardless of the reason for this restriction (Resolution of the Supreme Court of December 13, 1994, III CZP 159/94; order of the Supreme Court of October 25, 1983, III CRN 234/83). Therefore, it is unacceptable for a representative to give his consent – both by a statutory representative and a proxy.
Article 148

§ 1. A person who does not have full capacity for legal acts or has been deprived of public rights cannot be appointed guardian.

As soon as the ruling on incapacitation becomes legally binding, a legal obstacle to the provision of guardianship arises, which leads to the need for the guardian to be released by the court by the power of the law. A person with limited capacity for legal acts cannot be appointed a guardian.

The 1997 Constitution of the Republic of Poland

Article 60
Polish citizens enjoying full public rights have the right of access to the public service on equal terms.

Article 62
2. The right to participate in a referendum and the right to elect are not granted to persons who are legally incapacitated or deprived of public or electoral rights.

Article 99
1. A Polish citizen who has the right to elect, who turns 21 on the day of elections at the latest, may be elected to the Sejm.
2. A Polish citizen who has the right to elect, who turns 30 on the day of elections at the latest, may be elected to the Senat.

Article 127
3. A Polish citizen who turns 35 on the day of the elections at the latest and enjoys full electoral rights to the Sejm may be elected President of the Republic. A candidate is proposed by at least 100,000 citizens eligible to elect to the Sejm.

A completely or partially incapacitated person does not have the right to vote, cannot run for the office of president, has no access to the civil service and cannot exercise the right of universal legislative initiative.

Powers and duties of the representatives/support person

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

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

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

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

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

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

The 1964 Civil Code

Article 17
Subject to the exceptions provided for by law, the consent of the statutory representative shall be required for the validity of a legal act by which a person with limited capacity for legal acts assumes an obligation or disposes of his or her right.

An obligating activity is an activity that consists in the creation of a person who obliges him or her to perform a specific benefit, i.e. increasing the liabilities of that person. On the other hand, a disposing activity is an activity whose purpose and direct effect is an adverse change in the party's already existing property law in the form of transfer, encumbrance or abolition of this right. Therefore, these are activities such as: transfer of ownership of a thing, transfer of receivables, disposal of an inheritance, establishment of a limited property right, abandoning an item with the intention of disposing of it, renouncing a limited property right, exemption from debt and others. A special type of activity are activities with a double effect, i.e. obligatory activities, for example contracts such as a contract of sale, exchange, donation obliging to transfer the ownership of an item as to its marked identity, transfer ownership to the buyer.

As for the activities for which the law does not require the consent of the statutory representative, the possibility of performing them is available either to a person with limited capacity for legal acts, or may be performed by the representative himself on general terms. If the representative undertakes legal actions exceeding the scope of ordinary management of the property of a person with limited capacity for legal acts, he or she is obliged to obtain the consent of the guardianship court. A legal act relating to the property of such a person, performed by a statutory representative without the prior consent of the guardianship court, is null and void.

Article 21
A person limited in capacity for legal acts may dispose of his or her earnings without the consent of the statutory representative, unless the guardianship court decides otherwise for important reasons.

Disposal of earnings by a person limited in capacity for legal acts is not subject to control by his statutory representative. The possibility of disposing of earnings by a person with limited capacity for legal acts without the consent of the statutory representative does not mean that such a representative should not be interested in the way in which that person disposes of it. If it turns out that he or she is using his or her earnings improperly (e.g. she allocates it to alcohol or

drugs), the representative can always apply to the guardianship court for a decision specifying how to dispose of the funds obtained. Such a ruling may consist in authorizing the statutory representative to collect remuneration for a person with limited capacity for legal acts and to issue him or her only part of this remuneration for free use.

Article 63
§ 1. If the consent of a third party is required to perform a legal act, that person may also consent before the declaration is submitted by the persons performing the activities or after its submission. The consent expressed after the declaration has been submitted has retroactive effect from its date.
§ 2. If a specific form is required for the validity of a legal transaction, the declaration including the consent of the third party should be submitted in the same form.

The consent of the statutory representative to perform a legal action by a person with limited capacity for legal acts can be expressed before or after a legal act performed by that person. This requirement is justified by the need to protect the interest of a person limited in capacity for legal acts who performs legal acts, or the need to protect the interest of a third party.

Article 95
§ 1. Subject to the exceptions provided for by law or arising from the nature of the legal transaction, a legal transaction may be performed by a representative.
§ 2. A legal act performed by a representative within the scope of his authorization entails direct consequences for the represented one.

Representation enables persons deprived of capacity for legal acts or persons with limited capacity for legal acts to appear in legal transactions, and also exempts persons with full capacity for legal acts from the need to personally participate in these activities.

Article 901
§ 1. The representative of the incapacitated person may request the termination of the donation contract made by that person before incapacitation, if the donation is excessive due to the value of the benefit and the lack of legitimate motives.
§ 2. The donation agreement may not be terminated after two years from its performance.

Article 930
§ 1. The heir cannot be considered unworthy if the testator has forgiven him.
§ 2. If the testator did not have capacity for legal acts at the time of forgiveness, forgiveness is effective when it occurred with sufficient discernment.

Article 1010
§ 1. The testator may not disinherit the entitled to a reserved share if he has forgiven him.

§ 2. If the testator did not have capacity for legal acts at the time of forgiveness, forgiveness is effective when it occurred with sufficient discernment.

Not every legal act may be performed by a representative. A statutory representative may act on behalf of the represented person, subject to exceptions in the act provided for or resulting from the nature of the legal transaction. These limitations are therefore an obstacle to activities of a strictly personal nature. Therefore, the representative may not draw up or revoke a will [*testament*] under the name of the represented person, nor may he adopt [*przysposobienie*] a child or recognize the paternity [*ojcostwo*] of a child, representing a person without capacity for legal acts. He also cannot consent to the recognition of the child's paternity by a fully incapacitated person, as well as an effective act of forgiveness [*przebaczenie*].

The 1964 Family and Guardianship Code

Article 64
§ 1. If the mother's husband has been fully incapacitated due to a mental illness or another type of mental disorder, which he fell upon within the time limit for bringing an action for denial of paternity, the action may be brought by his statutory representative. In this case, the time limit for bringing an action is one year from the date of appointment of the statutory representative, and if the statutory representative found out that the child did not come from the mother's husband, after that time – one year from the date on which he learned about this circumstance.
§ 2. If the statutory representative of a completely incapacitated husband has not brought an action for denial of paternity, the husband may bring an action after revoking the incapacitation. In this case, the time limit for bringing an action is one year from the day the incapacitation was revoked, and if the husband learned that the child did not come from him, after that time – one year from the date on which he learned about this circumstance.

After the incapacitation of the child's mother's husband, the right to bring an action for denial of paternity is granted to his statutory representative. The time limit for bringing an action is six months, but the representative's failure to file for denial of paternity does not definitively close the way for the mother's husband to do so later, after the incapacitation has been revoked. The mother's husband, who has been fully incapacitated, will be a party to the trial because he has the judicial capacity. Full incapacitation leads to the deprivation of capacity for legal acts, and thus of procedural capacity.

Article 73
§ 1. Recognition of paternity takes place when the man from whom the child comes declares to the head of the registry office that he is the child's father, and the child's mother confirms at the same time or within three months from the date of the man's declaration that the man is the father of the child.

§ 3. The head of the registry office refuses to accept the declarations necessary for the recognition of paternity, if recognition is inadmissible or if he has doubts as to the child's origin.
§ 4. Recognition of paternity may also take place before the guardianship court, and abroad, also before a Polish consul or a person designated to perform the functions of a consul, if the recognition applies to a child whose both parents or one of them are Polish citizens. The provisions of § 1-3 shall apply accordingly.

Article 77
§ 1. The declaration necessary for the recognition of paternity may be submitted by a person who is sixteen years of age and there are no grounds for full incapacitation.
§ 2. The person referred to in § 1, if he or she does not have full capacity for legal acts, may submit the declaration necessary to recognize paternity only before the guardianship court.

A man with limited capacity for legal acts may recognize a child, but this requires the consent of his statutory representative.

Article 154
The guardian is obliged to perform his or her activities with due diligence, as required by the welfare of the person under guardianship and the social interest.

Article 155
§ 1. The guardian takes care of the person and property under care; he is subject to the supervision of the guardianship court.
§ 2. The provisions on parental authority shall apply mutatis mutandis to guardianship, subject to the following provisions.

In the case of a fully incapacitated person, the provisions on the guardianship over minors shall apply accordingly. Such persons are not subject to foster care, and therefore the scope of the guardian's duties is wider than in the case of minors.

Article 162
§ 1. The guardianship court shall grant the guardian for the conducting guardianship at his request an appropriate periodic remuneration or a one-off remuneration on the day of cessation of guardianship or release him from it.
§ 2. Remuneration is not awarded if the guardian's workload is insignificant or if the guardianship is related to the performance of a foster family or if it complies with the principles of social coexistence.
§ 3. The remuneration is covered by the income or property of the person for whom guardianship has been established, and if that person does not have adequate income or property, the remuneration is covered by public funds pursuant to the provisions on social assistance.

With regard to the guardians of fully incapacitated people, the above provision will apply directly. Such remuneration is awarded by the guardianship

court, taking into account the above-mentioned criteria. In the first instance, the remuneration should be covered from the income or property of the person for whom care has been established. If the above solution is impossible, the guardian may claim remuneration from the social welfare body.

Article 175
The provisions on guardianship over minors shall apply mutatis mutandis to the guardianship over fully incapacitated person, in compliance with the provisions below.

In the resolution of 17 May 2018 (III CZP 11/18), the Supreme Court indicated the following differences between guardianship over minor and guardianship over a fully incapacitated person. The first is an institution of family law, and the second of civil law. The guardian of an adult person does not have to take care of their upbringing, and the main goal of their care is to represent the sphere of personal rights and interests, and to care for their health. In principle, guardianship over a legally incapacitated adult lasts for life. On the other hand, guardianship over a minor is equivalent to parental authority.

Article 178
§ 1. The curator is appointed in the cases provided for in the law.
§ 2. To the extent not regulated by the provisions that provide for the appointment of a curator, the provisions on guardianship shall apply mutatis mutandis to curatorship, in compliance with the provisions below.

The legislator did not define the concept of "curatorship", but limited himself to a general statement that it is established in the cases provided for in the law. This was dictated by the far-reaching differentiation of the various types of curatorship. In addition, curatorship is provided for not only in the provisions of the Family and Guardianship Code, but also in the substantive civil law and civil procedure. In the scope of exercising curatorship over persons with limited capacity for legal acts, the legislator referred to the provisions on guardianship.

Article 179
§ 1. The state body which has appointed the curator shall, upon his request, grant him appropriate remuneration for the exercise of curatorship. The remuneration covers the income or property of the person for whom the curator is appointed, and if that person does not have adequate income or property, the remuneration is covered by the person who requested the appointment of a curator.
§ 2. Remuneration is not awarded if the curator workload is insignificant, and the exercise of curatorship complies with the principles of social coexistence.

The legislator introduced the principle according to which, in the first place, the curator's remuneration coincides with the property and income of the person for whom the curator was appointed, and if this is impossible, the remuneration is covered by the person requesting the appointment of a curator. According to the adopted line of jurisprudence, in the case of appointing a curator *ex officio*, if the

person for whom he or she was appointed has no income and property to cover remuneration, it should be covered from public funds.

Article 181
§ 1. The curator of a partially incapacitated person shall be appointed to represent him or her and to administer his or her property only if the guardianship court so decides.

The legislator separated the representation from the administration of the property of a partially incapacitated person. Prima facie, this procedure may indicate that the two concepts are disjoint. The concept of representation refers to legal and procedural acts relating to the person and property of the partially incapacitated person. Property management covers both representation and management of the property. Entrusting property management will most often take place when a partially incapacitated person ran an enterprise or a farm. If the court decides that a curator for an incapacitated person is appointed to represent him or her, then the provisions on guardianship over the person and property of the child will apply accordingly. The curator of the incapacitated person will have to obtain the permission of the guardianship court in all more important matters concerning the person or property of the partially incapacitated person. The prohibition of legal actions "with oneself" will apply. Such a curator is obliged to draw up an inventory of the property of the person under his or her curatorship, as well as to submit reports on conducting the curatorship. Curator for a partially incapacitated person is appointed by the guardianship court.

The 1964 Code of Civil Procedure

Article 554[1]
§ 1. The evidentiary proceedings should determine, first of all, the health, personal, professional and financial situation of the person to whom the petition for incapacitation relates, the type of cases that require this person to be conducted and the manner of satisfying his or her life needs.
§ 2. The court may oblige persons remaining in the home community with the person to whom the petition for incapacitation relates to submit a list of the property belonging to that person and to make an oath. The provisions of Art. 913, 915-917 shall apply mutatis mutandis.

The dominant view in the judicature is that the “conduct of affairs” by a statutory representative should be understood broadly and include not only legal acts, but also factual, not only property, but also personal ones. However, we also encounter the opposite view that from the point of view of the purpose of incapacitation, the party's difficulties in performing actual acts, but only legal ones, should not be taken into account. Therefore, if a person suffering from a mental illness or mental retardation or mental disorder really needs help, the court should take into account the actual scope of cases requiring an appropriate decision. Of course, the court examines this premise in detail, relying on an expert opinion, who should refer in detail to the situation of a specific person, and not to

typical situations occurring in practice. Therefore, this assessment should be made after determining the specific cases for which this assistance is needed, and this is about the presently existing needs, not the future ones. The examination of these needs must result from the findings regarding the health, personal, professional and financial situation of the person to whom the petition for incapacitation relates, the type of cases requiring them to be conducted by that person or the manner of satisfying his or her life needs.

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)?

The 1964 Family and Guardianship Code

Article 146
The guardian is responsible for conducting the guardianship. The court may entrust joint custody of a child only to spouses.

In the case of guardianship, the legislator introduces the principle that it is exercised by one person. Joint care is allowed only if it is provided by the spouses. The provisions on the guardian of a minor apply accordingly to the guardianship over a fully incapacitated person.

As a rule, the legislator also introduces the principle of one-person curatorship. The functional interpretation, however, argues for a different view. There are no obstacles for the court to appoint two curators, if necessary. For example, there are no obstacles, and even it should be considered advisable that the curators of a partially incapacitated person are their parents. Until the age of 18, custody over the person and property of the child results from parental authority, and after the child reaches the age of majority, if the child needs help in running his or her affairs, the guardianship court may partially incapacitate the child and appoint a curator. There are also no obstacles for the role of curator to be performed by parents, or more precisely – for each parent to be appointed a curator. Each of the curators is obliged and entitled to perform their functions; in more important cases, the decision should be made jointly, and in the event of a dispute, the matter is resolved by the guardianship court.

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?

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

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

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

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 1964 Civil Code

Article 121
The limitation period does not start, and the started one is suspended:
(...)
2) as to claims that are due to persons who do not have full capacity for legal acts against persons who conduct guardianship or curatorship – for the duration of guardianship or curatorship by these persons;
(..)

Assessing whether a guardian is properly discharging his or her obligations is essential in assigning him or her blame in the compensation [*odszkodowanie*] process. The person under guardianship may, in fact, pursue claims for compensation for damage caused by improper guardianship. The limitation [*przedawnienie*] period does not start, and the commenced period is suspended as to the claims that are due to persons who do not have full capacity for legal acts against persons who provide guardianship or curatorship – for the duration of guardianship or curatorship by these persons.

Article 426
A minor who has not attained the age of thirteen shall not be liable for the damage caused.

Article 427
A person who, under the law or contract, is obliged to supervise a person whose guilt cannot be read due to age or mental or physical condition, is obliged to compensate the damage caused by that person, unless he or she has fulfilled the supervision obligation or that the damage would have been caused even with careful supervision. This provision also applies to persons exercising, without statutory or contractual obligation, permanent custody over a person who cannot be read due to age or mental or physical condition.

In the case of incapacitated persons, the guardian or curator is obliged to compensate the damage. A person with limited capacity for legal acts may be

liable for damages for his or her actions, if in a given case he or she could be blamed when he or she had an understanding of the effects of his or her behavior. However, it is not possible to attribute discernment to such persons in general, nor to accept the lack of it, but *ad casum* to examine the question of their discernment and guilt.

The 1964 Family and Guardianship Code

Article 164
The claim of the person under guardianship to redress the damage caused by improper guardianship shall expire three years after the cessation of guardianship or the dismissal of the guardian.

Improper behaviour of the guardian in conducting guardianship, consisting in negligent or deliberate action unfavourable to the ward, may lead to damage to the person and property of the person under guardianship. The legislator introduced a limitation period for claims for compensation for damage caused by improper guardianship. The expiry of this period does not expire the obligation, but only the possibility of the debtor raising a plea which will lead to the dismissal of the claim.

Article 165
§ 1. The guardianship court exercises supervision over the exercise of guardianship, becoming acquainted with the activities of the guardian and giving him directions and instructions.
§ 2. The guardianship court may require the guardian to explain all matters within the scope of care and to present documents related to its exercise.

Article 166
§ 1. The guardian is obliged, on dates specified by the guardianship court, at least every year, to submit to this court reports on the person under guardianship and bills from the management of his or her property.
§ 2. If the income from the property does not exceed the probable costs of maintaining and bringing up the person under care, the guardianship court may release the guardian from presenting detailed accounts from the management board; in this case, the guardian will only submit a general estate administration report.

Article 167
§ 1. The guardianship court examines the guardian's reports and accounts in terms of material and accounting, orders their correction and supplementation, if necessary, and decides whether and to what extent it approves the accounts.
§ 2. The approval of the account by the guardianship court does not exclude the guardian's liability for damage caused by improper management of the property.

Article 168

If the guardian does not provide proper guardianship, the guardianship court will issue appropriate orders.

The provision of custody is subject to constant supervision by the guardianship court. The first form of exercising supervision over the guardian consists in getting acquainted with the guardian's activities on an ongoing basis. The above goal is achieved mainly by presenting reports on the person under care and accounts from the management of its assets. Such reports should be submitted at least every year, but the court may oblige the guardian to a higher frequency. The legislator also imposes an obligation on the guardian to draw up an inventory if, after setting the guardianship, the property is acquired by the person under the care. The performance of an action in any more important matter concerning a minor's person or property requires the consent of the guardianship court.

The legislator does not provide a catalogue of orders issued by the guardianship court. There is no obstacle for the court to issue several such orders at the same time. The ordinances cannot only weaken the person's situation by reducing the standards of his or her protection. Guardianship court in the event of failure to implement the issued orders may impose a fine. If the order is executed, the fine still not paid may be remitted. Failure to comply with orders may also lead to the dismissal of the guardian due to negligence that infringes the interests of the guardian.

Article 178
§ 2. In matters not covered by the provisions which provide for the appointment of a guardian, the provisions on guardianship shall apply accordingly to guardianship, in compliance with the following provisions.

Pursuant to the provisions on guardianship, supervision over the activities of the curator is carried out by the guardianship court.

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;
b. unauthorised acts of the adult and of the representative/support person;
c. ill-conceived acts of the adult and of the representative/support person;
d. conflicts of interests
Please consider the position of the adult, contractual parties and third parties.

The 1964 Civil Code

Article 159
§ 1. The guardian cannot represent the persons under his or her care:
1) in legal transactions between these persons;

2) in legal transactions between one of these persons and the guardian or his spouse, descendants, ascendants or siblings, unless the legal action consists in a gratuitous gain for the benefit of the person under care.
§ 2. The above provisions shall apply accordingly in proceedings before a court or other state authority.

In each case in which there is a fully incapacitated person and one or all persons listed in the above provision, the court is obliged to examine whether there is a hypothetical possibility of a conflict of interests between them. In the event of a positive test result, there is an obligation to apply to the guardianship court for the appointment of a curator for a fully incapacitated person. In the above decision, the Supreme Court found that a hypothetical conflict of interest exists in a case for the acquisition of an inheritance conducted with the participation of a completely incapacitated person and one of the above-mentioned persons, if the validity of a will drawn up for the benefit of a fully incapacitated person is questioned. Representing a fully incapacitated person by a guardian, and not a curator, if there is even a hypothetical conflict of interest, leads to the invalidity of the proceedings.

The 1964 Code of Civil Procedure

Article 593
Permits in all important matters relating to the person or property of the person under guardianship are granted by the guardianship court at the request of the guardian. The provision becomes effective upon becoming final and may not be amended or repealed if, on the basis of the authorization, legal effects have arisen in relation to third parties.

The 1964 Family and Guardianship Code

Article 156
The guardian should obtain the permission of the guardianship court in all more important matters concerning the minor's person or property.

Article 160
§ 1. Immediately after taking over guardianship, the guardian is obliged to draw up an inventory of the property of the person under guardianship and present it to the guardianship court. The above provision shall apply mutatis mutandis in the event of the subsequent acquisition of property by a person under guardianship.
§ 2. The guardianship court may release the guardian from the obligation to draw up an inventory, if the property is insignificant.

Article 161
§ 1. The guardianship court may oblige the guardian to deposit valuables, securities and other documents belonging to the person under guardianship. These items cannot be picked up without the permission of the guardianship court.

§ 2. Cash belonging to the person under the guardianship, if it is not needed to satisfy his legitimate needs, should be deposited by the guardian at a banking institution. The guardian may only withdraw the deposited cash with the permission of the guardianship court.

Article 175
The provisions on guardianship over minors shall apply mutatis mutandis to the guardianship over fully incapacitated person, in compliance with the provisions below.

Guardianship over fully incapacitated person is intended to protect the non-property and property interests of that person, because the guardian should obtain the consent of the guardianship court in all important cases concerning the person or property of the incapacitated person. The case law of the Supreme Court provides examples of activities performed by a fully incapacitated guardian, for which the consent of the guardianship court is required. These activities include, among others: the demand to abandon the decision on fault in the divorce case; filing an action for divorce; reaching a settlement; submitting an application for incapacitation of a loved one; sale of the cooperative ownership right to the premises; donation of shares in agricultural real estate and condominiums. In the case of substantive-law activities, the more important matters include activities related to real estate. In any case, the sale or purchase of real estate by the guardian of the fully incapacitated person requires the consent of the guardianship court. A more important matter is also the sale of valuable assets belonging to the property of a fully incapacitated person.

Guardianship over incapacitated person cannot lead to the disposal of the person's property, which will be combined with the enrichment of the guardian. It may also happen that the guardian will undertake many activities, objectively speaking of ordinary management, which in the long run are aimed at distributing the property remaining under his care. In this case, the guardianship court may request explanations from the guardian and, if necessary, will release the guardian from care.

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.

The 1964 Family and Guardianship Code

Article 177
The guardianship of a fully incapacitated person ceases by the power of law if the guardianship is revoked or the incapacitation is changed from full to the partial one.

In principle, guardianship over a legally incapacitated adult lasts for life. The guardianship over an incapacitated person is completely terminated by the power of law:

- in the event of the revocation of incapacitation,
- change from full to partial incapacitation,
- death of the incapacitated person.

The court revokes incapacitation when it finds that the reasons for which it was issued have ceased to exist. An application to revoke or amend a ruling on legal incapacitation may be submitted by:

- the spouse of the person to whom the petition for incapacitation relates,
- relatives in a straight line and siblings, with the proviso that relatives of the person to whom the petition for incapacitation relates may not submit this petition if that person has a statutory representative,
- the statutory representative of the incapacitated person,
- the public prosecutor,
- the Ombudsman,
- the incapacitated person.

Proceedings for the revocation of incapacitation may also be initiated *ex officio*, which follows directly from Art. 559 § 1 of the Code of Civil Procedure. This means that the court may at any time examine the circumstances and facts on the basis of which the incapacitation was declared, which it may do both on its own initiative and on the basis of a notification of a change in the facts.
Article 180
§ 1. Subject to the exceptions provided for in the law, the state authority which established the curator shall revoke the curatorship when its purpose is removed.
§ 2. If the curator has been appointed to deal with a particular case, the curatorship ceases upon the completion of this case.

Article 181
§ 2. If the incapacitation is revoked, the curatorship shall cease by the power of law.

The court revokes partial incapacitation when the reasons for which it was issued no longer apply, the repeal may also be made *ex officio*. Analogous to full incapacitation, the court may therefore examine and assess at any time the facts on the basis of which it declared partial incapacitation. Similarly to the provisions on guardianship, curatorship ceases as a result of revoking partial incapacitation, changing partial incapacitation to full incapacitation, and the death of a person under curatorship.

The 1964 Code of Civil Procedure
Article 559

§ 1. The court will revoke the incapacitation when the reasons for which it was issued have ceased to exist; the repeal may also be made ex officio.
§ 2. The court may, in the event of improvement of the mental state of the incapacitated person, change the full incapacitation into a partial incapacitation, and if this condition worsens – change the partial incapacitation into complete incapacitation.
§ 3. The incapacitated person may also apply for the revocation or change of incapacitation.

The ruling of incapacitation may not be for a specified period. It remains in force until it is repealed (or amended). The court will revoke the incapacitation (it may also do so *ex officio*) when the reasons for which it was issued no longer apply.

Article 560
§ 1. The incapacitated person himself or herself is entitled to challenge the order, even when a interim counsel or curator has been appointed.
§ 2. The appeals brought by the person to whom the petition for incapacitation relates, shall not apply to Art. 368. An appellate measure brought by a person to whom a petition for incapacitation relates is not rejected due to failure to remove formal defects.

An incapacitated person may appeal against orders in proceedings concerning his or her incapacitation and may grant a power of attorney in this respect.

Reflection

30. Provide statistical data if available.

According to the data of the Ministry of Justice, in 2017 there were 12,412 people partially incapacitated in Poland, and in 2017 alone, 764 people were partially incapacitated. In 2017, over 14,000 applications for incapacitation were submitted, of which approximately 10,000 concerned full incapacitation. The courts accepted 2/3 of all submitted applications. The statistics show a clear prevalence of full incapacitation over partial incapacitation (from 89% to 92% of granted applications). According to the data of the Ombudsman, in 2019 there were approximately 90,000 fully incapacitated persons in Poland. In 2022, there were approximately 100,000 incapacitated persons living in Poland[92].

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?

[92] M. Kubalski (n 32).

A person can be incapacitated due to mental health problems, mental deficiency or other "mental disorders", particularly alcoholism and drug addiction or if they cannot "control their behaviour". Such vague wording could lead to the abuse of this provision. If the circumstances do not warrant guardianship, but a person needs assistance, he or she can be placed under curatorship and the capacity for legal acts of the person is partially restricted.

In spite of the fact that guardianship is intended to provide legal protection for people with intellectual disabilities, there are often grave breaches of the law that have serious consequences for the ward. The current legal framework does not always ensure recourse to the law when there are serious infringements of the constitutional rights of people with disabilities, who do not receive the support or advice to which they have the right by law. Institutions that have "taken over" the right to defence from people under guardianship often do not fulfil their duties. During court proceedings, too often people with disabilities are not the subjects but the objects of the case.

Research has shown that in most cases the medical diagnosis of a person under guardianship strays from the prescribed standards and there are serious mistakes and failures of procedure. This applies to both initial and final diagnoses. Courts generally prefer full incapacitation, although partial incapacitation is a milder form of legal interference in a person's autonomy and should be preferred. Very often decisions made about people with intellectual disabilities are treated as permanent and final, in spite of the fact that there is a right to seek review.

Full incapacitation very deeply interferes with human freedom in all its aspects. All decisions are made by the guardian, without the participation of the incapacitated person, and only – in more important cases – with the consent of the guardianship court. Therefore, the institution of full incapacitation undoubtedly touches upon the issue of a person's freedom. Incapacitation does not protect a given person from making unfavourable financial or life decisions, nor does it protect the freedoms and rights of other participants in legal and economic transactions against the actions of people who are considered incapable of making rational decisions, because the fact of someone's incapacitation is not known to other market participants. There is no register of persons deprived of capacity for legal acts. It does not result from any documents of marital status, ID card or passport. The fact of incapacitation does not prevent legally incapacitated persons or companies or financial or telecommunications institutions from concluding credit and loan agreements. Although each such contract is legally invalid, it produces effects until it is proved to be invalid. In the event of its invalidity, it leads to the need to return the benefit. Therefore, it is not in the interest of companies to scrupulously check the capacity for legal acts of persons concluding contracts with them. Anyway, it is not possible due to the lack of any form of register.

There is also a systemic problem with finding a candidate for a guardian of an incapacitated person. Only after the person is completely deprived of capacity for legal acts, the proceedings to find a guardian are initiated. This means that between

the court's decision and the appointment of and taking care of a guardian, a person is completely deprived of any protection. It can no longer act in its own interest, and yet there is no person to do it for it. Such periods of protective vacuum can last for months, and sometimes even years, as evidenced by the experience of the Ombudsman. On the other hand, the lack of volunteers for guardians causes appointing them against the will of the candidates. It is about, for example, an employee of a social welfare home where a person with incapacitation is staying.

Moreover, the interests and welfare of the incapacitated person may be endangered as a result of transferring to the guardian the decisions regarding the given person and their property. The supervision of the guardianship court is usually based on the receipt of a general and schematic report of the guardian, usually repeating the same information every year. Guardians often do not ask the court for permission in all important cases, and this neglect does not come to light, e.g. due to the lack of access to the incapacitated person.

In none of the previous cases, the European Court of Human Rights has recognized incapacitation as an institution incompatible with the Convention on Human Rights. However, it has already recognized that the proportionality of incapacitation is questionable when the state authorities have at their disposal other means, more adapted to the situation of the person.

Taking the above reservations into account, it is worth mentioning the institutional change postulated by the Ombudsman. According to office of Ombudsman, the institution of incapacitation should be abolished and replaced with a system of supported decision-making.

SECTION IV – VOLUNTARY MEASURES

Overview

Polish legal system does not provide specific voluntary measures supporting legal protection and empowerment of vulnerable adults. However, it is worth mentioning in this context the general institution of power of attorney provided for in Art. 95 of the Civil Code and used in practice. A person with special needs can make use of it, so that the legal act may be performed through a representative within the scope of the authorisation. The attorney has no obligation to act on behalf of the principal, but only the power to do so. It does not include the ability to draw up and revoke a will.

32. **What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.**[93]

Please answer the following questions [33 - 47] for each (if there are several) voluntary measure.

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.**

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.**

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)?**

Start of the measure

Legal grounds and procedure

36. **Who has the capacity to grant the voluntary measure?**

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.**

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?**

[93] 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]).

d. is it necessary to register, give publicity or any other kind of notice of the entry into force of the measure?

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?

During the measure

Legal effects of the measure

40. To what extent is the voluntary measure, and the wishes expressed within it, legally binding?

41. How does the entry into force of the voluntary measure affect the legal capacity of the grantor?

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)?

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)?

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?

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.

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.

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.

Reflection

48. Provide statistical data if available.

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?

SECTION V – *EX LEGE* REPRESENTATION

Overview

50. Does your system have specific provisions for *ex lege* representation of vulnerable adults?

In the Polish legal system, there are no means in practice to act *ex lege* on behalf of an adult. A minor exception in this respect is the possibility provided for in Art. 29 of the Family and Guardianship Code for a spouse to act in matters of ordinary management on behalf of the other spouse if there has been a transient impediment in his or her case and they have remained in cohabitation.

The 1964 Family and Guardianship Code

Article 29

In the event of a temporary impediment affecting one of the cohabiting spouses, the other spouse may act for him or her in matters of ordinary management, and in particular may collect dues accruing to him or her without power of attorney, unless the spouse to whom the impediment relates objects. In relation to third parties, the objection shall be effective if it was known to them.

However, the application of this provision in practice is very limited.

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?**

52. **Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?**

53. **Is it necessary to register, give publicity or give any other kind of notice of the *ex-lege* representation?**

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.**

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. Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.**

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?

57. **Describe how this *ex lege* representation interacts with other measures? Think of subsidiarity**

Safeguards and supervision

58. **Are there any safeguards or supervision regarding *ex lege* representation?**

End of the ex-lege representation

59. Provide a general description of the end of each instance of *ex-lege* representation.

Reflection

60. Provide statistical data if available.

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)?

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?

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.

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?

SECTION VI – OTHER PRIVATE LAW PROVISIONS

65. Do you have any other private law instruments allowing for representation besides *negotiorum gestio*?

The Polish legal system does not provide for other private law instruments enabling representation. Running other people's affairs without a commission is regulated in Art. 752-757 of the Civil Code.

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?

The Polish legal system lacks such provisions.

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

67. Provide an assessment of your system in terms of *empowerment* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:

a. the transition from substituted to supported decision-making;
b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;
c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;
d. effect of the measures on the legal capacity of vulnerable adults;
e. the possibility to provide tailor-made solutions;
f. transition from the best interest principle to the will and preferences principle.

As indicated above, the Polish system still lacks institutions present in many countries aimed at the empowerment of vulnerable adults, such as supported decision-making. Discussions and preparations to replace the institution of incapacitation with this type of measures have been ongoing for several years.

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;
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.**

The institution of incapacitation, once unquestioned but not so often used, raises more and more doubts of lawyers[94], people with intellectual or mental disabilities and their families, as well as by successive Ombudsmen for several years[95]. There are currently approximately 100,000 incapacitated persons in Poland, and this number increases by several thousand every year[96]. The developing sphere of human rights, including recognition of inherent and inalienable human dignity as a source of human and civil freedoms and rights, makes the system of substitute decision-making less and less acceptable. Other countries, especially the Member States of the European Union, decided to abandon such systems and replace them with systems of supported decision-making.

The literature points out that the institution of incapacitation has its origins in patriarchal and patrimonial traditions, moreover, it is based on seeing human beings through the lens of their limitations rather than their potential[97]. On top of that, it has its origins in the medical approach to the protection of vulnerable adults, which consequently relegates incapacitated people to the margins of social life, whereas the modern approach to this issue should focus on facilitating their functioning in society.

Although in theory it may only serve the interests of the incapacitated person himself or herself, in reality it is often used to make life easier and more convenient for those dealing with the incapacitated person and various institutions and authorities[98]. For example, it was the practice of the Social Insurance Institu-

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[94] *Opinia HFPC na temat instytucji ubezwłasnowolnienia* [*HFHR Opinion on the Institution of Inca pacitation*], https://www.rp.pl/dobra-osobiste/art1810051-opinia-hfpc-na-temat-instytucji-ube zwlasnowolnienia [access: 16.04.2023]. K.M. Zoń (n 39), 147.

[95] *Rzecznik Praw Obywatelskich o potrzebie zmian przepisów dotyczących osób niepełnosprawnych* [*Ombudsman on the Need to Change the Law on Persons with Disabilities*], https://bip.brpo.gov.pl/pl/content/rzecznik-praw-obywatelskich-o-potrzebie-zmian-przepisow- dotyczacych-osob-niepelnosprawnych [access: 16.04.2023].

[96] M. Kubalski (n 32).

[97] M. Kubalski (n 32).

[98] R. Grzejszczak and M. Szeroczyńska, „Ubezwłasnowolnienie i inne formy wsparcia dla osób z niepełnosprawnością intelektualną w Polsce – teoria i praktyka" [„Incapacitation and Other Forms of Support for People with Intellectual Disabilities in Poland – Theory and Practice"], in *Jeśli nie ubezwłasnowolnienie, to co? Prawne formy wsparcia osób z niepełnosprawnością intelektualną [If Not*

tion [*Zakład Ubezpieczeń Społecznych*] in the past to summon the factual guardians of persons entitled to various types of disability benefits to initiate the procedure for the incapacitation of such persons, under the threat of discontinuing the payment of these benefits. This practice was stopped – at the request of the Ombudsman – by the Constitutional Tribunal in a judgement of 6 November 2007[99]. However, in many cases, the family of a person in a mental crisis or with intellectual disabilities still feels forced by various institutions to apply for the incapacitation of a person who – with their help and support – has so far successfully functioned in everyday life. Replacing such a person in decision-making seems to be an easier solution than supporting that person to understand and make his or her own decision in sometimes difficult and complicated matters.

A further argument against incapacitation is that its theoretical protective function is unable to be performed effectively. There is no register of incapacitated persons, so business entities are not able to check whether they are entering into a contract with a person with full capacity for legal acts. Guardians and curators are also not empowered to take away an identity card from an incapacitated person (which illegally sometimes happens, however) and thus prevent them from entering into transactions for larger amounts that require proof of identity. Moreover, providers of consumer credit or loans (so-called "instant loans") are not interested in thoroughly checking the legal status of such a person.

Interestingly, it would seem that according to the laws of statistics and probability, extreme cases, requiring the most far-reaching interference with a person's rights, will be rarer than moderate cases, requiring little support in only some spheres of a person's life. However, Polish courts agree with the application in the majority of cases and rule on incapacitation, while in approximately 90% of cases they rule on full incapacitation. This means that people who need only a certain amount of support and are able to make decisions about their own affairs are usually fully incapacitated, and only in some cases are they partially incapacitated or a curator for the disabled person is appointed, as specified in Art. 183 of the Family and Guardianship Code. Moreover, it is the extreme cases – profound intellectual disabilities, acute mental disorders, coma – that are often raised as arguments in favour of keeping the institution of incapacitation unchanged. The much more numerous cases of people needing support in decision-making are not treated as justifying the need for reform of this institution.

Unfortunately, the institution of a curator for a disabled person provided for in Art. 183 of the Family and Guardianship Code is not popular in Poland. Such a curator may be appointed if the person needs assistance to manage all matters or matters of a particular type or to deal with a particular case. The scope of

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Incapacitation, Then What? Legal Forms of Support For People With Intellectual Disabilities], K. Kędziora (ed.), Warszawa, 2012, 78-79.

[99] *Zasady wypłacania rent osobom z niepełnosprawnością intelektualną* [*Rules for the Payment of Pensions to People with Intellectual Disabilities*], https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/5151-zasady-wyplacania-rent-osobom-z-niepelnosprawnoscia-intelektualna [access: 16.04.2023].

the curator's duties and powers is determined by the guardianship court. This means a far-reaching individualisation of the curator's duties and rights, the possibility to adapt to the needs of a specific person and to the requirements of a specific case. In addition, the advantage of this solution is that the curatorship is revoked at the request of the disabled person for whom it was established. This institution could therefore form the basis for an alternative institution to incapacitation[100]. However, the main disadvantage (from the point of view of institutions and offices) is that such a curator is not a statutory representative of the assisted person, and thus cannot effectively represent a person who cannot communicate his or her will or make a legally binding decision.

The incapacitation procedure itself raises additional problems. It is split into two proceedings, taking place before two different courts, with different compositions. Indeed, incapacitation is declared by the regional court[101], sitting with three judges, but a guardian or legal guardian is appointed by the district court[102], sitting with one judge.

The transfer of the decision on incapacitation to a panel of three professional judges at the level of the regional court is intended to show the importance that the legislator attaches to such a far-reaching limitation of a person's capacity to act. On the other hand, the delegation of the very establishment of a guardian to the district court theoretically results in bringing this procedure closer to the person most strongly affected, enabling the court of the most local degree to become acquainted with the reality of his or her functioning in the community. However, such an arrangement has the effect not only of prolonging the proceedings, but also of creating a period of legal limbo for the incapacitated person. A final order of incapacitation already removes or limits the capacity for legal acts, while the guardian only acquires a statutory representative on the date the order appointing a particular person as guardian or curator becomes final. A certain possibility to prevent this legal void is the appointment of an interim counsel by the regional court in the course of the incapacitation procedure, as under Art. 550 § 1(2) of the Code of Civil Procedure the interim counsel may act until the guardian or curator has been appointed as a result of the incapacitation decision. However, this is not a common solution; moreover, it carries a separate risk: the appointment of an interim counsel limits the capacity for legal acts of the person who is the subject of the application for incapacitation already during the incapacitation proceedings (Art. 549 of the Code of Civil Procedure).

There is another problem with the issue of guardians and curators. For many years now, ordinary courts have been faced with a shortage of candidates to perform these functions. This is because there is no body of guardians or even a data set of persons willing to take on this duty. In the case of incapacitated persons

[100] K. Kurowski, „*Ubezwłasnowolnienie? Są alternatywy*!" ["Incapacitation? There are alternatives!"], *Psychiatra. Pismo dla praktyków* [*Psychiatrist. A Journal For Practitioners*], 3/2015, 15.
[101] See footnote n 30.
[102] See footnote n 29.

with large families, it is usually possible to find a candidate for a guardian or curator. However, it happens that these persons are strongly conflicted with their families or are single and the local authorities are unable to identify anyone to fulfil these functions. In such cases, the courts appoint court staff (e.g. from the registries) or social workers or those employed in the care home where the incapacitated person is staying as guardians and curators. It has also happened that a district court, in desperation, has asked the Ombudsman to identify a candidate as guardian for a person who is completely incapacitated. The consequence of appointing a complete stranger as guardian or curator may be that the guardianship or curatorship is improperly or ostensibly exercised; on the other hand, appointing a nursing home employee as guardian or curator may result in a conflict of interest and in representing more the interest of the institution where the incapacitated person resides than that of the person.

An already incapacitated person is treated like a child – partially incapacitated as a child after the age of 13, and fully incapacitated as a child under 13 years of age. This is reflected in the provisions of both the Civil Code and the Family and Guardianship Code, in matters of guardianship and curatorship over the incapacitated, referring to the regulation of guardianship over minors and parental authority. However, in some cases, incapacitated people are treated even worse than children. Until now, despite the appeals of the Commissioner for Human Rights and the reluctant consent of the Minister of Justice to take legislative steps in this area, contacts of incapacitated persons with their relatives, including family members, have not been regulated. In the resolution of May 17, 2018, III CZP 11/18, the Supreme Court ruled that "The parents of an adult child who is completely incapacitated due to mental disability and for whom a guardian has been appointed, are not entitled to demand a decision by the guardianship court on the manner of maintain contact with that child". The Supreme Court indicated that by analogy, the regulations governing contacts with a child and his relatives cannot be applied to the regulation of contacts with a fully incapacitated adult. Family and Guardianship Code regulations refer to the regulation on parental authority, meanwhile a position has been established for years according to which contacts are a right independent of parental authority. A parent who is isolated from his or her child by the other parent has the right to apply for regulation of contacts by the guardianship court, and in the event of hindering or preventing these contacts, he or she may demand the threat of payment of a specified amount of money pursuant to the provisions of 598^{15}-598^{22} of the Code of Civil Procedure – however, the parent of an adult fully incapacitated child does not have such a possibility against the other parent, appointed the legal guardian of this adult child. He or she can only apply to the guardianship court to issue an order to the guardian to enable such contacts – but without the possibility of threatening to pay the amount of money.

It is also worth noting that in the Polish economic reality there is no separate specific category of consumers, including both the elderly and other vulnerable adults. Acts safeguarding consumer rights refer to them in general and not to specific consumer groups. Meanwhile, susceptible persons constitute a specific

consumer group that requires special legal protection, separate information, as well as appropriate legal assistance[103].

[103] A. Malarewicz-Jakubów (n 19), 149-150.