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**E-Avis ISDC 2019-18**

# PERSONS WITH DISABILITIES' RIGHT TO AUTONOMY AND THEIR RIGHT TO VOTE

**Australia, Austria, Canada, France, Germany, Italy,  
The Netherlands, New Zealand, Norway, Spain, Sweden, United Kingdom,  
United States**

**Current to: 01.11.2019**

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## **E-Avis ISDC**

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## I. BACKGROUND AND QUESTIONS

### A. Mandate

In February 2019, the Swiss Institute of Comparative Law was requested by *the Eidgenössisches Büro für die Gleichstellung von Menschen mit Behinderungen* (EBGB) to conduct a comparative law study of various jurisdictions with regard to the voting rights of persons with disabilities who are under adult substituted and/or supported decisionmaking regimes. The study sets forth the features of guardianship and similar adult protection frameworks in each country as well as the scope of the right to vote and any limitations imposed on adults' rights to vote as a result of their legal capacity having been transferred to another person.

The study features reports<sup>1</sup> on the following legal systems: Australia, Austria, Canada (Ontario and Quebec), France, Germany, Italy, The Netherlands, New Zealand, Spain, Sweden, the United Kingdom (England and Wales), and the United States. A summary report is provided for Norway.

### B. Questions

The following questions/points are addressed in the respective country reports:

1. Introduction
2. What forms of guardianship for adults exist?
3. What are the criteria (or, the degree of incapacity required) for legal guardianship?
4. Can guardianship of a person with disabilities be compelled?
5. Can a person legally challenge a guardianship decision?
6. What are the obligations and rights of the guardian?
7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?
8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?
9. Are there current developments to change the voting rights of persons under guardianship?

## II. PERSONS WITH DISABILITIES' RIGHT TO AUTONOMY AND THEIR RIGHT TO VOTE

Individual autonomy is the most prominent and durable cornerstones of Enlightenment thought. The belief that the human person is in possession of herself leads to the pursuit of human dignity through the protection of human rights.

The expansion of the global human rights framework to persons with disabilities, including those persons with cognitive, psychological, psychosocial, or developmental disabilities rests on the same foundation of promoting the dignity and equal rights of persons with disabilities in order to ensure the fullest extent of personal autonomy. Many communities have made substantial progress in reducing the discrimination and barriers to access that persons with disabilities face, allowing for greater realization of civil, political, economic, and social rights for all persons.

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<sup>1</sup> The reports were to be kept to approximately 8 pages, an ambitious limit which was only slightly exceeded.

For persons with mental disabilities, however, the protection of rights presents challenges that are often substantially different from those of a person with a physical impairment. The basis for many of the challenges is the varying degree to which persons with mental disabilities can function autonomously. The type of impairment some persons with mental disabilities face are not ones that physical instruments can help overcome, leaving the impression that the person must be cared for rather than simply assisted, told what to do rather than guided to decide what to do, and given what is in her best interest rather than asked what she wants. The denial of autonomy

It is not surprising, then, that the denial of political autonomy of persons with disabilities would become a target of concern. At the same time, the right to participate in political processes requires the In particular, restrictions on an adult’s right to vote based on the person’s assignment of a legal guardian is a context in which a number of jurisdictions are now recognizing a need to reconsider existing policies. Whereas guardianship is still recognized as a useful legal tool to assist decisionmaking in certain spheres of life, it is being viewed more critically where the protection includes an automatic disenfranchisement of the ward.

The following reports look at the regulation of guardianship in the context of the right of persons with disabilities to vote.

## Guardianship

The concepts of guardianship and conservatorship have existed for centuries and continue to exist in legal systems throughout the jurisdictions studied. Driven by the perceived need to assist those who cannot take care of themselves, governments have assumed the role of protector of the incapacitated out of both compassion and, reportedly, from an occasional desire to take control of property.<sup>2</sup>

In the traditional sense of guardianship<sup>3</sup>, the submission to (or imposition of) guardianship places the right to decisionmaking about a person’s life and/or property with another person. Referred to as “civil death” or “legal death” by some<sup>4</sup>, guardianship effectively removes the ward’s legal competence to enter into any type of legal relationship – whether contractual or civil/political. This removal of capacity has long been justified by either the person’s potential harm to self (or others) and/or his/her incapacity to understand the consequences of decisions.

While the concept of guardianship itself does not necessarily entail a negation of a person’s autonomy, its historical development led to a practice of guardians making decisions for their ward

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<sup>2</sup> Rebekah Diller, Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making, 43 Fordham Urb. L.J. 495, 502 (2016) (citing Margaret K. Krasik, The Lights of Science and Experience: Historical Perspectives on Legal Attitudes Toward the Role of Medical Expertise in Guardianship of the Elderly, 33 Am. J. Legal Hist. 201, 204 (1989)).

<sup>3</sup> There are sometimes distinctions drawn between guardianship (which may refer to the granting of legal capacity for a child, of a surrogacy of capacity for an incapacitated adult’s personal decisionmaking, or of the power to make decisions regarding a business entity) and conservatorship (which often is limited to the grants of legal capacity for decisionmaking regarding an incapacitated adult’s property). Often, however, the terms are used interchangeably. The following report will use the term “guardianship” to refer to any type of surrogacy over incapacitated natural persons.

<sup>4</sup> See Kohn, Nina A. and Koss, Catheryn, Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship (June 2, 2016). Washington Law Review, Vol. 91, No. 2, 2016. Available at SSRN: <https://ssrn.com/abstract=2788912> (citing inter alia Michael L. Perlin, “Striking for the Guardians and Protectors of the Mind”: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law, 117 PENN ST. L. REV. 1159, 1159 (2013)).

which they considered best. Such decisions may not be what the ward would have wanted, but the “protective” nature of guardianship law was seen as imposing a duty on the guardian to consider the ward’s family’s or even society’s well-being in addition to the ward’s own preferences.

By the mid-20<sup>th</sup> Century, views on guardianship were changing to place more emphasis on the ward’s autonomy.<sup>5</sup> Guardianship systems responded by encouraging guardians to engage in decisionmaking that was a closer substitute for the ward’s own decisionmaking by trying to determine what the ward would have wanted. The guardian should, under the “ approach, take into account the ward’s values and beliefs, as evidenced by writings, conversations, or activities pursued. Decisions taken on the basis of what the ward wanted should thereby be a close approximation of the situation that would exist if the ward were to make the decision on his/her own.

Proponents of autonomy, however, pointed out that even when the guardian tried to consider what the ward would consider best for him-/herself, the result is a loss of the ward’s autonomy. By compartmentalizing a life into periods of “legal capacity” and “no capacity”, even improved substituted decisionmaking arrangements would ignore what an individual want for him-/herself at the moment. The only solution to this fundamental problem would be to dispose of the concept of guardian altogether.

Trying to ensure autonomy of persons with mental impairments thus would require permitting the persons to take decisions for themselves, but providing assistance to ensure that the decisions were informed and understood. The concept of “supported decisionmaking” was the name given to the system that recognizes each individual’s legal capacity to make decisions while permitting another individual to help the individual access and understand the information required to make a decision, and to communicate the person’s choice/decision in a way comprehensible to others.

## **CRPD and the Right to Autonomy**

The first proposals for supported decisionmaking regimes emerged in the early 1990s.<sup>6</sup> Widespread adoption of this change in thinking about guardianship and other assistance-lending structures related to autonomy began to take hold only later, with the negotiation and coming into effect of the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD’s provisions recognizing the equal legal capacity of all persons calls for State Parties to promote and protect the right to autonomy for all by offering support to persons requiring it. The language of Article 12 became the basis for the call for “supported” decisionmaking rather than “best interest” or even “substituted” decisionmaking in guardianship relations.

Article 12 CRPD (“Equal Recognition Before the Law”) sets out a person with disabilities’ right to non-discrimination in legal capacity:

- “1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

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<sup>5</sup> The 1960s is cited as the beginning of the move to reform the treatment of persons with disabilities. Karrie A. Shogren, Michael L. Wehmeyer, Jonathan Martinis, and Peter Blanck, *Supported Decision-Making: Theory, Research, and Practice to Enhance Self-Determination and Quality of Life* 31 (Cambridge Univ. Press, 2019).

<sup>6</sup> Dilip V. Jeste, et al. Supported Decision Making in Serious Mental Illness, 81:1 *Psychiatry* 28 (2018) (doi: [10.1080/00332747.2017.1324697](https://doi.org/10.1080/00332747.2017.1324697); viewed 11 November 2019).

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests"<sup>7</sup>

Though the language of Article 12 seems reasonably clear, the fact that persons with cognitive, intellectual, and psychosocial disabilities are often perceived to be unable to make decisions for themselves led the Committee to clarify the demand for autonomy for persons with these types of disabilities as its first General Comment.<sup>8</sup>

For the Committee, the autonomy of the person is incompatible with a system which moves legal capacity away from the person to a "guardian" legally authorized to make decisions in place of a ward.<sup>9</sup> Instead, persons with mental disabilities should retain their legal capacity and be offered support where and only to the extent necessary for decisionmaking.<sup>10</sup>

General Comment 1 to Article 12 therefore shifts the foreseen role of guardian from capacity-substitute to one of capacity-supporter, allowing the person with the disability to make decisions based on his or her own will rather than on what the guardian thinks is the best decision for the person.<sup>11</sup> Importantly, this paradigm shift does not rely on an assumption that the guardian is not making decisions with the best interests of the person with a disability in mind. That is, the change from substitute decisionmaking does not have to be based on suspicions of abusive guardianship. Instead relies on the primacy of autonomy of the individual and the principle of equality. Thus, supported decisionmaking is promoted as a measure to recognize the person with a disability as a "[person] before the law"<sup>12</sup> and as a part of the state's obligation of non-discrimination (as part of the "reasonable accommodation" required to be offered persons with a disability)<sup>13</sup>.

Work on further defining the contours of guardianship and supported decisionmaking continue. In 2016, the International Guardianship Network (IGN) issued a revised draft of its 2010 Yokohama

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<sup>7</sup> Convention on the Rights of Persons with Disabilities, Gen. A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13,2006), art. 12 (2).

<sup>8</sup> Committee of the Convention on the Rights of Persons with Disabilities, General Comment 1, CPRD/C/GC/1 (19 May 2014). See especially *id.* at para. 3 ("On the basis of the initial reports of various States parties that it has reviewed so far, the Committee observes that there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention. Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decisionmaking. [...]").

<sup>9</sup> E.g., *id.* at para. 9.

<sup>10</sup> *Id.* para. 16.

<sup>11</sup> *Id.* para. 28. See also Carole J. Petersen, Promoting the Rights of Older Persons: Addressing Adult Guardianship and Substituted Decision-Making in Health Care, 10 *Asia Pacific J. Health L. & Ethics* 41, 58-59 (2016).

<sup>12</sup> CPRD/GC/C/1 at para. 33.

<sup>13</sup> *Id.* at para. 34.

Declaration on Adult Guardianship.<sup>14</sup> This document includes principles to guide officials and practitioners in adult “legal protection and support”, including a list of seventeen elements that any “representative, and any other person accorded any role in relation to the exercise of legal capacity of another, shall” ensure.<sup>15</sup> Without denying the legitimacy of guardianship, the Declaration underscores the growing awareness of the need to consider alternatives to it.

## Right to Vote

Questions surrounding the autonomy of persons with disabilities are extremely broad, but all aim toward ensuring the individual’s right and ability to participate in a community. As political participation is an important component of community life, the availability of a right to take part in political decisionmaking is a core aspect of making the concept of autonomy a reality for persons with disabilities.

Although even democratic notions of governance “by the people” long restricted who was included in “the people”, the progressive broadening of voting rights throughout the jurisdictions covered in this report has resulted in nearly universal adult suffrage. Moreover, despite remaining barriers to full equality of voting rights in practice, the advent of rights of persons with disabilities has afforded those with physical disabilities a powerful legal tool to safeguard the right to access the ballot box and make their voices heard.

The two main remaining legal restrictions on voting rights of citizens today are the denial of the right to vote for persons who are incarcerated and the denial of the right to vote for persons deemed mentally incapable of taking decisions. While both such restrictions can be (and are being) challenged, the restrictions on the voting rights of persons under guardianship may not arise solely from voting or election laws. Rather, the voting prohibition on persons with mental disabilities may stem from the guardianship order itself. Finally, the exercise of voting rights of persons with mental impairments may be curbed by inaccessible polling places or by the complexity of materials relating to the electoral process.

## III. SUMMARY OF FINDINGS

Despite the widely regarded successes of the CRPD in improving the status of persons with disabilities, state adherence to the demands of autonomy remains deficient. In particular, implementation of official commitments to supported decision-making allegedly lags significantly behind the demands of rules set forth in the CRPD. This is true in general and in the case of voting rights of persons with mental disabilities.

The following reports address the status of substituted and supported decisionmaking and the autonomy of individuals with a mental impairment to vote in 12 jurisdictions. While 11 of the jurisdictions examined are Parties to the CRPD, the United States is not. The findings across jurisdictions, however, did not seem to diverge on this basis. Neither is there any indication of a common-civil law distinction.

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<sup>14</sup> International Guardianship Network, Yokohama Declaration, adopted by the First World Congress on Adult Guardianship Law (Yokohama, Japan, 4 October 2010; revised and amended by the Fourth World Congress on Adult Guardianship Law, Erkner/Berlin, Germany, 16 September, 2016).

<sup>15</sup> Id., Article 4.



## Adult Protection Regimes

Most significantly, in every jurisdiction, although legal capacity is generally presumed for persons over the age of 18 (voting age may be lower), a transfer of an adult's legal capacity to a guardian remains a possibility for persons with mental impairments. Under the label of adult "protection", guardianship arrangements vary as to nature, scope, and duration.

There are multiple types of guardianship (used here to indicate legal structures that transfer legal capacity) available in each jurisdiction. Most jurisdictions have a form of protection for persons who are deemed incapable of making decisions about their personal welfare, for those unable to make decisions about their property, and for persons unable to take decisions on either. In New York (USA) a difference in types of guardianship is drawn based on the type of mental impairment. This, however, seems to be an anomaly.

In all examined jurisdictions, there is a possibility of either full or partial guardianship, the latter being models in which only capacity for taking decisions of a particular type are given to a guardian.

Partial guardianship is the legally preferred choice in all jurisdictions, with judges to be guided by the principle of choosing the "least restrictive alternative" when determining the scope of a guardianship order. (Ontario is particular in this respect, as it excludes the possibility of partial guardianship over property matters.) Modern legislation commonly now states that full guardianship may only be imposed if there are no other lesser restrictions on the person's autonomy that would suffice.

In this same vein, an option of temporary guardianship is also present in all studied jurisdictions. Such schemes are used mainly in cases of mental impairment due to an accident or short-term medical condition.

While not examined in detail in the current reports, the procedural mechanisms of guardianship orders are important aspects of the protective schemes. These procedures are usually judicial, and as such, the decisions are subject to judicial review. National differences are apparent, however, in the details. In the United States, for example, the relevant court is different in different States (many use probate courts while others using courts of general jurisdiction). Australia, more exceptionally, uses tribunals rather than courts to decide on guardianship matters.

Beyond the regularly found plenary and partial guardianship for personal welfare and/or for property decisions, some jurisdictions have additional forms of adult protection. Spain, for example, allows for extended parental rights to reinstate the rights of parents over an adult offspring who is determined incapable. In Quebec (Canada) and New York (USA) there are further forms of protection available for adults who are only mildly intellectually impaired or temporarily incapacitated. France's five basic forms of guardianship also provide for particularized levels of protection for different levels of impairment.

## Supported Decisionmaking

The general finding of substituted decisionmaking being the main form of adult protection is qualified by some significant exceptions: a number of Canadian provinces, several of the U.S. States, Victoria (Australia) and Sweden have functioning mechanisms of supported decisionmaking in place. Supported decisionmaking alternatives may also be found alongside substituted decisionmaking (as in the case of the Quebec "adviser" or, from the government's perspective, the German "Doppelkompetenz Betreuer").

## Standard of Guardian’s Decisionmaking

A significant difference is where, within the legal regime, guardianship is regulated. While the European jurisdictions (including England and Wales) all have national laws governing adult protection, in Australia, Canada, and the United States guardianship is a matter for subnational laws. Thus, there are wide variations within each of those states in terms of both the specific rules as well as the general approaches to adult protection. In Victoria (Australia), British Columbia (Canada), and Texas (USA), for example, supported decisionmaking has been aggressively pursued, while in New South Wales (Australia), Ontario (Canada), and New York (USA), substituted decisionmaking and even notions of “best interest” continue to be the applicable models. Drawing general conclusions about any of these three jurisdictions, therefore, would present an inaccurate view of the situation facing adults with disabilities living in there.

## Who can be placed under guardianship?

Guardianship is typically practiced in reference to three categories of persons: minors; aged persons who are incapable of making decisions about their person or property; and adults who have intellectual or psychosocial disabilities.<sup>16</sup> Only adult protection systems were of direct interest to the current reports, but in certain jurisdictions (France and Italy), the same rules apply to “independent minors”.

In all jurisdictions examined, legal capacity is presumed upon reaching a particular age. As a result, incapacity must be established prior to the appointment of a guardian. The test for such a determination will vary according to jurisdiction, with some jurisdictions offering judges/decisionmakers substantial discretion in choosing the grounds on which to base a decision. Except for Australia (with its tribunal system), the decision to place an adult under protection in the examined jurisdictions must be taken by a court.

Adults may be placed under legal guardianship if they are determined to be incapable of taking decisions regarding their personal welfare or their property/finances. Most jurisdictions use a functional test to determine incapacity, asking (1) whether the individual can understand the information necessary to taking the decision and (2) whether the individual can understand the consequences of the decision.

Medically defined criteria are part of determining who may be placed under guardianship. In Germany, only those with a mental illness or a physical, mental or emotional (“*seelische*”) disability may be placed under guardianship. Those suffering from certain medical conditions may be subject to a declaration of legal incapacity in other jurisdictions as well. Italy, the Netherlands, Sweden, and Illinois (USA), for example, permit legal capacity to be removed from a person who suffers from an addiction such as alcoholism or compulsive gambling that threatens the long term ability of the person to provide for him-/herself. Notable in this context is that reference to “mental impairments” (such as in Austria’s law) may not always follow medical definitions of mental impairment, being instead legal terms.

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<sup>16</sup> A fourth category of guardianship is that of legal persons. Arising out of regulatory frameworks, because of an inability of the board to function, or in the case of liquidation of the company, the “custodian” (or, in the case of liquidation, “receivership”) of a company leads to a court-appointed individual looking after the assets of a company, collecting debts or other property due, and launching or countering legal claims on behalf of the company. As this guardianship is unrelated to the guardianship of an adult, it will not be further considered in this report.

In a number of jurisdictions (Australia, Austria, France, Germany, Italy, and the United Kingdom), an order of guardianship requires a separate showing of a causal link between a functional incapacity and the disability. That is, the incapacity to make a decision must be due to the mental incapacity.

### **Who may be a guardian?**

Theoretically, any adult with the mental capacity to make decisions may be a guardian. While the parents may be presumed to be the legal guardian of minors, there is often no binding presumption on who will be a guardian/custodian of an adult. The Courts of Protection themselves may act as a decisionmaker in the United Kingdom, should there be reason to have a specific decision taken and either there is no person with the capacity to act or there is a perceived risk that the person with capacity would abuse the authority.

Jurisdictions may impose certain limitations or qualifications on the persons for certain forms of protection (in France, for example, protection under the *habilitation familiale* requires the appointment of a family member), but this is not the case for most cases of guardianship.

### **What are the rights and obligations of the guardian?**

In general, the guardian's purpose is to help the ward in managing him-/herself and/or his/her property. Requirements such as acting with honesty and good faith are present in all jurisdictions, but also duties of record-keeping, maintaining the ward's contacts with society or family, and encouraging his independence are features mentioned in several reports (Australia, Ontario (Canada), Germany, New Zealand).

In all of the jurisdictions examined, guardianship competences in a partial guardianship are limited to decisionmaking only on the issues set out explicitly in the order. Jurisdictions vary in exclusions of guardianship competences for particular types of decisions even where full guardianship was in place. Examples of this include the prohibition on a guardian's competence to make an end-of-life decision (Illinois, USA and British Columbia, Canada<sup>17</sup>), the guardian's lack of competence to make significant personal decisions such as ones relating to marriage or testaments (e.g., Germany, Italy, New Zealand, Norway, the United Kingdom), or to place the ward in an institution (e.g., Spain). The Netherlands has an interesting possibility that goes in the other direction as this, allowing the curator to explicitly provide authority to the ward to take certain decisions for him-/herself.

More significant differences appear in the guardian's duty regarding the standard for decisionmaking. In some the jurisdictions, the law requires the guardian to use the best will and interest of the ward in determining what decision to take (Austria, Ontario (Canada), Illinois (USA)). In most other jurisdictions (Australia, Germany, Italy, the Netherlands, New Zealand, Spain, Sweden, United Kingdom) the "best interest" standard remains, at least in some of the guardianship forms. Germany's law, for example, encourages the guardian to support the ward's own expression of will, and requires the guardian to attend to signs of what the ward's interests are, but only insofar as the will does not run counter to the ward's best interest. In Italy, the Netherlands, and Spain, the curator's duty to take care of the person allows for an overriding of the ward's will. In Sweden, substituted decisionmaking is clearly the last resort, but where ordered, the guardian has the duty to act in the best interest of the ward.

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<sup>17</sup> Illinois (USA) and British Columbia (CAN). While British Columbia was not studied in detail, the research on Canada revealed this point.

When guardianship over property is ordered, there may be a difference in duties among categories of guardians. In Quebec (Canada), for example, the curator is legally obliged to increase the value of the property for which s/he is responsible, while the tutor need only maintain the value of the property.

Requirements for supporters, where permitted, are often less strict and their obligations more loosely defined. In Austria, a representative does not even have a duty to support the decisionmaking process. Instead, the representative is to ensure that the wishes of the person are communicated. In Victoria (Australia), too, the principal remains legally responsible for all decisions and the duties of the supporter are limited to conveying information regarding decisions to and from the supported person. At the same time, a supporter in Victoria would not be permitted to assist with certain financial transactions. Contrarily, the adviser in Quebec (Canada) is mainly a source of advice that can be ignored, but the court can make a co-signature of the adviser compulsory for significant financial transactions.

Guardians in most jurisdictions have a right to reimbursement for their expenditures on account of the ward as well as the possibility of being paid for their work. Payment for work, however, may be restricted to professional guardians (as it is, e.g., in Germany).

### **Can Guardianship be Compelled? Can it be Challenged? Can it be Modified?**

In every jurisdiction, guardianship may be compelled. In such cases, every jurisdiction examined provides a judicial review of the order if it is challenged.

Guardianship decisions can also be modified in each of the jurisdictions. The modification can be to adjust the scope of the guardian's authority (including to end it) or to change the guardian. In Australia, Austria, Quebec (Canada), and Germany, the guardianship order must be periodically reviewed by a court.

### **Voting Rights**

All jurisdictions examined are democracies with nearly universal suffrage. Nevertheless, the legal frameworks surrounding voting by persons with mental disabilities varies substantially.

In all but two of the jurisdictions studied, national law determining voting rights now gives the right to vote to every adult (although the voting age may be lower than 18 years). Canada, France, Germany, and Italy have recently overturned laws that automatically denied voting rights on the basis of a mental disability or being under guardianship.

Australia and the United States are two exceptional jurisdictions in the voting rights area. Australia placing a legal obligation on each adult on the enrolment list to vote. As a result, the problems in for Australians with disabilities are different than for their counterparts in jurisdictions with a right to vote.

The United States does not offer an affirmative right to vote, setting out instead prohibitions on permissible limits on the right. This places a greater emphasis on State-level election procedures in determining mentally impaired Americans' access to voting. Moreover, individual guardianship orders themselves can contain a cancellation of the ward's capacity to register and/or vote.

In a number of reports (Australia, Austria, and the United States), the experts noted that many of the limitations on the right to vote of adults with mental disabilities stem from the discretion of election officials and the practical difficulties of the voting process. Secret ballot poses a problem for persons with mental disabilities in the Netherlands and the United Kingdom. In the Netherlands, information

and assistance may be offered to persons with mental disabilities, but the rules require the voter to actually vote alone and independently. In the United Kingdom, even though election officers are required to give assistance to voters with learning disabilities, they may not permit anyone other than the voter into the voting booth (although voting by proxy may be available to those with a mental impairment).

Overcoming the restrictions of the secret ballot procedures is a problem particularly for jurisdictions that otherwise are open to forms of supported decisionmaking (Italy, UK, and possible Australia). On the other hand, Spain's December 2018 law explicitly ensures that persons may exercise their right to vote with assistance, if necessary. Sweden also allows for voting by representative for those unable to get to a polling place. In respect of overall program to support practicable voting rights, New Zealand seems to have made the most efforts to protect persons with mental disabilities. There, not only may persons with mental disabilities register to vote by means of a representative, there are also projects to teach persons with intellectual impairments how to vote.

## VI. COUNTRY REPORTS

### A. AUSTRALIA\*

#### INTRODUCTION

##### 1. Introduction

Australia is a common law country with a federal system of government.<sup>18</sup> The Australian *Constitution* allocates specific areas of law-making to the national government, but everything else is left to the six States and two Territories, which otherwise exercise plenary powers of law-making.<sup>19</sup>

Autonomy of the individual is an important value of the common law, but there is no human rights guarantee of any such right at the national level or in the majority of States and Territories. Even in those jurisdictions with a Charter of Rights (Victoria, the Australian Capital Territory 'ACT' and now Queensland) the Parliament can override such protections.

The basic framework of Parliamentary democracy is laid out in the Australian *Constitution* and the separate Constitution Acts of the six States,<sup>20</sup> but the right to vote and Australia's system of voting is generally found in legislation rather than in a constitutional provision (Victoria is one exception). Voting in federal, state/territory and local government elections is compulsory for all persons over the age of 18 who have enrolled to vote. Anyone who fails to vote is required to provide a justification and can be fined if the absence is unexplained. Besides being compulsory, voting is carried out by secret ballot and is generally manual rather than electronic, but provision is made for postal voting or assistance on polling day.<sup>21</sup>

Adult guardianship laws have been enacted in all States and Territories (there is no national power) enabling tribunals to appoint a substitute decisionmaker in areas of property and finances (an administrator), medical decisionmaking (health), or for personal affairs (personal guardianship).<sup>22</sup> A person retaining capacity to do so can make such 'enduring attorney' appointments in anticipation. Australia does not permit a guardian, however appointed, to hold any power over voting (or other sensitive matters such as marriage).

Being under a guardianship order does not impinge on the right of the represented person to be enrolled and to vote. This is dealt with quite separately as a matter of electoral law. Exemption from enrolment or denial of the right to vote due to cognitive disability is largely determined by provisions in the Australian *Electoral Act 1918* (Cth), which disentitle a person who 'by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting'.

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<sup>18</sup> There are two layers: a national government (the 'Cth') and six state and two territory governments. Local government is purely a creature of state and territory legislation.

<sup>19</sup> SAUNDERS & FOSTER, *The Australian Federation*, 87-92.

<sup>20</sup> The States are: Queensland, New South Wales, Victoria, Tasmania, South Australia, and Western Australia. The Northern Territory and the ACT are the two territories, which are not fully autonomous in law-making power, since the Cth can override enactments.

<sup>21</sup> KARLAWISH & BONNIE, *Voting by Elderly Persons with Cognitive Impairment*, p. 887-890.

<sup>22</sup> WHITE et al, *Adults Who Lack Capacity*, p. 207 et seq; WILLMOTT et al, *Guardianship and Health Decisions in China and Australia*, p. 371 et seq.

In practice however this involves an elector making a request, supported by a medical certificate, to be removed from the electoral roll.<sup>23</sup> States and Territories administer their electoral processes in a similar manner, deferring to the national arrangements.

In practice the citizenship rights of persons with cognitive impairment to vote in Australia mainly involves either:

- (i) their failure to apply for or denial of enrolment due to say an intellectual disability<sup>24</sup> or an acquired brain injury, or
- (ii) their removal from the roll as an older voter due to cognitive impairments such as a dementia.<sup>25</sup>

## GUARDIANSHIP

### 2. What forms of guardianship for adults exist

Australian guardianship law<sup>26</sup> is distinctive in relying on tribunals rather than courts for its administration, in encouraging private planning through enduring power of attorney appointments over the need for tribunal orders, and in its focus on ease of access, speediness and lack of cost.<sup>27</sup> **Although partial, time-limited and least restrictive guardianship orders are favoured, guardianship still always involves appointment of someone who is then clothed with powers as a substitute decisionmaker.**<sup>28</sup>

The Victorian Law Reform Commission proposed introducing co-decisionmaking orders, but apart from introduction of supported decisionmaking in that State and similar recommendations by the Australian Law Reform Commission,<sup>29</sup> no ‘degrees’ of guardianship are provided beyond the options of choosing between a ‘limited’ guardian or a ‘plenary’ guardian.

Any ‘limited’ guardian holds whatever of the plenary powers as are expressly conferred in the order.<sup>30</sup>

**Guardianship orders can cover any financial, health or personal lifestyle management issues (where to live, who to see etc), except for certain ‘sensitive’ matters such as voting, adoption, marriage, and major irreversible medical procedures like sterilisation or abortion.**

<sup>23</sup> SAVERY, Voting Rights and Intellectual Disability in Australia, p. 288-289.

<sup>24</sup> SAVERY, Voting Rights and Intellectual Disability in Australia, p 289. Precise breakdown of reasons for removal are not published however.

<sup>25</sup> KARLAWISH & BONNIE, Voting by Elderly Persons with Cognitive Impairment, p. 881-882, 890-892.

<sup>26</sup> *Guardianship and Administration Act 2000* (Qld); *Guardianship Act 1987* (NSW); *Guardianship and Administration Act 1986* (Vic) *Guardianship and Administration Act 2019* (Vic); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1990* (WA); *Guardianship and Management of Property Act 1991* (ACT); *Guardianship of Adults Act 2016* (NT).

<sup>27</sup> CARNEY, Australian Guardianship Tribunals, passim.

<sup>28</sup> For a brief summary of guardianship and capacity in the context of voting, see RYAN et al, Voting with an Unsound Mind, p. 1039-1043.

<sup>29</sup> ALRC, *Equality, Capacity and Disability*, p. 13-14 [recs 4.1-4.4], 91-111.

<sup>30</sup> Eg *Guardianship Act 1986* (Vic) s 25.

Only in the **State of Victoria is provision made for mere ‘supporters’** (who lack any decisionmaking authority), initially by enactment of new laws allowing anyone to appoint a supporter,<sup>31</sup> but most recently by passing legislation which from March 2020 empowers the tribunal to do so.<sup>32</sup> It is speculated that **sensitive matter restrictions may not apply to supporters**,<sup>33</sup> though the exclusion from the Victorian legislation of assisting a ‘significant financial transaction’<sup>34</sup> arguably implies that this concern about sensitive decisions remains. In practice however such assistance may be extended informally, quite outside reliance on any legal arrangements authorising a supporter.

### 2.1. Who may be placed under each form of guardianship?

Guardianship laws are potentially applicable to any adult over the age of 18 years, subject to meeting the statutory criteria for a tribunal order.

## 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

The criteria for legal guardianship are that there is an **immediate functional need which stems from a disability**.

### 3.1. Substituted decisionmaking

Guardianship in Australia is **agnostic to the type of incapacity**, but currently most jurisdictions **require** that the incapacity be **attributable to a ‘disability’**. The NSW Law Reform Commission and others have recommended abolition of this nexus.<sup>35</sup>

Although incapacity **must result in some otherwise unmanageable and immediate difficulty** for the person before an order can be imposed by a tribunal, medical evidence is the common basis for making an order (so it is not strictly speaking entirely a ‘functional’ test).

### 3.2. Supported decisionmaking

The criteria for appointment of a supporter in **Victoria, the only jurisdiction where this is currently possible**, is more relaxed than for guardianship. It calls for an ‘understanding’ that the effect of the appointment enables the principal to ‘make and give effect to his or her own decisions with support’, ‘choose’ that supporter, appreciate that decisions remain those of the principal and not the supporter, and an understanding of both ‘when the appointment commences’ and that it can be revoked at any time.<sup>36</sup>

Any adult may have a supporter. The power to appoint a supporter lies with the person themselves, as a ‘supportive attorney’ appointment,<sup>37</sup> but from March 2020 new legislation allows the Tribunal to make such appointments as well. The **appointment is restricted to assisting with those personal or**

<sup>31</sup> *Powers of Attorney Act 2014* (Vic), Part 7.

<sup>32</sup> *Guardianship and Administration Act 2019* (Vic), Part 4. The Act is an amended and updated version of the 1986 Act.

<sup>33</sup> RYAN et al, *Voting with an Unsound Mind*, p. 1070.

<sup>34</sup> *Powers of Attorney Act 2014* (Vic) s 89(1).

<sup>35</sup> NSWLRC, *Review of the Guardianship Act 1987*, p. xxix, 125-126 [rec 9.3]. This would align NSW with the ACT, NT and Qld: *ibid*.

<sup>36</sup> *Powers of Attorney Act 2014* (Vic) s86(2)(a)-(e).

<sup>37</sup> Sections 84, 85.



**financial decisions the person includes in the instrument.**<sup>38</sup> The **assistance is essentially confined to obtaining and communicating to others** (such as public or private bodies or individuals), any relevant information the person may need.<sup>39</sup>

While the facilitation assistance extends to reasonable and necessary steps associated with this, there are limits which reflect a policy concern about the 'risk' of certain transactions. Thus support excludes any involvement in a 'significant financial transaction'. This is defined in Victoria as making or continuing investments (including share investments other than continuing one of less than AUD10,000), undertaking real estate transactions (other than tenancy), entering loans or guarantees over land, or buying and selling substantial personal property.<sup>40</sup>

#### 4. Can guardianship of a person with disabilities be compelled?

Guardianship is compelled whenever it is imposed by order of the specialist tribunals (rather than being an appointment made by the person of their own free will<sup>41</sup>).

Anyone apart from someone demonstrably lacking a legitimate interest is able to make an application, and there is no application fee.

Hearings must be notified to the person and others with an interest, and are conducted with limited formality; some hearings are conducted 'on the papers' where the person subject to the application does not attend (or the tribunal does not organise a hearing where the person is residing).

#### 5. Can a person legally challenge a guardianship decision?

A guardianship order **can be reviewed** at the application of the person or anyone else with a legitimate interest in it, and this is able to be initiated as readily as an initial application, and without charge.

Requested reviews and **tribunal-scheduled routine reviews of orders must reconsider anything and everything involved in making the original order** (it is a review of the 'merits' and is not in any way confined to finding an 'error') but in practice routine reviews are usually conducted by a single member and frequently 'on the papers'.

Orders can be discharged, or be re-made with the same flexibility that was present when the tribunal first received the application.

Although substitute decisionmakers are to be guided in their work by principles of the least restrictive alternative and so forth, there is **little monitoring of compliance other than** opportunities presented **at the required scheduled reviews** (resource limitations mean they are rarely as frequent as annual) or on an application for review.

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<sup>38</sup> Section 85(1).

<sup>39</sup> Sections 87, 88.

<sup>40</sup> Section 89(1).

<sup>41</sup> In practice concerns have been raised about some residential aged care or other facilities 'insisting' on the making of a power of attorney or guardianship as a 'pre-condition' to admission to care; a practice that is both without legal authority or other justification.

## 6. What are the obligations and rights of the guardian?

A 'plenary' guardian under Australian legislation obtains **very extensive powers** of substitute decisionmaking, **but** they are **not unlimited**. This is because **the statutory language** to date generally **has retained a formulation equating plenary guardianship with parental authority for a child, or of common law guardianship** (a centuries old English 'equity' *parens patriae* jurisdiction, involving appointing a person as the so-called 'committee' of the estate or person<sup>42</sup>).

### 6.1. In substituted decisionmaking

*Powers of a guardian*: Section 24 of the Victorian legislation is a good example of the oldest parental authority form of drafting,<sup>43</sup> reading that

#### *Authority of plenary guardian*

*(1) A guardianship order appointing a plenary guardian confers on the plenary guardian in respect of the represented person all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child.*

*(2) Without limiting subsection (1) an order appointing a plenary guardian confers on the person named as plenary guardian the power—*

*(a) to decide where the represented person is to live, whether permanently or temporarily; and*

*(b) to decide with whom the represented person is to live; and*

*(c) to decide whether the represented person should or should not be permitted to work and, if so—*

*(i) the nature or type of work; and*

*(ii) for whom the represented person is to work; and*

*(iii) matters related thereto; and*

*(d) except as otherwise provided in Part 4A or in the Medical Treatment Planning and Decisions Act 2016, to consent to any health care that is in the best interests of the represented person; and*

*(e) to restrict visits to a represented person to such extent as may be necessary in his or her best interests and to prohibit visits by any person if the guardian reasonably believes that they would have an adverse effect on the represented person.*

**A formulation equating guardianship with parent-child authority necessarily excludes the right to vote**, so it is now not expressly excluded.<sup>44</sup> Western Australia uses a slightly more contemporary equivalent (by analogy with 'parenting' orders under the *Family Law Act 1975* (Cth)) and, presumably because such orders could be made for someone over the age of majority, it retains an express exclusion of voting, adoption, marriage or wills.<sup>45</sup>

<sup>42</sup> RYAN et al, *Voting with an Unsound Mind*, p. 1040; further, CARNEY, *Civil and Social Guardianship for Intellectually Handicapped People*, passim;

<sup>43</sup> Similar language is found in s 24 of the *Guardianship and Administration Act 1995* (Tas).

<sup>44</sup> See for example the Tasmanian guidance set out at [https://www.guardianship.tas.gov.au/\\_data/assets/pdf\\_file/0009/146187/Handbook\\_for\\_Private\\_Guardians.pdf](https://www.guardianship.tas.gov.au/_data/assets/pdf_file/0009/146187/Handbook_for_Private_Guardians.pdf).

<sup>45</sup> *Guardianship Act 1990* (WA) ss 45(1) [general authority'] (3)(a) [vote exclusion]; *Guardianship and Management of Property Act 1991* (ACT) s 7B(a) [vote exclusion].

South Australia is an example of adoption of **common law guardianship language**.<sup>46</sup> New South Wales just refers to ‘guardianship’ and the possibility of embracing ‘custody’ of the person,<sup>47</sup> but this is **understood not to include voting or other sensitive matters**.<sup>48</sup> Queensland simply clothes guardians with powers a competent adult otherwise would have enjoyed.<sup>49</sup>

*Obligations of guardians:* The Victorian legislation sets out the following obligations of a guardian in exercise of their responsibility as a substitute decisionmaker:

***S28 Exercise of authority by guardian***

*(1) A guardian must act in the best interests of the represented person.*

*(2) Without limiting subsection (1), a guardian acts in the best interests of a represented person if the guardian acts as far as possible—*

*(a) as an advocate for the represented person; and*

*(b) in such a way as to encourage the represented person to participate as much as possible in the life of the community; and*

*(c) in such a way as to encourage and assist the represented person to become capable of caring for herself or himself and of making reasonable judgments in respect of matters relating to her or his person; and*

*(d) in such a way as to protect the represented person from neglect, abuse or exploitation; and*

*(e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.*

Other jurisdictions have similar lists of considerations to guide the discharge of responsibilities of guardians.

**Summary:** In summary, Australian adult guardianship law is reasonably progressive (but not compliant with CRPD interpretations insisting on abolition of all substitute decisionmaking) and **has never given guardians any authority over voting**.

## **6.2. In supported decisionmaking**

Victoria rather confusingly calls a supporter a ‘supportive attorney’. Any adult can be so appointed (no need to be a legal attorney) and the person does not acquire any substitute decision-making authority (unlike under a power of attorney appointment).

The obligations of a supportive attorney in Victoria are stated as:

<sup>46</sup> *Guardianship Act 1993* (SA) s 31 [‘A person appointed as a guardian under this Part has and may exercise, subject to this Act and the terms of the Tribunal's order, all the powers a guardian has at law or in equity.’] This formulation likewise does not include the right to vote: [https://www.sat.justice.wa.gov.au/G/guardianship\\_and\\_administration.aspx](https://www.sat.justice.wa.gov.au/G/guardianship_and_administration.aspx)

<sup>47</sup> *Guardianship Act 1987* (NSW) s 16.

<sup>48</sup> See

[https://www.publicguardian.justice.nsw.gov.au/Documents/now\\_youre\\_the\\_guardian\\_chapter\\_1.pdf](https://www.publicguardian.justice.nsw.gov.au/Documents/now_youre_the_guardian_chapter_1.pdf).

<sup>49</sup> Section 33(1) of the *Guardianship and Administration Act 2000* (Qld) works by stipulating specific powers in Tribunal orders (s 12), which are then enlivened by the conferral of the following authority ‘(1) Unless the tribunal orders otherwise, a guardian is authorised to do, in accordance with the terms of the guardian’s appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised.’

### **S 90 Duties and obligations of supportive attorney**

(1) A supportive attorney under a supportive attorney appointment—

(a) must act honestly, diligently, and in good faith; and

(b) must exercise reasonable skill and care; and

(c) must not use the position for profit; and

(d) must avoid acting where there is or may be a conflict of interest and, if acting where there is a conflict of interest, must ensure that the interests of the principal are the primary consideration; and

(e) must discuss anything about a supported decision with the principal in a way the principal can understand and that will assist the principal to make the decision.

(2) A supportive attorney under a supportive attorney appointment is not entitled to receive any remuneration for acting as supportive attorney.<sup>50</sup>

As already mentioned, a supporter acts as a line of communication or ‘conduit’ by accessing and/or passing on information about the person. The **legislation principally serves to override privacy protections** that would otherwise prevent anyone apart from the person being supported from obtaining such information. A supporter, whether appointed by the person (supportive attorney) or by the tribunal (supportive guardian or supportive administrator), is in exactly the same position and has similar responsibilities.

## **VOTING RIGHTS**

### **7. Do persons with disabilities have the right to vote?**

In Australia **the right of a person with cognitive impairment to be enrolled to vote and then to exercise that right, is not in any way to be found in adult guardianship law.**<sup>51</sup>

#### **7.1. Where is the right to vote secured/denied?**

The franchise is nearly always governed by provisions of the Electoral Act (or equivalent term) enacted as standard legislation made by the relevant federal, state or territory Parliament.<sup>52</sup> Rarely is it placed in the relevant constitution of the jurisdiction; though Victoria is an exception.<sup>53</sup>

##### **7.1.1. Is the denial of the right to vote linked to having a disability or to being under guardianship?**

The substance of the law is essentially the same across all Australian jurisdictions.<sup>54</sup>

<sup>50</sup> *Powers of Attorney Act 2014* (Vic) s90. From March 2020 section 94 of the *Guardianship and Administration Act 2019* (Vic) will impose similar obligations on a supporter appointed by the Tribunal, along with requirements to act in accord with the basic principles of the Act and not assist with illegal activities or use any coercion or undue influence: s94(a), (g), (h) respectively.

<sup>51</sup> A guardian (or other carer) is most likely to become involved where someone without an active relative or family member able to do so, lodges paperwork to remove a person from the electoral roll. This undoubtedly happens, but there is no information on its frequency: RYAN et al, *Voting with an Unsound Mind*, p 1068.

<sup>52</sup> As ‘ordinary’ legislation in nearly all jurisdictions, amendment of electoral law is not subject to special additional ‘entrenching’ requirements, beyond commanding a majority in both Houses of the Parliament (or in Queensland, just the lower House in the absence of any upper chamber).

<sup>53</sup> *Constitution Act 1975* (Vic) s 48(2)(d).

The key provision is **s93(8)(a) of the *Electoral Act 1918 (Cth)*, which denies enrolment to a person who ‘by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting’.**<sup>55</sup> This provision was found by the High Court of Australia to be **constitutionally valid as a reasonable limitation on the franchise**, and thus does not unduly impinge on the implied constitutional protection of the right to vote.<sup>56</sup>

The **removal of someone already on the electoral roll due to loss of requisite cognitive capacity** to understand the nature and significance of being on the roll and the nature of voting – due to the person experiencing cognitive impairment such as due to a dementia or an acquired brain injury (‘ABI’) – is an **administrative but not automatic process**. It requires an enrolled voter to lodge an ‘Elector No Longer Capable’ form and a written certification of a registered medical practitioner attesting to the loss of that capacity with the Electoral Commission.<sup>57</sup> Once accepted, the person is removed from the electoral roll for federal, state/territory and also for local government elections. **The process** is usually set in train by a close relative, but is **open to any enrolled elector**. Figures for 2013 revealed that nearly 7,000 Australians (6,939), or 0.047% of the eventual franchise, lost enrolment in this way.<sup>58</sup>

**Obtaining enrolment in the first place for someone with cognitive impairment** due to intellectual disability is **more problematic and much less understood**. This is because it usually will rely on someone bringing the possibility of enrolment to the person’s attention and then assisting them with the administrative paperwork if they require such support. **The current law is a part of the difficulty of obtaining enrolment, but is not by any means the principal barrier** to enjoyment of electoral citizenship. As a recent report prepared in partnership with the Victorian Electoral Commission wrote:

*What has become clear is that, despite some very problematic laws that do need to change, one of the primary hurdles facing people with intellectual disability is the discretion of the various actors and agents they encounter when attempting to exercise their political citizenship. Whether it be the example of support staff seeking to protect people from the perceived dangers of voting, or polling volunteers taking it upon themselves to summarily assess the capability of voters with disability, social change is required to raise awareness and expectations.*<sup>59</sup>

<sup>54</sup> *Electoral Act 1992 (Queensland)* s 64 [adopts Cth]; *Electoral Act 2017 (NSW)* ss 30, 31; *Electoral Act 2004 (Tas)* ss 31 [adopts Cth but disqualifies prisoner 3y+]; *Electoral Act 1985 (SA)* s 29(1)(iv) [unsound mind]; *Electoral Act 1907 (WA)* s 18(1)(a) [unsound mind]; *Electoral Act 1992 (ACT)* s 72 [adopts Cth]; *Electoral Act 2004 (NT)* s 21 [adopts Cth with modification].

<sup>55</sup> For its history as originally adopted by the Commonwealth Parliament as an ‘unsound mind’ provision derived from English Lunacy statutes, narrowed in 1983 to focus on understanding of enrolment and voting, and in 1989 amended to require the supporting medical certificate, see RYAN et al, *Voting with an Unsound Mind*, p.1057-1062.

<sup>56</sup> *Roach v Electoral Commission* (2007) 233 CLR 162; SAVERY, *Voting Rights and Intellectual Disability in Australia*, p. 289-290.

<sup>57</sup> Section 118(4) *Electoral Act 1918 (Cth)*. See for example the Victorian Electoral Commission brochure at VEC <https://www.vec.vic.gov.au/files/CarersBrochure.pdf>

<sup>58</sup> There were 14,712,799 voters enrolled in 2013. By way of perspective, another 40,000 young people were eligible to enrol but did not take steps to do so: HOLMES, *Federal Election 2013*, passim.

<sup>59</sup> DESPOTT, *Electoral Inclusion*, p. 14 (emphasis supplied).

### 7.1.2. Might a person under legal guardianship have a right to vote?

Australia has **not ever** followed some overseas models<sup>60</sup> which **deny the right to vote to a person on the basis of being under guardianship**.<sup>61</sup>

**Decisions of Electoral Commissions about enrolment or removal from the roll are subject to merits review by the federal Administrative Appeals Tribunal** (though no decision has ever been adjudicated there) or a complaint might be taken to the **Ombudsman**.<sup>62</sup> In theory these decisions are also open to challenge in the courts, but only if an error of law can be shown.

**Neither administrative review nor judicial review avenues in practice offer any realistic comfort** however, and it is hard to see what the poor administration might be to warrant any recommendation by the Ombudsman. So it is unsurprising that there is no evidence of any challenges ever being made.<sup>63</sup>

## 8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?

Australia has been **very active on the law reform front in proposing** introduction of supported decisionmaking<sup>64</sup> **and in conducting trials** of how this might be achieved.<sup>65</sup>

Yet, aside from the limited initiatives introducing supported decisionmaking as an option under Victorian law, all other jurisdictions (in common with other countries), have **so far failed** either to introduce or foreshadow introduction of similar legislative measures.<sup>66</sup>

Somewhat **greater enthusiasm** is expressed **for measures, outside the law**, designed to provide 'support for' decisionmaking.<sup>67</sup>

### 8.1. In what contexts is substituted voting permissible?

As explained, there is **no scope at all for substituted decisionmaking by a guardian in regard to voting**.

The answer **might be different for a supporter**, though this remains speculative.

It is **arguable that a supporter might not be barred from providing assistance in voting**. This is **on the (speculative) basis** that this is **no longer a sensitive personal matter** to be excluded from the supporter's role (and that the legislation is silent about it in Victoria). Ryan and colleagues raise this

<sup>60</sup> SAVERY, Voting Rights and Intellectual Disability in Australia, p 297, n 75.

<sup>61</sup> Some very early colonial legislation did however deny the vote to residents of institutions, on an assumption of senility: *Electoral Act 1863* (Vic). For a brief overview of past provisions in comparable countries including Canada, see RYAN et al, Voting with an Unsound Mind, p. 1045.

<sup>62</sup> See ALRC, *Equality, Capacity and Disability* p. 263, n 6.

<sup>63</sup> RYAN et al, Voting with an Unsound Mind, p. 1068.

<sup>64</sup> See for example, ALRC, *Equality, Capacity and Disability*; NSWLRC, *Review of the Guardianship Act 1987*.

<sup>65</sup> BIGBY et al, Delivering Decision-making Support to People with Cognitive Disability, p. 222 et seq.

<sup>66</sup> THEN et al, Supporting Decision-making of Adults with Cognitive Disabilities, p. 64 et seq.

<sup>67</sup> DOUGLAS & BIGBY, Development of an Evidence-based Practice Framework, passim.

tantalising notion in passing,<sup>68</sup> and it does share a number of features with the ways others have suggested cognitively impaired voters be able to be assisted to exercise their rights should all capacity tests for enrolment and voting be repealed.

But of course this is precisely what can (and does) occur currently if a person has stayed on the roll and turns up to vote and asks for or brings an assistant to help. The **Electoral officials have a wide discretion to permit this**, so this aspect of the existing informal arrangements might sensibly be left untouched, rather than broaching their incorporation in supported decision-making legislation.<sup>69</sup>

## 9. Are there current developments to change the voting rights of persons under guardianship?

**Considerable civil society pressure** is exerted to rectify the outdated, stigmatising and rights limiting ‘unsound mind’ provisions governing voting rights of people with cognitive impairment in Australia.<sup>70</sup>

Jonathon Savery has made a compelling case for repeal of s93(8) of the *Electoral Act*, arguing that its retention is incompatible with the equality and other human rights obligations under international law, including Article 12 of the *UN Convention on the Rights of Persons with Disabilities* (‘CRPD’), and that there are other existing provisions which adequately deal with any difficulties these voters may face.<sup>71</sup> Trevor Ryan and colleagues have made similar arguments.<sup>72</sup> However these representations and the **powerful recommendations for reform made by the Australian Law Reform Commission**<sup>73</sup> have all fallen on stony ground so far.

The lack of action is partly explained as due to the **federal parliamentary committee covering electoral matters continuing to regard the 1983 insertion of the phrase ‘incapable of understanding the nature and significance of enrolment and voting’ to be consistent with the spirit of the CRPD**. It may also be explained by **concern about fraud and vote manipulation** (which can readily be overcome by sending mobile polling stations into residential facilities<sup>74</sup>), and by the **generally benign way the law is administered**, which Kalawish and Bonnie somewhat equivocally described as:

From a voting rights standpoint, the exclusive reliance on an administrative medical certification process initiated by families and long-term care staff would appear to be subject to mistake and abuse, leading to unwarranted disenfranchisement of elderly voters. However, in our opinion, *the Australian system functions in practice as a mechanism for “excuse” rather than exclusion*.<sup>75</sup>

However the largest contribution is the unresolved legacy of a 2012 Bill which would have deleted the words ‘unsound mind’ from s 93(8), leaving the discretion to remove someone from the roll to be governed just by the 1983 phrase of showing incapacity to understand enrolment and voting, as certified by a broader class of health professionals. The concern of the Parliamentary Committee about this reform was that in practice this would allow *more* rather than fewer people to be removed from the roll.

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<sup>68</sup> RYAN et al, *Voting with an Unsound Mind*, p. 1070.

<sup>69</sup> Ibid.

<sup>70</sup> MURPHY, *Voters Of ‘Unsound Mind’ Deserve A Fair Go*, passim; DESPOTT, *Electoral Inclusion*, passim.

<sup>71</sup> SAVERY, *Voting Rights and Intellectual Disability in Australia*, p 291 et seq.

<sup>72</sup> RYAN et al, *Voting with an Unsound Mind*, p. 1043-1047, 1063-1066.

<sup>73</sup> ALRC, *Equality, Capacity and Disability*, Chap 9.

<sup>74</sup> KARLAWISH & BONNIE, *Voting by Elderly Persons with Cognitive Impairment*, p. 908.

<sup>75</sup> KARLAWISH & BONNIE, *Voting by Elderly Persons with Cognitive Impairment*, p 909 (emphasis supplied).

The ALRC's bolder outright repeal of the whole of the clause would avoid such unintended outcomes, bring the law fully into CRPD compliance, and if overseas experience is any guide, would avoid any other adverse impacts on electoral integrity.<sup>76</sup> But to date it has not gained traction.

## 10. Conclusion

The right of an Australian with a cognitive impairment to be on the electoral roll and to exercise the right of participatory citizenship to cast a ballot in democratic elections, is determined not by adult guardianship laws but by electoral legislation.

This state of affairs may remove a line of criticism sheeted home to adult guardianship in some other countries. But it leaves people with cognitive impairment arguably in a poorer (or at least no better) place. This is due to the way intransigent reluctance to change the national provision for disenfranchisement 'locks in' the constituent States and Territories to arrangements that largely deny voting rights for people with demonstrable cognitive impairments.

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<sup>76</sup> RYAN et al, *Voting with an Unsound Mind*, p. 1067 et seq



## B. AUSTRIA

### EINLEITUNG

#### 1. Einleitung

In Österreich wurde der völligen Entrechtung von Menschen mit Behinderungen in der Monarchie – Entmündigungsordnung 1916 – und der Verfolgung im Nationalsozialismus, insbesondere T4 in Schloß Hartheim/Alkoven – 1984 das **Sachwalterrecht** entgegengesetzt.<sup>77</sup> In seinen **Intentionen der Selbstbestimmung von Menschen mit Behinderungen** sehr verbunden, war es bei Beschlussfassung auch europaweit ein Meilenstein. **In der Praxis wurden die Gesetzesziele verfehlt**, auch weil es an **adäquaten Unterstützungspersonen mangelte** – Rechtsanwaltskanzleien übernahmen dutzendfache Vertretungen – aber auch, weil **vollumfängliche Sachwalterschaften die Regel und nicht die Ausnahme** wurden.

**Das Recht zu Wählen ist für Menschen mit Behinderungen** anerkannt, es gibt **keine gesetzlichen Einschränkungen**. **In der Praxis** werden vielfach Übergriffe und Missbrauch berichtet. Neben der grundlegenden **Kultur des wohlintendierten Paternalismus** – „ich weiß, was für Dich gut ist“ – geht es dabei vor allem um **praktische Fragestellungen**: wie können Informationen verständlich aufbereitet werden; wie sieht die Unterstützung im Wahlprozess, insbesondere in der Begleitung in die Wahlkabine, konkret aus, um die Selbstbestimmung an der Urne zu verwirklichen und das Wahlgeheimnis zu wahren.

Die Ratifizierung der UN Konvention über die Rechte von Menschen mit Behinderungen hat wesentlich dazu beigetragen, dass das Bewusstsein für die praktischen Problemstellungen gestiegen und die Bereitschaft diese zu erörtern und zu lösen, stark gewachsen ist. Ein Privatunternehmen mit Spezialisierung auf Leicht Verständliche Formate mit Sitz in Graz – capito als Teil der atempo Gruppe – trägt zur praktischen Umsetzung, insbesondere von leichter verständlichen Wahlprogrammen, entscheidend bei.

### BETREUUNG

#### 2. Welche Formen von rechtlicher Vertretung gibt es für erwachsene Personen?

Mit der Einführung des **Erwachsenenschutzgesetzes 2018** sind folgende Formen der rechtlichen Vertretung vorgesehen:

##### 2.1. Vorsorgevollmacht

Die Vorsorgevollmacht ist die Regelung von Vertretungs- und Entscheidungsbefugnissen **für einen späteren Zeitpunkt**, insbesondere für **medizinische Eingriffe, aber auch für finanzielle und andere Bereiche**. Sie kann **sowohl** für ein **spezifisches Rechtsgeschäft**, als **auch** für **generelle Angelegenheiten** bestimmt werden. Sie ist bei einem **Notar, Rechtsanwalt** oder einem der **Erwachsenenschutzvereine**<sup>78</sup> zu errichten.

<sup>77</sup> Dazu umfassend: PETER BARTH/MICHAEL GANNER, Sachwalterrecht<sup>2</sup>, Linde Verlag (2010).

<sup>78</sup> Vom Bundesministerium finanziell unterstützte Vereine, die auf Vertretungen im Bereich Erwachsenenenschutz spezialisiert sind.

## 2.2. Gewählte Erwachsenenvertretung

Die gewählte Erwachsenenvertretung ist für Personen gedacht, die ohne Vorsorgevollmacht **in eine Lebensphase eintreten, in der ihre Entscheidungsfähigkeit reduziert** ist, sie **aber die Bedeutung** einer Vertretungsperson **verstehen** und der Auswahl zustimmen können. Diese ist sie **insbesondere** für Menschen mit **psycho-sozialen Beeinträchtigungen** gedacht. Als Vertreter/in kommen **sämtliche Personen** in Frage, zu denen ein **Vertrauensverhältnis** besteht. Eine **schriftliche Vereinbarung** muss bei Notar, Rechtsanwalt oder einem Erwachsenenschutzverein **errichtet werden**.

## 2.3. Gesetzliche Erwachsenenvertretung

Die **Gesetzliche Erwachsenenvertretung** ist für Personen gedacht, die ihren Vertreter nicht mehr selbst bestimmen können oder wollen und **Entscheidungen nicht mehr ohne Gefahr, sich selbst zu schaden, treffen können**. Gesetzliche Vertreter können **nächste Angehörige** sein, darunter: Eltern, Großeltern, Kinder, Enkelkinder, Geschwister, Nichten, Neffen, sowie EhepartnerInnen oder eingetragene PartnerInnen. Für Fälle, in denen innerhalb der Familie keine Einigung über die Vertretung gefunden wird, gilt die gerichtliche Erwachsenenvertretung.

**Die Bereiche für die eine gesetzliche Erwachsenenvertretung bestellt wird, sind klar zu definieren und sind zeitlich befristet.** Eine gesetzliche Erwachsenenvertretung **endet automatisch nach drei Jahren, sowie bei Widerspruch** durch die vertretene Person.

## 2.4. Gerichtliche Erwachsenenvertretung

Ein Erwachsenenvertreter wird für eine Person, die **Unterstützungsbedarf in ihren Entscheidungen** hat, **vom Gericht bestellt**. Voraussetzung dafür ist ein Clearing<sup>79</sup> der Unterstützungsmöglichkeiten in Entscheidungsprozessen; ein fehlendes Clearing ist ein Verfahrensmangel. Ein **Gespräch mit der Person**, die Unterstützungsbedarf hat, ist zwingend vorgesehen; weiter wird für das Verfahren ein **Rechtsbeistand** vom Gericht bestimmt. Weiter ist ein **fachliches Gutachten zu erstellen** und eine **Verhandlung** abzuhalten, bevor ein Erwachsenenvertreter bestellt wird. Die Vertretung wird für **spezifisch bestimmte Angelegenheiten** bestellt und muss **zwingend nach drei Jahren überprüft** werden; dazu hat auch ein weiteres Clearing statt zu finden.

**Trotz Erwachsenenvertretung soll die Person, die Unterstützung benötigt, ihre Angelegenheiten selbstbestimmt regeln und entscheiden können.** Die Erwachsenenvertretung ist **nicht verpflichtet, Unterstützung im Entscheidungsprozess zu leisten**, sehr wohl aber, ist die **Wunschermittlungspflicht** zu beachten.

Die **Reform des Sachwalterrechts** und Einführung des Erwachsenenschutzes **geht auf die Empfehlungen des Fachausschusses zur Konvention über die Rechte von Menschen mit Behinderungen zurück**.<sup>80</sup> Bei der Anhörung im Fachausschuss hat sich das Fachministerium redlich darum bemüht, die Kompatibilität des Sachwalterschaftsrechts als mit der einschlägigen Bestimmung der UN-Behindertenrechtskonvention (Artikel 12) zu erklären. Die Kritik des Ausschusses führte schließlich zu einem umfassenden Reformprozess.<sup>81</sup>

<sup>79</sup> „Clearing“ bedeutet die fachlich gestützte Abklärung im sozialen Umfeld, ob eine Erwachsenenvertretung tatsächlich notwendig ist.

<sup>80</sup> Committee on the Convention on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Austria // UN Fachausschuss zur Konvention über die Rechte von Menschen mit Behinderungen, Abschließende Bemerkungen zur Staatenprüfung Österreichs, 30. September 2013, CRPD/C/AUT/CO/1..

<sup>81</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, Vorwort.

Beachtlich ist, dass Diskussionen in Österreich, bei denen Personen, die einen Sachwalter hatten, zu Wort kamen, vom Ministerium nicht als Anstoß für die Reform genannt werden.<sup>82</sup> In weiterer Folge wurden Menschen mit Behinderungen als ExpertInnen in eigener Sache in den Reformprozess eingebunden, es wurde eine eigene Besprechung ausschließlich mit ExpertInnen in eigener Sache (sog. SelbstvertreterInnen) eingeführt.

**In der Umsetzung des Gesetzes**, insbesondere dem Anliegen, sämtliche Sachverwalterschaften einem Clearing über die Notwendigkeit und das Ausmaß der Unterstützung zu unterziehen, **ist an einer dramatischen Budgetkürzung unmittelbar vor Beschlussfassung gescheitert. Dennoch** gibt es **erste positive Auswirkungen** zu vermelden. Laut der Halbjahresstatistik – die noch nicht komplett bereinigt ist – ist die Zahl der gerichtlichen Vertretungen von 55.000 auf 47.000 gesunken.<sup>83</sup>

Kritisch erwähnt werden muss, dass die Reform der UN-Konvention über die Rechte von Menschen mit Behinderungen sehr nahe kommt, aber nicht völlig gerecht wird.<sup>84</sup>

### 3. Welche Kriterien (Grad des Unvermögens) gelten für die rechtliche Vertretung?

#### 3.1. Umfassende rechtliche Vertretung (substituted decisionmaking)

Nach § 271 Allgemeines Bürgerliches Gesetzbuch (ABGB) sind Voraussetzung:

- Volljährigkeit (Minderjährige sind explizit ausgenommen)<sup>85</sup>
- Psychische Krankheit oder vergleichbare Beeinträchtigung der Entscheidungsfähigkeit
- Unfähigkeit zur Besorgung von Angelegenheiten
- Unvermeidlichkeit (Subsidiarität)

Das Begriffspaar “psychische Krankheit oder vergleichbare Beeinträchtigung” hat eine historische sprachliche Genese, die auch im Nationalrat gewürdigt wurde.<sup>86</sup> Der Begriff “**psychische Krankheit**” ist insbesondere durch umfangreiche Judikatur zum **§ 3 Unterbringungsgesetz (UbG)** gefestigt. Es handelt sich um einen Rechtsbegriff, der sich **nicht notwendiger Weise mit dem medizinischen Begriff deckt**. Es muss eine **psychische Beeinträchtigung** vorliegen, **die die Fähigkeit, selbstbestimmt zu entscheiden, beeinträchtigt**.<sup>87</sup> Der Begriff „**vergleichbare Beeinträchtigung**“ umfasst **intellektuell-kognitive Beeinträchtigungen**.<sup>88</sup> Der von ExpertInnen in eigener Sache (SelbstvertreterInnen) gewünschte Begriff „Menschen mit Lernschwierigkeiten“ war gleichzeitig zu weit bzw. zu eng.

<sup>82</sup> Siehe insbesondere eine öffentliche Debatte im Festsaal des Bundesministeriums für Justiz im Rahmen einer öffentlichen Sitzung des Monitoringausschusses am 17. November 2011: <https://www.monitoringausschuss.at/sitzungen/wien-17-11-2011-unterstuetzte-entscheidungsfindung-jetzt-entscheide-ich/>.

<sup>83</sup> Document on file with author.

<sup>84</sup> Siehe insb. Stellungnahme des unabhängigen Monitoringausschusses Selbstbestimmte Entscheidungsfindung – Jetzt entscheide ich, 21. Mai 2011: [https://www.monitoringausschuss.at/download/oeffentliche-sitzungen/entscheidungsfindung/MA\\_SN\\_entscheidungsfindung\\_final1.pdf](https://www.monitoringausschuss.at/download/oeffentliche-sitzungen/entscheidungsfindung/MA_SN_entscheidungsfindung_final1.pdf).

<sup>85</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 764.

<sup>86</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 24.

<sup>87</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 765.

<sup>88</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 25.

Die **Handlungsfähigkeit** wird als Oberbegriff – bezogen auf eine bestimmte Handlung – weiter verwendet. In weiterer Folge wird der Begriff der **Handlungsmacht** und des **Handlungsvermögens** eingeführt. Das Handlungsvermögen wird im Gesetz nun als **Entscheidungsfähigkeit** bezeichnet.<sup>89</sup> Das **Vorliegen der Entscheidungsfähigkeit wird vom Gesetz vermutet**; das ist ein **Paradigmenwechsel**.<sup>90</sup>

### 3.2. Partielle rechtliche Vertretung (supported decisionmaking)

Das **Unvermögen** im Kontext der gewählten Erwachsenenvertretung **wird streng beurteilt**, es gilt das **Subsidiaritätsprinzip**.<sup>91</sup> Ziel ist es, die Selbstbestimmung möglichst lang zu erhalten und potenzielle und tatsächliche Einschränkungen laufend in Frage zu stellen. § 264 ABGB normiert eine geminderte Entscheidungsfähigkeit: „die volljährige Person muss noch fähig sein, die Bedeutung und die Bevollmächtigung **in Grundzügen** zu verstehen.“<sup>92</sup> Laut ständiger Rechtsprechung muss die Person den **Zweck der Vollmacht erkennen** können.<sup>93</sup>

## 4. Kann die rechtliche Vertretung erzwungen werden?

### 4.1. Welche Umstände?

Wenn konkrete und begründete Anhaltspunkt vorliegen, dass eine Person ihre Entscheidungsfähigkeit **nicht ohne Gefahr eines Nachteils für sich selbst** ausüben kann, ist gerichtlich eine Vertretung – auch von Amts wegen – einzusetzen.<sup>94</sup>

### 4.2. Welche Formen der Entscheidungsfindung können eingeschränkt werden?

Es dürfen **nur „einzelne“ Angelegenheiten, die konkret – „gegenwärtig“ – zu besorgen sind**, durch die Erwachsenenvertretung **vorgenommen** werden.<sup>95</sup> Die ausgewählten Angelegenheiten müssen „bestimmt bezeichnet werden.“<sup>96</sup>

## 5. Kann eine Person eine Betreuungsanordnung rechtlich angreifen?

Gemäß dem **Ausserstreitgesetz** – der Verfahrensordnung auch für den Erwachsenenschutz – ist ein solches Verfahren möglich.<sup>97</sup> Es kann hiez zu **ein Antrag der unterstützten Person** gestellt werden, das Gericht kann eine solche Beendigung von Amts wegen einleiten. Darüber hinaus ist es auch auf **begründeter Anregung von dritten Personen** möglich, den Erwachsenenschutz zu ändern bzw. zu beenden.

<sup>89</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 51.

<sup>90</sup> § 24 Abs. 2 ABGB.

<sup>91</sup> § 240 Abs. 2 ABGB.

<sup>92</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 664.

<sup>93</sup> Ibid.

<sup>94</sup> § 271 ABGB.

<sup>95</sup> § 272 ABGB.

<sup>96</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 789.

<sup>97</sup> § 128 Ausserstreitgesetz, siehe auch Barth/Ganner, Handbuch des Erwachsenenschutzrechts, 868.

## 6. Rechte und Pflichten des Betreuers

Die **Leitlinien der Tätigkeit** werden angeführt von der Förderung der **Sicherstellung des Wohls der schutzberechtigten Person**.<sup>98</sup> Das ABGB legt dafür an anderer Stelle eine **umfassende Fürsorgepflicht** nieder.<sup>99</sup> Das Wohl ist als Rechtsbegriff individuell zu determinieren; abzustellen ist auf die **subjektiven Interessen und Wünsche** der Person, die Unterstützungsbedarf hat.<sup>100</sup>

Die **Vertretungsperson hat die Aufgaben persönlich wahrzunehmen** und hat insbesondere die Pflicht, den **regelmäßigen persönlichen Kontakt** mit der Person, die Unterstützungsbedarf hat, zu suchen und zu pflegen. Die **Unterstützung der Selbstbestimmung ist sicherzustellen**: die unterstützende Person soll „soweit wie möglich in die Lage versetzt werden, ihre Angelegenheiten selbst zu besorgen“.<sup>101</sup> Die Vertretungsperson hat alles dafür zu tun, den Willen der unterstützten Person zum Ausdruck und zur Verwirklichung zu verhelfen (**Wunschermittlungspflicht**).

Die Vertretungsperson hat **Anspruch auf Entgelt und Aufwandsersatz**.<sup>102</sup>

Neben der **Verschwiegenheitspflicht** ist die zentrale **Verpflichtung vis-a-vis dem Gericht**: ein **Antrittsbericht** und ein **jährlicher Lebenssituationsbericht**<sup>103</sup> sind zu erstellen. In wichtigen Angelegenheiten hat die Vertretungsperson die **Genehmigung des Gerichts einzuholen**, dies betrifft insbesondere **wichtige Vermögensangelegenheiten, sowie medizinische Eingriffe**.<sup>104</sup>

## WAHLRECHT

### 7. Haben Menschen mit Behinderung das Wahlrecht/wovon hängt ein Wahlrechtsausschluss ab?

Das **Bundes-Verfassungsgesetz (B-VG)** regelt die **Grundlagen des aktiven und passiven Wahlrechts**. Gemäß Artikel 26 Abs 2 B-VG kann ein Ausschluss vom Wahlrecht „nur durch ein Bundesgesetz als Folge einer rechtskräftigen gerichtlichen Verurteilung vorgesehen werden.“ Im weiteren sieht die Nationalratswahlordnung (NRWO) die spezifischen Ausschließungsgründe auf Basis des Strafgesetzbuchs vor.<sup>105</sup> Die Regelungen gelten auch für Landtags- und Gemeinderatswahlen, die keinen engeren Maßstab festlegen dürfen, sowie für Volksabstimmungen<sup>106</sup> und Volksbefragungen. Österreich sieht also **keinerlei Einschränkung des Wahlrechts von Menschen mit Behinderungen vor**. Zur Umsetzung gibt es keine wissenschaftlichen Untersuchungen.<sup>107</sup> **Anekdotische Indizien für verbreiteten Missbrauch** gibt es insbesondere **aus größeren Wohneinrichtungen**. Die Auswirkung von Stereotypen über das vermeintliche Unvermögen von Menschen mit Behinderungen, insbesondere Menschen mit Lernschwierigkeiten, sind aber auch in kleineren Institutionen verbreitet.

<sup>98</sup> § 274 ABGB.

<sup>99</sup> § 21 ABGB.

<sup>100</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 129.

<sup>101</sup> § 241 Abs.1 ABGB.

<sup>102</sup> § 276 ABGB.

<sup>103</sup> § 259 Abs. 1 ABGB.

<sup>104</sup> BARTH/GANNER, Handbuch des Erwachsenenschutzrechts, 153.

<sup>105</sup> § 22 Abs. 1 NRWO.

<sup>106</sup> Artikel 95 bzw. 117 B-VG.

<sup>107</sup> NAUE/WEGSCHEIDER, Politische Partizipation von Menschen mit Behinderungen in Österreich, Juridikum 1/2015, 88.

## 8. Hat der Gesetzgeber sich verpflichtet, flächendeckend unterstützte Entscheidungsfindung einzuführen?

Das ursprüngliche Ansinnen war eine breite Sicherstellung von unterstützter Entscheidungsfindung. Insbesondere war eine Einzelfallprüfung sämtlicher bestehender Sachwalterschaften angedacht. Dies ist in dem gewünschten Umfang und insbesondere im angedachten Zeitraum nicht möglich, da das Budget für die Umsetzung – vor allem durch privatrechtliche Vereine – drastisch gekürzt wurde. Da es zwischenzeitlich auch das Szenario gab, dass es **gar keine Finanzierung für die Umsetzung** geben würde, hat die rechtzeitige Abhaltung von Fortbildungsveranstaltung beträchtlich gelitten. Das **hat der Qualität der Umsetzung** in den ersten Monaten **substantiell geschadet**.

## 9. Gibt es aktuelle Entwicklungen zur Änderung des Wahlrechts unter Betreuung stehender Personen

Es gibt keine Pläne, das bestehende Wahlrecht einzuschränken. **Diskussionen zur Erhöhung der umfassenden Barrierefreiheit**, also auch zum Wahlprocedere, sind **insbesondere auf Länderebene ständig am Laufen**. Das Erwachsenenschutzgesetz selbst soll in drei Jahren – 2022 – einer kritischen Überprüfung unterzogen werden.

## C. CANADA

### 1. Introduction and Context

In Canada, a federation with constitutionally-defined areas of jurisdiction for the federal and provincial governments, guardianship law is developed at the provincial level.<sup>108</sup> While some have noted Canadian “leadership in legislated supported decision-making”<sup>109</sup>, the provinces differ greatly in their commitment to moving toward such a goal. British Columbia was the first to adopt supported decision-making, setting this out in its Representation Agreement Act<sup>110</sup> which largely excludes the court system.<sup>111</sup> Alberta, Manitoba, Saskatchewan, and Yukon also include at least some supported decision-making in their laws.<sup>112</sup>

This report focuses solely on the guardianship regimes in Ontario and Quebec, and summarizes the legal framework for voters with mental disabilities in Ontarian, Quebecois, and Canadian election law. In these jurisdictions, guardianship law and election law are largely separate regimes.

## ONTARIO

### 1. Introduction

The Ontario system regarding legal capacity and decision-making is complex, falling under various laws and ministries. The three main laws are: the *Substitute Decisions Act*, 1992 [SDA],<sup>113</sup> the *Health Care Consent Act*, 1996,<sup>114</sup> and the *Mental Health Act*.<sup>115</sup> The complexity of Ontario’s system has been identified as one of its weaknesses.<sup>116</sup> The current system emerged from reforms in the late 1980s and early 1990s. This note will focus on the *Substitute Decisions Act* (“SDA”) and will not address powers of attorney.<sup>117</sup>

<sup>108</sup> This is in conformity with s. 92(12) of the *Constitution Act*, 1867, 30 & 31 Vict, c 3, which accords the provinces jurisdiction over “Property and Civil rights in the Province”. Canada’s three territories exercise powers delegated by the Federal Government.

<sup>109</sup> See Krista James and Laura Watts, *Understanding the Lived Experience of Assisted and Supported Decision-making in Canada: BACKGROUNDER 1* (Canadian Centre for Elder Law, 2014), online: <[http://www.bcli.org/sites/default/files/Supported\\_Decision\\_Making\\_Background.pdf](http://www.bcli.org/sites/default/files/Supported_Decision_Making_Background.pdf)>.

<sup>110</sup> RSBC 1996, c 405.

<sup>111</sup> Krista James and Laura Watts, *Understanding the Lived Experience of Assisted and Supported Decision-making in Canada*, 23-25 (2014) (full report).

<sup>112</sup> See James and Watts, full report at pp 25-30. The study also notes that while the references in Manitoba’s guardianship law are not concretized in formal structures of supportive decision-making, “supportive decision-making occurs informally [...] without statutory protection”. Ibid at p 4.

<sup>113</sup> SO 1992, c 30, online: <<http://canlii.ca/t/53nm>> [SDA].

<sup>114</sup> SO 1996, c 2, Sch A, online: <<http://canlii.ca/t/5354b>> (which deals with decision regarding treatment, long-term care, or personal assistance).

<sup>115</sup> RSO 1990, c M.7, online: <<http://canlii.ca/t/52kdd>>.

<sup>116</sup> See Law Commission of Ontario, *Legal Capacity, Decision-Making, and Guardianship: Final Report* (Toronto: March 2017), online: <<http://www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf>> [LCO].

<sup>117</sup> In Ontario, powers of attorney are simple and low-cost, and allow people to choose their own SDMs, and limit or direct how they exercise their powers.

## GUARDIANSHIP

### 2. What forms of guardianship for adults exist?

Ontario's model is based on substitute, rather than supported, decision-making. The SDA provides for **substitute decision-makers** ("SDMs"), for **property or for personal care**.<sup>118</sup> Someone's request for a capacity assessment may in turn trigger a **statutory guardianship over property**, depending on the outcome of the assessment. In this case, the Public Guardian and Trustee ("PGT")<sup>119</sup> is automatically appointed but family members can apply to replace the PGT in this role.<sup>120</sup> In addition, SDMs may be court-appointed, for either property or the person.<sup>121</sup>

**Guardianship over the property is always full guardianship, but guardianship for personal care can be either full or partial.** A guardian may also be appointed for a temporary period.

### 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

People are presumed to have capacity. Thus, a court will only appoint a guardian if satisfied that there is no alternative course of action that wouldn't require making a finding of incapacity and that would be less restrictive of the person's autonomy.<sup>122</sup>

Ontario's system for determining capacity is complex and **carried out by different assessors**, whether informal or formal, depending on the context. Designated capacity assessors conduct assessments. Procedural conditions for these assessments are set out in the SDA, but not the criteria to be applied by assessors.<sup>123</sup>

The assessment is based on a **functional and cognitive approach to capacity**: whether someone has the ability to make a specific type of decision, because they **understand information** relating to the decision **and its potential consequences**.

For personal care, **full guardianship** will be ordered by the court if the person is **unable to "understand information** that is relevant to making a decision" or to **"[...]appreciate the** reasonably foreseeable **consequences** of a decision or lack of decision"<sup>124</sup> **with respect to all** of the following **decision-making categories**: health care, nutrition, hygiene, safety, shelter, and clothing. A **partial guardianship** will be ordered **when a person is capable of understanding/appreciating the consequences of decisions taken in at least one** of these categories.

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<sup>118</sup> Personal care guardianships under the SDA are for those 16 years of age or older, whereas property guardianships are as of age 18.

<sup>119</sup> The PGT plays an important role, including appointing replacement guardians, conducting investigations, reviewing applications for court-appointed guardians, etc.

<sup>120</sup> See SDA, *supra* note 6 at s 17(1). Partners, relatives, powers of attorney, or trust corporations may apply.

<sup>121</sup> The relevant court in Ontario is the provincial Superior Court of Justice. Any person can apply to the court to be appointed as guardian.

<sup>122</sup> See SDA, *supra* note 6 at s 55(2).

<sup>123</sup> See LCO, *supra* note 9 at 25. The LCO identifies the lack of clarity and standardization for capacity assessments as problematic. Note, however, that the Ministry of the Attorney General Capacity Assessment Office has issued Guidelines for Conducting Assessments of Capacity, in May 2005, online : <<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf>>. Assessors will generally look at whether someone's factual understanding of issues is correct and at the person's current decisions to determine whether they can explain their choices and understand their consequences.

<sup>124</sup> SDA, *supra* note 6 at s 45.



#### 4. Can guardianship of a person with disabilities be compelled?

**Guardianship may be compelled.** However, the court will only appoint a guardian if satisfied that the need for decisions to be made cannot be met through an alternative course of action.

It is also noteworthy that **a person may refuse to have their capacity assessed**,<sup>125</sup> unless the assessment is ordered by the court,<sup>126</sup> in which case the person can potentially be apprehended and held in custody for assessment.<sup>127</sup> Similarly, for a person under a guardianship court order, their guardian may be authorized to apprehend them.<sup>128</sup>

#### 5. Can a person legally challenge a guardianship decision?

A person with a statutory guardian for property can apply to the **Consent and Capacity Board**, an independent administrative tribunal, **for a review of a finding of incapacity** to manage property.<sup>129</sup> They can also **request capacity re-assessment** on a **six-month** basis.<sup>130</sup>

A person can **apply to the court to terminate a statutory guardianship** over property. Likewise, the court can modify<sup>131</sup> or terminate<sup>132</sup> a personal care guardianship. The court has broad powers to “give directions on any question” in relation to guardianship<sup>133</sup> and to make orders to protect vulnerable persons. Individuals may face access to justice barriers (e.g. costs, complexity) in seeking a remedy from the court or appealing a court order.

#### 6. What are the obligations and rights of the guardian?

The SDM must **act for the person’s benefit and may be held liable for breach of duty**. SDMs must: **keep records, explain** their powers and duties, **encourage** the person’s **participation** in decision-making, **foster contact** between the person and their family and friends, consult with the person’s family and friends, and foster the person’s **independence**.

In managing property, the SDM must carry out their duties **diligently with honesty and integrity, and in good faith**. The SDM must make expenditures that are reasonably necessary for: support, education, and care of the person (in priority) and their dependents (secondarily); and to satisfy the person’s legal obligations. A guardian of property can do anything on the person’s behalf except make a will.<sup>134</sup> **Financial compensation** of the guardian is **permitted in prescribed amounts**.

A full guardian for personal care **can determine living arrangements, litigate, settle claims, have access to personal information, make health care decisions, etc.**<sup>135</sup> In partial guardianships, the

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<sup>125</sup> See *Ibid* at s 78(1).

<sup>126</sup> See *Ibid* at s 78(3). The other exception is if a power of attorney for personal care authorizes the use of force for assessment.

<sup>127</sup> See *Ibid* at s 81(1).

<sup>128</sup> See *Ibid* at s 59(3) and s 62(10). This is only possible if the guardian has custodial power over the person.

<sup>129</sup> See *Ibid* at s 20.2(1). The person has 6 months to file an application, and as such, can only apply to the Board once.

<sup>130</sup> See *Ibid* at ss 20.2(1)-(2).

<sup>131</sup> See *Ibid* at s 61(1).

<sup>132</sup> See *Ibid* at s 63(1).

<sup>133</sup> See *Ibid* at s 39(1) and s 68(1).

<sup>134</sup> See *Ibid* at s 31(1). In addition, the Court may impose conditions: see *Ibid* at s 31(3).

<sup>135</sup> See *Ibid* at s 59(2).

court order will establish the guardian's powers.<sup>136</sup> The SDM must **respect the prior capable wishes** of the person for personal care and treatment decisions, or in the absence of expressed wishes, **be guided by the best interests** of the individual, **considering**: the person's **values** and beliefs, **current wishes** (if ascertainable), impact on quality of life, and the relative benefits and risks. Generally, the **SDM must choose the least intrusive** and restrictive course of action that is appropriate.

The **SDA does not refer to voting** in government elections.

## QUÉBEC

### 1. Introduction

See under chapter 1; Introduction and context.

## GUARDIANSHIP

### 2. What forms of guardianship for adults exist?

Under Québécois law, there are **three formal forms** of protective supervision: **curatorship, tutorship, and advisers** for adults.<sup>137</sup> Advisers, tutors, or curators are generally **appointed by the court** on the recommendation of a meeting of family or friends.<sup>138</sup>

In the **most serious cases of incapacity, curatorship** applies. A curator is a legal representative named by the court to protect a person and manage their property. Curatorships can be either private (a family member or other person with a close relationship to the protected person) or public (the Public Curator of Quebec).

A person subject to **tutorship** maintains **some decision-making freedom**, insofar as the person has the mental capacity to make decisions and explain their wishes. Tutorship can be put into place for adults who suffer from a **temporary** (e.g. due to an accident) **or partial incapacity** (e.g. an intellectual disability of lesser gravity). "Public tutorship", when the court appoints the Public Curator as the person's tutor, applies as a last resort, when no friend or family member is available to be the tutor.

The form of protective supervision that **provides the most independence** to a person subject to it is the '**advisers for adults**' category. This type of assistance is intended for people who can generally take care of themselves, but **require assistance to manage their property**. The person with an adviser keeps their legal autonomy, remains responsible for their property, and is not represented by the adviser. The advisers are **generally friends or family members**; the **Public Curator cannot be an adviser**.

<sup>136</sup> See *Ibid* at s 60(3). The powers will be from among those set out in s 59(2)-(5) of the SDA.

<sup>137</sup> Note that a fourth similar regime exists in the case of a person who expressed their wishes before being incapacitated and chose a person or persons (a "mandatary") to exercise a protection mandate in their regard.

<sup>138</sup> For more information, see Curateur public du Québec, Protection of persons of full age, online: < <https://www.curateur.gouv.qc.ca/cura/en/majeur/index.html>>.

### 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

The form of protective supervision chosen depends on the degree of incapacity.<sup>139</sup> To assess the degree of incapacity of the person, a doctor conducts a **medical assessment**, and a professional, often a social worker, conducts a **psychosocial assessment**. Also, the **clerk to the court or a notary** must personally **confirm the degree of incapacity** by asking the person questions.

**Curatorship** is intended for adults who suffer from a total, permanent incapacity, due to illness or accident.

**Tutors** are for individuals whose incapacity is partial or temporary, and who require assistance with to care for their person or property, or both.

**Advisers** are intended for persons with a mild intellectual deficit or temporary incapacity due to illness or accident.

### 4. Can guardianship of a person with disabilities be compelled?

In Québec, **protective supervision can be compelled**,<sup>140</sup> notably when a legal process is initiated by a relative or director of an establishment. The **court has a broad discretionary power** within the constraints of the law.<sup>141</sup>

### 5. Can a person legally challenge a guardianship decision?

A person may **contest an application** for subjecting them to protective supervision, with the help of a lawyer, and will be given the opportunity to express their views to the court. In making a decision regarding protective supervision, the court will take into account assessment reports, the examination of the person by a notary or court clerk, the opinion of a family meeting, the degree of autonomy, any testimony or facts, and the existence of a mandate from the person in question.

Protective **supervision can be challenged through court appeal**,<sup>142</sup> and can be re-evaluated at any time.<sup>143</sup> It **must be reviewed every three years for tutorships**, and every **five years for curatorships**.<sup>144</sup> After a medical and a psychosocial assessment of the person, the original decision can be maintained, modified, or abolished.

In addition, if an incapacitated person's representative is not properly carrying out their responsibilities, any interested person, the tutorship council, or the Public Curator can ask the court to dismiss and replace a tutor. Likewise, an adviser can be dismissed.

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<sup>139</sup> Art 259 CCQ [CCQ].

<sup>140</sup> *Ibid* at art 268.

<sup>141</sup> See, for example, *Curateur public du Québec c. D.P.*, 2000 CanLII 10834 (QC CA), <<http://canlii.ca/t/1fbz0>> (in which the Court of Appeal overturned the lower court decision for an improper exercise of jurisdiction in setting a delayed and limited temporal period for a protective regime, noting the importance of protecting the interests of the person subject to the protective regime).

<sup>142</sup> See, for example, *Ibid*. See also CCQ, *supra* note 32 at art 26(6)(d) and art 492.

<sup>143</sup> See *Ibid* at art 277.

<sup>144</sup> See *Ibid* at art 278. The period can be shorter if so determined by the Court.

## 6. What are the obligations and rights of the guardian?

For curatorship and tutorship, the degree and duration of the incapacity are considered by the court to determine the powers of the legal representative.

Under **curatorship**, the curator's **responsibilities** are both **in relation to personal well-being and to property**. They include maintaining a relationship with the person and **getting their opinion** on decisions concerning them insofar as possible (however, curators are permitted to make decisions alone), **looking after their care** personally or via a facility suited to their needs, authorizing or refusing medical care, **representing their civil rights** in legal proceedings, and **getting a re-evaluation of their incapacity** every five years.

For **property**, a private curator must: make a list of property to be managed (within 60 days), give an **annual report** of the property's management, make a **final report** at the end of the curatorship, and provide this documentation to the tutorship council and the Public Curator. The curator **must make the person's property increase in value**, for example by making sound investments.

For **tutorship**, the court will decide what form is appropriate. **Depending on the needs of the adult**, the tutor (or tutors) may have **responsibility for physical and mental well-being and/or property**. With regard to well-being, the tutor must ensure the overall well-being of the person subject to tutorship; the responsibilities are the same as those listed above for curatorship<sup>145</sup>. With regard to **property**, the factors are generally the same as those for curatorship, except that the **tutor must safeguard and maintain the value** of the property, **without being obliged to make it yield a profit**.

The curator's and the tutor's **decisions are supervised by a tutorship council** usually made up of three people chosen by the person's family or friends. **For some decisions, the law requires the tutorship council's approval**, or even that of the court. A private **curator or tutor is generally not paid** for taking care of the person, **unless so stated** in the court's judgment putting the tutorship into place.

For **advisers** for adults, their **role** as well as what the person can do without their help will be **set out by the court**. **Generally, a person is free to disregard the adviser's advice**. However, **for important acts named in the court judgment, the adviser's signature may be required**. If the court judgment does not specify otherwise, the protected person must obtain their adviser's signature if they wish to refuse an inheritance, accept a gift that comes with an obligation to act, lend or borrow a large amount (in relation to their situation), or sell or mortgage property.<sup>146</sup>

### Level of commitment to supported decision-making in Canada generally

There is **no broad commitment to supported decision-making** in Canada. In fact, upon ratification of the *Convention on the Rights of Persons with Disabilities*, on March 11, 2010, Canada entered a **Declaration and Reservation stating its understanding of Article 12** of the Convention as permitting substitute decision-making in appropriate circumstances, and reserving the right to continue its use.<sup>147</sup> As mentioned above, however, certain Provinces have acted to ensure supported decision-making locally.

<sup>145</sup> With the difference that a tutor cannot generally make decisions alone.

<sup>146</sup> See CCQ, *supra* note 32 at arts 293, 173, and 174.

<sup>147</sup> See United Nations Treaty Collection, Convention on the Rights of Persons with Disabilities: "Declarations and Reservations", online:

## VOTING RIGHTS

### 7. Voting Rights for People with Mental Disabilities

#### 7.1. Democratic rights in Canada generally

In Canada, democratic rights, including **voting rights, are protected by the Constitution**: s. 3 of the *Canadian Charter of Rights and Freedoms* (“Charter”), enacted in 1982, provides, “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”<sup>148</sup> Other rights protected by the Charter are also relevant, including notably the right to freedom of expression (s. 3(b)), and the right to equality (s. 15). The Charter applies to federal and provincial governments.

#### 7.2. Voting at the Federal Level

The main law governing the **conduct of federal elections is the *Canada Elections Act*** (“CEA”).<sup>149</sup> Prior to 1993, para. 14(4)(f) of the Act excluded from voting: “every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease.”<sup>150</sup> A 1988 ruling of the Federal Court of Canada declared this provision unconstitutional for conflicting with s. 3 of the Charter.<sup>151</sup> The judge in the case noted that the limitation was arbitrary, insofar as it excluded people that it should not, and did not capture people that should perhaps be excluded. **In April 1993, the Federal Parliament eliminated the discriminatory provision.**<sup>152</sup>

However, **persons with mental incapacities are still vulnerable to exclusion from voting**. The current CEA specifies that the **Chief Electoral Officer will delete from the elector registry** a person who:

[...](d) is, by reason of mental incapacity, under a court-ordered protective regime, including guardianship, tutorship or curatorship, and whose authorized representative under the regime requests in writing that the person’s name be deleted; or

(e) is a future elector with a mental incapacity whose parent requests in writing that the future elector’s name be deleted.<sup>153</sup> [emphasis added]

Various other provisions are more beneficial for voters with disabilities. For example, the CEA requires **advertising** on how to be added to the list of electors and **how to vote** to be accessible to electors with a disability.<sup>154</sup> In addition, s. 18.1(3) states: “The Chief Electoral Officer shall develop, obtain or adapt **voting technology** for use by electors with a disability [...]”<sup>155</sup>, in addition to other

<[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4)>. Note that as general practice, the federal government considers the views of provinces when developing its position on international instruments.

<sup>148</sup> *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, online: <<http://canlii.ca/t/ldsx>>, s 3.

<sup>149</sup> *Canada Elections Act*, SC 2000, c 9, online: <<http://canlii.ca/t/53mhm>> [CEA].

<sup>150</sup> *Canada Elections Act*, 1970, c. 14, s 14(4).

<sup>151</sup> See *Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.).

<sup>152</sup> See Bill C-114, *An Act to Amend the Canada Elections Act*, 3<sup>rd</sup> Sess, 34<sup>th</sup> Parl, 1993, Vol 1, Ch 19 (assented to 6 May 1993).

<sup>153</sup> CEA, *supra* note 42 at s 52 (1) (d)-(e). See also s 52(1.1). The Act goes on to specify as conditions that the deletion will only occur if the authorized representative provides a copy of the relevant court order and proof of identity.

<sup>154</sup> See *ibid* at s 18(2). These provisions were added in 2018, by the Elections Modernization Act, SC 2018, c 31, online: <<http://canlii.ca/t/53jm9>>. CEA, *supra* note 42 at s 18.1(3).

provisions on the accessibility of voting.<sup>156</sup> The CEA also has various provisions on political candidates' "accessibility expenses".<sup>157</sup>

## ONTARIO

In Ontario, the *Election Act* ("OEA") governs the conduct of elections.<sup>158</sup> The OEA does not specifically refer to guardianship or mental disability, but s. 14(1) states that a polling place will be provided in a hospital or psychiatric facility where people reside and that has at least 20 beds. Arrangements will be made for them to vote from their bed.<sup>159</sup> In addition, s. 45.4(1) states that an elector may request a home visit to vote by special ballot because of a disability or inability to read or write.<sup>160</sup> Finally, s. 44.1(1) of the Act provides that accessible voting equipment will be made available, in every electoral district.<sup>161</sup> It must allow a voter to vote "privately and independently."<sup>162</sup> No developments suggest the laws for accessible voting will substantially change soon.

## QUÉBEC

In Québec, legislation adopted in 1989 allowed the right to vote to persons with mental disabilities, except those under the most restrictive form of protective supervision: s. 1(4) of Québec's *Election Act* ("QEA") excludes every person under curatorship from being a qualified elector.<sup>163</sup> Since 1995, polling sites must be accessible for people with disabilities ("handicapped persons" in the language of the QEA)<sup>164</sup>. Elections Quebec publishes a **simplified electors' manual** and information sheet to permit people with intellectual disabilities to vote.<sup>165</sup> No developments suggest the laws for accessible voting will substantially change soon.

## 8. Commitment to Supported Decisionmaking

See answers under 2. (Ontario and Quebec), above.

<sup>156</sup> See, for example, *ibid* at ss 98, 121(1), and 168(6).

<sup>157</sup> See *ibid* at s 377.2(1). Generally, an accessibility expense is for making communications materials accessible to persons with disabilities.

<sup>158</sup> *Election Act*, RSO 1990, c E.6, online: <<http://canlii.ca/t/53hks>> [OEA].

<sup>159</sup> *ibid* at s 14(2). See also s 14(5) on a mobile poll as an alternative to voting in the facility.

<sup>160</sup> *ibid* at s 45.4(1)(b). Also, an elector who is unable to read or write or who is disabled may be assisted by the deputy returning officer at a polling place (s 55(1), or by a friend (s 55(2)). The Act further provides that every electoral officer shall receive training to understand the needs of electors with disabilities (s 55.0.1), and, at s 67.2(1), that the Chief Electoral Officer will prepare a report after each election on how services are provided in accordance with the *Accessibility for Ontarians With Disabilities Act*, 2005, SO 2005, c 11. The term "disability" is not defined in the *Ontario Election Act*. The definition in the *Accessibility for Ontarians with Disabilities Act* explicitly includes a condition of mental impairment, a developmental disability, a learning disability, and a mental disorder.

<sup>161</sup> See OEA, *supra* note 52 at s 44.1(4).

<sup>162</sup> This rule applies alongside other conditions. See *ibid* at s 44.1(6).

<sup>163</sup> See *Election Act*, CQLR c E-3.3, <<http://canlii.ca/t/53knh>>, s.1 (4) [QEA].

<sup>164</sup> See *ibid* at ss 132, 180, 300, 303.

<sup>165</sup> See Élections Québec, "Personnes ayant une déficience intellectuelle", online: <<https://www.electionsequbec.qc.ca/provinciales/fr/deficience-intellectuelle.php>>.

## 9. Current Developments

There is no indication that the Federal government intends to change the voting rights of people under guardianship. **Recent adoption of the *Accessible Canada Act*<sup>166</sup> demonstrates a general commitment to ensuring that people with disabilities can fully participate in society.**

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<sup>166</sup> Bill C-81, *An Act to ensure a barrier-free Canada*, 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, 2019, c 10 (assented to 21 June 2019). Note that the next Federal Elections will be held on 21 October 2019.

## C. FRANCE

### INTRODUCTION

#### 1. Introduction

La protection juridique des **majeurs** est composée de **mesures de protection *a priori***, dont l'objectif est d'empêcher une personne d'accomplir certains actes ou de l'assister dans leur réalisation, et d'une **mesure de protection *a posteriori***, qui vise à annuler un acte conclu par une personne dont les facultés mentales étaient altérées. Ce sont les premières qui font l'objet du présent rapport. Par ailleurs, il ne sera pas non plus question des mesures d'accompagnement social<sup>167</sup>, dans la mesure où celles-ci n'ont pas d'incidence sur la capacité juridique des majeurs concernés<sup>168</sup>.

Une **nouvelle loi, adoptée le 23 mars 2019<sup>169</sup>**, garantit de nouveaux droits **aux majeurs protégés** en matière de **droit de vote** et droits matrimoniaux. Il est désormais prévu que les majeurs placés sous le régime de la tutelle ou de la curatelle, les majeurs bénéficiant de mesures d'accompagnement social personnalisé, d'accompagnement judiciaire, d'habilitation familiale ou de sauvegarde de justice, peuvent exercer leur droit de vote dans les mêmes conditions que les autres personnes. Des mesures relatives à **l'assistance pour la prise de décision pour l'exercice du droit de vote ne sont pas prévues** par la nouvelle loi.

### GUARDIANSHIP

#### 2. What forms of guardianship for adults exist

Il existe **cinq formes de protection *a priori*** à destination des majeurs : le mandat de protection future, la sauvegarde de justice, la curatelle, la tutelle et l'habilitation familiale.

**A l'exception du mandat de protection future** (mesure de protection conventionnelle), ces mesures sont **décidées par un juge**.

Le **mandat de protection future** peut être conclu par une personne majeure afin de prévoir que telle(s) personne(s) serai(en)t chargée(s) de la représenter, **si elle ne pouvait plus pourvoir seule à ses intérêts, en raison d'une altération de ses facultés mentales** ou corporelles<sup>170</sup>.

L'**habilitation familiale**<sup>171</sup> est délivrée aux ascendants, descendants, frères, sœurs, conjoint, partenaire ou concubin du majeur protégé, **afin de le représenter, de l'assister**, ou de passer un ou des actes en son nom, **afin d'assurer la sauvegarde de ses intérêts**<sup>172</sup>. L'habilitation **est ordonnée par le juge seulement en cas de nécessité** et lorsqu'il ne peut être suffisamment pourvu aux intérêts

<sup>167</sup> Voir Service-Public, Site officiel de l'administration française, Mesure d'accompagnement social personnalisé (Masp) ou judiciaire (Maj), disponible sous : <https://www.service-public.fr/particuliers/vosdroits/F1336> (24.09.2019).

<sup>168</sup> M. Brusorio Aillaud, Droit des personnes et de la famille, 9<sup>ème</sup> éd., Bruxelles 2018, N 201 ; voir N 285 pour la mesure de protection *a posteriori*.

<sup>169</sup> Loi n° 2019-222 du 23.03.2019 de programmation 2018-2022 et de réforme pour la justice.

<sup>170</sup> Code civil, article 477.

<sup>171</sup> Voir aussi l'habilitation judiciaire pour représentation du conjoint, dans le chapitre du Code civil relatif aux devoirs et droits respectifs des époux (article 217) ; voir également : Service-Public, Site officiel de l'administration française, Habilitation judiciaire pour représentation du conjoint, disponible sous : <https://www.service-public.fr/particuliers/vosdroits/F34327> (24.09.2019).

<sup>172</sup> Code civil, article 494-1 alinéa 1.



de la personne par l'application des règles du droit commun de la représentation, de celles relatives aux droits et devoirs des époux, ou des stipulations du mandat de protection future le cas échéant<sup>173</sup>. En fonction des intérêts patrimoniaux, voire personnels de l'intéressé, le juge statue sur l'étendue de l'habilitation, qui peut se limiter à un ou plusieurs actes sur les biens, un ou plusieurs actes relatifs à la personne, ou sur l'ensemble des actes ou l'une des deux catégories d'actes mentionnés<sup>174</sup>.

La **sauvegarde de justice** vise à répondre au besoin d'une **protection juridique temporaire ou d'une représentation pour l'accomplissement de certains actes déterminés**<sup>175</sup>. La sauvegarde de justice peut également être prononcée par le juge à des fins conservatoires, pendant la durée d'une procédure de curatelle ou de tutelle<sup>176</sup>. La sauvegarde de justice est la mesure de protection judiciaire la plus légère.

La **curatelle**, mesure de protection judiciaire intermédiaire entre la sauvegarde de justice et la tutelle, vise à **assister ou contrôler d'une manière continue le majeur protégé dans les actes importants de la vie civile**<sup>177</sup>. Il existe plusieurs degrés de curatelle : la **curatelle simple** (la personne accomplit seule les actes de gestion courante (actes d'administration et conservatoires) et doit être assisté de son curateur pour les actes plus importants (actes de disposition)), la **curatelle renforcée** (les ressources du majeur protégé sont perçues par le curateur, qui règle ses dépenses) et la **curatelle aménagée** (les actes que le majeur protégé peut ou non faire seul sont indiqués par le juge). De manière générale, le majeur sous curatelle reste **autonome dans les actes de la vie courante** (actes d'administration tels que des travaux d'entretien dans son logement, décisions relatives à sa personne telles que changer d'emploi si son état le permet, etc.) **et pour ses décisions d'ordre familial** (actes strictement personnels tels que la reconnaissance d'un enfant<sup>178</sup>, se marier sur simple information préalable de son curateur<sup>179</sup>, etc.). En revanche, le majeur placé sous curatelle doit être **assisté de son curateur pour accomplir des actes de dispositions** (tels que la vente de son appartement, etc.)<sup>180</sup> ou encore faire des donations<sup>181</sup>. La curatelle permet la prise de mesures de protection strictement nécessaires pour mettre fin au danger que le comportement du majeur à pour conséquence de lui faire encourir<sup>182</sup>.

La **tutelle** offre une **représentation continue dans les actes de la vie civile**<sup>183</sup>. Il existe deux sortes de tutelles : la tutelle complète et la tutelle simplifiée. Dans la **tutelle complète**, un tuteur représente le majeur protégé dans les actes de la vie civile, et un subrogé tuteur vérifie sa gestion. Les actes de conservation et d'administration sont effectués par le tuteur, et les actes de disposition doivent être autorisés par un conseil de famille constitué de 4 à 6 membres et présidé par le juge. Cette forme de tutelle sera choisie lorsque « les nécessités de la protection de la personne ou la consistance de son patrimoine le justifient et si la composition de sa famille et de son entourage le permet »<sup>184</sup>. La **tutelle simplifiée** ne comprend qu'un tuteur, agissant sous le contrôle du juge. Le tuteur prend seul les actes de conservation et d'administration, et le juge donne son accord pour les actes de disposition. En principe, le majeur protégé accomplit **sans assistance ni représentation** les actes dont

<sup>173</sup> Code civil, article 494-2.

<sup>174</sup> Code civil, article 494-6 alinéas 1 et 3.

<sup>175</sup> Code civil, article 433 alinéa 1.

<sup>176</sup> Code civil, article 433 alinéa 2.

<sup>177</sup> Code civil, article 440 alinéa 1.

<sup>178</sup> Code civil, article 458.

<sup>179</sup> Code civil, article 460.

<sup>180</sup> Code civil, article 467.

<sup>181</sup> Code civil, article 470 alinéa 2.

<sup>182</sup> Code civil, article 459 alinéa 4.

<sup>183</sup> Code civil, article 440 aliéna 3.

<sup>184</sup> Code civil, article 456 alinéa 1.

la nature implique un consentement strictement personnel (tels que la reconnaissance d'un enfant)<sup>185</sup> et relatifs à sa personne<sup>186</sup>.

## 2.1. Who may be placed under each form of guardianship?

Une disposition générale, commune à toutes les mesures de protection juridique des majeurs, prévoit qu'elles peuvent bénéficier à « **toute personne dans l'impossibilité de pourvoir seule à ses intérêts** en raison d'une altération, médicalement constatée, soit de ses **facultés mentales**, soit de ses **facultés corporelles** de nature à **empêcher l'expression de sa volonté** »<sup>187</sup>.

Le **mandat de protection future** peut être conclu par toute personne majeure ou mineure émancipée ne faisant pas l'objet d'une mesure de tutelle ou d'une habilitation familiale générale ; les personnes sous curatelle peuvent conclure un mandat de protection future avec l'assistance de leur curateur<sup>188</sup>.

L'**habilitation familiale** est destinée à toutes les personnes<sup>189</sup> hors d'état de manifester leur volonté, qui se trouvent dans un cadre familial favorable, sans conflit, et pour lesquelles les mesures plus lourdes de protection ne sont pas nécessaires<sup>190</sup>.

La **sauvegarde de justice** est prononcée par le juge lorsqu'une personne souffre d'une altération de ses facultés mentales ou corporelles et « a besoin d'une protection juridique temporaire ou d'être représentée pour l'accomplissement de certains actes déterminés »<sup>191</sup>.

La **curatelle** est destinée aux personnes qui, sans être hors d'état d'agir elles-mêmes, ont besoin, en raison d'une altération de leurs facultés mentales ou corporelles, d'être assistées ou contrôlées d'une manière continue dans les actes importants de la vie civile<sup>192</sup>.

La **tutelle** s'adresse aux personnes qui, en raison d'une altération de leurs facultés mentales ou corporelles, ont besoin d'être représentée d'une manière continue dans les actes de la vie civile<sup>193</sup>.

## 3. What are the criteria for legal guardianship?

En premier lieu, une mesure de protection ne doit être mise en place que si cela est **nécessaire au vu de l'état ou de la situation des personnes majeurs concernées**. Il est précisé que « cette protection est instaurée et assurée dans le respect des libertés individuelles, des droits fondamentaux et de la dignité de la personne. Elle a pour finalité **l'intérêt de la personne protégée**. Elle **favorise, dans la mesure du possible, l'autonomie** de celle-ci. Elle est un devoir des familles et de la collectivité publique »<sup>194</sup>.

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<sup>185</sup> Code civil, article 458.

<sup>186</sup> Code civil, article 459.

<sup>187</sup> Code civil, article 425 (mise en évidence ajoutée).

<sup>188</sup> Code civil, article 477 alinéas 1 et 2.

<sup>189</sup> Code civil, article 494-1.

<sup>190</sup> Brusorio Aillaud, Droit des personnes et de la famille, *op. cit.*, N 269 et N 271.

<sup>191</sup> Code civil, article 433 alinéa 1.

<sup>192</sup> Code civil, article 440 alinéa 1.

<sup>193</sup> Code civil, article 440 aliéna 3.

<sup>194</sup> Code civil, article 415 (mise en évidence ajoutée).

Ensuite, en vertu du **principe de subsidiarité**, le juge ne peut ordonner une mesure de protection que si elle est nécessaire et si le droit commun de la représentation, les règles relatives aux droits et devoirs respectifs des époux ou, le cas échéant, le mandat de protection future décidé par l'intéressé, ne suffisent pas à assurer les intérêts de la personne à protéger<sup>195</sup>.

En vertu du **principe de proportionnalité**, une mesure de protection judiciaire doit être « proportionnée et individualisée en fonction du degré d'altération des facultés personnelles de l'intéressé »<sup>196</sup>. Ainsi, une curatelle ne doit pas être mise en place, si une sauvegarde de justice est suffisamment protectrice ; ou encore une tutelle n'a lieu d'être que si la curatelle ne protège pas suffisamment la personne concernée.

En outre, un **certificat médical** est nécessaire pour solliciter une mesure de protection judiciaire<sup>197</sup> et donner effet à un mandat de protection future<sup>198</sup>. Des conditions encadrent ce certificat médical<sup>199</sup>.

De manière générale, la tutelle est une mesure de représentation, alors que la curatelle est une mesure d'assistance<sup>200</sup>. Cependant, d'une part, cette catégorisation de principe n'est pas sans exceptions. Par exemple, la personne en tutelle n'est qu'assistée par son tuteur pour la signature d'un pacte de solidarité civil<sup>201</sup> ou pour les actes énumérés par le juge<sup>202</sup> ; ou encore le curateur peut être autorisé à conclure seul un bail d'habitation pour le majeur protégé<sup>203</sup>. D'autre part, **chaque mesure de protection doit être individualisée en fonction du degré d'altération des facultés personnelles** de l'intéressé<sup>204</sup>. Ainsi, les mesures mises en place individuellement peuvent impliquer la représentation (3.1.) ou l'assistance (3.2.) du majeur protégé. La loi ne catégorise pas les mesures en fonction de leur caractère représentatif ou d'assistance ; elle ne donne ainsi pas de définition de la représentation et de l'assistance. La doctrine peut pallier ce manque.

### 3.1. Substituted decisionmaking (full guardianship)

Les mesures de protection, en particulier la tutelle, l'habilitation familiale et le mandat de protection future, peuvent prévoir que le majeur protégé est représenté. Le mandataire désigné est autorisé à **réaliser des actes, pour le majeur protégé et à sa place**. Toutefois, il semble que le mandataire soit tenu de **rechercher l'avis et le consentement du majeur protégé**, éventuellement ce qu'il aurait exprimé avant de perdre ses facultés.<sup>205</sup> Les juges associent les majeurs protégés aux décisions importantes qui les concernent, en respectant leur choix à chaque fois qu'il est conforme à leur

<sup>195</sup> Code civil, article 428 aliéna 1 et article 494-2 pour l'habilitation familiale.

<sup>196</sup> Code civil, article 428 alinéa 2.

<sup>197</sup> Code civil, article 431.

<sup>198</sup> Code civil, article 481.

<sup>199</sup> Voir : Code civil, article 431 (« certificat circonstancié rédigé par un médecin choisi sur une liste établie par le procureur de la République ») ; Code de procédure civile, article 1219 (« Le certificat médical circonstancié [...] : 1° Décrit avec précision l'altération des facultés du majeur à protéger ou protégé ; 2° Donne au juge tout élément d'information sur l'évolution prévisible de cette altération ; 3° Précise les conséquences de cette altération sur la nécessité d'une assistance ou d'une représentation du majeur dans les actes de la vie civile, tant patrimoniaux qu'à caractère personnel [...] ») ; Conseil national de l'Ordre des médecins, Le majeur protégé, disponible sous : <https://www.conseil-national.medecin.fr/medecin/prise-charge/majeur-protoge> (18.10.2019).

<sup>200</sup> Code civil, article 440.

<sup>201</sup> Code civil, article 462.

<sup>202</sup> Code civil, article 473.

<sup>203</sup> Code civil, article 472.

<sup>204</sup> Code civil, article 428 alinéa 2.

<sup>205</sup> Adultes Vulnérables, Glossaire - Représentation, disponible sous : <https://www.adultes-vulnerables.fr/vocabulaire-tutelle-conseil-reglementation/glossaire#Assistance> (26.09.2019).

intérêt<sup>206</sup>. Cette forme de participation du majeur protégé aux mesures de protection prenant la forme de la représentation s'inscrit dans le **principe de nécessité**<sup>207</sup> posé dans le Code civil :

« Les personnes majeures reçoivent la protection de leur personne et de leurs biens que leur état ou leur situation rend nécessaire selon les modalités prévues au présent titre.

Cette protection est instaurée et assurée dans le respect des libertés individuelles, des droits fondamentaux et de la dignité de la personne.

Elle a pour finalité l'intérêt de la personne protégée. Elle favorise, dans la mesure du possible, l'autonomie de celle-ci. [...]»<sup>208</sup>

### 3.2. Supported decisionmaking (partial guardianship)

Les mesures de protection, en particulier de curatelle et d'habilitation familiale, peuvent prévoir que le majeur protégé est assisté. Le mandataire désigné est autorisé à **réaliser des actes, avec le majeur protégé et sans le suppléer**. Pour des actes de gestion courante, le mandataire ne fera que conseiller le majeur protégé, voir contrôler les décisions qu'il a prises.<sup>209</sup>

## 4. Can guardianship of a person with disabilities be compelled?

Les mesures de protection des majeurs sont **décidées par le juge des tutelles**, voire déclenchées sur **déclaration du médecin** traitant. En ce sens, on peut estimer que les mesures de protection sont **imposées au majeur concerné**<sup>210</sup>. Seule **limite générale** en faveur de la liberté de décision du majeur : « la mesure de protection judiciaire ne peut être ordonnée par le juge qu[e] [...] lorsqu'il ne peut être suffisamment pourvu aux intérêts de la personne par la mise en œuvre du **mandat de protection future conclu par l'intéressé** »<sup>211</sup>.

## 5. Can a person legally challenge a guardianship decision?

**En principe, les décisions du juge des tutelles sont susceptibles d'appel**, dans un délai de 15 jours, auprès du tribunal de grande instance. L'appel est ouvert au majeur concerné, ou à son conjoint, son partenaire avec qui il a conclu un pacte civil de solidarité ou son concubin, à moins que la vie commune ait cessé entre eux, ou à un ascendant, descendant, un frère, une soeur ou un allié, une personne entretenant avec le majeur des liens étroits et stables, ou la personne qui exerce à son égard une mesure de protection juridique, ou par le procureur de la République soit d'office, soit à la demande d'un tiers.<sup>212</sup> Toutefois, le refus du juge d'ouvrir la mesure de protection ne peut être contesté que par la personne qui l'a demandée<sup>213, 214</sup>.

<sup>206</sup> G. Raoul-Cormeil, La protection de la personne du majeur protégé, in A. Batteur (dir.), Les grandes décisions du droit des personnes et de la famille, 2<sup>ème</sup> éd., Issy-les-Moulineaux 2016, pp. 416 – 425, N 482.

<sup>207</sup> Raoul-Cormeil, La protection de la personne du majeur protégé, *op. cit.*, N 482.

<sup>208</sup> Code civil, article 415 (mise en évidence ajoutée).

<sup>209</sup> Adultes Vulnérables, Glossaire - Assistance, disponible sous : <https://www.adultes-vulnerables.fr/vocabulaire-tutelle-conseil-reglementation/glossaire#Assistance> (26.09.2019).

<sup>210</sup> Voir : Code civil, articles 430, 432, 433 alinéa 3, 434 (renvoyant à l'article L. 3211-6 du Code de la santé publique), 494-4 alinéa 2 et 494-5, 481 alinéas 1 et 2, 485.

<sup>211</sup> Code civil, article 428 *in limine*.

<sup>212</sup> Code de procédure civile, article 1239.

<sup>213</sup> Code de procédure civile, article 1239-2. En ce qui concerne le point de départ du délai, voir Code de procédure civile, article 1241.

En matière de **mandat de protection future**, il est prévu que « tout intéressé peut saisir le juge des tutelles aux fins de contester la mise en œuvre du mandat ou de voir statuer sur les conditions et modalités de son exécution »<sup>215</sup>.

**Le placement sous sauvegarde de justice ne peut, en revanche, faire l'objet d'un recours**<sup>216</sup>. Néanmoins, la Cour de cassation admet implicitement un tel recours, lorsque le placement résulte d'une déclaration médicale<sup>217</sup>.

Par ailleurs, il est possible de **restreindre l'appel** contre la décision du juge des tutelles **à l'un des chefs de la décision** autre que le prononcé de la protection<sup>218</sup>.

### 5.1. If yes, can a court-ordered guardianship be reversed in whole or in part?

En matière d'**habilitation familiale**, il est prévu que « le juge statue à la demande de tout intéressé ou du procureur de la République sur les difficultés qui pourraient survenir dans la mise en œuvre du dispositif »<sup>219</sup>. Le juge peut, en ce sens, modifier l'étendue de l'habilitation ou y mettre fin, après avoir entendu la personne à l'égard de qui l'habilitation a été délivrée, dans la mesure du possible, ainsi que la personne habilitée<sup>220</sup>. En outre, l'habilitation familiale peut prendre fin par le placement du majeur sous curatelle ou tutelle, ou encore en cas de jugement de mainlevée passé en force de chose jugée<sup>221</sup>.

En matière de **mandat de protection future**, la contestation devant le juge des tutelles peut porter sur la mise en œuvre du mandat, ses conditions et modalités d'exécution<sup>222</sup>. Par ailleurs, en cas de rétablissement des facultés personnelles de l'intéressé, le mandant ou le mandataire peuvent mettre fin au mandat, par la production au greffe du tribunal d'instance d'un certificat médical l'attestant<sup>223</sup>. Le juge peut encore décider du placement (complémentaire ou substitutif) sous une autre mesure de protection<sup>224</sup>, ou la suspension des effets du mandat pour le temps d'une mesure de sauvegarde de justice<sup>225</sup>.

Si le besoin d'une mesure **sauvegarde de justice** prend fin, la mesure de protection peut être levée à tout moment, par le juge<sup>226</sup> ou bien suite à la radiation de la déclaration médicale ayant engendré la mesure ou une nouvelle déclaration d'un médecin au procureur de la République<sup>227</sup>.

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<sup>214</sup> M. Moulai (éd.) et al., Les droits des personnes handicapées, Paris 2018, p. 44 et p. 47 ; Site de la Cour de cassation, Les recours contre les décisions des juges des tutelles, disponible sous : [https://www.courdecassation.fr/publications\\_26/rapport\\_annuel\\_36/rapport\\_2009\\_3408/etude\\_personnes\\_3411/chambre\\_civile\\_3417/majeurs\\_proteges\\_3424/decisions\\_juges\\_15313.html](https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2009_3408/etude_personnes_3411/chambre_civile_3417/majeurs_proteges_3424/decisions_juges_15313.html) (02.10.2019).

<sup>215</sup> Code civil, article 484.

<sup>216</sup> Code de procédure civile, article 1249 alinéa 2.

<sup>217</sup> Brusorio Aillaud, Droit des personnes et de la famille, *op. cit.*, N 220, citant la décision de la Cour de cassation, 1<sup>ère</sup> chambre civile, du 02.12.1992, publiée au Bulletin civil 1, n° 295.

<sup>218</sup> Code de procédure civile, article 1243.

<sup>219</sup> Code civil, article 494-10 alinéa 1.

<sup>220</sup> Code civil, article 494-10 alinéa 2.

<sup>221</sup> Code civil, article 494-11.

<sup>222</sup> Code civil, articles 484 et 483 alinéa 1, 4°.

<sup>223</sup> Code civil, article 483 alinéa 1, 1°.

<sup>224</sup> Code civil, article 483 alinéa 1, 2° et 3° et article 485.

<sup>225</sup> Code civil, article 483 alinéa 2.

<sup>226</sup> Code civil, article 439 alinéa 2.

<sup>227</sup> Code civil, article 439 alinéa 3.

En matière de **curatelle** comme de **tutelle**, la mesure peut également prendre fin, être modifiée ou être substituée par une autre mesure, à tout moment. De telles décisions appartiennent au juge, qui se prononce après avoir recueilli l'avis de la personne chargée de la mesure de protection, au vu d'un certificat médical et, si possible, après audition de l'intéressé.<sup>228</sup> Il est encore prévu que la mesure de protection peut prendre fin en cas de jugement de mainlevée passé en force de chose jugée (en cas de guérison, amélioration de l'état de santé ou disparition de la condition relative au besoin de protection). En outre, il est précisé que, en cas de résidence du majeur protégé en dehors du territoire national, le juge peut mettre fin à la mesure si cet éloignement empêche le suivi et le contrôle de la mesure.<sup>229</sup>

## 6. What are the obligations and rights of the guardian?

Au nombre des principaux obligations et droits des personnes en charge d'une mesure de protection, figurent la tenue d'un compte de leur gestion et la question de leur rémunération.

La tenue d'un **compte de gestion** est une obligation faite aux tuteurs<sup>230</sup> et aux curateurs renforcés<sup>231</sup>. Elle consiste en l'établissement d'un compte de gestion, chaque année et lorsque la mission du tuteur ou du curateur renforcé prend fin. Ce compte de gestion est vérifié et approuvé par la personne compétente, qui varie selon les situations (par exemple : le subrogé tuteur, le conseil de famille, le juge, un professionnel qualifié, etc.). A l'issue de la vérification du compte de gestion, un exemplaire est transmis au tribunal. En cas de refus d'approbation des comptes, le juge est saisi et statue lui-même sur la conformité. Les fautes de gestion sont sanctionnées par le tribunal civil par des dommages et intérêts<sup>232</sup>. S'il y a eu détournement de fonds, de valeurs ou d'un bien par abus de confiance<sup>233</sup> ou de faiblesse<sup>234</sup>, les sanctions sont pénales (emprisonnement et amende)<sup>235</sup>. Il est toutefois possible de dispenser le tuteur ou le curateur renforcé de cette obligation relative au compte de gestion, en particulier lorsque les revenus ou le patrimoine de la personne protégé sont modiques.

<sup>228</sup> Code civil, article 442 alinéas 3 et 4.

<sup>229</sup> Code civil, article 443.

<sup>230</sup> Code civil, articles 510 à 514.

<sup>231</sup> Code civil, article 472 alinéa 3.

<sup>232</sup> Code civil, article 421 *in limine*. De manière générale, tous les organes de l'ensemble des mesures de protection judiciaire « sont responsables du dommage résultant d'une faute quelconque qu'ils commettent dans l'exercice de leur fonction » (Code civil, article 421 *in limine*). La faute doit toutefois être lourde pour le curateur (non renforcé) et le subrogé curateur (Code civil, article 421 *in fine*) ; pour le mandataire de protection future et la personne habilitée à protéger un majeur dans le cadre d'une habilitation familiale, « la responsabilité relative aux fautes est appliquée moins rigoureusement à celui dont le mandat est gratuit qu'à celui qui reçoit un salaire » (Code civil, article 1992 par renvoi de l'article 424).

<sup>233</sup> Code pénal, articles 132-16, 314-1 et 314-2 à 314-4.

<sup>234</sup> Code pénal, articles 223-15-2, 223-15-3 et 223-15-4.

<sup>235</sup> Ces infractions sont de portée générale. Elles s'appliquent même en dehors de toute obligation relative au compte de gestion. Elles sont également constituées si elles ont été commises par un curateur (non renforcé), un mandataire de protection future, une personne habilitée à protéger un majeur dans le cadre d'une habilitation familiale ou toutes autres personnes à qui ont été remis des fonds, des valeurs ou un bien d'autrui à charge de les rendre, de les représenter ou d'en faire un usage déterminé (abus de confiance), ou bien qui ont frauduleusement abusé de la situation de faiblesse d'une personne dont la particulière vulnérabilité est apparente ou connue, pour conduire cette personne à un acte ou une abstention qui lui sont gravement préjudiciables (abus de faiblesse).

L'encadrement de la **rémunération** des personnes en charge d'une mesure de protection varie en fonction de son caractère professionnel ou non. Ainsi, lorsqu'une mesure de protection est confiée à **un professionnel (mandataire judiciaire à la protection des majeurs), celui-ci est rémunéré**. Le financement est à la charge totale ou partielle du majeur protégé, en fonction de ses ressources. Les collectivités publiques financent le reliquat<sup>236</sup>. Lorsqu'une mesure de protection est confiée à un **membre de la famille ou un proche du majeur protégé, toute rémunération est en principe exclue**<sup>237</sup>. Des exceptions à la gratuité sont possibles : lorsque l'importance des biens gérés ou la difficulté d'exercer la mesure justifie le versement d'une indemnité par la personne protégée<sup>238</sup> ; ou encore, en matière de mandat de protection future, lorsque ce dernier stipule une forme de rémunération<sup>239</sup>.

## VOTING RIGHTS

### 7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?

Avant le 25 mars 2019, le Code électoral prévoyait que le juge qui ouvrait ou renouvelait une mesure de tutelle devait également statuer sur le maintien ou la suppression du droit de vote de la personne protégée<sup>240</sup>. La Loi du 23 mars 2019<sup>241</sup> a supprimé cette possibilité. Désormais, **tous les majeurs protégés ont le droit de vote**, dans les mêmes conditions que les autres majeurs.

#### 7.1. Where is the right to vote secured/denied? (in the Constitution? In the voting laws? In the guardianship order?)

Le droit de vote est garanti par **la Constitution**<sup>242</sup> **et la loi**<sup>243</sup> (Code électoral).

**Le droit de vote ne peut pas être retiré** aux majeurs protégés, ni sur le fondement de leur handicap, ni sur le fondement de leur mesure de protection.

### 8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?

La réforme ayant restitué aux majeurs protégés le droit de vote ne prévoit **pas de mesure d'assistance** pour son exercice, c'est-à-dire pour aider à la prise d'une décision.

Au contraire, le nouvel article du Code électoral aménage, spécialement pour les majeurs protégés, les règles de la procuration électorale, dans le but de garantir le **principe de la sincérité du scrutin**<sup>244</sup>.

<sup>236</sup> Code civil, article 419 alinéas 2 à 4.

<sup>237</sup> Code civil, articles 419 alinéa 1 et 494-1 alinéa 2

<sup>238</sup> Code civil, article 419 alinéa 1.

<sup>239</sup> Code civil, article 419 alinéa 5.

<sup>240</sup> Code électoral, article L. 5 abrogé (au 25.03.2019).

<sup>241</sup> Loi n° 2019-222 du 23.03.2019 de programmation 2018-2022 et de réforme pour la justice, article 11.

<sup>242</sup> Constitution du 04.10.1958, en particulier l'article 3.

<sup>243</sup> Cf. le Code électoral, article L. 1 et suivants.

<sup>244</sup> Ministère de la Justice, Annexe 9 : Restitution immédiate du droit de vote aux majeurs en tutelle, p. 1, disponible sous : [http://www.justice.gouv.fr/art\\_pix/dacs\\_ann09\\_droit\\_vote\\_majeurs\\_tutelle.pdf](http://www.justice.gouv.fr/art_pix/dacs_ann09_droit_vote_majeurs_tutelle.pdf) (18.10.2019).

Ainsi, le majeur protégé ne peut pas donner procuration à son mandataire judiciaire, aux personnes travaillant pour l'établissement qui l'accueille, ou encore aux personnes intervenants à son domicile pour accomplir des services à la personne<sup>245</sup>.

La **représentation** – entendue au sens de la prise de décision à la place du majeur protégé – pour l'exercice du droit de vote d'un majeur protégé n'est **pas permise**. Le Code électoral prévoit expressément que « le majeur protégé exerce personnellement son droit de vote pour lequel il ne peut être représenté par la personne chargée de la mesure de protection le concernant »<sup>246</sup>. S'il peut donner procuration à une personne pour se déplacer à sa place dans le bureau de vote<sup>247</sup>, cela ne signifie pas que cette personne pourra voter différemment de ce que le majeur protégé lui aura indiqué.

Suite à sa visite en France en 2017, la Rapporteuse spéciale sur les droits des personnes handicapées a produit à rapport en janvier 2019, dans lequel elle exprime ses préoccupations relatives à la participation politique des personnes handicapées en France<sup>248</sup>. Ses préoccupations portaient sur la possibilité de supprimer le droit de vote des personnes protégées et l'interdiction faite aux personnes sous tutelle ou curatelle de se présenter à des élections ; les préjudices et les stéréotypes concernant les personnes handicapées en ce qu'ils font obstacle à la mise en œuvre effective de leur droit de vote au moment de l'inscription sur les listes électorales et des votes ; le manque d'accessibilité des campagnes électorales pour les personnes dont le handicap est autre que physique. Sa demande portant sur l'abrogation des normes qui permettaient au juge de supprimer le droit de vote d'une personne protégée a trouvé une réponse dans la réforme présentée (cf. *supra* 7).

## 9. Are there current developments to change the voting rights of persons under guardianship?

La norme susmentionnée relative au droit de vote des majeurs protégés a été adoptée très récemment (mars 2019). De nouveaux développements ne sont, à notre connaissance, **pas prévus**.

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<sup>245</sup> Code électoral, article L. 72-1 alinéa 2.

<sup>246</sup> Code électoral, article L. 72-1 alinéa 1.

<sup>247</sup> Code électoral, article L. 72-1 alinéa 2.

<sup>248</sup> Rapport de la Rapporteuse spéciale sur les droits des personnes handicapées, Visite en France, A/HRC/40/54/Add. 1, 08.01.2019, N 27 à N 29. La France a ratifié la Convention relative aux droits des personnes handicapées et son Protocole facultatif et a accepté la procédure d'enquête le 18.02.2010 ; Nations unies Droits de l'homme, Haut-Commissariat, Base de données relative aux organes conventionnels de l'ONU, page relative aux engagements pris par la France, disponible sous : [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?Lang=fr](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?Lang=fr) (29.10.2019).



## D. GERMANY

### EINLEITUNG

#### 1. Einleitung

Ende 2015 standen in Deutschland ca. 1,5 Mio. Personen unter rechtlicher Betreuung.<sup>249</sup> Das Betreuungsrecht versteht sich als **Erwachsenenschutzrecht**, dessen Hauptanliegen die Wahrung und Stärkung der Selbstbestimmung des Betreuten ist.<sup>250</sup>

Das deutsche Betreuungsrecht wurde im Jahre **1992 grundsätzlich reformiert**. Das einheitliche Rechtsinstitut der Betreuung ersetzte die vorherigen Institute von Entmündigung, Vormundschaft und Gebrechlichkeitspflegschaft. Aktuell wird eine grössere Reform des Vormundschafts- und Betreuungsrechts erarbeitet, unter anderem um den durch die UN-Behindertenrechtskonvention garantierten Selbstbestimmungsrechten sowie Forschungsergebnissen besser Rechnung zu tragen.<sup>251</sup>

Wichtigster Grundsatz und entscheidend für das ob und wie jeder Betreuung ist heute das **Erforderlichkeitsprinzip** als Ausprägung des Verhältnismässigkeitsgrundsatzes: der Betreuungsrichter muss **im Einzelfall entscheiden**, für welche Aufgabenkreise eine Betreuung erforderlich ist. Entfallen ihre Voraussetzungen, so ist sie aufzuheben.

Eine klare gesetzliche Unterscheidung zwischen stellvertretender Entscheidung und unterstützter Entscheidungsfindung wird im deutschen Recht nicht getroffen, vielmehr gilt grundsätzlich das **Gebot der unterstützten Entscheidungsfindung**. Durch die Betreuung soll die rechtliche Handlungsfähigkeit des Betroffenen wiederhergestellt werden.<sup>252</sup> Eine Betreuung endet mit ihrer Aufhebung durch das Betreuungsgericht oder bei Tod des Betreuten.

Bis 2019 sah Bundesrecht einen **Wahlrechtsausschluss für Betreute in allen Angelegenheiten** vor. Der Wahlrechtsausschluss wurde nun **aufgehoben**<sup>253</sup> und gleichzeitig im Bundeswahlgesetz eine neue Regelung zur technischen Hilfeleistung für Wahlberechtigte, die des Lesens unkundig oder wegen einer Behinderung an der Ausübung ihrer Stimme gehindert sind, eingeführt.<sup>254</sup>

<sup>249</sup> W. Roth, Erbfall und Betreuungsrecht, Köln 2016, S. 5.

<sup>250</sup> H. Lang, Inklusives Wahlrecht – ein Update, ZRP 2018, 19, 21 f.

<sup>251</sup> Rede der damaligen Staatssekretärin im Bundesministerium der Justiz und für Verbraucherschutz (BMJV), Christiane Wirtz, zur Auftaktsitzung zum Diskussionsprozess «Selbstbestimmung und Qualität im Betreuungsrecht» am 20.6.2018, mit Bezug auf die Abschlussberichte der vom BMJV in Auftrag gegebenen Forschungsvorhaben «Qualität in der rechtlichen Betreuung» (verfügbar unter [https://www.bmjb.de/DE/Service/Fachpublikationen/Bericht\\_Qualitaet\\_rechtliche\\_Betreuung.html](https://www.bmjb.de/DE/Service/Fachpublikationen/Bericht_Qualitaet_rechtliche_Betreuung.html) (01.10.2019)) und «Umsetzung des Erforderlichkeitsgrundsatzes in der betreuungsrechtlichen Praxis im Hinblick auf vorgelagerte 'andere Hilfen'» (verfügbar unter [http://www.bmjb.de/SharedDocs/Downloads/DE/Fachinformationen/Zusammenfassung\\_Forschungsvorhaben\\_Erforderlichkeitsgrundsatz.pdf?\\_\\_blob=publicationFile&v=3](http://www.bmjb.de/SharedDocs/Downloads/DE/Fachinformationen/Zusammenfassung_Forschungsvorhaben_Erforderlichkeitsgrundsatz.pdf?__blob=publicationFile&v=3) (01.10.2019)).

<sup>252</sup> C. Beetz in Deinert/Welti, Stichwortkommentar Behindertenrecht, 2. Aufl. 2018, *Betreuungsrecht*, Rn. 2.

<sup>253</sup> Gesetz zur Änderung des Bundeswahlgesetzes und anderer Gesetze vom 18.6.2019 (BGBl. I 2019 S. 834).

<sup>254</sup> § 14 Abs. 5 BWahlG, verfügbar unter <https://www.gesetze-im-internet.de/bwahlg/> (26.09.2019).

## BETREUUNG

### 2. Arten der Betreuung Erwachsener

Für eine volljährige Person, die aufgrund einer psychischen Krankheit oder einer körperlichen, geistigen oder seelischen Behinderung ihre Angelegenheiten ganz oder teilweise nicht mehr besorgen kann<sup>255</sup> existiert seit 1992 allein das **einheitliche Rechtsinstitut der rechtlichen Betreuung**, welches in §§ 1896 – 1908i Bürgerliches Gesetzbuch (BGB) geregelt ist.<sup>256</sup>

Zuständig für die Bestellung eines Betreuers ist das Betreuungsgericht.<sup>257</sup> Das Betreuungsgericht kann mehrere Betreuer für einen oder unterschiedliche Aufgabenkreise bestellen.<sup>258</sup> Das Betreuungsverfahren kann von Amts wegen oder auf Antrag des Betroffenen eingeleitet werden und ist ein **Amtsermittlungsverfahren**. Grundsätzlich ist in der förmlichen Beweisaufnahme zur Bestellung eines Betreuers ein Sachverständigengutachten, **zumindest ein ärztliches Attest erforderlich**.<sup>259</sup> Der **Betroffene muss persönlich vom Gericht angehört** und über den möglichen Verfahrensverlauf informiert werden.<sup>260</sup> Der Betroffene ist, auch wenn er nicht mehr geschäftsfähig sein sollte, im Betreuungsverfahren immer verfahrensfähig.<sup>261</sup>

Grundsätzlich kann eine Betreuung von Amts wegen angeordnet werden. Bei körperlicher Behinderung ist eine Betreuung dagegen nur möglich, wenn der Betroffene selbst die Betreuung beantragt.<sup>262</sup>

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<sup>255</sup> § 1896 Abs. 1 S. 1 BGB.

<sup>256</sup> Das Gesetz zur Reform des Rechts der Vormundschaft und Pflegschaft für Volljährige vom 12.9.1990 (Betreuungsgesetz; BGBl. I S. 2002) ersetzte die Institute der Entmündigung (die eine völlige Entrechtung bedeutete), der Vormundschaft für Volljährige und der Gebrechlichkeitspflegschaft. Weitere Reformen regelten unter anderem die Vergütung für Berufsbetreuer, vgl. für einen Überblick Müller/Renner, *Betreuungsrecht und Vorsorgeverfügungen in der Praxis*, 5. Aufl. 2018, Rn. 1-32.

<sup>257</sup> §§ 23a I Nr. 2, II Nr. 1 Gerichtsverfassungsgesetz (GVG) i.V.m.§§ 271 ff. Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG). Die Bestellung eines Betreuers ist dem Richter vorbehalten und kann nicht vom Rechtspfleger angeordnet werden, vgl. §§ 3 Nr. 2 b, 15 Rechtspflegergesetz (RPfG).

<sup>258</sup> Ein Kontrollbetreuer kann eingesetzt werden, wenn eine Kontrolle der bevollmächtigten Person nötig ist und der Vollmachtgeber dies selbst nicht mehr leisten kann, §1896 Abs. 3. Möglich ist nach § 1899, dass mehrere Betreuer bestellt werden; für den selben Aufgabenkreis, für unterschiedliche Aufgabenkreise oder nur als Ersatz. So ist etwa nach § 1899 Abs. 2 für die Entscheidung über die Einwilligung in eine Sterilisation des Betreuten stets ein besonderer Betreuer zu bestellen. Nach §§ 1908i i.V.m. 1792 kann zudem ein Gegenbetreuer insbesondere für Vermögensverwaltung bestellt werden.

<sup>259</sup> Soll die gegen den geäußerten Willen des Betroffenen vorgenommen werden soll, genügt ein ärztliches Attest nicht, es muss ein Sachverständigengutachten vorliegen (§ 280 FamFG) und der Sachverständige muss den Betroffenen persönlich und zeitnah mit dem Verfahren untersuchen.

<sup>260</sup> § 278 Abs. 1 und 2 FamFG; Falls dies zur Wahrnehmung der Interessen des Betroffenen erforderlich ist, ist ihm gem. § 276 FamFG ein Verfahrenspfleger zu bestellen.

<sup>261</sup> § 275 FamFG. Der Betroffene kann Anträge stellen und gegen Entscheidungen Rechtsmittel einlegen.

<sup>262</sup> Eine Betreuung sollte hier nur in besonderen Fällen erforderlich sein. Die in den meisten Fällen nötige, tatsächliche Hilfe, kann durch Assistenzleistungen als Leistungen der sozialen Teilhabe zur selbstbestimmten und eigenständigen Bewältigung des Alltags nach §§76 Abs. 1, Abs. 2 Nr. 2, 78 Abs. 1 Sozialgesetzbuch IX (SGB IX), in Kraft seit 1.1.2018, abgedeckt werden, vgl. etwa C. Beetz in Deiner/Welti, *Behindertenrecht*, op. cit., *Betreuungsrecht*, Rn. 4.

### 3. Was sind die Voraussetzungen (oder der nötige Grad von Unzurechnungsfähigkeit) für eine rechtliche Betreuung?

Zentrale Vorschrift für die Betreuung ist § 1896 BGB, der die Voraussetzungen festlegt, unter denen eine rechtliche Betreuung angeordnet werden kann.

Danach muss als medizinische Voraussetzung zunächst eine «**psychische Krankheit oder körperliche, geistige oder seelische Behinderung**»<sup>263</sup> des Betroffenen vorliegen. Diese muss der **Grund dafür sein, dass der Betroffene seine persönlichen, tatsächlich besorgungsbedürftigen Angelegenheiten, ganz oder teilweise nicht mehr selbst regeln kann**. Nötig ist hier ein **medizinischer Befund** der Krankheit und ihrer Kausalität für die Unfähigkeit des Betroffenen, seine Angelegenheiten zu besorgen.<sup>264</sup>

Nach dem gesetzlich verankerten **Erforderlichkeitsprinzip**<sup>265</sup> darf ein Betreuer nur für die Aufgabenkreise bestellt werden, in denen eine **Betreuung unbedingt notwendig** ist. Das Betreuungsgericht muss die erforderlichen Aufgabenkreise im individuellen Fall festlegen.<sup>266</sup>

Nach dem **Subsidiaritätsprinzip** ist eine Betreuung ultima ratio. Sie darf nicht angeordnet werden, soweit die Angelegenheiten durch einen Bevollmächtigten oder durch andere Hilfen (etwa von Familie, Freunden oder Behörden<sup>267</sup>) ebenso gut wie durch einen Betreuer besorgt werden können,<sup>268</sup> wenn es lediglich tatsächlicher Hilfe (etwa zur Führung des Haushalts) bedarf oder der Betroffene in einer Vorsorgevollmacht oder Patientenverfügung selbst bereits vorsorgende Erklärungen abgegeben hat.

#### 3.1. Stellvertretende Entscheidung

In seinem Aufgabenkreis vertritt der Betreuer den Betreuten gerichtlich und aussergerichtlich,<sup>269</sup> sodass er stellvertretend für den Betreuten wirksam entscheiden kann. Dennoch gilt grundsätzlich

<sup>263</sup> Nach C. Beetz in Deiner/Welti, Behindertenrecht, op. cit., *Betreuungsrecht*, Rn. 4. fallen dabei unter psychische Krankheiten körperlich begründbare (exogene) und nicht begründbare (endogene) Psychosen und Persönlichkeitsstörungen (medizinische Klassifikation), unter geistige Behinderungen Intelligenzdefizite unterschiedlicher Schweregrade und unter seelische Behinderungen langanhaltende oder bleibende psychische Beeinträchtigungen aufgrund regelwidrigen körperlichen, geistigen oder seelischen Zustands, etwa Altersdemenz.

<sup>264</sup> Vgl. § 280 FamFG, Ausnahmefälle sind in § 281 FamFG geregelt.

<sup>265</sup> § 1896 Abs. 2 BGB.

<sup>266</sup> Die Aufgabenkreise sind eng zu fassen: Typische Aufgabenkreise können etwa sein die Gesundheitsorge, Wohnungsangelegenheiten oder Vermögenssorge, dabei werden aber in der Betreuungsanordnung diese oft noch weiter untergliedert und ein Betreuer nur für einzelne Teilbereiche des Aufgabenkreises bestellt. Vgl. H. Lang in Bundesministerium für Arbeit und Soziales (BMAS), Forschungsbericht 470, Studie zum aktiven und passiven Wahlrecht von Menschen mit Behinderung, Juli 2016, S. 223. Der Bericht ist verfügbar unter: [https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/verfassung/studie-wahlrecht-behinderung.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/verfassung/studie-wahlrecht-behinderung.pdf?__blob=publicationFile&v=1) (16.9.2019).

<sup>267</sup> H. Lang in BMAS, Forschungsbericht 470, op. cit., S. 227.

<sup>268</sup> §1896 Abs. 1a und Abs. 2 S. 2 BGB.

<sup>269</sup> §1902 BGB. Für bestimmte (Zwangs-)Massnahmen benötigt der Betreuer die Genehmigung des Betreuungsgerichts, vgl. §§ 1904 ff. BGB.

das Gebot der unterstützten Entscheidungsfindung. Der Betreuer sollte stellvertretende Entscheidungen nur ausnahmsweise als letztes Mittel einsetzen<sup>270</sup> oder auf Wunsch der betreuten Person.<sup>271</sup> Trotz der gesetzlichen Vertretung bewirkt die Betreuung **keine Einschränkungen der Geschäftsfähigkeit des Betreuten** mehr.<sup>272</sup> Das Institut der Entmündigung wurde abgeschafft. Das aktuelle Regime ist eines der **Doppelkompetenz**: Der Betreute selbst kann auch nach Bestellung eines Betreuers weiterhin eigene Rechtsgeschäfte abschliessen kann, solange er nach den allgemeinen Regeln geschäftsfähig ist.<sup>273</sup>

Möglich ist, dass ein **Einwilligungsvorbehalt** durch das Betreuungsgericht angeordnet wird, soweit dies zur Abwendung einer erheblichen Gefahr für die Person oder das Vermögen des Betreuten erforderlich ist. In diesem Fall bedarf der Betreute zu einer Willenserklärung, die den Aufgabenkreis des Betreuers betrifft, dessen Einwilligung und kann nicht mehr alleine entscheiden.<sup>274</sup> Für höchstpersönliche Angelegenheiten kann ein solcher Einwilligungsvorbehalt nicht angeordnet werden.<sup>275</sup>

Selbst wenn der Betreuer als Vertreter entscheidet, hat er nach dem Wohl und geäußerten Wünschen des Betreuten zu entscheiden. Dennoch wird das Ziel der Selbstbestimmung des Betroffenen durch die Möglichkeiten der Bestellung eines Betreuers gegen seinen Willen und die Möglichkeit von Einwilligungsvorbehalt und Freiheitsentziehung eingeschränkt.<sup>276</sup>

### 3.2. Unterstützte Entscheidungsfindung

Solange der Betroffene noch wirksam selbst rechtsgeschäftliche Vollmachten erteilen und damit Vertrauenspersonen zur Wahrnehmung seiner Angelegenheiten beauftragen kann, darf eine Betreuung nicht angeordnet werden.<sup>277</sup>

Die aktuellen gesetzlichen Regelungen, mit der Doppelkompetenz von Betreuer und Betreutem, dem Weiterbestehen der eigenen Entscheidungsmöglichkeit des Betreuten trotz Betreuerbestellung und der Pflicht des Betreuers, den Wünschen des Betreuten zu entsprechen, können als unterstützend

<sup>270</sup> Wenn Beratung und Unterstützung, um den Betreuten zu eigenem Handeln zu aktivieren, nicht ausreichen, vgl. V. Lipp, *Betreuungsrecht und UN-Behindertenrechtskonvention*, FamRZ 2012, 669, 676.

<sup>271</sup> C. Beetz in Deiner/Welti, *Behindertenrecht*, op. cit., *Betreuungsrecht*, Rn. 14. Inwieweit dies in der Praxis tatsächlich so gehandhabt wird, ist fraglich. Die damalige Staatssekretärin im Bundesministerium für Justiz und Verbraucherschutz, Christiane Wirtz, betonte daher auch in ihrer Rede zur Auftaktsitzung zum Diskussionsprozess «Selbstbestimmung und Qualität im Betreuungsrecht», dass die bessere Umsetzung der unterstützten Entscheidungsfindung einer der wesentlichen Punkte für die anstehende Reformdiskussion sei. Es sei dafür zu sorgen, dass das Mittel der Stellvertretung in der Praxis als Unterstützungsinstrument und nicht als Instrument der Entmündigung und Fremdbestimmung genutzt wird. Der Text der Rede ist verfügbar unter [https://www.bmjv.de/SharedDocs/Reden/DE/2018/062018\\_Wirtz\\_Betreuungsrecht.html?nn=670423&\\_\\_blob=publicationFile](https://www.bmjv.de/SharedDocs/Reden/DE/2018/062018_Wirtz_Betreuungsrecht.html?nn=670423&__blob=publicationFile) (26.9.2019).

<sup>272</sup> P. Kiess in Jurgelcit, *Betreuungsrecht*, 3. Aufl. 2013, §1902 BGB Rn. 15.

<sup>273</sup> §§ 104 Nr. 2, 105, 105a BGB. Falls es zu entgegengesetzten Entscheidungen von Betreutem und Betreuer kommt, soll grundsätzlich das zuerst abgeschlossene Geschäft gelten, MüKoBGB/Schwab, 7. Aufl. 2017, § 1902 Rn. 21 f.

<sup>274</sup> § 1903 BGB. Ausnahmen gelten für Geschäfte, die dem Betreuten einen lediglich rechtlichen Vorteil bringen, da §1903 BGB anordnet, dass die §§ 108 bis 113, 131 Abs. 2 und § 210 entsprechend gelten.

<sup>275</sup> § 1903 Abs. 2 BGB.

<sup>276</sup> V. Lipp, *Betreuungsrecht und UN-Behindertenkonvention*, FamRZ 2012, 669.

<sup>277</sup> Palandt/Götz, 78. Aufl. 2019, Einf. v. §1896 Rn. 13 und §1896 Rn. 12.

angesehen werden.<sup>278</sup> Die Bundesregierung vertritt diese Meinung. Selbst eine stellvertretende Entscheidung sei mit den Anforderungen der UN-BRK vereinbar und ein Element der unterstützten Entscheidungsfindung, soweit sie zur Durchsetzung des Willens des Betroffenen oder seines subjektiven individuellen Wohls erforderlich ist.<sup>279</sup> Dies folge aus der Schutzpflicht des Staates für hilfebedürftige Personen vor einer gravierenden Selbstschädigung, wenn ihnen die Fähigkeit zur Selbstbestimmung fehlt.<sup>280</sup>

#### 4. Kann eine Betreuung ohne oder gegen den Willen der betroffenen behinderten Person angeordnet werden?

Nach dem Gesetzeswortlaut darf gegen den freien Willen des Volljährigen ein Betreuer nicht bestellt werden.<sup>281</sup> Nichtsdestotrotz kann in Ausnahmefällen eine sogenannte **Zwangsbetreuung**<sup>282</sup> ohne Einwilligung des Betroffenen angeordnet werden. Für die Anordnung einer Zwangsbetreuung muss positiv festgestellt werden, dass der Betroffene zu einer freien Willensbestimmung nicht mehr in der Lage ist. Hierfür muss genau geprüft werden, inwieweit die Krankheit die Einsichts- und Steuerungsfähigkeit des Betroffenen beeinträchtigt. Eine bloße richterliche Feststellung einer erheblichen Beeinträchtigung genügt nicht, auch eine fehlende Krankheitseinsicht kann nur Indiz sein – für eine **Feststellung fehlender Selbstbestimmung** sind vielmehr konkrete Tatsachen und auch konkrete Äusserungen im Gutachten erforderlich.<sup>283</sup>

#### 5. Kann eine Person eine Betreuungsanordnung rechtlich angreifen?

Gegen die Entscheidung des Betreuungsgerichts kann innerhalb eines Monats **Beschwerde**<sup>284</sup> eingelegt werden. Gegen Entscheidungen in zweiter Instanz ist die **Rechtsbeschwerde** möglich.<sup>285</sup> Der Betroffene ist im gesamten Verfahren der Betreuerbestellung verfahrensfähig und kann damit auch selbst Rechtsmittel einlegen. Weiterhin können Personen<sup>286</sup>, die im Verfahren beteiligt waren, im Interesse des Betroffenen sowie die zuständige Behörde<sup>287</sup> Beschwerde einlegen.

<sup>278</sup> Vgl. J. Seichter, Einführung in das Betreuungsrecht, 5. Aufl. 2018, S. 230, der betont, dass der Betreuer nicht mehr Vormund, sondern Teilhabeassistent ist, sodass ein Mehr an Selbstbestimmungsrecht und Inklusionspotential schwer vorstellbar sei.

<sup>279</sup> BMAS, Staatenbericht 2019, op. cit., S. 23. mit Bezug auf BVerfG, Beschluss vom 26.7.2016, 1 BvL 8/15, Rn. 88.

<sup>280</sup> BMAS, Staatenbericht 2019, op. cit., S. 23.

<sup>281</sup> § 1896 Abs. 1a BGB; dies beruht auf dem von Art. 2 Abs. 1 Grundgesetz gewährleisteten Selbstbestimmungsrecht.

<sup>282</sup> Diese ist zu unterscheiden von Zwangsmitteln zur Durchführung einzelner Betreuungsmassnahmen in den gesetzlich vorgesehenen Fällen.

<sup>283</sup> A. Roth in Dodegge/Roth, Systematischer Praxiskommentar Betreuungsrecht, 5. Aufl. 2018, Teil A Rn. 17.

<sup>284</sup> § 58 ff. FamFG. Die Beschwerde ist grundsätzlich das Rechtsmittel gegen erstinstanzliche Entscheidungen. Zuständig für die Entscheidung ist im Grundsatz das Landgericht, das Betreuungsgericht selbst hat aber die Möglichkeit der Abhilfe gem. § 68 Abs. 1 FamFG.

<sup>285</sup> § 70 Abs. 1 FamFG, nach § 75 kann im Ausnahmefall auch schon gegen einen im ersten Rechtszug ergangenen Beschluss eine Sprungrechtsbeschwerde eingelegt werden.

<sup>286</sup> § 303 FamFG (inklusive Ehegatten und Lebenspartner, Eltern, Grosseltern, Pflegeeltern, Kinder und Geschwister, aber auch Vertrauenspersonen des Betroffenen, sowie der Verfahrenspfleger und der, bzw. die Betreuer oder Vorsorgebevollmächtigte(n)).

<sup>287</sup> Nach § 304 FamFG sind zudem auch Vertreter der Staatskasse beschwerdebefugt, wenn die Interessen der Staatskasse durch den Beschluss betroffen sind.

### 5.1. Kann eine gerichtlich angeordnete Betreuung ganz oder teilweise rückgängig gemacht werden?

Neben der Beschwerde gegen die Anordnung, kann der Betreute eine gerichtliche **Überprüfung der Betreuerauswahl** erwirken.<sup>288</sup> Ist die Betreuung auf den **eigenen Antrag** des Betreuten hin angeordnet worden, so ist sie auf seinen Antrag hin auch wieder aufzuheben, wenn nicht eine Betreuung von Amts wegen erforderlich ist.<sup>289</sup>

Im Übrigen ist eine Betreuung aufzuheben, wenn ihre Voraussetzungen nicht mehr vorliegen.<sup>290</sup> Der Betreuer hat dem Betreuungsgericht Umstände mitzuteilen, die eine Aufhebung der Betreuung oder des Einwilligungsvorbehalts bzw. Einschränkung des Aufgabenkreises erfordern.<sup>291</sup>

Das Gesetz sieht explizit eine Entscheidung über die Aufhebung oder Verlängerung einer angeordneten Betreuung oder eines Einwilligungsvorbehalts nach **spätestens sieben Jahren** vor.<sup>292</sup>

## 6. Rechte und Pflichten des Betreuers

Der Betreuer **vertritt** den Betreuten im Rahmen einzelner oder mehrerer ihm übertragener Aufgabenkreise<sup>293</sup> **als gesetzlicher Vertreter gerichtlich und aussergerichtlich.**<sup>294</sup> **Höchstpersönliche Geschäfte** des Betreuten wie Eheschliessung, Testamentserrichtung oder politische Wahlen **sind von der Vertretung ausgenommen, ebenso wie Insichgeschäfte**<sup>295</sup>. Die Aufgaben und Befugnisse des Betreuers im konkreten Einzelfall hängen von den, ihm übertragenen Aufgabenkreisen ab, die im Beschluss des Betreuungsgerichts genau benannt sein müssen und auch in seiner **Bestellungs-urkunde** aufzuführen sind.<sup>296</sup> Dazu sind vom Betroffenen in einer Betreuungsverfügung abgegebene vorsorgende Erklärungen ebenfalls vorrangig.

§ 1901 BGB legt den Umfang der Betreuung und die Pflichten des Betreuers fest. Danach hat der Betreuer die **Angelegenheiten des Betreuten nach dessen Wohl** zu besorgen. Dazu gehört, dass der Betreute im Rahmen seiner Fähigkeiten sein Leben nach seinen eigenen Wünschen und Vorstellungen gestalten kann (Autonomiegebot als Ausdruck des Grundrechts auf freie Entfaltung der Persönlichkeit). Der Betreuer hat **Wünschen** und Vorstellungen **des Betreuten zu entsprechen**

<sup>288</sup> § 291 FamFG. Nach § 1908b BGB kann der Betreuer durch das Gericht entlassen werden, wenn seine Eignung, die Angelegenheiten des Betreuten zu besorgen, nicht mehr gewährleistet ist oder ein anderer wichtiger Grund für die Entlassung vorliegt. Ein solcher kann nach dem Gesetz bei falschen Abrechnungen, aber auch mangelndem persönlichen Kontakt mit dem Betreuten gegeben sein. Zudem kann der Betreuer selbst auch seine Entlassung verlangen, § 1908b Abs. 2 BGB.

<sup>289</sup> § 294 FamFG. Auch ein Geschäftsunfähiger kann diesen Antrag stellen; in aller Regel wird hier ein Sachverständigengutachten erforderlich sein.

<sup>290</sup> § 1908 d BGB.

<sup>291</sup> §§ 1903 Abs. 4, 1901 Abs. 5 BGB. Auch der Betreute und andere Personen können dies mitteilen.

<sup>292</sup> § 294 Abs. 3, bzw. § 295 Abs. 2. FamFG. Zudem sieht § 286 Abs. 3 FamFG vor, dass die Anordnung bereits den Zeitpunkt für die Überprüfung der angeordneten Massnahme festlegen muss.

<sup>293</sup> Eine Besonderheit gilt nach § 1896 Abs. 4 für die Entscheidung über den Fernmeldeverkehr, sowie Entgegennahme, Öffnen und Anhalten seiner Post. Diese Aufgaben werden vom Aufgabenkreis des Betreuers nur umfasst, wenn das Gericht es ausdrücklich angeordnet hat.

<sup>294</sup> § 1902 BGB. Wirksam wird die Betreuung mit Zustellung des gerichtlichen Beschlusses an den Betreuer, vgl. § 287 FamFG. Ab diesem Zeitpunkt entstehen die Rechte und Pflichten aus dem Betreuungsverhältnis.

<sup>295</sup> § 1908 i Abs. 1 i.V.m. §1795 BGB.

<sup>296</sup> §§ 286 Abs. 1 und 2, sowie 290 FamFG.

(d.h. auch, wenn die Person nicht mehr geschäftsfähig ist und möglicherweise keine Erklärungen abgeben kann, genügt es, wenn (etwa durch Gesten) wahrnehmbar ist, was sie möchte<sup>297</sup>), auch wenn sie vor Bestellung des Betreuers geäußert wurden (Betreuungsverfügung), **soweit dies dem Wohl des Betreuten nicht zuwiderläuft<sup>298</sup> und dem Betreuer zuzumuten ist<sup>299</sup>**. Er muss **wichtige Angelegenheiten mit dem Betreuten besprechen**, bevor er sie erledigt, sofern dies dem Wohl des Betreuten nicht zuwiderläuft.<sup>300</sup> Der Betreuer muss innerhalb seines Aufgabenkreises dazu beitragen, dass Möglichkeiten genutzt werden, die **Krankheit oder Behinderung des Betreuten zu beseitigen, zu bessern, ihre Verschlimmerung zu verhüten oder ihre Folgen zu mildern.**<sup>301</sup>

Gegenüber dem Gericht muss der Betreuer **Auskunft** erteilen, mindestens einmal im Jahr berichten und über seine Vermögensverwaltung Rechnung zu legen.<sup>302</sup>

Die Betreuung ist prinzipiell ein **Ehrenamt**, sodass der Betreuer nur die mit der Betreuung verbundenen notwendigen Aufwendungen geltend machen kann.<sup>303</sup> **Eine Vergütung kann nur der Berufsbetreuer verlangen.** Betreuer haben das Recht, sich bezüglich ihrer Tätigkeit beraten zu lassen.<sup>304</sup>

## WAHLRECHT

### 7. Haben Menschen mit Behinderung das Wahlrecht/wovon hängt ein Wahlrechtsausschluss ab?

**Bis Mitte 2019** sah das deutsche Recht auf **Bundesebene Wahlrechtsausschlüsse** für unter **Vollbetreuung** stehende Menschen<sup>305</sup> vor, d.h. für Personen, für die nicht nur in einzelnen, sondern in **allen Angelegenheiten** eine Betreuung angeordnet war.<sup>306</sup> Dieser (aktive und passive)

<sup>297</sup> Schmidt-Recla in Gsell et al, BeckOGK BGB, 1.10.2019, §1901 Rn. 25.

<sup>298</sup> Diesem eher paternalistisch anmutenden Wortlaut gegenüber vertritt Schmidt-Recla in Gsell et al, BeckOGK BGB, 1.10.2019, §1901 Rn. 19 ff. und 32ff., dass das «Wohl» rein subjektiv aus Sicht der betreuten Person zu bestimmen ist und damit das «Interesse, dieser Person, mit ihren Ressourcen mit den gleichen Rechten am Rechtsverkehr teilnehmen zu können wie nicht betreute Personen». Danach (Rn 41 ff.) gehen der Wunsch des Betreuten im Rahmen der Personensorge (Grenze ist §1906 BGB, der Zwangsbehandlungen erlaubt) und der Vermögenssorge (Grenze Selbstgefährdung) immer vor.

<sup>299</sup> Der Betreuer ist an die ihm übertragenen Aufgabenkreise gebunden, muss etwa keine tatsächliche Pflege übernehmen, unbegrenzt Zeit mit dem Betreuten verbringen oder Straftaten für den Betreuten begehen oder unterstützen, vgl. Schmidt-Recla in Gsell et al, BeckOGK BGB, 1.10.2019, §1901 Rn. 52 f.

<sup>300</sup> Unter anderem auch, um widersprüchliche Entscheidungen im Rahmen der Doppelkompetenz von Betreuer und Betreutem zu verhindern, s.o. Frage 3.1. Die **Besprechungspflicht** illustriert die **persönliche Betreuung** und Pflicht des Betreuers zum **Kontakt** mit dem Betreuten. Siehe §1908b Abs. 1, sowie §§1908i Abs. 1 i.V.m. 1837 Abs. 2 und 1840 BGB.

<sup>301</sup> §1901 Abs. 4 BGB. Damit muss der Betreuer darauf hinwirken, dass eine Betreuung entbehrlich wird. Ist eine Einschränkung oder Aufhebung möglich, muss er dies dem Gericht mitteilen, § 1901 Abs. 5 BGB.

<sup>302</sup> §§1908i i.V.m. 1839 ff. BGB.

<sup>303</sup> C. Beetz in Deiner/Welti, Behindertenrecht, op. cit., *Betreuungsrecht*, Rn. 18 f.

<sup>304</sup> C. Beetz in Deiner/Welti, Behindertenrecht, op. cit., *Betreuungsrecht*, Rn. 20.

<sup>305</sup> Die Betreuung in allen Angelegenheiten wird nur im Ausnahmefall angeordnet. Damit waren 99,2% der Menschen mit Behinderung und 93,7% der Betreuten nicht von den Wahlrechtsausschlüssen betroffen, W. Schreiber, Bundeswahlgesetz, 10. Aufl. 2017, § 13 Rn. 10.

<sup>306</sup> Bisher entschied das Betreuungsgericht damit indirekt über einen Wahlrechtsausschluss: Nur wenn es explizit und im Ausnahmefall einen Betreuer «für alle Angelegenheiten» bestellte, führte dies zu einem Verlust des Wahlrechts. Ordnete es für einzelne Aufgabenkreise eine Betreuung an, selbst wenn

Wahlrechtsausschluss fand sich nicht im Grundgesetz, sondern **in den jeweiligen Wahlgesetzen**.<sup>307</sup> Auf **Bundesebene** waren dies für Bundestagswahlen §§ 13 und 15 Bundeswahlgesetz (BWahlG), sowie für Europawahlen §§ 6 a und b Europawahlgesetz (EuWG).

Bereits 2016 waren in einer Studie des Bundesministeriums für Arbeit und Soziales die verschiedenen Möglichkeiten geprüft worden, einen absoluten Wahlrechtsausschluss für unter Vollbetreuung stehende Menschen auf Bundesebene zu ändern.<sup>308</sup> Die Empfehlungen des CRPD Ausschusses im Rahmen der 1. Staatenprüfung 2015 forderten, die gesetzlichen Regelungen, die Menschen mit Behinderungen das Wahlrecht vorenthalten, zu streichen (Ziffer 53).

Nachdem das Bundesverfassungsgericht in **zwei Entscheidungen**<sup>309</sup> **Anfang 2019** die Wahlrechtsausschlüsse für Betreute in allen Angelegenheiten für mit dem Grundgesetz unvereinbar erklärt hatte, wurde auch der Gesetzgeber tätig. Im **Juni 2019** wurden die **Wahlrechtsausschlüsse aufgehoben**.<sup>310</sup> Daneben wurde eine **Regelung zur technischen Hilfestellung**<sup>311</sup> bei der Wahl in § 14 BWahlG eingeführt und die (strafrechtlichen) **Grenzen** der zulässigen Hilfe bei der Wahl festgelegt.<sup>312</sup>

Der neugefasste §13 BWahlG lautet nun:

«Ausgeschlossen vom Wahlrecht ist, wer infolge Richterspruchs das Wahlrecht nicht besitzt.»<sup>313</sup>

Auf Grundlage der aktuellen Gesetzeslage ist damit eine Einschränkung des Wahlrechts **nur noch aufgrund eines richterlichen Urteils** möglich. Eine solche Entziehung des Wahlrechts erfolgte bisher aber nur in sehr seltenen Fällen als Folge bestimmter Straftaten<sup>314</sup> und nicht aufgrund einer Betreuung.

diese faktisch alle Angelegenheiten abdeckten, so führte dies nicht zu einem Ausschluss. Ebenso führte eine Einschränkung der Betreuung für alle Angelegenheiten auf einzelne Aufgabenkreise zu einer Wiedererlangung des Wahlrechts.

<sup>307</sup> Eine spezifische Wahlrechts-, bzw. Wahlreifepfung im Rahmen des Verfahrens der Betreuungsanordnung fand im deutschen Recht bisher nicht statt und würde auf verfassungsrechtliche Bedenken stossen, vgl. H. Lang in BMAS, Forschungsbericht 470, op. cit., S. 229 f.

<sup>308</sup> BMAS, Forschungsbericht 470, op. cit.

<sup>309</sup> Siehe BVerfG, Beschluss des Zweiten Senats vom 29. Januar 2019 - 2 BvC 62/14, verfügbar unter [http://www.bverfg.de/e/cs20190129\\_2bvc006214.html](http://www.bverfg.de/e/cs20190129_2bvc006214.html) (20.09.2019); BVerfG, Urteil vom 15. April 2019 - 2 BvQ 22/19, verfügbar unter [http://www.bverfg.de/e/qs20190415a\\_2bvq002219.html](http://www.bverfg.de/e/qs20190415a_2bvq002219.html) (20.09.2019).

<sup>310</sup> Gesetz zur Änderung des Bundeswahlgesetzes und anderer Gesetze vom 18.6.2019 (BGBl. I 2019 S. 834).

<sup>311</sup> Es wurden in Bundes- und Europawahlordnung verschiedene Erleichterungen für Behinderte eingeführt, etwa Angaben zu barrierefreien Wahlräumen, Hilfe durch Hilfspersonen, Stimmzettelschablonen, erleichterte Lesbarkeit von Stimmzetteln und Briefwahlunterlagen, sowie Informationen in leichter Sprache, vgl. BMAS, Staatenbericht 2019, op. cit., S. 61 f.

<sup>312</sup> Gesetz zur Änderung des Bundeswahlgesetzes und anderer Gesetze vom 18.6.2019 (BGBl. I 2019 S. 834). Hinsichtlich der nunmehr erlaubten Assistenz bei der Wahl bestimmt § 107a Abs. 1 S. 2 StGB «unbefugt wählt auch, wer im Rahmen zulässiger Assistenz entgegen der Wahlentscheidung des Wahlberechtigten oder ohne eine geäußerte Wahlentscheidung des Wahlberechtigten eine Stimme abgibt.»

<sup>313</sup> Bisheriger § 13 Nr. 1 BWahlG a.F., verfügbar unter <https://www.gesetze-im-internet.de/bwahlg/BWahlG.pdf> (16.09.2019).

<sup>314</sup> Dies bedeutet laut der Kriminalstatistik insbesondere Fälle der Grundrechtsverwirkung nach §18 GG, sowie als mögliche Nebenfolge von bestimmten Straftaten innerhalb der Abschnitte des Friedensverrats, Hochverrats, Gefährdung des demokratischen Rechtsstaats (§§80-91 StGB), des Landesverrats und Gefährdung der äusseren Sicherheit (§§93-100a StGB), des Angriffs gegen Organe und Vertreter ausländischer Staaten (§102 StGB), sowie bei Straftaten gegen Verfassungsorgane sowie



Auf **Länderebene** fanden sich entsprechende Wahlrechtsausschlüsse in den jeweiligen Landes- und Kommunalwahlgesetzen. Manche Bundesländer hatten die Wahlrechtsausschlüsse schon vor der Entscheidung des Bundesverfassungsgerichts aufgehoben, wie etwa Nordrhein-Westfalen und Schleswig-Holstein 2016, oder Brandenburg, Bremen und Hamburg 2018. Andere zogen nach dem Urteil nach oder werden dies noch tun.<sup>315</sup>

## 8. Hat der Gesetzgeber sich verpflichtet, flächendeckend unterstützte Entscheidungsfindung einzuführen?

Durch die Ratifizierung der **UN-Behindertenrechtskonvention** hat sich Deutschland auch der unterstützten Entscheidungsfindung verschrieben. Die Empfehlungen des CRPD Ausschusses im Rahmen der 1. Staatenprüfung 2015 forderten, bei der rechtlichen Betreuung alle Formen der ersetzten Entscheidung abzuschaffen und an ihre Stelle die unterstützte Entscheidung treten zu lassen (Ziffer 26a).<sup>316</sup>

Im aktuellen Diskussionsprozess um eine **Reform** des Betreuungsrechts soll diskutiert werden, wie die bisherigen Defizite in der Umsetzung der Ziele der Behindertenrechtskonvention vermindert werden können. Das Bundesministerium für Arbeit und Soziales führte aus, dass dazu unter anderem auch eine **stärkere Ausrichtung der betreuungsrechtlichen Vorschriften am Gebot der unterstützten Entscheidungsfindung** gehöre.<sup>317</sup>

## 9. Gibt es aktuelle Entwicklungen zur Änderung des Wahlrechts unter Betreuung stehender Personen

Wie unter Punkt 7 beschrieben wurden die Wahlrechtsausschlüsse für Betreute in allen Angelegenheiten 2019 für verfassungswidrig erklärt und aus den Wahlgesetzen auf Bundesebene entfernt. Zudem wurde eine Regelung zur Wahlassistenz eingeführt. Auch die meisten Länder haben inzwischen reagiert und ihre Wahlgesetze geändert.

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bei Wahlen und Abstimmungen (§§105-108b StGB). Eine Wahlrechtsaberkennung nach §13 Nr. 1 BWahlG a.F. stellte aber die absolute Ausnahme dar.

<sup>315</sup> 2019 wurden in Bayern, Berlin, Mecklenburg-Vorpommern, Niedersachsen, Rheinland-Pfalz, Sachsen, Thüringen entsprechende Gesetzesänderungen verabschiedet.

<sup>316</sup> Committee on the Rights of Persons with Disabilities, Abschliessende Bemerkungen zur 1. Staatenprüfung 2015, verfügbar unter <https://www.institut-fuer-menschenrechte.de/monitoring-stelle-un-brk/staatenpruefung-2018-2020/abschliessende-bemerkungen-von-2015/> (26.09.2019).

<sup>317</sup> BMAS, Zweiter und Dritter Staatenbericht der Bundesrepublik Deutschland zum Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung vom 17.07.2019, S. 22 f. Der Bericht ist verfügbar unter <https://www.institut-fuer-menschenrechte.de/monitoring-stelle-un-brk/staatenpruefung-2018-2020/dokumente-zur-2-staatenpruefung/> (26.09.2019).

## E. ITALY

### INTRODUCTION

#### 1. Introduction

In the Italian legal system, the **regulation of protection measures** in favor of subjects who entirely or partially lack autonomy has been **reformed by Law 6/2004**<sup>318</sup> which substantially amended Book I, Title XII of the Italian Civil Code (Articles 404-432 ICC). The regulatory intervention **introduced the measure of *amministrazione di sostegno* (administrative support)** and, at the same time, **revised the legal regime of the preexisting measures of *interdizione* (full guardianship) and *inabilitazione* (curatorship)**. The **motivation for the reform** enacted by Law 6/2004,<sup>319</sup> was to establish a system of protection of vulnerable persons able to **balance the sometimes conflicting needs of protection of the person, respect for his/her dignity and enhancement of his/her self-determination**. Such an aim is in line with the principles subsequently proclaimed in Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD) of 2006, ratified by Italy with Law 18/2009. However, in its 2016 Concluding Observations on the Initial Report of Italy on the implementation of the Convention,<sup>320</sup> the CRPD Committee expressed its concern that “substituted decision-making continues to be practised through the mechanism of administrative support.”<sup>321</sup> It also deemed the support to persons with intellectual and/or psychosocial disabilities in exercising their right to vote inadequate.<sup>322</sup>

Thus, **Italy’s regime for adult protection is one of only substituted decisionmaking**. The *interdizione* and *inabilitazione* are protective measures fully or partially depriving people of their legal capacity and clearly are forms of substituted decisionmaking. At the same time, while the measure of *amministrazione di sostegno*, is literally translated as “administrative support”, it is in fact partial guardianship, permitting substituted decisionmaking as well, even though it has a less invasive impact on decisionmaking and legal capacity.

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<sup>318</sup> Law of 09.01.2004, No. 6, Introduction in the first book, title XII, of the civil code of chapter I, on administration of the support and modification of Articles 388, 414, 417, 418, 424, 426, 427 and 429 of the civil code concerning full guardianship and curatorship, as well as related implementation, coordination and final rules, published in Gazzetta Ufficiale No. 14 of 19.01.2004.

<sup>319</sup> Article 1 of Law 6/2004 reads as follows: “The present law has the purpose of protecting, with the less limitation possible of the ability to act, the people lacking in whole or in part of autonomy in the performance of the functions of daily life, through interventions by temporary or permanent support.”

<sup>320</sup> Italy submitted its Initial Report in 2013. CRPD Committee, Consideration of Reports submitted by States parties under Article 35 of the Convention. Initial reports of State parties due in 2011 – Italy, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CRPD/C/ITA/1&Lang=E> (22.08.2019).

<sup>321</sup> The CRPD Committee, therefore, recommended to “repeal all laws that permit substituted decision-making by legal guardians, including the mechanism of administrative support and the enactment and implementation of supported decision-making provisions. See CRPD Committee, Concluding observations on the initial report of Italy, CRPD/C/ITA/CO/1, 06.10.2016, para. 27-28, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fIT A%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fIT A%2fCO%2f1&Lang=en) (22.08.2019). For an analysis of the compliance of the Italian law on legal capacity to Article 12 of the CRPD, see the Report of the Institute for International Legal Studies (ISGI) of the National Research Council (CNR) of Italy, available at <http://www.anffas.net/dld/files/RAPPORTO%20ISGI.pdf> (22.08.2019).

<sup>322</sup> CRPD Committee, *ibid.*, para. 73.

## GUARDIANSHIP

### 2. What forms of guardianship for adults exist

The protection of vulnerable adults is essentially achieved through the **judicial appointment of a legal representative charged with acting on behalf of the protected person in the performance of all or some acts.**

The representative may be a *tutore* (full guardian), a *curatore* (curator), or an *amministratore di sostegno* (support administrator), depending on whether the protection is organised respectively in the form of full guardianship, curatorship, or administrative support.

Under the **full guardianship** regime, the **beneficiary is completely deprived of the legal capacity to act.** The guardian represents the person in **all civil acts** and makes decisions on his or her behalf in matters concerning **property and financial affairs**, as well as **personal welfare and health.** By way of exception, the **judge may decide that the adult retains the ability to perform certain acts of ordinary administration**<sup>323</sup> without the intervention or with the assistance of the guardian (Article 427 ICC). In the absence of any provision in this regard, however, the acts performed by the interdict are voidable.

The judgement instituting **curatorship** **limits the subject's ability to make some decisions.** The incapacitated person can only perform ordinary administration acts, while **most acts of extraordinary administration must be co-decided by a curator.** For example, the incapacitated person can continue to exercise a commercial enterprise if authorized by the court (Article 425 ICC), but he cannot start one. For some extraordinary administration acts, the person under curatorship may be declared capable of acting independently (Article 427 ICC). Absent such a declaration, extraordinary administration acts performed by the incapacitated person without the curator's assistance are voidable.

**Support administration** is a **partial guardianship scheme** and is the preferred solution when the situation does not require a more limiting intervention. The **administrator is chosen by the tutelary judge**<sup>324</sup> **with exclusive regard to the care and best interests of the beneficiary,** and, if possible, is selected from the members of his or her family (Article 408 ICC). The **administrator replaces or assists the person in the performance of the acts enumerated** in the decree instituting the protection, while the beneficiary retains the ability to perform all other acts (Article 409 ICC).

#### 2.1. Who may be placed under each form of guardianship?

**Full guardianship** can be ordered against the elderly and the emancipated minor who are in **conditions of habitual mental infirmity,** rendering them **incapable to provide for their own interests** in order to ensure their adequate protection (Article 414 ICC).

**Curatorship** can be instituted: a) against a person with a **mental infirmity**<sup>325</sup> **whose status is not so serious** as to give rise to the interdiction; b) against **persons who expose themselves or their family to serious economic prejudices,** for prodigality or abuse of alcoholic beverages or drugs; and c) in

<sup>323</sup> Included in ordinary administration are those acts aimed at managing a patrimonial asset without affecting its consistency. Acts of extraordinary administration are, instead, aimed at changing the structure and consistency of an asset ( eg. from the sale or donation of an asset).

<sup>324</sup> A formal designation of a support administrator in contemplation of an eventual incapacity may be made in advance by the beneficiary in the form of a notarial act or private deed (Article 408 ICC).

<sup>325</sup> A minor who is in the last year of his minor age and not yet emancipated may also be under a curatorship.

**cases of deafness and blindness from birth or early childhood, if sufficient education has not been received** (Article 415 ICC).

**Administrative support** is applied to protect **individuals who, due to physical or mental impairment, are no longer, or are only partially, capable of protecting their own interests** (Article 404 ICC).

### 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

While the effects and the scope of application of the different protection measures are distinct, the **vagueness of their application criteria**, in particular for support administration, **resulted in a situation of the - at least partial - overlap of such measures**. In all three protection measures the same **two assumptions** apply<sup>326</sup>: (1) **mental or physical disability**; and (2) the subject's lack of aptitude to provide for his **own interests**.

Making any distinctions in the criteria for the different protection measures has been complicated by the 2004 reform which made establishing full guardianship and curatorship optional and by the **extreme flexibility of the measure of support administration**. The latter, indeed, is **applicable also in cases traditionally covered by the two pre-existing protection measures**. As the **choice of measure is left to the discretion of the court**, it is complex to distinguish discrete criteria in the abstract.

The partial overlap of the measures and the relevant powers attributed to courts triggered early doubts about the constitutional legitimacy of the normative legislative framework. The Italian Constitutional Court affirmed the conformity of Law 6/2004 with the Constitution in 2005, however, thereby underlining that the **applicability of the other protection measures is residual** with respect to support administration.<sup>327</sup> Accordingly, the prevailing jurisprudential orientation is in the sense of appointing support administration even in very serious situations,<sup>328</sup> while the measures of *interdizione* and *inabilitazione* are instituted in situations for which the full protection of the vulnerable person cannot be realized through the partial guardianship.

#### 3.1. Full guardianship

Article 414 ICC provides that persons who are in conditions of *habitual mental infirmity*, making them unable to provide for their interests, “*may*” (no longer “*must*” as in the text in force before the reform) be declared incapable only “*when this is necessary to guarantee their appropriate protection*” (“*quando ciò è necessario per assicurare la loro adeguata protezione*”). The choice of full guardianship should not be based only on the degree of infirmity of the person, but the **judge must proceed to a careful reconstruction of the particular physical and mental situation of the subject, relating it to the complexity of decisions to be taken and to the need of his full protection**. Accordingly, the institution of full guardianship is deemed appropriate for the best management and conservation of substantial movable and immovable assets,<sup>329</sup> where it is necessary to inhibit the

<sup>326</sup> Except for the hypotheses of prodigality and habitual abuse of alcoholic or narcotic substances in the case of curatorship, according to Article 415, para. 2, ICC.

<sup>327</sup> Const. Court, judgment of 09.12.2005, No. 440, available at <http://www.giurcost.org/decisioni/2005/0440s-05.html> (22.08.2019).

<sup>328</sup> P. Stanzione, Amministrazione di sostegno, interdizione ed inabilitazione: rapporti ed interazione, p. 15, available at [http://www.comparazioneDirittocivile.it/prova/files/stanzione\\_sostegno.pdf](http://www.comparazioneDirittocivile.it/prova/files/stanzione_sostegno.pdf) (22.08.2019). The favor in appointing support administration prevails even if it is request full guardianship, *ex plurimis* see Tribunal of Udine judgment of 25.03.2017, No. 435, available at <https://news.avvocatoandreani.it/allegati/sentenze/Tribunale-%20Udine-435-2017.pdf> (22.08.2019).

<sup>329</sup> Cass. I Civil Section, judgement of 26.07.2013, No. 18171, available at

subject from taking decisions that will expose him or others to possible prejudices.<sup>330</sup> This includes cases concerning subjects suffering from suicidal tendencies.<sup>331</sup>

## 3.2. Partial guardianship

### 3.2.1. Curatorship

**Curatorship involves protection only in the patrimonial context.** It follows that with regard to persons with *less severe mental infirmity*, who can be protected both through curatorship and administrative support, the judge will favor the support administration if there are also needs beyond patrimonial context to meet.<sup>332</sup>

The functional criterion leads also the choice of the protection measure with regard to *deaf and blind persons from birth or early childhood* who did not received sufficient education. While the measure of curatorship has fallen into disuse for persons with sensorial disabilities and for people in states of mild mental illness, it is **still applied to those who, because of prodigality or abuse of alcoholic beverages or drugs, expose themselves or their family to serious matters economic prejudices, if they are not deemed suffering from illness or physical or mental impairment and their needs cannot be met through administrative support.**

### 3.2.2. Administrative Support

Article 404 ICC provides for two assumptions on the basis of which the measure of support administration can be instituted: *infirmity or physical or mental impairment*, and *impossibility* of protecting one's own interests. These two assumptions must both be present and an etiological link must also exist between the two: **the impossibility to provide for one's own interests must be caused by infirmity or physical or mental impairment.**<sup>333</sup> Such definition is capable of embracing a vast heterogeneity of cases given its **consideration of infirmities in general** (not exclusively mental ones) **and mental impairments** (including mental disabilities not amounting to a clinical illness), and the reference to the notion of impossibility (instead of incapacity which entails a thresholds of autonomy lesser than those required for impossibility) to look after one's own interests.<sup>334</sup>

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[http://www.digiec.unirc.it/documentazione/materiale\\_didattico/697\\_2014\\_1373\\_20677.pdf](http://www.digiec.unirc.it/documentazione/materiale_didattico/697_2014_1373_20677.pdf) (22.08.2019).

<sup>330</sup> See Tribunal of Milan, judgment of 13.02.2013, available at <http://www.ilcaso.it/giurisprudenza/archivio/9716.pdf> (22.08.2019).

<sup>331</sup> Tutelary judge of Milano, decree of 27.08.2013, [http://lecco.progettoads.net/allegati/ADS\\_t2\\_allegati/716/FILE\\_Allegato\\_decreto\\_Buffone\\_\\_interdizi one.pdf](http://lecco.progettoads.net/allegati/ADS_t2_allegati/716/FILE_Allegato_decreto_Buffone__interdizi one.pdf) (22.08.2019).

<sup>332</sup> Tribunal of Naples, 03.07.2006.

<sup>333</sup> Cass. IV Civ. Sec., order of 04.02.2014, No. 2364, available at <http://www.ilcaso.it/giurisprudenza/archivio/10011.pdf> (22.08.2019).

<sup>334</sup> The reference to "*impossibility, even partial or temporary*" allows to include within the scope of application of support administration also the hypothesis of serious and habitual mental illness. Physical and sensorial disabilities that prevent the subject to provide for his own interests, such as blindness or deafness, are also covered since the rule, reading "*physical or mental impairments*", qualifies physical disability as an autonomous application assumption. As for "*impossibility of protecting one's own interests*", it can be referred to both the interests of person care and conservation and administration of his heritage, separately or jointly considered. See F. Durante, *Inabilitazione, interdizione amministrazione di sostegno* (Treccani – Diritto on line), available at [http://www.treccani.it/enciclopedia/interdizione-e-amministrazione-di-sostegno-inabilitazione\\_%28Diritto-on-line%29/](http://www.treccani.it/enciclopedia/interdizione-e-amministrazione-di-sostegno-inabilitazione_%28Diritto-on-line%29/) (22.08.2019).

The tutelary judge, supported by consultants and psychopedagogical experts, will periodically examine the beneficiary to identify his abilities and autonomy. The scope of the administrative support will thereby be reassessed. The Court of Cassation has further profiled the measure to **prioritize the functional criterion**. That is, the identification of the protection measure must be based on the appropriateness of this measure to the persons's specific needs,<sup>335</sup> taking into consideration the person's residual abilities, life experiences, scholastic studies, and development of the person's employment activity.<sup>336</sup> In this vein, the judge takes into account the type of activity that must be carried out on behalf of the beneficiary, the severity and duration of the illness, or nature and the duration of the impediment, as well as all other circumstances peculiar to the case.

#### 4. Can guardianship of a person with disabilities be compelled?

The institution of **all three protective measures can be compelled** since it can be requested not only by the beneficiary himself (after the 2004 reform also for full guardianship and curatorships), but also by many other subjects, such as persons linked to the incapacitating subject from close ties of familiarity (such as the spouse, cohabitant and relatives), and other persons foreseen by law (full guardian or curator, and public prosecutor) (Articles 406 and 417 ICC).

The appointment of an administrative supporter may also be compelled<sup>337</sup> and even against the wishes of the person<sup>338</sup>. Moreover, a judge can appoint a protective measure different from the one requested if the relevant application conditions are met.

##### 4.1. To what degree/what types of decisionmaking can be restricted?

The person under full guardianship is **substituted by his tutor in all acts of extraordinary and ordinary administration**, unless the judgement of institution establishes otherwise for certain acts of ordinary administration (Article 427 ICC). **For most personal acts, a tutor cannot represent the person** under full guardianship<sup>339</sup>. The incapacitated person is therefore completely prevented from making a will (Article 591 ICC), marrying (Article 85 ICC), recognizing a natural child (Article 266 ICC),<sup>340</sup>

<sup>335</sup> Cass. I Civ. Sec., judgment of 12.06.2006, No. 13584, available at [http://www.digiec.unirc.it/documentazione/materiale\\_didattico/697\\_2014\\_1373\\_20613.pdf](http://www.digiec.unirc.it/documentazione/materiale_didattico/697_2014_1373_20613.pdf) (22.08.2019).

<sup>336</sup> Cass. I Civ. Sec, judgement of 11.09.2015, No. 17962, available at <https://www.personaedanno.it/dA/0911d2e152/allegato/17962del%202015.pdf> (22.08.2019).

<sup>337</sup> Article 408, para. 1, ICC; Cass. I Civ. Sec, judgment of 01.03.2010, No. 4866, available at <http://www.personaemercato.it/wp-content/uploads/2010/04/cass-132010-n-4866-doc.pdf>.

<sup>338</sup> Const. Court, order of 19 January 2007, No. 4, available at <http://www.giurcost.org/decisioni/2007/0004o-07.html> (22.08.2019).

<sup>339</sup> As for the divorce, Article 4, para. 5, of Law 898/1970 establishes that a person under full guardianship must be represented by a special curator in responding to divorce proceedings. By extensive interpretation of Law 898/1970, jurisprudence recognized to the incapacitated person the legitimacy to act through a special curator, appointed at the request of the guardian. See Cass. I Civ. Sec., judgment of 06.06.2018, No. 14669, which further ruled that according to a constitutionally oriented interpretation of Articles 357 and 414 ICC, the incapacitated person is allowed, through his/her legal representative, to carry out personal acts (unless, as in the case of Article 85 of the Civil Code, they are expressly prohibited), when the exercise of the corresponding right is necessary to ensure his/her adequate protection.

<sup>340</sup> It is excepted the capacity granted to the woman under full guardianship to request pregnancy interruption *ex* Article 13 of Law of 22.05.1978, No. 194, Rules on the social protection of motherhood and the voluntary

Within curatorship, the beneficiary is under a condition of relative incapacity, as a result of which for extraordinary acts he will be assisted by the curator. For some extraordinary administration acts, the person under curatorship may be declared suitable to act independently (Article 427 ICC).

**Administrative support is characterized by its flexibility according to the capabilities of the beneficiary and to the needs to be protected.** Being aimed at “protecting without mortifying the person with a disability”,<sup>341</sup> the support is distinguished to be the result of a “balance between protective needs and respect for individual autonomy”<sup>342</sup>, being deemed in line with the CRPD Convention by the Italian Constitutional Court.<sup>343</sup> By the **appointing decree**, the tutelary judge **establishes the acts that the beneficiary can perform with the assistance of the support administrator** and the **acts that the administrator carries out in the name and on behalf of the beneficiary** (Article 405 ICC). All other acts remain in the full ownership of the beneficiary.

## 5. Can a person legally challenge a guardianship decision?

Subjects entitled to request the institution of a protective measure can either challenge a guardianship decision or, if the conditions that led to its settlement no longer exist, request the revocation of the protection measure.

Against the sentence instituting **full guardianship or curatorship, all persons entitled to activate the proceedings, including the beneficiary, can appeal** before the Court of Appeal (Articles 718 and 719 of the Italian Code of Civil Procedure, ICCP). An **administrative support decree may be contested before the Court of Appeal** (Article 720 bis, para. 2, ICCP) and the Court of Appeal’s decree can be contested before the Court of Cassation (Article 720 bis, para. 3, ICCP).

Full guardianship and curatorship can be revoked at any time by a court ruling on the request of the spouse, the cohabitant, the parents by the fourth degree, the relatives up to the second degree, the guardian, or the public procurement (Articles 429 ICC and 720 ICCP). The revocation of support administration can be requested also by the same beneficiary (Articles 408 ICC and 720 bis ICCP).

The **revocation can be also partial** given that, if the judge does not deem restored the full capacity of the person, by deciding the revocation of full guardianship he can institute curatorship (Article 432 ICC) or request to the tutelary judge to open a support administration procedure for the person under full guardianship or curatorship (Article 429 ICC). It is also provided that the **tutelary judge can transform administrative support into the other protection measures** (Article 413 ICC).

## 6. What are the obligations and rights of the guardian?

The rules relating to the **obligations and duties of the guardian concern, mainly, the patrimonial aspects**. The only norm of the full guardianship regime that speaks of “**care**” is, in fact, Article 357 ICC that, in defining the functions of the guardian, establishes: “*The guardian takes care of the person and represents him in all civil acts and he replaces the beneficiary in all acts of ordinary administration.*” (Article 357 ICC)

<sup>341</sup> Cass. I Civ. Sec., judgment of 27.09.2017, No. 22602, available at <https://sentenze.laleggepertutti.it/sentenza/cassazione-civile-n-22602-del-27-09-2017> (04.09.2019).

<sup>342</sup> Cass. I Civ. Sec., order of 28.02.2018, No. 4709, available at <https://sentenze.laleggepertutti.it/sentenza/cassazione-civile-n-4709-del-18-02-2019> (04.09.2019).

<sup>343</sup> Const. Court., judgment of 10.05.2019, no. 114, published in Gazzetta Ufficiale No. 20 of 15.05.2019.

The predominantly **“patrimonial” approach also characterizes** the rules of the ICC on **the curator**. They, in fact, regulate only the methods of intervention for the performance of extraordinary administration acts.

The full guardian can perform acts of ordinary administration without the duty of requesting prior authorization of the tutelary judge or the court. With the authorization of the tutelary judge, the guardian can perform acts of extraordinary administration.<sup>344</sup> Immediately after his appointment, the **guardian must prepare an inventory of the assets** of the person (Article 362 ICC). He must also keep the **accounts** of beneficiary’s administration and **report them annually** to the tutelary judge (Article 380 ICC).

The **curator** does not replace the incapacitated, but **integrates his will**. In fact, the Court must authorize the curator to perform any act beyond those of ordinary administration. The curator has neither the obligation to prepare an initial inventory of the assets of the incapacitated person, nor the obligation to present the annual report of his management to the tutelary judge. This results in a less degree of protection of the persons under curatorship.

The **decree appointing the administrative support establishes**, inter alia, **the object of the appointment, the scope of the activities of the support administrator in favor of the beneficiary and the acts that the beneficiary can perform only with the assistance of the support administrator** (Article 405 ICC). Therefore, the support administrator can take action only and exclusively with reference to the acts expressly provided for by the tutelary judge in the decree appointing the support administrator.<sup>345</sup>

All tasks covered by the administrative support and those that can be jointly accomplished with the beneficiary or on his behalf must be stated in the appointing decree (Article 405 ICC). As a general rule, the **administrator must always take into account the needs and aspirations of the beneficiary and respect his dignity** (Article 410 ICC). This aim is secured through the obligation of the support administrator to **promptly inform the beneficiary about the acts to be performed** and to **inform the tutelary judge in the event of dissent** with the beneficiary. In addition, it is established the duty of the administrator to get acquainted with the tutelary judge about the activities carried out and the personal and social circumstances of the beneficiary (Article 405, para. 4, ICC).<sup>346</sup>

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<sup>344</sup> Namely, he can sale or purchase real estate or valuable movable property; collect capital, cancel mortgages, release pledges, enter into contracts and assume obligations; renounce or accept inheritances, donations or legacies; enter into leases over nine years; take legal action, unless it is a question of new work or feared damages, possessory actions, to collect fruits, obtain conservative measures and eviction procedures.

<sup>345</sup> Support administration has been defined by its creators as “a container” that can be filled by the most varied services and organizational structures. See P. Cendon, *Infermi di mente e altri "disabili" in una proposta di riforma del codice civile*, in *Giurisprudenza Italiana*, 1988, I, p. 122.

<sup>346</sup> Article 411 ICC, by recalling the rules concerning the powers of full guardian, states that some provisions are consistent and therefore become common to the two protection measures, with the exception that, in support administration, the administrator always needs the authorization issued by the tutelary judge to carry out certain acts (e.g., to collect capitals, to allow the cancellation of mortgages or the release of pledges, to undertake obligations, unless they concern necessary expenditures to maintain the beneficiary and to handle the day-to-day administration of his assets).



## VOTING RIGHTS

### 7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?

The **right to vote is recognized by Article 48 of the Italian Constitution**. The same constitutional provision foresees the possibility of restricting the right to vote on the basis of *civil incapacity*, as a consequence of irrevocable penal sentence and in cases of moral unworthiness as laid down by law. Following this provision, Presidential Decree 223/1967 established the exclusion of the right to vote for persons under full guardianship and curatorship due to mental illness (Article 2, para. 1).<sup>347</sup> In 1978, this rule was repealed by Article 11 of Law 180/1978 (known as Basaglia law)<sup>348</sup>. Although the repeal did not explicitly acknowledge the right to vote for people lacking the capacity to act and notwithstanding the continued existence of Article 48 of the Italian Constitution,<sup>349</sup> even the most critical doctrine could not fail to recognize that **Article 11 of Law 180/1978 “had the effect of eliminating from the Italian legal system any residual cause of limitation of the right to vote due to disability and civil incapacity”**.<sup>350</sup>

In order to **secure the exercise of the right to vote by persons with disabilities**, laws have been enacted in order to provide **special voting procedures**. Some laws provide for voting accessibility requirements, providing for architectonic accessibility of facilities and voting booths<sup>351</sup>, the possibility of assisted voting (*voto assistito*)<sup>352</sup>, or the right to vote from home (*voto domiciliare*)<sup>353</sup>

<sup>347</sup> Decree of the President of the Republic of 20.03.1967, No. 223, Approval of the consolidated text of the laws governing the electorate and keeping and revising the electoral lists, published in Gazzetta Ufficiale No. 106 of 28.04.1967.

<sup>348</sup> Law of 13.05.1978, No. 180, Compulsory and voluntary health checks and treatments, published in Gazzetta Ufficiale No. 133 of 16.05.1978. Article 11 reads:  
“Sono abrogati gli articoli 1, 2, 3 e 3-bis della legge 14 febbraio 1904, n. 36, concernente “Disposizioni sui manicomi e sugli alienati” e successive modificazioni, l'articolo 420 del codice civile, gli articoli 714, 715 e 717 del codice penale, il n. 1 dell'articolo 2 e l'articolo 3 del testo unico delle leggi recanti norme per la disciplina dell'elettorato attivo e per la tenuta e la revisione delle liste elettorali, approvato con decreto del Presidente della Repubblica 20 marzo 1967, n. 223, nonché ogni altra disposizione incompatibile con la presente legge. [...]”

<sup>349</sup> CRPD Committee, cit. , paras. 73-74, found Article 48 of the Constitution inconsistent with Article 29 of the CRPD and recommended to repeal it.

<sup>350</sup> See T. Martines, Art. 56-58, in G. Branca (ed.), Commentario della Costituzione, Le Camere, I, Bologna-Roma 1984, p. 64, who, however, deems Article 11 of Law 180/1978 as “of suspected constitutional illegitimacy”. According to L. Brusciuglia, Commento all'art. 11 legge 13 maggio 1978, n. 180, in Le nuove leggi civili commentate, Padova, 1979, p. 215, in any case, the right to vote would not be exercisable “following a medical assessment that excludes any ability to understand and want.”

<sup>351</sup> Law of 15.01.1991, No. 15, Rules aimed at favoring the voting of non-ambulatory voters, published in Gazzetta Ufficiale No. 16 of 19.01.1991.

<sup>352</sup> Article 55, para. 2, of the Presidential Decree 361/1957, as modified by Law 17/2003. See Decree of the President of the Republic of 30.03.1957, No. 361, Approval of the single text of the laws containing rules for the election of the Chamber of Deputies, published in Gazzetta Ufficiale No. 139 of 03.06.1957. Law of 05.02.2003, No. 17, New rules for the exercise of voting rights by voters suffering from serious illness, published in Gazzetta Ufficiale No. 33 of 10.02.2003.

<sup>353</sup> Law of 23.01.2006, No. 22, Conversion into law, with amendments, of Decree-law 3 January 2006, n. 1, containing urgent provisions for the vote from home for certain voters, for the computerized recording of the ballot and for admission to the seats of OSCE observers, published in Gazzetta Ufficiale No. 23 of 28.01.2006. Law of 07.05.2009, No. 46, published in Gazzetta Ufficiale No. 105 of 08.05.2009.

However, **persons with developmental, intellectual and/or psychosocial disabilities are neither allowed to exercise their right to vote with the help of an assistant nor are provided with specific measures to facilitate the casting of ballots or for adapted voting services.** Indeed, the CRPD Committee found Italy in violation of the Convention on these grounds and recommended that the state provide support and facilitation services to ensure all persons with disabilities can exercise their right to vote.<sup>354</sup>

Although **no limitation applies to the right to vote for persons under guardianship**, doubts arise about the entitlement of the right to vote for subjects with severe mental disease preventing them to form and express their will, even with the support of a third person. **There is a collision between the entitlement of the rights to personality, equality, freedom and secrecy of the vote with regard to these persons.**<sup>355</sup> The Italian Constitutional Court's findings on the constitutional legitimacy of Article 11 of Law 180/1978 did not provide useful interpretative criteria to better understand the meaning and scope of the rule in question.<sup>356</sup>

In the absence of specific legislation integrating the mere abolition of the voting ban on the basis of civil incapacity, some scholars deem that as a result of Law No. 180/1978 it is up to the court to decide on this.<sup>357</sup>

## 8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?

**Bill C. 1985,**<sup>358</sup> introduced to the Chamber of Deputies on 23 January 2014, is aimed at **strengthening the institution of administrative support and repealing full guardianship and curatorship.**

This bill conceives of incapacity as functional and limited in time and to specific acts. The **deprivation of legal capacity is replaced with the possibility of a declaration of so-called "functional incapacitation" which entails a contingent suspension of decisionmaking,** justified by specific dangers for the performing of personal and patrimonial acts, and **limited to one or more acts and**

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<sup>354</sup> CRPD Committee, cit., paras. 73-74.

<sup>355</sup> C. La Farina, *Infermità mentale e diritti politici*, in *Rivista italiana di medicina legale*, 1979, p. 15 ss.

<sup>356</sup> Const. Court, order of 30.09. 1987, No. 303, available at <http://www.giurcost.org/decisioni/1987/0303s-87.html> (22.08.2019).

<sup>357</sup> F. Balla, *Come vota il civilmente incapace? Un caso concreto, due soluzioni appaenti, una proposta interpretativa*, in *Forum di Quad. Cost.*, 2014, pp. 22- 23, available at [http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/10/dalla\\_balla.pdf](http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/10/dalla_balla.pdf) (22.08.2019). In particular, according to such interpretation the judge, called to decide on the limitation of the capacity to act, is entrusted with the task of ascertaining the relationship between the faculties of the subject and the possible satisfaction of the Constitutional voting requisites. By instituting the measure of full guardianship, the judge could expressly permit the beneficiary to vote. On the contrary, in the cases of curatorship and support administration the right to vote could be denied only if it is so expressly established in the the judgment establishing the institution of curatorship or in the decree appointing support administration.

<sup>358</sup> Bill C. 1985, *Strengthening of the administration of support and suppression of interdiction and disabling institutions*, was presented on 23.01.2014, is under examination of the Parliamentary Committee (since 09.09.2015), available at <http://www.camera.it/leg17/126?idDocumento=1985> (22.08.2019).

**transactions.** Given the functional character of this incapacitation, any decision in this regard is revocable and subject to periodic review.<sup>359</sup>

## **9. Are there current developments to change the voting rights of persons under guardianship?**

No current developments are reported in this regard.

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<sup>359</sup> Bill C. 1985 modifies provisions of the ICC on marriage, parentage, testamentary succession, donation, contracts, eliminating all the automatic personal impediments that the ICC currently provides for persons under full guardianship. In relation to each of the institutes, in fact, the legislator provides that it is up to the tutelary judge, when appointing the support administrator, to decide on the possibility for the beneficiary to perform the act. If the personal acts were prohibited by the judge, the prohibition must be temporary and subject to periodic review.

## F. THE NETHERLANDS

### INTRODUCTION

#### 1. Introduction

Plusieurs formes de mise sous tutelle des personnes majeures existent aux Pays-Bas, mais elles visent toutes la substitution de la personne placée sous curatelle, dans des proportions différentes et vis-à-vis d'actes différents. La loi néerlandaise ne prévoit pas expressément de régime séparé d'accompagnement de prise de décision. Toutefois, dans tous les régimes de tutelle, qu'il s'agisse de la curatelle, de l'administration protectrice ou encore du mentorat, le curateur, l'administrateur ou le mentor est tenu d'exercer sa mission en respectant la philosophie de vie, l'orientation religieuse et le bagage culturel de la personne mise sous tutelle. En outre, le curateur, l'administrateur ou le mentor est tenu de favoriser ou promouvoir, le plus possible, l'autonomie de la personne placée sous sa tutelle.

Les personnes majeures placées sous curatelle, administration protectrice ou mentorat conservent leur droit de vote. La loi prévoit que seules les personnes souffrant d'un handicap physique peuvent être assistées de la personne de leur choix dans l'isoloir. Les personnes souffrant d'un handicap mental doivent être en mesure d'exprimer leur voix de manière indépendante dans l'isoloir pour pouvoir valablement exercer leur droit de vote.

### GUARDIANSHIP

#### 2. What forms of guardianship for adults exist

Essentiellement, trois types de mise sous tutelle des personnes majeures sont reconnues en droit néerlandais : le régime de curatelle, le régime d'administration protectrice et le régime de mentorat. Celles-ci sont prévues par le Code Civil néerlandais (« *Burgerlijk Wetboek* », ci-après « BW »). Les trois formes de mise sous tutelle peuvent être ordonnées par un tribunal dans les cas où une personne adulte n'est pas/plus en mesure, en raison de son **état physique ou mental**, de prendre soin de ses intérêts.

**Le régime de la curatelle** est le plus invasif de ces régimes en ce sens que la mise sous curatelle implique pour la personne concernée la perte de sa capacité juridique. Cette mesure vise ainsi directement la personne concernée et couvre tant les intérêts patrimoniaux que non-patrimoniaux de cette personne.

**La mise sous curatelle** sera ordonnée à l'égard d'une personne majeure qui, de manière **temporaire ou permanente, n'est plus en état de prendre soin de ses intérêts** ou compromet sa sécurité ou celle des autres, des suites de :

- son état **physique ou mental**, ou
- son **habitude d'abus** d'alcool ou de drogues.

La mise sous curatelle sera ordonnée **uniquement si la protection adéquate des intérêts de la personne concernée ne peut être atteinte par une mesure moins invasive**. Il revient au tribunal d'apprécier si les conditions pour le mise sous curatelle sont remplies dans chaque espèce<sup>360</sup> (art. 1 :378 al.1er BW).

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<sup>360</sup> Par exemple : Rb Haarlem, 21 décembre 2011, LJN BW 4483.

**Le régime de la mise sous administration protectrice** permet de confier à une tierce personne la gestion d'un ou plusieurs biens de la personne concernée qui, en raison de son état physique ou mental, ne peut pas/plus en prendre soin. **Contrairement à la mise sous curatelle**, cette mesure vise un ou plusieurs biens de la personne concernée, mais **pas directement la personne concernée**. Cette mesure **est ordonnée plus fréquemment** par les tribunaux, étant donné qu'elle vise aussi les personnes en situation de banqueroute personnelle.

La **mesure d'administration protectrice** sera, quant à elle, ordonnée à l'égard d'une personne majeure qui, de manière **permanente ou temporaire, n'est plus capable de prendre pleinement soin de ses intérêts patrimoniaux**, des suites de :

- son état **physique ou mental**, ou
- ses problèmes de gaspillage ou de paiement de dettes<sup>361</sup> (Art. 1 :431, al. 1<sup>er</sup> BW).

Quant à la situation de handicap physique ou mental, il est nécessaire que celle-ci implique que la personne concernée **n'est plus en état de gérer pleinement ses intérêts patrimoniaux**. (« *ten volle zijn vermogensrechtelijke belangen behoorlijk waar te nemen* »xxx) Par « pleinement », la cour suprême des Pays-Bas (« *Hoge Raad* ») a décidé que **l'ampleur du handicap de la personne concernée n'était pas pertinente**<sup>362</sup>, et qu'il fallait **avoir égard non seulement à l'intérêt de la personne concernée, mais aussi à celui de l'entourage** de la personne concernée<sup>363</sup>.

Enfin, **le régime de mentorat** vise la **protection des intérêts non-patrimoniaux** uniquement de la personne concernée par la mesure. Placée sous le régime de mentorat, la personne adulte n'a pas la capacité juridique pour décider de ses soins, son accompagnement, son traitement.

La mise sous mentorat peut être prononcée à l'égard des **personnes majeures** qui, **en raison de leur état physique ou mental, ne parviennent plus ou difficilement**, de manière **durable ou temporaire**, à prendre soin de **leurs intérêts non-patrimoniaux**. (Art. 1:450 al.1<sup>er</sup> BW). En ce qui concerne la situation de la personne, il peut s'agir non seulement d'une situation durable mais **aussi d'une situation temporaire** comme une hospitalisation ou un séjour en hôpital psychiatrique ou encore une situation de coma passager. Par intérêts non-patrimoniaux, la loi vise essentiellement les **questions liées aux soins, traitement et accompagnement**.

### 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

#### 3.1. Substituted decisionmaking (full guardianship)

La mise sous **curatelle** est prononcée à l'égard des personnes qui ne sont **plus capables de gérer leurs intérêts tant patrimoniaux que non-patrimoniaux**. Ainsi, la mise sous curatelle implique, pour la personne concernée, la **perte de toute capacité juridique**, et ce, **tant en ce qui concerne l'exercice de ses droits patrimoniaux que non-patrimoniaux**, et ce, **sauf si la loi le prévoit autrement**. Ces exceptions, qui consistent à maintenir une capacité juridique de la personne placée sous curatelle pour certains actes précis, sont exposés ci-dessous (voir section 4.1).

<sup>361</sup> Par gaspillage, la loi vise un rapport inadéquat continu entre les revenus et les dépenses dû au gaspillage, que ce soit par des actes ou des omissions. Par problème de paiement de dettes, la loi vise les situations dans lesquelles il peut être raisonnablement prévu qu'une personne déterminée ne pourra plus payer ses dettes ou ne peut déjà plus les payer.

<sup>362</sup> HR, 1 juillet 1983, NJ 1984/181.

<sup>363</sup> HR 7 novembre 1986, NJ 1978/526.

La mise sous administration protectrice est prononcée à l'égard de personnes qui **ne sont plus capable de gérer le volet patrimonial ou certains aspects patrimoniaux** de leur vie. C'est le juge qui détermine l'ampleur de la mise sous administration protectrice selon les circonstances de l'espèce. En ce qui concerne les aspects non couverts par la mise sous administration protectrice, la personne concernée peut agir librement, comme toute autre individu majeur. Ainsi, à la différence de la mise sous curatelle, la mise sous administration protectrice n'implique pas en soi une totale incapacité juridique de la personne concernée (« *handelingsonbekwaamheid* »), mais une simple **non-autorisation ou incompétence pour cette personne d'exercer telle ou telle activité ou d'entreprendre tel ou tel actions** (« *handelingsonbevoegdheid* »).

Comme évoqué ci-avant (voir section 2.1.), la **mise sous mentorat** peut être prononcée à l'égard des personnes majeures qui, **en raison de leur état physique ou mental, ne parviennent plus ou difficilement à prendre soin de leurs intérêts non-patrimoniaux**. La loi vise un état dans lequel il n'est pas uniquement impossible mais également difficile de prendre soin de ces intérêts ; par ailleurs, la mesure peut être prononcée même en cas de difficultés passagères. Enfin, le tribunal n'est pas légalement tenu de prononcer la mise sous mentorat même s'il constate que les conditions légales sont remplies.<sup>364</sup>

### 3.2. Supported decisionmaking (partial guardianship)

La loi néerlandaise ne prévoit pas expressément de régime séparé d'accompagnement de prise de décision. Toutefois, dans tous les régimes de tutelle, qu'il s'agisse de la curatelle, de l'administration protectrice ou encore du mentorat, le curateur, l'administrateur ou le mentor est tenu d'**exercer sa mission en respectant la philosophie de vie, l'orientation religieuse et le bagage culturel de la personne mise sous tutelle**. En outre, l'Arrêté prévoit à l'article 4, alinéa 2 de l'Arrêté que le curateur, l'administrateur ou le mentor est tenu de **favoriser ou promouvoir, le plus possible, l'autonomie de la personne placée sous sa tutelle**.

A ce titre, on relève que la mise sous curatelle implique une nécessaire **incapacité juridique de la personne concernée**, qui se trouve « remplacée » par son curateur. La loi prévoit toutefois une **exception générale à cette incapacité juridique de la personne sous curatelle, puisque celle-ci peut être autorisée par son curateur à exercer certains actes** (art. 1:381 par. 3 BW). Une telle autorisation n'est possible que pour des actes que le curateur est en principe compétent pour prendre et ne concerner que certains actes ou qu'un but spécifique. L'autorisation donnée pour certains actes ne nécessite pas la forme écrite ; celle qui est donnée dans un objectif précis nécessite d'être donnée par le curateur sous une forme écrite (art. 1:381 par.3 BW).

## 4. Can guardianship of a person with disabilities be compelled?

La mise sous **curatelle peut être ordonnée par le tribunal** compétent à la demande de la personne concernée, mais aussi **à la demande d'autres personnes**, en particulier de son entourage ou encore à la demande du ministère public lorsque l'intérêt général est en jeu (art. 1:379 BW). Ainsi, la décision de mise sous curatelle prise par le tribunal peut intervenir contre la volonté de la personne concernée.

La mise sous **administration protectrice** peut, elle aussi, être **ordonnée par le tribunal** compétent à la demande de la personne concernée ou **de son entourage familial** proche (en cas de problème de

<sup>364</sup> HR 8 novembre 1996, NJ 1997/471 ; M.J.C. Koens, A.P.M.J. Vonken, *Personen- en familierecht*, tiende druk, 2018, p. 865.

paiement de dettes, par exemple) **mais aussi par le curateur** en cas de mise sous curatelle **ou par le mentor** en cas de mentorat (Art. 1 :432 al. 1<sup>er</sup> BW). La demande de mise sous administration protectrice peut **aussi être faite par le ministère public**; le ministère public, généralement réticent à s’immiscer dans des relations d’ordre privé, décidera librement de l’opportunité de faire la demande ou pas, en fonction notamment des circonstances de l’espèce, en particulier de la présence ou non d’un entourage familial et institutionnel de la personne concernée compétent pour faire ladite demande. **L’institution soignant** et accompagnant la personne concernée **est également compétente pour faire la demande** de mise sous administration protectrice. Enfin, l’organe exécutif des communes aux Pays-Bas (« *College van Burgemeester en Wethouders* ») est compétent pour solliciter la mise sous administration protectrice d’une personne souffrant de problèmes de gaspillage ou de paiement de dettes. Lorsque la demande est faite par l’institution soignante ou par le Collège exécutif communal, le demandeur devra indiquer dans sa requête les raisons pour lesquelles les personnes de l’entourage familial de la personne concernée n’ont pas initié de demande (Art. 1:432 al. 2 BW). Enfin, **le juge saisi d’une demande de mise sous curatelle ou d’une demande de fin de curatelle est également compétent pour ordonner la mise sous administration protectrice** en tant que mesure intermédiaire ou alternative. Dans l’ensemble de ces cas, le tribunal pourra ordonner la mise sous administration protectrice même contre la volonté de la personne concernée.

#### 4.1. What types of decisionmaking can be restricted?

L’opposition de la personne concernée placée sous un régime de curatelle, d’administration protectrice ou de mentorat est indépendant de la détermination de l’ampleur ou du type de décisions qui sont restreint pour cette personne, élément qui relève de l’appréciation du juge uniquement. Il en va autrement en ce qui concerne le choix du curateur, administrateur ou mentor. **Le juge est en effet obligé d’honorer la préférence exprimée explicitement par la personne concernée quant au choix du curateur ou de l’administrateur**, sauf s’il y a des motifs fondés pour écarter cette option (art. 1:383 al.2, art. 1 :435 al. 3 et art. 1 :452 al. 3 BW)<sup>365</sup>.

La loi a prévu **quelques exceptions à l’incapacité juridique** de la personne placée sous curatelle. Parmi ces exceptions, on compte essentiellement les suivantes : la mise en possession (art. 3 :112 et 3 :113 BW) et l’intervention comme mandataire (art. 3 :63 BW), la conclusion d’un mariage (art. 1 :37 BW et s.), la détermination du domicile commun des époux (art. 1 :83 par. 2 et 3 BW) ; la stipulation ou la modification des conditions de mariage (art. 1 :117 et 1 :118 BW), la reconnaissance d’un enfant (art. 1 :204 par. 4 BW) et la stipulation d’un testament (art. 4 :55 par. 1<sup>er</sup> BW). La personne sous curatelle peut également demander le prononcé du divorce en justice pour autant qu’elle est, malgré son état, en mesure de se déterminer quant à cette option et comprend les conséquences de cette demande<sup>366</sup>. De plus, la loi prévoit certains règlements particuliers selon les circonstances spécifiques, notamment en ce qui concerne l’autorité parentale sur les enfants de la personne placée sous curatelle (art. 1 :246 BW)<sup>367</sup>.

<sup>365</sup> Si aucune préférence n’est exprimée par la personne mise sous curatelle, la loi prévoit un ordre de préférence pour le choix du curateur : le partenaire de vie de la personne placée sous curatelle ; à défaut, ses parents, ses enfants, ses frères et/ou sœurs (art. 1 :383 al.3 BW). La même logique est suivie en cas de mise sous administration protectrice (Art. 1 :435 al. 4 BW).

<sup>366</sup> HR 28 mars 1980, NJ 1980/378.

<sup>367</sup> De plus, la personne placée sous curatelle en raison des suites de son habitude d’abus d’alcool ou de drogues demeure capable de gérer ses relations familiales, sauf là où la loi prévoit autre chose. Par exemple, même si elles restent en principe capables de gérer leurs relations familiales, ces personnes ne pourront pas exercer l’autorité parentale (art. 1:246 BW).

En ce qui concerne la mise sous **administration protectrice**, c'est **le juge qui détermine les biens qui sont concernés par la mise sous administration protectrice** : il peut s'agir d'un ou plusieurs biens qui appartiennent à la personne concernée ou qui lui appartiendront dans le futur. Si la personne sous administration protectrice est mariée<sup>368</sup>, l'administration protectrice peut également couvrir les biens communs entre les époux et ceux qui ne relèvent pas de la gestion exclusive de l'époux (-se) de la personne concernée (Art. 1:431 al. 1<sup>er</sup> BW). Sous administration protectrice, la personne concernée devient incompétente pour exercer tous **les actes de gestion et de disposition sur les biens de son patrimoine qui sont visés par la mesure**.

Comme évoqué ci-avant (voir section 2.1.), la mise sous mentorat peut être prononcée à l'égard des personnes majeures qui, en raison de leur état physique ou mental, ne parviennent plus ou difficilement à prendre soin de leurs intérêts non-patrimoniaux. Pour ces questions liées aux soins, traitement et accompagnement de la personne concernée, le mentor représente la personne placée sous son mentorat, dans le droit et dans les faits, sauf les cas pour lesquels une telle représentation n'est pas admise (Art. 1:453 al. 1<sup>er</sup> et 2 BW).

## 5. Can a person legally challenge a guardianship decision?

En application de l'article 1:381 par. 6 BW, **la personne placée sous curatelle est capable d'agir en justice pour les questions relatives à sa propre mise sous curatelle**. Il en va ainsi concernant un désaccord avec le curateur sur une question relative à sa mise sous curatelle ou encore une demande de mettre fin à la mise sous curatelle. Dans ces cas, le curateur doit veiller à ne pas empêcher ou freiner les contacts entre la personne placée sous sa curatelle et son avocat sauf si ceux-ci ont un impact sur la santé de la personne placée sous curatelle. Le cas échéant, la personne placée sous curatelle est également capable d'interjeter appel contre la décision judiciaire de sa mise sous curatelle rendue en première instance (art. 1:381 par. 6 BW).

**La personne placée sous administration protectrice** n'étant pas en situation d'incapacité juridique totale, elle **reste en mesure d'agir en justice** contre une décision prise par son administrateur ou pour contester sa mise sous administration protectrice dans le cadre d'une procédure d'appel.

### 5.1. If yes, can a court-ordered guardianship be reversed in whole or in part?

En fonction des demandes portées dans le cadre de la procédure judiciaire, il découle du paragraphe ci-avant (voir section 5) et de l'article 1:381 par. 6 BW que le tribunal sera amené, le cas échéant, à **décider de la fin de la mise sous curatelle ou à se prononcer sur un aspect dans l'exercice de cette curatelle**. En vertu de l'article 1:384 BW, si l'ordonnance de mise sous curatelle est annulée en appel ou en cassation, la mission du curateur prendra fin le lendemain de cette décision. L'annulation de la mise sous curatelle n'a pas pour effet de rendre nulles les actions prises par le curateur avant l'annulation de la mise sous curatelle, ces actions demeurant valables et contraignantes pour la personne concernée. Il en va **de même** en ce qui concerne la mise sous **administration protectrice** et de **mentorat**, étant donné que, dans ces deux hypothèses, la personne concernée n'a pas perdu sa capacité juridique à agir en justice en ce qui concerne son statut.

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<sup>368</sup> On vise également le partenariat enregistré.



## 6. What are the obligations and rights of the guardian?

### 6.1. In substituted decisionmaking

Les obligations du curateur ne sont pas décrites spécifiquement pour le régime de la mise sous curatelle mais il est renvoyé à certaines dispositions d'autres régimes de protection des personnes. Ainsi, en application de l'article 1:385 BW, renvoyant à l'article 1 :336 BW, le curateur est tenu de **prendre soin de la personne placée sous curatelle en fonction des moyens de celle-ci**.

En application de l'article 1:383 BW, 1:435 et 1:452 BW, en cas d'impossibilité de nommer en tant que curateur, administrateur protecteur ou mentor, respectivement, une personne de confiance de la personne placée sous tutelle ou une personne de son entourage direct, le juge est en mesure de nommer une tierce personne en tant que curateur, administrateur ou mentor. Celle-ci a alors l'obligation de démontrer sa formation et ses compétences. Ces **obligations de qualité** sont développées dans le cadre d'un arrêté datant de 2014 (« *Besluit Kwaliteitseisen curatoren, Beschermingsbewindvoerder en mentoren* », ci-après « l'Arrêté ») <sup>369</sup> et sont pour la plupart communes aux curateurs dans le régime de la curatelle, aux administrateurs dans le régime de l'administration protectrice et aux mentors dans le régime de mentorat.

Tout d'abord, le curateur, administrateur ou mentor, est tenu de **disposer d'une déclaration attestant du bon comportement** de lui-même et des personnes qui effectuent des tâches issues de ses fonctions en son nom et pour son compte<sup>370</sup>. De même, **le curateur, l'administrateur ou le mentor est tenu d'entretenir et de développer les connaissances** dont il a besoin pour exercer ses fonctions, par le suivi au moins chaque année d'une formation continue ou d'un entraînement.

Concernant les relations entre le curateur, l'administrateur ou le mentor d'une part, et la personne placée sous tutelle d'autre part, l'Arrêté prévoit que le curateur, l'administrateur ou le mentor est tenu **d'exercer sa mission en respectant la philosophie de vie, l'orientation religieuse et le bagage culturel de la personne mise sous tutelle**. En outre, l'Arrêté prévoit à l'article 4, alinéa 2 de l'Arrêté que le curateur, l'administrateur ou le mentor est tenu **de favoriser ou promouvoir, le plus possible, l'autonomie de la personne placée sous sa tutelle**.

Le curateur, l'administrateur ou le mentor fixe dans la mesure du possible conjointement, **l'objectif de la curatelle, l'administration protectrice ou le mentorat, ainsi que les engagements réciproques pour atteindre cet objectif**. Ces éléments sont intégrés dans un document écrit qui est remis à la personne sous tutelle, avec une explication orale, et au juge avant sa nomination<sup>371</sup>.

Le curateur, l'administrateur ou le mentor doit également faire preuve de ses **compétences en matière de gestion d'entreprise**. A cette fin, il est tenu de **créer et de maintenir un dossier pour**

<sup>369</sup> *Besluit van 29 Januari 2014 houdende regels ter waarborging van de kwaliteit van curatoren, beschermingsbewindvoerder en mentoren*, St. 2014, 46, 31.01.2014.

<sup>370</sup> Art. 2 Arrêté.

<sup>371</sup> Art. 5, al. 1 Arrêté. L'article 5 de l'Arrêté prévoit aussi que le curateur, l'administrateur ou le mentor est tenu d'être directement joignable pour la personne placée sous tutelle au moins quatre jours par semaine et, pour le reste, être joignable de telle manière à ce que la personne sous tutelle reçoit une réaction dans les deux jours ouvrables de sa prise de contact initiale. De plus, le curateur devra avoir au moins deux fois par mois contact avec la personne placée sous curatelle. Enfin, le curateur et l'administrateur sont tenus de remettre une fois par mois au moins un aperçu des mouvements sur ses comptes financiers. Le curateur, l'administrateur ou le mentor dispose d'un règlement des plaintes, qui prévoit la possibilité de déposer une plainte par la personne sous tutelle, la procédure applicable ainsi que les possibilités en cas de rejet.

**chaque personne placée sous sa tutelle**, contenant toute la documentation utile pour l'exercice de la curatelle, de l'administration protectrice ou du mentorat. Il est également tenu de **disposer d'une description des procédures** d'ouverture, de l'exercice et de la fin de la curatelle, l'administration ou le mentorat ainsi que l'organisation administrative et financière et le cas échéant le soutien, et exerce ses fonctions en conformité avec ses procédures. En outre, le curateur, l'administrateur ou le mentor est tenu de **ne pas accepter de cadeaux** de la personne placée sous sa tutelle, de ne rien lui acheter, de ne pas recevoir d'avantage d'ordre testamentaire de la personne placée sous tutelle et ne reçoit pas d'autre avantage de toute autre mission convenue dans le cadre du régime de tutelle. Ces interdictions concernent également **les avantages indirectement perçus**. Enfin, **le curateur, l'administrateur ou le mentor charge un comptable d'examiner ses capacités en matière de gestion d'entreprise** telles que décrites dans le présent paragraphe, lequel rend un rapport..

A la fin de son intervention en tant que curateur (en cas de fin de curatelle ou de changement de curateur), le curateur est tenu de procéder à la **reddition des comptes**. Celle-ci se fait devant le juge. En cas de désaccord sur la reddition des comptes, le juge décide.

Parmi ses prérogatives, le curateur est **en mesure de se décharger de sa mission** s'il démontre qu'il n'est plus en mesure d'assumer ses fonctions en raison de sa situation physique ou mentale diminuée, ou s'il apporte la déclaration écrite d'une tierce personne disposée à reprendre la curatelle et que le tribunal estime qu'il en va de l'intérêt de la personne placée sous curatelle.

## 6.2. In supported decisionmaking

Comme exposé ci-avant (section 3.2.), la loi néerlandaise ne prévoit pas expressément de régime séparé d'accompagnement de prise de décision. Il n'y a donc pas de droits et devoirs spécifiques pour les accompagnateurs. Toutefois, dans tous les régimes de tutelle, qu'il s'agisse de la curatelle, de l'administration protectrice ou encore du mentorat, le curateur, l'administrateur ou le mentor est tenu d'**exercer sa mission en respectant la philosophie de vie, l'orientation religieuse et le bagage culturel de la personne mise sous tutelle**. En outre, l'Arrêté prévoit à l'article 4, alinéa 2 de l'Arrêté que le curateur, l'administrateur ou le mentor est tenu de **favoriser ou promouvoir, le plus possible, l'autonomie de la personne placée sous sa tutelle**.

## VOTING RIGHTS

### 7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?

Chaque citoyen néerlandais âgé de 18 ans au moins peut voter<sup>372</sup>. Depuis 2008, **même les personnes incapables juridiquement et placées sous curatelle** restent titulaires du droit de vote, et peuvent voter<sup>373</sup>. A fortiori, les personnes placées sous mentorat ou, le cas échéant, sous administration protectrice peuvent également voter.

Cependant, le législateur distingue **l'exercice du droit de vote** par les personnes souffrant d'un handicap mental de celles souffrant d'un handicap physique. Les deux catégories de personnes conservent le droit de vote par principe. Cependant, comme le droit de vote est un droit personnel, les personnes qui sont atteinte d'une **déficience mentale doivent pouvoir exercer seule et de manière indépendante leur droit de vote**, et ne peuvent pas être influencées par une tierce

<sup>372</sup> Art. 4 Constitution.

<sup>373</sup> Wet van 27 juni 2008 tot verandering in de Grondwet, strekkende tot het vervallen van de bepaling over het uitsluiten van wilsonbekwamen van het kiesrecht, Stb. 2008, 272.

personne par exemple. C'est la raison pour laquelle **il n'est pas permis aux électeurs souffrant d'une déficience mentale de recevoir de l'aide à l'intérieur de l'isoloir**. Le législateur a ainsi considéré que si la personne souffrant d'un handicap mental était en mesure de voter seule, de manière indépendante, elle était aussi en mesure de déterminer seule sa volonté quant au droit de vote. Les explications fournies hors de l'isoloir sont acceptées mais l'électeur doit pouvoir voter seul, de manière indépendante.

Les personnes atteinte d'une **déficience physique** peuvent, quant à elle, bénéficier de soutien lors de l'exercice de leur droit de vote, y compris à l'intérieur de l'isoloir<sup>374</sup>. Il peut s'agir, par exemple, de personnes aveugles ou malvoyantes ou de personnes atteintes de la maladie de Parkinson.

Pour le reste, **seul le juge pénal peut exceptionnellement retirer le droit de vote à des personnes qui en bénéficie par principe**. Le retrait du droit de vote peut être ordonné en tant que mesure particulière dans le cadre d'une sanction pénale imposée à la personne ayant commis **certaines infractions pénales**.<sup>375</sup> Dans la pratique, la mesure est toutefois rarement ordonnée. Les personnes emprisonnées restent autorisées à donner procuration à une autre personne pour l'exercice de leur droit de vote.

### **7.1. Where is the right to vote secured/denied? (in the Constitution? In the voting laws? In the guardianship order?)**

L'article 4 de la **Constitution** garantit à tout néerlandais un même droit d'élire les membres des organes représentatifs généraux ainsi que d'être élu comme membre de ces organes, sauf restrictions et exceptions établies par la loi. Depuis 2008, la Constitution ne limite plus le droit de vote des personnes incapables juridiquement.<sup>376</sup>

En outre, la loi électorale prévoit que les personnes atteinte d'un handicap physique sont en droit de bénéficier de l'aide par une personne de leur choix, y compris dans l'isoloir.<sup>377</sup>

#### **7.1.1. Is the denial of the right to vote linked to having a disability or to being under guardianship?**

La Constitution néerlandaise garantit à toute personne néerlandaise âgée de 18 ans au moins **le droit de voter**. Seul le juge pénal peut, dans certains cas, retirer le droit de vote à des personnes condamnées pénalement, une mesure très rarement ordonnée. Ainsi, les cas de retrait du droit de vote ne sont pas liés à l'existence d'un handicap ou encore d'une incapacité juridique.

C'est au niveau de **l'exercice du droit de vote** que des différences peuvent s'appliquer. Ainsi, les personnes souffrant de déficience mentale pourront voir l'exercice de leur droit de voter leur **être refusé** si elles ne sont pas en mesure d'exprimer leur voix, de manière indépendante, seule dans l'isoloir. Les personnes souffrant d'un handicap physique pourront être assistée même dans l'isoloir.

<sup>374</sup> Art. J28 Wet van 28 september 1989, houdende nieuwe bepalingen inzake het kiesrecht en de verkiezingen, Stb. 1989, 481 .

<sup>375</sup> Art. 54 par. 2 Constitution prévoit en effet: « Est privé du droit de vote celui qui, pour avoir commis une infraction spécifiée à cet effet par la loi, a été, par une décision judiciaire irrévocable, condamné à une peine privative de liberté d'au moins un an et déchu en même temps du droit de vote. »

<sup>376</sup> Wet van 27 juni 2008 tot verandering in de Grondwet, strekkende tot het vervallen van de bepaling over het uitsluiten van wilsonbekwamen van het kiesrecht, Stb. 2008, 272.

<sup>377</sup> Art. J28 Wet van 28 september 1989, houdende nieuwe bepalingen inzake het kiesrecht en de verkiezingen, Stb. 1989, 481 .

## 7.1.2. Might a person under legal guardianship have a right to vote?

### 7.1.2.1. Can a court change this? (ie, permit voting or restrict the right)

**Les personnes placées sous curatelle, sous mentorat ou sous administration protectrice conservent leur droit de vote.** Le pouvoir du juge en charge du contrôle du statut de ces personnes ne permet pas de leur retirer le droit de vote<sup>378</sup>. Ce n'est que si l'exercice de ce droit - de manière indépendante pour les personnes souffrant de déficience mentale ou de manière accompagnée pour les personnes souffrant de déficience physique uniquement - est impossible, qu'il ne pourra pas être valablement exercé dans les faits.

## 8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?

Lors de la signature de la Convention des Nations-Unies relative aux droits des personnes handicapées en 2006, le gouvernement des Pays-Bas a fait la déclaration interprétative concernant l'article 29 de ladite Convention, précisant « *qu'il interprètera l'expression "se faire assister" figurant à l'alinéa a) iii) de l'article 29 comme ne concernant qu'une assistance en dehors de l'isoloir, sauf lorsqu'en raison d'un handicap physique, cette assistance est aussi nécessaire à l'intérieur de l'isoloir, auquel cas cette assistance y est aussi autorisée.* »<sup>379</sup> De nombreuses voix plaident toutefois pour une plus grande flexibilité pour les personnes souffrant d'un handicap mental, en vue de leur permettre d'exercer leur droit de vote.<sup>380</sup>

### 8.1. In what contexts is substituted decisionmaking permissible?

Pas applicable.

## 9. Are there current developments to change the voting rights of persons under guardianship?

Le collège électoral a proposé de modifier la loi néerlandaise de telle sorte à permettre à toute personne qui le demande d'obtenir une **aide et/ou d'être accompagnée lors de l'exercice de son droit de vote, y compris dans l'isoloir**<sup>381</sup>. Cette aide serait la même **indépendamment du type de handicap** de la personne concernée, mais ne pourrait être fournie **que par le personnel responsable du bureau de vote**, et non par une tierce personne du choix de la personne assistée.

<sup>378</sup> Seul le juge pénal détient le pouvoir de retirer le droit de vote, dans le cadre du sanctionnement de certaines infractions pénales.

<sup>379</sup> Voir : [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_fr#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_fr#EndDec) (30.09.2019).

<sup>380</sup> Rapport d'évaluation des élections et du référendum du 21 mars 2018 rendu par le collège électoral le 17 mai 2018: Kiesraad, Evaluatieadvies gemeenteraadsverkiezingen en raadgevend referendum 21 maart 2018, disponible sous : <https://www.kiesraad.nl/adviezen-en-publicaties/adviezen/2018/5/17/evaluatieadvies-gemeenteraadsverkiezingen-en-raadgevend-referendum-21-maart-2018> (30.09.2019).

<sup>381</sup> Rapport d'évaluation des élections et du référendum du 21 mars 2018 rendu par le collège électoral le 17 mai 2018: Kiesraad, Evaluatieadvies gemeenteraadsverkiezingen en raadgevend referendum 21 maart 2018, disponible sous : <https://www.kiesraad.nl/adviezen-en-publicaties/adviezen/2018/5/17/evaluatieadvies-gemeenteraadsverkiezingen-en-raadgevend-referendum-21-maart-2018> (30.09.2019).

## G. NEW ZEALAND

### INTRODUCTION

#### 1. Introduction

Guardianship law in New Zealand is consistent with a system of substituted decision-making, and there is **no specific legislative recognition of supported decision making**. A substitute decision maker, once appointed as welfare guardian under the *Protection of Personal and Property Rights Act 1988*, has, as a paramount consideration, the **welfare and best interests** of the person who lacks capacity.<sup>382</sup>

Insofar as political participation is concerned, the **right to vote is enshrined in New Zealand’s Bill of Rights legislation**, and **no distinction is made on the basis of disability**. Being the ward of a welfare guardian does not disqualify a person from being eligible to vote, and anyone who has a physical or mental impairment may apply for registration to **vote through a representative**. Legislative measures designed to increase accessibility to voting have typically focused on the blind and physically disabled, although **initiatives in recent years**, such as phone dictation voting services and guidance on how to vote for people with learning disabilities have been **aimed at improving legal capacity**, including through recognition of supported decision making.<sup>383</sup>

### GUARDIANSHIP

#### 2. What forms of guardianship for adults exist?

In New Zealand, the *Protection of Personal and Property Rights Act 1988* (the “PPPR Act”)<sup>384</sup> is the **guardianship law for adults** who may permanently or temporarily lack capacity. The central objective of the PPPR Act is to make the **least restrictive intervention and to maximise a person’s decision-making capacity**. Underpinning the Act is the **presumption of competence**: a person must be assumed to have capacity unless proved otherwise. Judicial intervention is limited by the principle that people are entitled to make imprudent or unwise decisions so long as they are considered to have the capacity to do so.<sup>385</sup>

It should be noted that the PPPR Act and its accompanying Regulations extend beyond the disabled community, however. In particular, it **provides the mechanisms for the making use of what is referred to as an enduring power of attorney (an “EPOA”)**, which a person can execute in advance to authorise another person to make decisions about their care, welfare or property if they later become mentally incapable of making those decisions.<sup>386</sup> This is more relevant to older adults looking toward the possibility of future incapacity than to the developmentally disabled, who may already lack capacity. It is forms of guardianship concerning the latter which will form the focus of the present report.

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<sup>382</sup> See sections 2. to 6. of this country report, below.

<sup>383</sup> See sections 7. to 9. of this country report, below.

<sup>384</sup> *Protection of Personal and Property Rights Act 1988* (“PPPR Act”), available at <http://www.legislation.govt.nz/act/public/1988/0004/latest/whole.html> (29.08.2019).

<sup>385</sup> Alison Douglass, *Mental Capacity – Updating New Zealand’s Law and Practice – a Report for the New Zealand Law Foundation*, Dunedin, July 2016, para. 1.19.

<sup>386</sup> *Ibid*, para. 1.18.

Alongside EPOAs, the PPPR Act provides the Family Court with jurisdiction to make the following **orders with regard to guardianship**:

- personal orders;
- the appointment of ‘welfare guardians’;
- property orders.

These are discussed briefly, in turn, below.

A court which assumes jurisdiction can make a variety of **personal orders** with respect to an adult’s care and welfare.<sup>387</sup> A personal order is an instruction by a judge requiring an action to be taken to look after a specific part of a person’s care and welfare where the adult wholly or partly lacks capacity. The kind of orders that may be made are listed in section 10 of the PPPR Act. These include: that the person be provided with living arrangements of a kind specified in the order; that the person be provided with medical advice or treatment of a specific kind; that the person be provided with educational, rehabilitative, therapeutic, or other services. Personal orders may **expire at a set time**,<sup>388</sup> or when the subject matter of the order is fulfilled.<sup>389</sup> Otherwise, an order expires **automatically 12 months** after it is made.<sup>390</sup>

The **appointment of a welfare guardian** is listed under section 10 of the PPPR Act as a **type of personal order**. However, this is widely considered to be the most drastic form of personal order,<sup>391</sup> or the personal order of “**last resort**”.<sup>392</sup> Jurisdiction to appoint a welfare guardian may be exercised only where the adult wholly lacks capacity to make or to communicate decisions relating to particular aspects of their personal care and welfare, and the court believes that the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made.<sup>393</sup>

Finally, an **order to administer a person’s property** may be issued by the court in respect of any property owned by any person domiciled or ordinarily resident in New Zealand who, in the opinion of the court, lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property.<sup>394</sup> Given the focus of the present legal study, however, property orders will not be referred to further.

## 2.1. Who may be placed under each form of guardianship?

The type of person who may be placed under guardianship is determined by the extent of their incapacity. In fact, a Family Court can only intervene where a person lacks capacity. The **two forms of guardianship that will be addressed** are personal orders and orders for the appointment of a welfare guardian.

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<sup>387</sup> See British Columbia Law Institute, *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario*, CEELS Report No. 4, BCLI Report No. 46, October 2006, p.33-34.

<sup>388</sup> PPPR Act, *op. cit.*, section 10(3).

<sup>389</sup> *Ibid*, section 17(1)(b)(ii).

<sup>390</sup> *Ibid*, section 17(1)(b)(i).

<sup>391</sup> W. R. Atkin, *Adult Guardianship Reforms – Reflections on the New Zealand Model*, International Journal of Law and Psychiatry, Volume 20, No. 1, 1997, pp.77-96 at p. 83.

<sup>392</sup> British Columbia Law Institute, *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario*, *op. cit.*, p. 34.

<sup>393</sup> PPPR Act, *op. cit.*, section 12(2).

<sup>394</sup> *Ibid*, section 11. Other orders may be made in respect of property, under sections 25 and 31, where the court considers the person lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property.

A **personal order** can be made in respect of any person who:

- (a) lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
- (b) has the capacity to understand the nature, and to foresee the consequences, of decisions relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.<sup>395</sup>

As stated above, **jurisdiction to appoint a welfare guardian**, on the other hand, may be exercised by the court **only where the adult wholly lacks capacity** to make or to communicate decisions relating to particular aspects of their personal care and welfare. Moreover, the court must believe that the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made.<sup>396</sup>

### 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

The PPPR Act provides **no single test for incapacity**. This, it is said, makes it complex legislation to follow and apply.<sup>397</sup> In general terms, the Act says a person lacks capacity if they do not understand the nature or cannot foresee the consequences of decisions, or are unable to communicate them.<sup>398</sup>

A finding of impairment of capacity under the PPPR Act is fundamental to any resulting intervention that may be made on the person's behalf, such as a court order. There are **different legal tests for incapacity in the PPPR Act**, each depending on the kind of substitute decision-maker appointed, and on whether care and welfare, or property decisions are involved. These codify the jurisprudence of the common law, which previously provided the framework for determining capacity.

#### 3.1. Substituted decisionmaking

**Court orders for forms of guardianship**, as provided for by the PPPR, are widely viewed as mechanisms consistent with substituted decision-making. As referred to above,<sup>399</sup> whether a person is partly or wholly incapable of managing their affairs is relevant to the kind of orders the court can make. A person need only partly lack capacity for the court to make a personal order, such as an order for medical treatment, provision of services or living arrangements.<sup>400</sup> Personal orders such as this are often used by the Family Court as a fall-back order where the person does not meet the threshold of "wholly" lacking capacity for the appointment of a welfare guardian. This is said to reflect the primary objective of the Act, which is to impose the least restrictive intervention tailored to the person's specific needs.<sup>401</sup>

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<sup>395</sup> *Ibid*, section 6.

<sup>396</sup> *Ibid*, section 12(2).

<sup>397</sup> Alison Douglass, *Mental Capacity – Updating New Zealand's Law and Practice – a Report for the New Zealand Law Foundation*, *op. cit.*, para. 1.23.

<sup>398</sup> *Ibid*.

<sup>399</sup> See section 2.1. of this country report, above.

<sup>400</sup> PPPR Act, *op. cit.*, section 6.

<sup>401</sup> Alison Douglass, *Mental Capacity – Updating New Zealand's Law and Practice – a Report for the New Zealand Law Foundation*, *op. cit.*, para. 4.20.

There is, however, **no real clarity on what the legal test of “partly” lacking capacity actually means.** Applying a decision-specific approach, partial lack of capacity suggests something less than incapacity for that specific decision. On the other hand, it could indicate that a person lacks capacity in respect of the decision about which the court is going to make an order, and not other decisions. The legal provision of the Act about personal orders refers to partly lacking capacity in respect of “decisions” in general however, and not in a specific sense.<sup>402</sup>

As stated above, for the **appointment of a welfare guardian**, the person must, “wholly lack capacity”.<sup>403</sup> Although “wholly” is a much more stringent threshold than simply “lacks” or “partly lacks” capacity, it has not been interpreted by the courts to mean that the threshold is crossed only where the person is totally incapable of making decisions at all, for example, where a person has advanced dementia or is in a persistent vegetative state.<sup>404</sup> In one case, it was said that if a person has limited capacity to make some decisions but has no capacity to make others, it is **sufficient that the person “wholly” lacks the capacity in respect of a “particular aspect or aspects”** of their care and welfare over which decisions will be transferred.<sup>405</sup> There has, however, been little case law on the meaning of “wholly” in the 20 years since the initial decisions of the enactment of the PPPR Act in 1988. In a report on mental capacity for the New Zealand Law Foundation, the author criticised this approach in practice, arguing that the notion that capacity is decision-specific is undermined where court orders are made in respect of “all aspects of a person’s care and welfare, effectively making the welfare guardian a global decision-maker for a wide range of decisions.”<sup>406</sup>

### 3.2. Supported decisionmaking

Supported decision making is **not expressly recognised in New Zealand legislation.** Rather, the primary objectives of the PPPR Act and its substituted decision-making mechanisms are to make the least restrictive intervention and to maximise a person’s participation to the greatest extent possible in decision-making.<sup>407</sup> These legal principles are said to underpin the ethical notion of autonomy, and are further supported by adoption by the Act of the common law presumption of competence<sup>408</sup> and the freedom to make unwise decisions, under which a person is said to be entitled to make imprudent decisions so long as they have capacity to do so. Although **these principles are akin to the notion of supported decision-making**, it is said that there are few mechanisms to prioritise or enforce them.<sup>409</sup>

One of the primary objectives of the PPPR Act is to maximise a person’s capacity to the greatest extent possible. However, this is said to be overshadowed by the other primary objective of making the least restrictive intervention. Both principles will generally only come into play after a person has been found to lack capacity – such as when a welfare guardian has been appointed – and only then are they placed under a duty to consult the person subject to the order and maximise their participation in decisions.<sup>410</sup> Accordingly, there is **no positive obligation to support the person to**

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<sup>402</sup> *Ibid*, para. 4.21.

<sup>403</sup> PPPR Act, *op. cit.*, section 12.

<sup>404</sup> Alison Douglass, *Mental Capacity – Updating New Zealand’s Law and Practice – a Report for the New Zealand Law Foundation*, *op. cit.*, para. 4.24.

<sup>405</sup> *Re G* [1994] New Zealand Family Law Reports 445, as reported *ibid*, at para. 4.24.

<sup>406</sup> Alison Douglass, *Mental Capacity – Updating New Zealand’s Law and Practice – a Report for the New Zealand Law Foundation*, *op. cit.*, para. 4.24.

<sup>407</sup> PPPR Act, *op. cit.*, sections 8(1) and (2).

<sup>408</sup> At section 5 of the PPPR Act, *op. cit.*

<sup>409</sup> Alison Douglass, *Mental Capacity – Updating New Zealand’s Law and Practice – a Report for the New Zealand Law Foundation*, *op. cit.*, para. 2.37.

<sup>410</sup> *Ibid*, para. 2.38.



**exercise their capacity at the beginning of the decision-making process;** in other words, there is no presumption of supported decision-making.<sup>411</sup>

#### 4. Can guardianship of a person with disabilities be compelled?

It is understood from the wording of the relevant provisions of the PPPR Act that guardianship of a person with disabilities **can be compelled**. However, the Act makes it clear that the appointment of a welfare guardian is very much a last resort.<sup>412</sup>

As discussed above, the appointment of a welfare guardian will only be ordered where that person wholly lacks capacity to make or to communicate decisions, and that the appointment is the only satisfactory way to ensure that appropriate decisions are made relating to that particular aspect or aspects of the personal care and welfare of that person.<sup>413</sup> Under the PPPR Act, the **court must attempt to ascertain the wishes of the adult** when determining who to appoint as welfare guardian. Moreover, a welfare guardian is given only those powers reasonably required to make and implement decisions for the adult in respect of each aspect specified by the court order appointing them.<sup>414</sup> Accordingly, the **powers to the welfare guardian are limited by the terms of their appointment**, and the Act sets out a number of decisions over which the welfare guardian has no authority. These are:

- Marriage and divorce;
- Adoption of the adult's child;
- Withholding consent to "standard medical treatment or procedures" intended to save the adult's life or prevent serious damage to health;
- Electro-convulsive treatment;
- Psychosurgery;
- Pure medical experimentation.<sup>415</sup>

#### 5. Can a person legally challenge a guardianship decision?

People subject to personal orders, including the appointment of a welfare guardian, have the **right of review of the order and/or decisions of the welfare guardian** at any time during the currency of the order.<sup>416</sup>

Following application for review of a personal order, a **court may vary or discharge the order, and it may extend the order for a further period**, or make any order, whether in addition to or instead of the order under review, that it could have made on the original application.<sup>417</sup>

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<sup>411</sup> *Ibid.*

<sup>412</sup> PPPR Act, *op. cit.*, section 12(2).

<sup>413</sup> *Ibid.*

<sup>414</sup> *Ibid.*, section 18(2).

<sup>415</sup> *Ibid.*, section 18(1).

<sup>416</sup> PPPR Act, *op. cit.*, section 86.

<sup>417</sup> *Ibid.*, section 86(5).

## 6. What are the obligations and rights of the guardian?

As discussed above, there is no specific legislative recognition of supported decision making. No clear distinction is made between substituted and supported decision making. A substitute decision maker, once appointed as welfare guardian under the PPPR Act, **has as a paramount consideration, the welfare and best interests of the person** who lacks capacity.<sup>418</sup>

In acting in the best interests of the adult concerned, however, the **guardian is under a statutory duty to encourage the adult to act on his or her own behalf** to the greatest extent possible, to seek to facilitate the integration of the adult into the community to the greatest extent possible and to consult, so far as may be practicable, with the adult for whom they are acting as well as any others who are interested in the adult's welfare and who are competent to advise the welfare guardian with regard to the adult's personal care and welfare.<sup>419</sup>

## VOTING RIGHTS

### 7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?

Under the *Electoral Act 1993*,<sup>420</sup> every adult New Zealand citizen or permanent resident is **qualified to be registered as a voter** if that person has at some time resided continuously in New Zealand for a period of not less than one year.<sup>421</sup> There is **no distinction on the basis of disability**. In particular, all people under compulsory care or treatment are entitled to vote unless they have committed criminal offences and have been detained for three years or longer (the same applies to the general population) and are still detained.<sup>422</sup> In particular, section 80 of the Act disqualifies from being registered as electors, those persons who are detained in a hospital under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* or in a secure facility under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003*, who either committed an offence, or was found "unfit to stand trial", or was acquitted because of "insanity" and thereafter detained.

Section 85 of the *Electoral Act 1993* provides for **a person who has a physical or mental impairment to apply for registration as an elector through a representative**. Moreover, section 170 of the *Electoral Act 1993* provides for electors who are wholly or partially blind, unable to read or write or who has severe difficulty in reading or writing, or who is not sufficiently familiar with the English language to vote without assistance, to obtain assistance from another person or the polling officer

<sup>418</sup> *Ibid*, sections 18(3) and (4).

<sup>419</sup> *Ibid*, section 18(4).

<sup>420</sup> *Electoral Act 1993*, available at <http://www.legislation.govt.nz/act/public/1993/0087/latest/DLM307519.html> (03.09.2019).

<sup>421</sup> *Ibid*, section 74.

<sup>422</sup> See reference to Article 29 CRPD in Office for Disability Issues, *First New Zealand report on implementing the UN Convention on the Rights of Persons with Disabilities*, submitted to the UN in March 2011, available at <https://www.odi.govt.nz/united-nations-convention-on-the-rights-of-persons-with-disabilities/un-reviews-of-nzs-implementation-of-the-convention/first-nz-report-on-implmentation-march-2011/first-new-zealand-report-on-implementing-the-un-convention-on-the-rights-of-persons-with-disabilities/#twenty-nine> (03.09.2019). Electoral law disqualifies from being registered as electors, those persons who are detained in a hospital under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* or in a secure facility under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003*, who either committed an offence, or was found "unfit to stand trial", or was acquitted because of "insanity" and thereafter detained: *Electoral Act 1993, op. cit.*, section 80(1).

to assist the person in marking his or her ballot paper. Section 155(4) requires that at least 12 polling places in each district have access suitable for persons who are physically disabled.

### **7.1. Where is the right to vote secured/denied? (in the Constitution? In the voting laws? In the guardianship order?)**

The right to vote is secured by legislation. **New Zealand's *Bill of Rights Act 1990* ("BORA") provides that every New Zealand citizen of or over the age of 18 years is entitled to vote.**<sup>423</sup> However, the right to vote has not been seen as a self-executing one, and the *Electoral Act 1993* limits the right to vote in a number of ways. First, under the Act, **a person must be enrolled on the electoral roll** in order to vote.<sup>424</sup> Secondly, it provides for **four grounds of disqualification for registration** as an elector: non-residence for certain periods, detention in a mental health institution, incarceration in a penal institution and presence on what is known as the Corrupt Practices List.<sup>425</sup>

Accordingly, **anyone with a mental impairment**, except a person specifically excluded under the legislation,<sup>426</sup> is **permitted to register as an elector**.

#### **7.1.1. Is the denial of the right to vote linked to having a disability or to being under guardianship?**

As referred to above, a denial of the right to vote insofar as a mental impairment is concerned can only take place if the person is disqualified under section 80 of the *Electoral Act 1993* **after having been involved in criminal proceedings**.

#### **7.1.2. Might a person under legal guardianship have a right to vote?**

A person under legal guardianship, unless excluded under section 80 of the *Electoral Act 1993*, has the right to vote. **Being subject to a personal order, such as the appointment of a welfare guardian, does not disqualify a person from being eligible to vote.** Indeed, anyone who has a physical or mental impairment, may, under section 85 of the *Electoral Act 1993*, apply for registration through a representative. Insofar as casting a vote is concerned, section 168 of the *Electoral Act 1993* sets out the process a person must follow in order to cast their vote. As mentioned above, this process is modified for:

*"any elector who is wholly or partially blind or (whether because of physical handicap or otherwise) is unable to read or write or has severe difficulty in reading or writing, or is not sufficiently familiar with the English language to vote without assistance...."*<sup>427</sup>

Such a voter is **entitled to nominate a person to accompany him or her into the voting booth** for the ballot paper to be marked by the voter with the assistance of the other person, or to be marked by the other person in accordance with the instructions of the voter. Accordingly, **only if the voter is**

<sup>423</sup> *Bill of Rights Act 1990*, available at <http://www.legislation.govt.nz/act/public/1990/0109/latest/whole.html> (03.09.2019), section 12(a).

<sup>424</sup> *Electoral Act 1993*, *op. cit.*, section 60. Note that a previous requirement, under section 90 of the Act, on electors to notify authorities if they changed residence within a district was subject to an exception that a person, "*who lacks, wholly or partly, the capacity to understand the nature of the decision to register as an elector,*" and who has a welfare guardian did not have a personal obligation to inform the authorities. This obligation has since been repealed in any case, however.

<sup>425</sup> *Ibid*, section 80(1).

<sup>426</sup> See section 7 of this country report, above.

<sup>427</sup> *Electoral Act 1993*, *op. cit.*, section 170(1).

incapable of forming a voting intention, can they not complete the voting process as required by the Act.<sup>428</sup>

### 7.1.2.1. Can a court change this? (ie, permit voting or restrict the right)

Forming part of New Zealand's uncodified constitution, the BORA 1990<sup>429</sup> guarantees the right to vote. Other than in the event of the implementation of legislation contradicting this fundamental right, the **courts are arguably unable to restrict this right** as part of an order for the appointment of a welfare guardian or otherwise.

## 8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?

Although it may be said that the New Zealand government has committed itself broadly to implementing supported decisionmaking, there are **currently no known specific proposals for modifying the current system of substitute decision-making** established by the mechanisms provided for in the PPPR Act. In 2015, the government response to the Concluding Observations of the *United Nations Convention on the Rights of Persons with Disabilities* ("UNCRPD") Committee's 2014 review (which recommended that New Zealand take immediate steps to revise the relevant laws and replace substituted decision-making with supported decision-making) stated:

*"There is already an action in the Disability Action Plan 2014-2018 to 'Ensure disabled people can exercise their legal capacity, including through recognition of supported decision making' [led by the Office for Disability Issues]. This work may recommend changes to legislation, however no decisions have been made yet."*<sup>430</sup>

**The Office for Disability Issues**, a small team administered by the Ministry of Social Development, published a report in August 2017,<sup>431</sup> providing an update of the work it has been carrying out to identify improvements for disabled people exercising their legal capacity or decision making. This expressly **recognised the importance of "supported decision making"** and the limits, for those with cognitive impairment, of existing systems and approaches which formalise substitute decision making.<sup>432</sup> Moreover, it acknowledges that implementation of Article 12 of the CRPD requires a paradigm shift from substitute decision making to supported decision making.<sup>433</sup> Its next steps, it says are to undertake further work to understand how the population of people with impairment experience decision making in legislation/policy, in practice and in education/information provision.

<sup>428</sup> See Andrew Geddis, *Voting, mental capacity, and the law – Pundit*, 17<sup>th</sup> September 2014, available at <https://www.pundit.co.nz/content/voting-mental-capacity-and-the-law> (03.09.2019).

<sup>429</sup> *Bill of Rights Act 1990*, *op. cit.*

<sup>430</sup> See Office for Disability Issues, *Government response to the United Nations Committee on the Rights of Persons with Disabilities' Concluding Observations on New Zealand*, 2015, available at <https://www.odi.govt.nz/united-nations-convention-on-the-rights-of-persons-with-disabilities/un-reviews-of-nzs-implementation-of-the-convention/first-review-of-implementation-2014-2015/government-response-to-the-united-nations-committee-on-the-rights-of-persons-with-disabilities-concluding-observations-on-new-zealand/> (04.09.2019), para. 18.

<sup>431</sup> Office for Disability Issues, *Summary report on improving disabled people's exercise of legal capacity*, August 2017, available at <https://www.odi.govt.nz/assets/Uploads/2017-08-24-Summary-progress-report-legal-capacity-PDF-issues3.pdf> (04.09.2019).

<sup>432</sup> *Ibid*, para. 21.

<sup>433</sup> *Ibid*, para. 27.

In New Zealand's latest submission to the UNCRPD of 2018,<sup>434</sup> it states that, "there are no measures currently underway to recognise supported decision making consistent with the CRPD," and confirms that there are **currently no plans to revise the PPPR Act**.<sup>435</sup> The New Zealand Government will be appearing before the UNCRPD Committee in 2019.

In July 2019, however, it was announced by the Minister Responsible for the Law Commission,<sup>436</sup> that he had requested that the Commission commence work on a range of projects, including a **review of laws related to adults with impaired decision-making capacity** in the 2019/20 year.<sup>437</sup>

### 8.1. What contexts is substituted decisionmaking permissible?

As discussed above, substituted decision-making is reflected in the PPPR Act and its provision for personal orders, including the appointment of welfare guardians.<sup>438</sup>

## 9. Are there current developments to change the voting rights of persons under guardianship?

None known.

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<sup>434</sup> *The New Zealand Government's response to 'the list of issues prior to submission of the combined second and third periodic review of New Zealand'*, Adopted by the Committee at its nineteenth session (14 February – 9 March 2018), available at <https://www.odi.govt.nz/assets/Uploads/2019-NZ-Governments-response-to-the-UN-CRPD-Committees-List-of-Issues-final.docx> (05.09.2019).

<sup>435</sup> *Ibid*, para. 104.

<sup>436</sup> The Law Commission is what is known as an independent Crown Entity, free from direction by the Government as to how they carry out their work, with responsibility for reviewing New Zealand law and making recommendations to Government on how to improve the law.

<sup>437</sup> Law Commission, *The Law Commission's 2019/20 work programme*, 19<sup>th</sup> July 2019, available at <https://www.lawcom.govt.nz/news/law-commission%E2%80%99s-201920-work-programme> (05.09.2019).

<sup>438</sup> See section 3. of this country report, above.

## I. NORWAY

The Kingdom of Norway is the fifth largest country in Europe, but with around **5.3 million inhabitants** (2018), one of the least densely populated. GDP per capita in 2018 was 69,530 EUR (2nd in Europe after Luxembourg).<sup>439</sup>

The Norwegian legal system is generally considered to belong to the **Nordic subfamily of “continental” (Romano-Germanic or ‘civil’) legal systems**, which also includes Danish, Finnish, Icelandic and Swedish law.<sup>440</sup> These legal systems can be described as practical and pragmatically orientated and less conceptualistic than German and French law.

The Norwegian rules on guardianship are laid down in the **2010 Guardianship Act (vergemålsloven)**, which entered into force on 1 July 2013.<sup>441</sup> Apart from a general overview and modernisation of the rules, the adoption of the new act was aimed to **ensure compliance with requirements laid down in international legal instruments** such as the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which Norway signed in 2007 and ratified on 3 June 2013.<sup>442</sup> Among other things, the 2010 Act strengthened the self-determination of persons with guardians and abolished the Act Relating to the Declaring of a Person as Incapable of Managing his own Affairs (*Umyndiggjørelsesloven*) and thereby the full guardianship provided for in that act.<sup>443</sup> Although the Guardianship Act exceptionally allows for substituted decision-making, the Norwegian guardianship legal regime is **largely based on supported decision-making** in line with the UNCRPD.

### Forms of guardianship

The forms of guardianship for adults are regulated in Chapter 4 of the Guardianship Act. The **main form of guardianship involves supported decision-making** and therefore imposes **no restrictions on an individual’s right to exercise his or her full legal capacity (hereafter “support”)**.<sup>444</sup> The person concerned must in principle agree to the support. However, support can be imposed if the person concerned is in a position in which he or she does not have the mental capacity to understand what consent implies.<sup>445</sup>

The Guardianship Act also allows for **substituted decision-making**, which involves the **restriction of an individual’s legal capacity**. This is however an exceptional measure that can only be imposed if it is essential to protect the person’s own interest (financial and/or personal).<sup>446</sup>

In 2018, there were around **65,000 support arrangements** and only **220 substituted decision-making guardianships** (i.e. restrictions of legal capacity).<sup>447</sup>

<sup>439</sup> [https://ec.europa.eu/eurostat/databrowser/view/sdg\\_08\\_10/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/sdg_08_10/default/table?lang=en) (22.10.2019).

<sup>440</sup> M. Bogdan, Concise Introduction to Comparative Law, 1st ed., Groningen: Europa Law Publishing, 2013, p. 76.

<sup>441</sup> Lov om vergemål (vergemålsloven) 2010-03-26-9 (consolidated act last amended by lov 2018-12-20-114).

<sup>442</sup> Ot.prp.nr.110 (2008–2009) Om lov om vergemål (vergemålsloven), p. 12.

<sup>443</sup> Ibid.

<sup>444</sup> Guardianship Act, sections 20-21.

<sup>445</sup> Guardianship Act, sections 20.

<sup>446</sup> Guardianship Act, sections 22.

<sup>447</sup> The United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”) Committee’s List of issues in relation to the initial report of Norway (2019), p. 7.

## Scope and criteria for support/guardianship

A supporter/guardian can be appointed if a person is **no longer capable to take care of his or her own interests** due to mental illness (including dementia), mental disability, drug or alcohol abuse, severe gambling addiction, or severely reduced health.<sup>448</sup>

The general rule provides that the person concerned **must agree in writing** to the establishment of support (including its scope) and on whom to appoint as supporter.<sup>449</sup> A decision on support/guardianship must **identify the precise scope of the measure, both in material and time aspects**. The **principle of minimum intervention** must be observed in this assessment.<sup>450</sup> The support/guardianship can concern a person's financial and/or personal circumstances.

Certain rights **cannot be covered by support/guardianship**. These rights include the **right to vote**, enter into marriage, recognition of paternity, consent to donate organs, and the right to create or revoke a will.<sup>451</sup> Accordingly, the **right to vote for people with disabilities cannot be subject to any restrictions**.

## Support/Guardianship decision and appeal

The **decision on supported decision-making** is taken by the **County Governor (Fylkesmannen)**, which is the local guardianship authority. The decisions of the County Governor **can be appealed** to the central guardianship authority - the **Norwegian Civil Affairs Authority (Statens sivilrettsforvaltning)**.<sup>452</sup>

Guardianship involving **substituted decision-making can only be decided by a court**.<sup>453</sup> The decisions of the first instance court (*Tingrett*) **can be appealed to the Appeal Court (Lagmannsrett)**.<sup>454</sup> For such procedures, a legal representative shall be appointed at the government expense.

Decisions by the County Governor to establish or modify support arrangements can be **appealed by the person concerned, immediate family members, the supporter** (if the person already has a supporter) and the responsible **physician** (if the person resides in an institution).<sup>455</sup> The same applies in principle for the appeal of court decisions regarding guardianship.<sup>456</sup>

## Criticism of the current system and planned reforms

The *United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") Committee's 2019 review of Norway* includes a number of concerns of the Norwegian guardianship rules. In particular, it **criticizes Norway for not yet having fully replaced the substituted decision-making**

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<sup>448</sup> Guardianship Act, section 20.

<sup>449</sup> Guardianship Act, section 20.

<sup>450</sup> Guardianship Act, section 21.

<sup>451</sup> Ibid.

<sup>452</sup> Guardianship Act, section 64.

<sup>453</sup> Guardianship Act, section 55 and 68.

<sup>454</sup> Guardianship Act, section 73. The decision of the Appeal Court can be appealed to the Supreme Court (requires the granting of leave to appeal).

<sup>455</sup> Guardianship Act, section 56.

<sup>456</sup> Guardianship Act, section 73.

**regime** with a supported decision-making regime.<sup>457</sup> This issue has also been addressed by the *Funksjonshemmedes Fellesorganisasjon*, the umbrella organisation for disability organisations in Norway.<sup>458</sup> The UNCRPD Committee further criticises the **lack of effective safeguards** for persons with disabilities **in the exercise of their legal capacity** and a **lack of knowledge about the scope of support** for decision-making.<sup>459</sup>

In order to clarify and reinforce certain rights of a person subject to support, the Norwegian government has **recently proposed some minor amendments** to the Guardian Act. According to the current rules, a support arrangement can be imposed if the person concerned is in a position in which he or she does not have the mental capacity to understand what consent implies. The **proposed amendment adds the requirement** that – for such situations - **support cannot be imposed if there are grounds to believe that the measure would be contrary to the will of the person concerned**.<sup>460</sup> The proposal was sent out for consultation until February 2019 and the government bill has not yet been submitted to parliament.<sup>461</sup>

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<sup>457</sup> The Committee's observations on the initial report of Norway, p. 6, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5) (15.10.2019).

<sup>458</sup> <https://www.vl.no/nyhet/ny-vergemalslov-hindrer-ikke-umyndiggjoring-1.1238324> (17.10.2019).

<sup>459</sup> The Committee's observations on the initial report of Norway, p. 6, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5) (15.10.2019).

<sup>460</sup> Horingsnotat November 2018 Snr. 18/5852 Endringer i vergemålsloven mv., p. 25.

<sup>461</sup> <https://www.regjeringen.no/no/dokumenter/--horing---endringer-i-vergemalsloven-mv.-personer-uten-samtykkekompetanse/id2618793/> (18.10.2019)



## J. SPAIN

### INTRODUCTION

#### 1. Introduction

Spain ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 3 December 2007. As part of its obligations, the State implemented several legal reforms, including the adoption of Act 26/2011 of 1 August 2011 on the normative adaptation to the CRPD, which amended various pieces of legislation; the Royal Legislative Decree No. 1/2013 of 29 November 2013 on the rights and social inclusion of persons with disabilities; and the Organic Law No. 2/2018 of 5 December 2018, which amended the Organic Law of the General Electoral Regime in relation to the right to vote of persons with disabilities.

However, as the Committee on the Rights of Persons with Disabilities has stressed in two occasions<sup>462</sup>, the Civil Code still allows for the deprivation of the legal capacity on the basis of disability and maintains substituted decision-making regimes. In response of these concerns, the Spanish government published last year a draft bill amending civil and procedural legislation in relation to the legal capacity of persons with disabilities, which is pending for adoption.

### GUARDIANSHIP

#### 2. What forms of guardianship for adults exist?

In Spain, provisions relating to the legal capacity of individuals and substituted decision-making regimes are found in the 1889 Civil Code<sup>463</sup> which is applicable to the whole country.<sup>464</sup> The regimes are referred as "tutelary institutions" (*instituciones tutelares*) and their purported principal aim is to provide "custody and protection" (*guarda y protection*).

The Title X of the First Book of the Spanish Civil Code regulates **three regimes of substituted decision-making**:

- a) **Guardianship** ("tutela"): when a guardian ("tutor") is entrusted with the legal representation of an individual, including personal and patrimonial affairs.<sup>465</sup>
- b) **Curatorship** ("curatela"): when a curator ("curador") complements the the subject's capacity to act and may only act in those acts expressly established by judicial decision, commonly this relates to decisions on patrimony-related decisions.<sup>466</sup>
- c) **Judicial defender** ("defensor judicial"): when a third person is appointed by the court to represent and protect the interests of an individual in the absence of a guardian or curator,

<sup>462</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Spain (CRPD/C/ESP/CO/1, 19 October 2011) and the combined second and third periodic reports (CRPD/C/ESP/CO/2-3, 13 May 2019).

<sup>463</sup> Adopted by Royal Decree of 24 July 1889 (hereinafter "CC").

<sup>464</sup> The Basque Country, Catalonia, Galicia, Aragon, The Valencian Community, Navarra and Balearic Islands have adopted autonomic civil laws. The Spanish Civil Code will apply in what is not specifically regulated.

<sup>465</sup> CC Arts. 222-285.

<sup>466</sup> CC Arts. 286-297.

or when there is a conflict of interest between them and the individuals under those measures.<sup>467</sup>

There is a **general presumption of full legal capacity** in relation to all adults, which also applies to persons with disabilities.<sup>468</sup> To have a guardian, a curator or a judicial defender appointed, **an adult must be first declared "incapable" ("incapaz") by a judicial decision.**<sup>469</sup> The causes of incapacitation of adults set forth in the Civil Code are "persistent diseases or impairments of a physical or mental nature that prevent the person from governing himself/herself".<sup>470</sup> While the Civil Code does not expressly refer to persons with disabilities, listing the causes of incapacitation makes the application of the relevant rules only applicable to them.

The Civil Codes also foresees "**extended paternal rights**" (*patria potestad prorrogada*). Such rights apply when an adult who has been judicially declared "incapable" still lives with his/her parents.<sup>471</sup> In those cases, instead of appointing a guardian or a curator, **parental rights are restored.**

In addition, a *de facto* custody regime ("guarda de hecho") applies when a **person without a formal title** takes care of and protects the interests of an individual who could be placed under guardianship or curatorship.<sup>472</sup>

The Spanish Supreme Court has ruled that all these substituted decision-making regimes are compatible with the Constitution.<sup>473</sup>

### 3. What are the criteria (or the degree of incapacity required) for legal guardianship?

The criteria for declaring a person "incapable" is regulated by Article 200 of the Civil Code, which establishes the causes of incapacitation.<sup>474</sup> As noted above, these causes are:

- persistent physical or mental diseases or impairments; *and*
- the diseases or impairment prevents the individual from self-governance.<sup>475</sup>

Both elements of the definition are significant. The Supreme Court of Spain has clarified that for a person to be incapacitated, "it is not sufficient only for them to suffer a persistent illness of a physical or psychic nature [...] what really stands out is the concurrence of the second requirement, that is, that the disorder, **whether permanent or oscillating in intensity**, prevents the affected person from governing themselves".<sup>476</sup>

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<sup>467</sup> CC Arts. 299-302.

<sup>468</sup> CC Art. 322.

<sup>469</sup> CC Art. 199.

<sup>470</sup> CC Art. 200 ("Son causas de incapacitación las enfermedades o deficiencias persistentes de carácter físico o psíquico que impidan a la persona gobernarse por sí misma")

<sup>471</sup> CC Art. 171.

<sup>472</sup> CC Arts. 303-306.

<sup>473</sup> Supreme Court, Sentence No 282/2009 of 29 April 2009, available at: <https://supremo.vlex.es/vid/-60279937>

<sup>474</sup> See supra at n. 9.

<sup>475</sup> Id.

<sup>476</sup> Supreme Court, Sentence No 818/1998 of 28 July 1998, available at <https://supremo.vlex.es/vid/incapacitacion-c-17745354>

In theory, the incapacitation system in Spain is flexible. The judge can conclude capacity/incapacity according to the degree of "discernment" (*discernimiento*) of each individual and may determine for which acts the person needs assistance. In this line, the judge can decide the appointment of a guardian or a curator on the basis of the capabilities of the individual to "self-govern" and the degree of "discernment" of the individual.<sup>477</sup>

#### 4. Can guardianship of a person with disabilities be compelled?

**Yes.** According to Spanish legislation, the judicial procedure of "incapacitation" (*incapacitación*) consists of a **procedure which is contentious** in nature. While the allegedly "incapable person" **may request a deceleration of his/her own** incapacitation, the declaration of incapacity may also be sought **by the family** (spouse, partner in a de facto union, descendant, ascendant, or sibling of the individual presumed incapable) or **by the Office of the Public Prosecutor**.<sup>478</sup> Accordingly, those who seek the procedure – be it the relatives or the prosecutor - act as the plaintiff and the alleged "incapable person" acts as the defendant.

In fact, the Civil Code establishes that **relatives** of an individual who may be considered "incapable" **are obliged to initiate the establishment of a guardianship** from the moment they know of the fact that motivates it.<sup>479</sup> Similarly, a **public prosecutor** or a judge **must seek or ensure the establishment of a guardianship**, even ex officio, if they are aware of a person in their jurisdiction that should be subjected to guardianship.<sup>480</sup> Furthermore, any person may inform the prosecutor's office or the judicial authority of a determining fact for the establishment of guardianship.<sup>481</sup>

Where the guardianship procedure is contentious, **the judge enjoys substantial discretion** in establishing a guardianship or curatorship. The Civil Code permits the judge, where appropriate, to take into account the preferences manifested by the individual subjected to it but the judge is not bound to comply with those preferences.<sup>482</sup>

The incapacitation **ruling must establish the scope and limits of the restriction** of the capacity to act and determine the **substituted decision-making regime** to which the individual is to be subjected. **In practice, however, people under guardianship are fully restricted as regards making decisions involving their personal and patrimonial spheres, while people subjected to curatorship only experience partial restrictions.**<sup>483</sup> Furthermore, **judges tend to opt for declarations of total incapacitation and guardianship.**

#### 5. Can a person legally challenge a guardianship decision?

**Yes.** The Civil Procedural Law foresees that **if "new circumstances" arise**, a new procedure can be initiated for the purpose of **nullifying or modifying** the scope of the incapacitation established.<sup>484</sup> The

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<sup>477</sup> CC Art. 287.

<sup>478</sup> Civil Procedure Law Art. 757.

<sup>479</sup> CC Art. 229.

<sup>480</sup> CC Art. 228.

<sup>481</sup> CC Art. 230.

<sup>482</sup> CC Arts. 224, 231.

<sup>483</sup> Patricia Cuenca, "La capacidad jurídica de la persona con discapacidad", *Derechos y Libertades* 24, 2011, pp. 221-257.

<sup>484</sup> Civil Procedure Law Art. 761.

individual him/herself, their guardian or curator, their relatives, and the general prosecutor's office could trigger the review. However, if the person declared "incapable" has been deprived of their capacity to appear in court, they must first obtain express judicial authorization to act in the review procedure.

Spanish legislation does not provide for periodic or ex officio review of the measures established.

## 6. What are the obligations and rights of the guardian?

The **guardian acts as the legal representative** of the incapacitated person, making decisions on behalf of that person in different areas, **except** in those **where the individual is authorised to act by him-/herself by express provision of the law or the incapacitation ruling.**<sup>485</sup>

In this respect, it is important to bear in mind that an order of incapacitation does not usually contain provisions that indicate which acts the incapacitated person can continue to perform on his/her own. Therefore, **in most cases representation will cover both personal and patrimonial areas.** Nevertheless, certain decisions of special importance require additional judicial authorization. The **internment** of the incapacitated person or the **disposal of property** are two issues that **require such particularized authorization.**<sup>486</sup>

The guardian is **obliged to take care of the incapacitated individual**, in particular to procure food, and to periodically **inform the judge** about the situation of the individual and to **give an annual account** of their administration.<sup>487</sup> Furthermore, the guardian must **promote the acquisition or restoration of the capacity** of the individual **and his/her integration in society.**<sup>488</sup> If the person recovers his/her capacity, the guardianship measure can be reviewed.<sup>489</sup>

In addition, the guardian is the legal administrator of the patrimony of those declared "incapable" and is obliged to exercise this administration with the "**diligence of a good parent**" (*diligencia de un buen padre de familia*).<sup>490</sup> The guardian is entitled to a remuneration, provided that the patrimony of the individual incapacitated allows it.<sup>491</sup>

The **curator assists** the incapacitated person to **make decisions related to those acts expressly indicated** by the incapacitation ruling.<sup>492</sup> While the ruling does not usually contain specific provisions, it is understood that the curator assists individuals declared "incapable" in those acts for which the guardian requires judicial authorization, **commonly decisions of patrimonial nature.**<sup>493</sup> The curator is also entitled to a remuneration, provided that the patrimony of the incapacitated individual allows for it.<sup>494</sup>

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<sup>485</sup> CC Art. 267.

<sup>486</sup> CC Art. 271.

<sup>487</sup> CC Art. 269.

<sup>488</sup> Id.

<sup>489</sup> See supra at n. 23.

<sup>490</sup> CC Art. 270.

<sup>491</sup> CC Art. 274.

<sup>492</sup> CC Art. 289.

<sup>493</sup> CC Art. 290.

<sup>494</sup> Law 15/2015 on Voluntary Jurisdiction, Art. 48.

## VOTING RIGHTS

### 7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?

According to the 1978 Constitution of Spain, Spanish citizens have the right to participate in public affairs, directly or through representatives, freely elected in periodic elections by universal suffrage.<sup>495</sup> The **Constitution does not foresee any limitation to the right to vote**.

The Organic Law No 5/1985 of the General Electoral System originally foresaw two limitations to the right to vote of persons with disabilities. According to its article 3, the following did not have the right to vote:

- those declared "incapable" by virtue of a final judicial ruling, provided that it expressly declares the inability to exercise the right to vote<sup>496</sup>; and
- those admitted to a psychiatric hospital through judicial authorization, during the period of their internment, provided that in the authorization the judge expressly declares the inability to exercise the right to vote.<sup>497</sup>

Nevertheless, **in an effort to harmonise the national legislation with the Convention on the Rights of Persons with Disabilities**, Spain adopted **Organic Law No. 2/2018 of 5 December 2018**, which amended the Organic Law of the General Electoral Regime in relation to the right to vote of persons with disabilities. Accordingly, the two **provisions limiting the right to vote** of persons with disabilities **were abolished** and two **new provisions** were included:

"Any person may exercise his or her right to vote actively, consciously, freely and voluntarily, whatever their means of communicating it and with the means of support required".<sup>498</sup>

and

"As of the entry into force of the Law amending the Organic Law of the General Electoral Regime to align it with the International Convention on the Rights of Persons with Disabilities, the limitations on the exercise of the right to vote established by judicial resolution legally based on section 3(1)(b) and (c) of Organic Law 5/1985, of June 19, now suppressed, have no effect. Persons whose right of suffrage was limited or nullified by reason of disability are fully reintegrated into the law".<sup>499</sup>

Therefore, there is **no current limitation to the right to vote of persons with disabilities** in Spain.

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<sup>495</sup> Constitution, Art. 23.1.

<sup>496</sup> Organic Law No 5/1985 of the General Electoral System, Art. 3(1)(b).

<sup>497</sup> Id., Art. 3(1)(c).

<sup>498</sup> Organic Law No. 2/2018 of 5 December 2018, Art. 3(2). («2. Toda persona podrá ejercer su derecho de sufragio activo, consciente, libre y voluntariamente, cualquiera que sea su forma de comunicarlo y con los medios de apoyo que requiera.»)

<sup>499</sup> Id., Additional Eighth Provision. («A partir de la entrada en vigor de la Ley de modificación de la Ley Orgánica del Régimen Electoral General para adaptarla a la Convención Internacional sobre los Derechos de las Personas con Discapacidad, quedan sin efecto las limitaciones en el ejercicio del derecho de sufragio establecidas por resolución judicial fundamentadas jurídicamente en el apartado 3.1. b) y c) de la Ley Orgánica 5/1985, de 19 de junio, ahora suprimidas. Las personas a las que se les hubiere limitado o anulado su derecho de sufragio por razón de discapacidad quedan reintegradas plenamente en el mismo por ministerio de la ley.»)

## 8. Has the lawmaker committed itself to broadly implementing supported decision-making?

**Supported decision-making has not been well developed in the Spanish legal system.** While the curatorship regime could be interpreted in a restrictive way in the light of the Convention on the Rights of Persons with Disabilities (limiting the participation of the curator to assistance for and not the annulment of the individual's decision-making), in practice it continues to operate as a partial guardianship regime.

Similarly, **voluntary regimes for anticipating an individual's will and preference in case of future incapacitation also operate under a substituted decision-making model.** Law no 41/2003 of 18 November 2003 on the Patrimonial Protection of Persons with Disabilities introduced self-protection measures and preventive powers into the Civil Code. The former permits individuals to anticipate any provision regarding their own person or property, including the appointment of guardian; the latter permits individuals to establish powers of attorney.

In this context, last year, the Spanish Executive published a **draft bill amending civil and procedural legislation in relation to the legal capacity** of persons with disabilities.<sup>500</sup> The draft bill proposes the reform of the Civil Code, the Civil Procedure Law, the Mortgage Law and the Civil Registry Law, **aiming to implement a new paradigm in which the person with disabilities will be supported to exercise their legal capacity instead of being declared "incapable".**

The main aspects of the proposal are:

- declarations of incapacitation, **guardianship** and **extended parental rights** over adults with disabilities are **abolished**;
- **preventive measures** in anticipation of support needs in the future are foreseen, including preventive powers and mandates;
- **existing substituted-decision making measures** (de facto custody, curatorship and judicial defence) are **amended** to serve as support measures for persons with disabilities;
- **persons providing support will have an obligation to act "according to the will, wishes and preferences** of those who require it";
- **periodic review** of support measures is established.

The Executive has not formally submitted the draft bill to the Parliament yet.

## 9. Are there current developments to change the voting rights of persons under guardianship?

Organic Law No. 2/2018 of 5 December 2018 amended Organic Law of the General Electoral Regime recognising the right of all persons with disabilities to vote, including those under guardianship.

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<sup>500</sup> Available at <http://www.nreg.es/ojs/index.php/RDC/article/view/375/291>

## K. SWEDEN

### INTRODUCTION

#### 1. Introduction

The Swedish legal system is generally considered to belong to the Nordic subfamily of “**continental**” (**Romano-Germanic or ‘civil’**) legal systems, which also includes Danish, Finnish, Icelandic and Norwegian law. These legal systems can be described as practical and pragmatically orientated and less conceptualistic than German and French law.<sup>501</sup>

The Swedish rules on guardianship are laid down in the **Children and Parents Code (*Föräldrabalk (1949:381)*)** and are closely aligned with the aims of the UN Convention on Rights of Persons with Disabilities in their **prioritization of the individual’s autonomy through the use of supported decisionmaking**. Indeed, full guardianship no longer exists in Sweden.

The current rules are a result of several major reforms in Swedish guardianship law, the first being the adoption of the Guardianship Act of 1924. That Act moved regulation of the incapacitated adult from its original place within the Inheritance Act to a separate piece of legislation.<sup>502</sup> The 1924 legislation created the concept of the godmanship (*god man*): a guardian with the legal mandate of taking decisions for the person with a mental impairment.<sup>503</sup>

The second and third major reforms were made in 1974 and in 1988, each of which is relevant to the questions addressed in this report. The **reform of 1974** brought about a radical change in the societal view on vulnerable adults’ needs and rights. It was here that the **principle of minimum intervention was introduced, with the reformed godmanship (*god man*) as the key measure**.

The two major changes in the **1988 reform** were the **abolishment of the full guardianship for adults** and a rule **requiring the *god man* to obtain consent from the individual** concerned in order to make legally binding commitments. The full guardianship had the effect of completely eliminate a person’s right and power to manage his or her personal affairs (*omyndigförklaring*). This included the annulment of the individual under guardianship’s right to vote. In fact, a **main driver behind the 1988 reform was the concern of the loss of the right to vote as a consequence of full guardianship**. The reform supplanted full guardianship with a new, partial guardianship in the form of administratorship (*förvaltare*). This targets the individual’s specific needs thereby allowing for the individual to maintain the rest of his or her legal capacity.<sup>504</sup>

The **right to vote cannot be restricted** because of a person’s mental or physical disabilities. The Elections Act (*Vallag (2005:837)*) permits persons with disabilities who are unable to go to a polling location to **vote by means of a messenger (*budröstning*)**. Moreover, the Act sets forth obligations for the election officials present at the voting office to assist people with disabilities.

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<sup>501</sup> M. Bogdan, Concise Introduction to Comparative Law, 1st ed., Groningen: Europa Law Publishing, 2013, p. 76.

<sup>502</sup> Torbjörn Odlöw, Swedish Guardianship Legislation ([http://www.guardianship.org/IRL/Resources/Handouts/Guardianship%20and%20Human%20Rights\\_Supplement.pdf](http://www.guardianship.org/IRL/Resources/Handouts/Guardianship%20and%20Human%20Rights_Supplement.pdf); viewed 17 October 2019).

<sup>503</sup> Id.

<sup>504</sup> G. Wallin & S. Vängby, Föräldrabalken - En kommentar del 1, Stockholm: Norstedts Juridik AB, 2009, p. 11:2.

## GUARDIANSHIP

### 2. What forms of guardianship for adults exist

Under Swedish law, there are **two forms of guardianship for adults: *god man* and *förvaltare***. These correspond closely to supported and partially substituted decisionmaking models, respectively.

The ***god man* assists and supports the principal** in his or her decisionmaking. A person having a *god man* therefore **maintains his or her full legal capacity** (*rättshandlingsförmåga*).

This is different to the ***förvaltare* who, within the scope of the commission set by the court, has exclusive powers** to represent the principal (i.e. substituted decisionmaking). While the appointment of a *god man* requires the consent of the person concerned, a *förvaltare* can be appointed against the will of the principal.

The *förvaltare* was introduced in 1988 replacing the previous full guardianship which had the effect of completely eliminate a person's right and power to manage his or her personal affairs (*omyndigförklaring*).

#### 2.1. Who may be placed under each form of guardianship?

##### 2.1.1. God man

The general requirements for appointing a *god man* to a person are laid down in Chapter 11 section 4 of the Children and Parents Code. It states that if a person, as a consequence of a disease, a mental disorder, a weakened state of health or a comparable condition, **needs help in managing his or her private and/or financial affairs**, the court shall appoint a *god man*.

##### 2.1.2. Förvaltare

The general requirements for appointing a *förvaltare* are laid down in Chapter 11 section 7 of the Children and Parents Code. They are stricter than those for appointing a *god man* since the person concerned must be considered **unable to manage his or her own private and/or financial affairs** (*ur stånd att vårda sig eller sin egendom*). Significantly, this excludes those individuals with an advanced state of degenerative disease and those in comas, as such individuals are not in a position to engage in legal acts that will endanger him- or herself.<sup>505</sup>

### 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

#### 3.1. Substituted decisionmaking

The criteria for guardianship (*förvaltare*) is that a person as a consequence of a disease, a mental disorder, a weakened state of health or a comparable condition is **unable to manage his or her own private and/or financial affairs**.<sup>506</sup> In assessing if the criteria are fulfilled, specific consideration is given to assessment by medical professionals.<sup>507</sup> In accordance with the principle of minimum

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<sup>505</sup> Odlöw, supra.

<sup>506</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 11 section 4.

<sup>507</sup> See for example Supreme Court case 2018:HD ö 5846/17.



intervention, a *förvaltare* can only be appointed if a less intrusive measure can be taken, such as the appointment of a *god man*.<sup>508</sup>

### 3.2. Supported decisionmaking

The criteria for supported decisionmaking (*god man*) is that a person as a consequence of a disease, a mental disorder, a weakened state of health or a comparable condition **needs help in managing his or her private and/or financial affairs**.<sup>509</sup>

The court can only appoint a *god man* if it finds that the needs cannot be satisfied by a less intrusive measure, e.g. with help from relatives, by appointing a power of attorney or likewise.<sup>510</sup> Moreover, the person for whom the god man is appointed must, in principle, **give his or her consent to the measure**.

## 4. Can guardianship of a person with disabilities be compelled?

### 4.1. Guardianship

A *förvaltare* can be appointed without the consent of the person concerned. An appointed *förvaltare* gets exclusive powers to represent the person concerned, but only within the scope of the commission.<sup>511</sup> This means that within the scope of the commission, the person concerned **cannot enter into legally binding acts** (i.e. loss of legal capacity), unless he or she has permission from the *förvaltare*.<sup>512</sup>

The court must **specify the scope of the appointment in order to match the specific needs as far as possible**.<sup>513</sup> For instance, a person who suffers from a compulsive disorder and because of this cannot refrain from shopping and does so in an extent that seriously harms his or her financial situation, will be appointed a *förvaltare* with exclusive powers to enter into credit agreements on behalf of the individual.

The person for which a *förvaltare* has been appointed **keeps certain legal capacities**, in particular, the right to **enter into employment and to dispose of the salary**. However, this right can be restricted if this is needed because of specific circumstances (i.e. if it is obvious that the employment is not suitable for the person in question).<sup>514</sup> It should also be noted that a person having a *förvaltare* maintains the right to vote and to run for public office. Moreover, having a *förvaltare* does not hinder the person to enter into marriage.<sup>515</sup>

<sup>508</sup> M. Brattström & A. Singer, *Föräldrabalk (1949:381)* Karnov lagkommentar, 2019, commentary to Chapter 11 section 7.

<sup>509</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 11 section 7.

<sup>510</sup> M. Brattström & A. Singer, *Föräldrabalk (1949:381)* Karnov lagkommentar, 2019, commentary to Chapter 11 section 4.

<sup>511</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 11 section 9.

<sup>512</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 11 section 10.

<sup>513</sup> G. Wallin & S. Vängby, *Föräldrabalken - En kommentar del 1*, Stockholm: Norstedts Juridik AB, 2009, p. 11:31.

<sup>514</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 11 section 8. See also Government bill Prop 1987/88 :124 Om god man och förvaltare, p. 171.

<sup>515</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 12 section 2.

## 4.2. Godmanship

According to the main rule, the **appointment of a *god man* requires the consent of the person concerned**. However, a *god man* can **exceptionally be appointed without a consent if the condition of the person concerned makes it impossible to obtain his or her opinion** (for example if the person suffers from grave dementia and is unable to take any action such as enter into agreements and therefore poses no real danger to him- or herself).<sup>516</sup> If this is the case, the person's inability to give his or her opinion must be supported by a medical certificate or a similar assessment.<sup>517</sup>

## 5. Can a person legally challenge a guardianship decision?

A decision on the appointment of either a *god man* or a *förvaltare* is taken by the district court (*tingsrätten*) and can be **appealed to the Appeal Court (*hovrätten*)**.<sup>518</sup> When appointing a *god man* or a *förvaltare*, the court must appoint a person in accordance with the person's wishes if the guardian proposed is suitable for the specific assignment.<sup>519</sup>

The court's decision to appoint a *god man* or a *förvaltare* **can be appealed by anyone who could have applied for the measure** (i.e. in addition to the person concerned, his or her spouse and other closer relatives, the person's *förvaltare*, a person having a so called future proxy (*framtidssfullmakt*), and the local Chief Guardian (*överförmyndarnämnden*)).<sup>520</sup>

### 5.1. If yes, can a court-ordered guardianship be reversed in whole or in part?

Yes, the appeal court can reverse in whole or in part the district court's appointment and the scope of commission of a *god man* or a *förvaltare*.<sup>521</sup> It should be noted that the **appointment of a *god man* requires the consent of the person in need and can therefore be terminated at any time upon his or her request**.<sup>522</sup>

## 6. What are the obligations and rights of the guardian?

The obligations and rights of the *god man* and the *förvaltare* are regulated mainly in Chapter 12 of the Children and Parents Code. Within the scope of the commission (*förordande*), the *god man/förvaltare* shall **safeguard the principal's financial and/or personal rights and interests**.<sup>523</sup> Each is under a general obligation to conduct their tasks with diligence and **act/advise in a way that best serves the interest of the principal**.<sup>524</sup>

<sup>516</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 11 section 4(1).

<sup>517</sup> Government bill Prop 1987/88 :124 Om god man och förvaltare, p. 164.

<sup>518</sup> Administration of Justice Act (*Rättegångsbalk (1942:740)*), Chapter 49 section 3.

<sup>519</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 11 section 12.

<sup>520</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 20 section 3 and Chapter 11 section 15.

<sup>521</sup> Administration of Justice Act (*Rättegångsbalk (1942:740)*), Chapter 49 section 3.

<sup>522</sup> M. Brattström & A. Singer, *Föräldrabalk (1949:381) Karnov lagkommentar*, 2019, commentary to Chapter 11 section 19.

<sup>523</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 12 section 2.

<sup>524</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 12 section 3.

The *god man/förvaltare* shall **ensure that the principal's financial assets are used in a reasonable manner** to cover the principal's living expenses. Assets not used for living expenses shall be managed carefully.<sup>525</sup>

More detailed rules on the management on assets are laid down in Chapter 14 of the Children and Parents Code. Among other requirements, the *god man/förvaltare* must provide a list of all the assets managed within the scope of the commission to the local Chief Guardian (*överförmyndarnämnden*) within 2 months of the appointment.<sup>526</sup> The **municipality's Chief guardian is tasked with supervising** that a *god man/förvaltare* acts in accordance with the requirements laid down in the Act. A *god man/förvaltare* that does not comply with the rules can be liable to pay damages to the principal.<sup>527</sup>

Certain **actions concerning the management of assets require the permission of the Chief Guardian**, such as buying or selling real estate, enter into a loan agreement, giving away assets, etc.<sup>528</sup> Moreover, the *god man/förvaltare* is under a **general obligation to (to the extent possible) consult the principal** and his or her spouse or cohabitee (if the person is not married) as regards all issues of a more important character.<sup>529</sup>

## VOTING RIGHTS

### 7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?

**All persons have the right to vote** in elections to the parliament and to the European Parliament provided that they are Swedish citizens and at least 18 years old, and have at some point resided in the country. This right is protected under the Constitution.<sup>530</sup> The right to vote includes persons with disabilities and it is not subject to any exceptions with regards to the mental or physical condition of a person.

The Elections Act (*Vallag (2005:837)*) permits persons with disabilities who are unable to go to a voting center to **vote by means of a messenger (budröstning)**. Moreover, the Act lays down a number of accessibility requirements, such as mandatory assistance to persons who because of disability cannot prepare and hand over the vote themselves.<sup>531</sup> A person with disabilities may also choose to be assisted by a person (such as a relative or his or her *god man*) other than an election official.<sup>532</sup>

The **Swedish Agency for Participation (*Myndigheten för delaktighet*)** has issued **guidelines on how to make a voting center accessible to people with disabilities**. They include various requirements on the access to and within the building in order for it to be accessible for all persons.<sup>533</sup> Specifically targeting persons with mental disabilities, the Agency for Accessible Media (*Myndigheten för*

<sup>525</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 12 section 4.

<sup>526</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 14 section 1.

<sup>527</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 12 section 14.

<sup>528</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 14.

<sup>529</sup> Children and Parents Code (*Föräldrabalk (1949:381)*) Chapter 12 section 7.

<sup>530</sup> The Instrument of Government (*Regeringsformen (1974 :152)*) Chapter 3 section 4.

<sup>531</sup> Elections Act (*Vallag (2005:837)*) Chapter 7 section 3.

<sup>532</sup> Ibid.

<sup>533</sup> The Guidelines are available in Swedish at the website of the Agency <https://www.mfd.se/stod-och-verktyg/publikationer/checklistor/checklista-for-tillgangliga-vallokaler/> (27.09.2019).

*tillgängliga medier*) runs a website with easy-to-read news about Swedish politics and information on how to vote.<sup>534</sup>

### **7.1. Where is the right to vote secured/denied? (in the Constitution? In the voting laws? In the guardianship order?)**

Swedish citizens' right to vote in general elections to parliament is secured in the Constitution.<sup>535</sup> The previous exception that persons subject to the full guardianship for adults (*omyndigförklaring*) did not have the right to vote was abolished in 1988 following the reform of the guardianship rules and the introduction of *förvaltare* as the new form of full guardianship.

The right to vote in regional and local elections are regulated in the Local Government Act.<sup>536</sup>

### **8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?**

Given that the key measure is the appointment of a *god man* and that a *förvaltare* is only appointed as a last resort, the lawmaker clearly promotes the use of supported decision making as opposed to substituted decision making for adults with mental disabilities. This is also in line with the principle of minimum intervention underpinning the legislation in this area.

The *United Nations Convention on the Rights of Persons with Disabilities* ("UNCRPD") Committee's 2014 review acknowledged that legal incapacity is abolished but stated that it is "concerned that the appointment of an administrator is a form of substituted decision-making" and suggested that Sweden should take immediate steps to replace substituted decision-making with supported decision-making.<sup>537</sup> We are however not aware of any foreseen reforms of the current rules.

### **9. Are there current developments to change the voting rights of persons under guardianship?**

As held above, the right to vote of persons under guardianship was ensured following the 1988 reform of the guardianship rules.

<sup>534</sup> <https://8sidor.se/kategori/alla-valjare/> (18.10.2019).

<sup>535</sup> The Instrument of Government (*Regeringsformen* (1974 :152) Chapter 3 section 4.

<sup>536</sup> Kommunallag (2017:725) Chapter 1 sections 7 and 8.

<sup>537</sup> The Committee's observations on the initial report of Sweden is available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSWE%2fCO%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSWE%2fCO%2f1&Lang=en) (27.09.2019).

## L. UK (ENGLAND AND WALES)

### INTRODUCTION

#### 1. Introduction

Adult guardianship in England and Wales is primarily governed by a legal framework established under the *Mental Capacity Act 2005* (the “MCA”).<sup>538</sup> This sets out a **single decisionmaking regime** for personal welfare, healthcare and financial matters on behalf of adults who may lack capacity to make those decisions. The MCA is founded upon a **decision-specific and functional approach** to mental capacity under which a court can make a stand-alone decision on the question at hand. **Courts may make a decision** on the adult’s behalf **or appoint a substitute decision-maker**, known as a ‘**deputy**’.<sup>539</sup>

It is a central principle of the MCA that a person must be given support before it can be said that he or she lacks capacity in relation to a particular act or decision. However, it **does not provide for a supported decision-making** scheme, and 2019 amendments to the MCA have not acted on recommendations made to the UK Government that powers be provided to ministers to establish such a scheme.<sup>540</sup>

As to involvement in elections, **all UK adults who are on the electoral register are eligible to vote** in elections and there are **no restrictions based on particular impairments**, such as learning difficulties. Legislation specifically abolishes any principle of the common law which says that a person does not have capacity to vote by reason of their mental state. Polling stations are under various duties to provide reasonable assistance to voters with disabilities to enable them to cast their vote. However, the MCA confirms that no one can make a decision on voting or cast a vote at an election or a referendum on behalf of a person lacking capacity to vote.<sup>541</sup>

### GUARDIANSHIP

#### 2. What forms of guardianship for adults exist

The MCA establishes a **single statutory framework** in England and Wales for the making of personal welfare decisions, healthcare and financial decisions on behalf of adults who may lack capacity to make specific decisions for themselves. The MCA’s starting point is to confirm in legislation the **presumption** at common law that an **adult** (aged 16 or over) has **full legal capacity**, unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be made.

Under the MCA, a **number of roles and powers in relation to persons lacking capacity** were created or modified. These include: lasting powers of attorney for future incapacity,<sup>542</sup> statutory rules on the making of advance decisions with regard to refusal of medical treatment,<sup>543</sup> parameters for research

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<sup>538</sup> *Mental Capacity Act 2005* (hereafter, the “MCA”), available at <http://www.legislation.gov.uk/ukpga/2005/9/contents> (01.10.2019).

<sup>539</sup> See sections 2. to 6. of this country report, below.

<sup>540</sup> See section 8. of this country report, below.

<sup>541</sup> See section 7. of this country report, below.

<sup>542</sup> *MCA, op. cit.*, sections 22 and 23.

<sup>543</sup> *Ibid*, sections 23-25.

involving, or in relation to, people lacking capacity to consent to their involvement;<sup>544</sup> and the appointment of independent mental capacity advocates to support those who lack capacity to make important decisions about serious medical treatment, changes in accommodation, involvement in adult protection proceedings and deprivation of liberty.<sup>545</sup>

The MCA also clarifies the law around acting - **without formal procedures or judicial intervention** - in connection with the care or treatment of people lacking capacity to consent. This provides a **defence to liability for persons who take actions in respect of a person on the basis of their incapacity** which would amount to criminal or tortious acts if they were carried out in the face of their refusal by a person with capacity.<sup>546</sup> This regime dictates certain steps to be taken by the relevant person (often carers, health care or social care staff) to determine the person's incapacity and what is in his or her best interests.<sup>547</sup> The permissible acts range from every day tasks of caring to life-changing events (including serious medical treatment or arranging for someone to go into a care home).<sup>548</sup>

Insofar as formal guardianship is concerned however, the MCA provides for courts to issue **orders appointing what is known as a 'deputy'**. It is this which forms the focus of the present report.

The MCA re-established the **Court of Protection** to be the exclusive jurisdiction for making orders relating to "deputy" decision-making.<sup>549</sup> In addition to decisions about property and affairs, the new court also deals with serious **decisions** (previously dealt with by the High Court<sup>550</sup>) **affecting healthcare and personal welfare** matters.

There are two main kinds of deputy which may be appointed are set out under section 16(1) of the MCA. These are deputies appointed:

- to manage a person's **property and affairs**; and
- to make **personal welfare** decisions.

However, it should be noted that in each case, the **order of appointment will set out the specific powers** and scope of authority of the deputy.

## 2.1. Who may be placed under each form of guardianship?

The court will assign a guardian to a person who lacks the capacity to make specific decisions. Section 2(1) of the MCA sets out the **definition of a person who lacks capacity** as follows:

*"For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."*

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<sup>544</sup> *Ibid*, sections 30-34.

<sup>545</sup> *Ibid*, sections 35-41.

<sup>546</sup> *Ibid*, section 5.

<sup>547</sup> Wayne Martin et. al., *The Essex Autonomy Project – Three Jurisdictions Report*, 6th June 2016, University of Essex, available at <https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-3J-Final-Report-2016.pdf> (30.09.2019), p. 18.

<sup>548</sup> Department for Constitutional Affairs, *Mental Capacity Act 2005 – Code of Practice*, The Stationery Office, London, 2007, (hereafter, "CoP") available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/497253/Mental-capacity-act-code-of-practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf) (25.09.2019), para. 6.1.

<sup>549</sup> *MCA, op. cit.*, section 16.

<sup>550</sup> *CoP, op. cit.*, para. 8.2.

In all cases, the government-issued Code of Practice (“CoP”) recommends a **two-stage procedure be applied to determining whether a person has a lack of capacity** – namely, that it must **first** be established that there is an **impairment** of, or disturbance in the functioning of, the person’s mind or brain; and **secondly**, that the impairment or disturbance is **sufficient to render the person unable** to make that particular decision at the relevant time.<sup>551</sup>

Section 2(1) of the MCA also requires it to be shown that the person lacks capacity **because of an impairment** of, or disturbance in the functioning of, the person’s mind or brain. Section 3 of the MCA sets out the test for assessing whether is **unable to make a decision for him or herself**. A person is unable to make a decision if he or she is unable:

- (a) to understand the information relevant to the decision;
- (b) to retain that information;
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his decision (whether by talking, using sign language or any other means).<sup>552</sup>

If someone cannot undertake any one of these four aspects of the decision-making process, then he or she is unable to make the decision.

### 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

It is a pre-requisite of the jurisdiction of the court that the person to whom the proceedings relate **lacks capacity**. The court’s powers in deciding whether to appoint a deputy are subject to the provisions of the MCA - in particular, the **‘statutory principles’** and the person’s **best interests**. These are discussed below.

Section 1 of the MCA sets out **five statutory principles** representing the values that underpin the legal requirements of the Act. These are that:

- (a) A person must be assumed to have capacity unless it is established that they lack capacity<sup>553</sup>;
- (b) A person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success;<sup>554</sup>
- (c) A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision;<sup>555</sup>
- (d) An act done, or decision made, under the MCA for or on behalf of a person who lacks capacity must be done, or made, in his or her best interests;<sup>556</sup>

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<sup>551</sup> *Ibid*, paras. 4.11 to 4.13. The MCA does not impose a duty on anyone to ‘comply’ with the CoP, and it should be viewed as guidance rather than instruction. But if they have not followed relevant guidance contained in the CoP, then they will be expected to give good reasons why they have departed from it: see CoP, *op. cit.*, p. 1.

<sup>552</sup> MCA, *op. cit.*, section 3(1).

<sup>553</sup> MCA, *op. cit.*, section 1(2).

<sup>554</sup> MCA, *op. cit.*, section 1(3).

<sup>555</sup> MCA, *op. cit.*, section 1(4).

<sup>556</sup> MCA, *op. cit.*, section 1(5).

- (e) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.<sup>557</sup>

The **first three principles** are pivotal to the process before or at the point of determining whether someone lacks capacity. Once it is decided that capacity is lacking, **the last two principles** must be applied as part of the decision-making process by the person acting for on behalf of the person lacking capacity.

Although the provision for court-appointed deputies, as a form of guardianship, is a mechanism for giving authority for substituted decision-making, certain legal principles in the MCA imply **a role for supported decision-making**. The assumption of capacity, maximising a person's capacity and maintaining the freedom to make unwise decisions are all consistent with a legal 'right' to non-interference and to make decisions for one's self.<sup>558</sup> However, despite these principles being akin to the notion of supported decision-making, there are, it is said, **few mechanisms to prioritise or enforce them**.<sup>559</sup> Moreover, once it has been determined that a person lacks capacity and that a deputy may be appointed, the focus is rather on acting in the person's best interests and making the least restrictive intervention.<sup>560</sup>

### 3.1. Substituted decisionmaking

Capacity is both **decision-specific and time-specific**. In particular, a person may lack capacity in relation to one matter but not in relation to others. In the context of proceedings to determine whether to appoint a deputy, the court may decide to appoint a deputy with powers to make decisions both now and in the future. In addition, a deputy may be given authority to make all decisions or only a specified range of decisions in regard to personal welfare and/or financial matters.<sup>561</sup>

Whether a person who lacks capacity to make specific decisions needs a deputy will depend on:

- the individual circumstances of the person concerned;
- whether future or ongoing decisions are likely to be necessary; and
- whether the appointment is for decisions about property and affairs or personal welfare.<sup>562</sup>

A person will be appointed **to manage a person's property and affairs** where there is no power of attorney already in place and there is need to deal with cash assets over a specified amount that remain after debts have been paid, for selling a person's property or where the person has a level of income or capital that the court considers a deputy needs to manage.<sup>563</sup> Powers in relation to a person's property and affairs are set out at section 18 of the MCA.

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<sup>557</sup> MCA, *op. cit.*, section 1(6).

<sup>558</sup> Alison Douglass, *Mental Capacity – Updating New Zealand's Law and Practice – A Report for the New Zealand Law Foundation*, Dunedin, July 2016, para. 2.35.

<sup>559</sup> *Ibid*, 2.37.

<sup>560</sup> See section 6.1. of this country report, below.

<sup>561</sup> Gordon Ashton, *Mental Capacity – Law and Practice*, 2015, 3<sup>rd</sup> edition, Jordan Publishing, Bristol, para. 4.43.

<sup>562</sup> CoP, *op. cit.*, para. 8.34.

<sup>563</sup> *Ibid*, para. 8.35.



Deputies for **personal welfare decisions** will only be required in the **most difficult cases where** important and necessary actions cannot be carried out without the court's authority or **there is no other way** of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions. Particular powers in relation to person's welfare are set out under section 17 of the MCA. Examples given by the **CoP** include when:

- someone needs to make a **series of linked welfare decisions** over time (due, for example to profound and multiple learning disabilities) and it would not be beneficial or appropriate to require all of those decisions to be made by the court;
- the **most appropriate way to act in the person's best interests** is to have a deputy, who will consult relevant people but have the final authority to make decisions;
- there is a **history of serious family disputes that could have a detrimental effect on the person's future care** unless a deputy is appointed to make necessary decisions;
- the person who lacks capacity is felt to be **at risk of serious harm** if left in the care of family members. In such rare cases, the deputy may be a local authority officer.<sup>564</sup>

### 3.2. Supported decisionmaking

The forms of 'guardianship' provided by the legislative framework, and the references of the MCA and the CoP guidance to acting in the person's best interests reflect the formal substituted decision making model applying in England and Wales.

This does not mean, however, that supported decision-making is not recognised at all. Indeed, before deciding that someone lacks capacity to make a particular decision, the MCA emphasises the importance of **taking all practical and appropriate steps to enable them to make that decision themselves**.

This is reflected in the Act: the statutory principles set out at section 1 of the MCA include that a person is not to be treated as unable to make a decision **unless all practicable steps to help him or her to do so have been taken without success**; moreover, section 3(2) of the Act provides that a person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (for example, by using simple language, visual aids or any other means). The CoP accompanying the MCA sets out, in some detail, **practical guidance on how to support people to make decisions for themselves**, or to play as big a role as possible in decision-making.<sup>565</sup>

Furthermore, section 4(4) of the MCA requires that even where a person does not have capacity to make an effective decision, **he or she should be both permitted and encouraged to participate**, or to improve his or her ability to participate as fully as possible, in the decision-making process or in relation to any act done for him or her. The importance of involving the person in the decision-making process has been **reinforced by case law from the Court of Protection**.<sup>566</sup>

Some critics argue, however, that these **principles purporting to uphold supported decision-making** are, in practice, of **limited effect**. One commentator points out that although the provision of support is alluded to at the beginning of the MCA, **it receives no elaboration in the remainder of the**

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<sup>564</sup> *Ibid*, para. 8.39.

<sup>565</sup> See section 6.2. of this country report, below.

<sup>566</sup> *C v. V, Re S and S (Protected Persons)* [2008] England and Wales High Court B16 (Family Division). *CC v. KK and STCC* [2012] England and Wales High Court 2136 (Court of Protection).

**Act, and that it is expressed in the passive voice**, thereby failing to indicate to anyone in particular who has the positive obligation to take such action.<sup>567</sup>

#### 4. Can guardianship of a person with disabilities be compelled?

Yes. In some cases, the **court must make a specific decision on behalf of a person** because someone needs specific authority to act. This includes where there is no power of attorney in place and someone needs to make a financial decision for a person who lacks capacity to make that decision or it is necessary to make a will or amend an existing will on behalf of a person who lacks authority to do so. A court may also consider it appropriate to intervene where there is a major disagreement regarding a serious decision to be made, for example, about where a person who lacks capacity to determine where he or she should live, or where someone suspects that a person who lacks capacity to make decisions to protect themselves is at risk of harm or abuse from a named individual.<sup>568</sup>

The Court of Protection is, however, **required to be mindful of the principles set out at section 1 of the MCA**, including best interests and to make the least restrictive intervention. The Act even specifically imposes an obligation on the Court **to make a single order in preference to appointing a deputy**, and where the appointment of a deputy is considered necessary, that powers conferred on the deputy should be limited in scope and duration as far as possible.<sup>569</sup> A deputy has a duty to act only within the scope of the actual powers given by the court, which are set out in the order of appointment.

#### 5. Can a person legally challenge a guardianship decision?

Yes. Under section 16(8) of the MCA, the **Court may revoke the appointment of a deputy** or vary the powers conferred on him or her if it is satisfied that the deputy has behaved, or is behaving in a way that contravenes the authority conferred on him or her by the court or is not in the best interest of the person for whom they are acting, or that he or she proposes to behave in such a way.

In relation to specific decisions of the deputy, a person may seek to resolve the issue informally to determine the best interests of the concerned person, attempt mediation or complain to what is known as the **Office of the Public Guardian (the "OPG")**, an executive agency of the Ministry of Justice.<sup>570</sup> Among its various duties, the OPG is responsible for supervising and supporting deputies, as well as protecting people lacking capacity from possible abuse or exploitation. The OPG may instruct an officer, known as a Court of Protection Visitor, to visit a deputy to investigate any matter of concern. Ultimately, where the matter cannot be resolved, the OPG has standing to apply to the Court of Protection to cancel a deputy's appointment.<sup>571</sup>

As a general rule, **applicants must get the permission of the Court of Protection** before making an application to it on any matter. However, no permission is required for an application to the Court for the exercise of any of its powers by a person who lacks or is alleged to lack capacity, by a deputy

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<sup>567</sup> Wayne Martin et. al., *The Essex Autonomy Project – Three Jurisdictions Report*, *op. cit.*, p. 26.

<sup>568</sup> See CoP, *op. cit.*, paras. 8.27 – 8.29.

<sup>569</sup> MCA, *op. cit.*, section 16(4).

<sup>570</sup> See CoP, *op. cit.*, para. 5.68.

<sup>571</sup> *Ibid*, paras. 8.69 – 8.70.

for person to whom the application relates, or by a person named in an existing order of the court, if the application relates to the order.<sup>572</sup>

## 6. What are the obligations and rights of the guardian?

### 6.1. In substituted decisionmaking

A deputy is, according to the MCA, **to be treated as ‘the agent’ of the person who lacks capacity** when they act on their behalf, and this means that they will have legal duties, under the law of agency, to the person they are representing. These include a duty to act with due care and skill, not to take advantage of their situation, to act in good faith, to respect the person’s confidentiality and to comply with the directions of the Court of Protection.<sup>573</sup>

Alongside these common law duties, the **MCA sets out more generally what can and cannot be done** by someone in relation to a person lacking capacity. Section 20 of the MCA sets out a number of **powers which the deputy expressly will not have**. Section 27 sets out a **list of decisions on family relationships**, such as consenting to marriage or civil partnership, consenting to have sexual relationships and consenting to a child’s being placed for adoption by an adoption agency, which are excluded from being taken on behalf of a person lacking the capacity to make the decision. Section 28 **excludes decision-making powers used for giving or consenting to certain regulated treatment** for mental disorders. Significantly, section 29 confirms that no one can **make a decision on voting** or cast a vote on behalf of a person lacking capacity to vote.<sup>574</sup>

As discussed above, a court-appointed deputy must follow the statutory principles of the MCA. Of paramount importance is the duty, in all decision-making, to **act in the best interests of the person who lacks capacity** to make their own decisions.<sup>575</sup>

In addition to having the right to make decisions on behalf of the person lacking capacity (within the scope of the order of the court appointing them as deputy), the deputy is **entitled to be reimbursed out of the property of the person lacking capacity** for his or her reasonable expenses in discharging his or her functions. The court may also confer powers on the deputy **to take possession or control of any specified part of the person’s property**, as well as powers of investment.<sup>576</sup>

### 6.2. In supported decisionmaking

As mentioned above, the MCA also permits acts to be undertaken by people in connection with the care or treatment of a person lacking capacity to consent, without the need for designation as a court-appointed guardian. Section 5 of the MCA provides **a defence to liability for persons who take actions in respect of a person on the basis of their incapacity** which would amount to criminal or tortious acts if they were carried out in the face of their refusal by a person with capacity.<sup>577</sup> The provisions of section 5 are based on the common law doctrine of necessity.<sup>578</sup>

<sup>572</sup> MCA, *op. cit.*, section 50(1).

<sup>573</sup> CoP, *op. cit.*, paras. 8.55 - 8.56.

<sup>574</sup> See section 7.1.2. of this country report, below.

<sup>575</sup> *Ibid*, section 1(5).

<sup>576</sup> MCA, *op. cit.*, section 19(7) and (8).

<sup>577</sup> *Ibid*, section 5.

<sup>578</sup> Set out in *Re F (Mental Patient: Sterilisation)* [1990] 2 Appeals Court 1.

There are no formal rights and obligations, as such, of a person acting – without court authority - on behalf of a person lacking capacity to consent. Section 5 provides quite simply that before doing the act, the person concerned (D) takes reasonable steps to establish whether the individual (P) lacks capacity in relation to the matter in question, and, when doing the act, D reasonably believes that P lacks capacity in relation to the matter, and that it will be in his or her best interests for the act to be done.

## VOTING RIGHTS

### 7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?

All UK citizens aged 18 or over and who are on the electoral register are eligible to vote in elections and no eligible person may be refused a ballot paper to vote on the grounds of mental incapacity.<sup>579</sup>

Local authorities are under an obligation to ensure that so far as is reasonable and practicable, **every polling place in their district are accessible to disabled voters**.<sup>580</sup> Moreover, as a public body, the *Electoral Commission*, which oversees how elections are run, is subject to the **public sector equality duty to advance equality of opportunity** between people who share a relevant protected characteristic, such as disability, and those who do not.<sup>581</sup>

In addition to various assistance available to persons with physical disabilities, guidance for polling station staff states that the presiding officer of the polling station must try to ensure that a **person with a mental health problem or learning disability is given appropriate assistance** in order to be able to cast his or her vote. This may include an explanation of the voting process and being allowed the assistance of a companion.<sup>582</sup> However, **the requirement for ballots to be secret means that no one can enter the voting booth with an elector**, including those who seek to assist voters who have visual impairments or learning difficulties.<sup>583</sup>

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<sup>579</sup> See sections 7.1. and 7.1.1. of this country report, below. *Representation of the People Act 1983*, available at <http://www.legislation.gov.uk/ukpga/1983/2/contents> (26.09.2019), sections 1 and 2 and *Electoral Administration Act 2006*, available at <http://www.legislation.gov.uk/ukpga/2006/22/contents> (26.09.2019), section 73.

<sup>580</sup> With regard to parliamentary elections, see *Representation of the People Act 1983, op. cit.*, section 18B(4)(b).

<sup>581</sup> *Equality Act 2010*, available at <http://www.legislation.gov.uk/ukpga/2010/15/contents> (30.09.2019), section 149.

<sup>582</sup> The Electoral Commission, *Handbook station for polling staff – Supporting a UK Parliamentary Election in Great Britain*, 2017, available at [https://www.electoralcommission.org.uk/sites/default/files/pdf\\_file/Polling-station-handbook-UKPE.pdf](https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Polling-station-handbook-UKPE.pdf) (30.09.2019), p.22.

<sup>583</sup> Equality and Human Rights Commission, *Guidance – Equality and Human Rights Law during an Election Period*, Updated April 2017, available at <https://www.equalityhumanrights.com/sites/default/files/equality-and-human-rights-law-during-an-election-period.pdf> (30.09.2019), p. 12.

### 7.1. Where is the right to vote secured/denied? (in the Constitution? In the voting laws? In the guardianship order?)

The **right to free elections** is incorporated into UK law by the *Human Rights Act 1998*,<sup>584</sup> which incorporates the provisions of the *European Convention on Human Rights*, including Article 3 of the First Protocol (“Right to free elections”). The **entitlement to vote** is confirmed in legislation in the form of the *Representation of the People Act 1983*<sup>585</sup> and Section 73 of the *Electoral Administration Act 2006*.<sup>586</sup> The law confirms that those detained in a short-term psychiatric hospital (save for offenders) may vote, subject to meeting registration requirements,<sup>587</sup> and that even a person detained under the *Mental Health Act 1983* may vote by post or by proxy.

At the same time, Section 29 of the MCA confirms that **no one can make a decision on voting or cast a vote at an election or a referendum on behalf of a person lacking capacity to vote** (for example, where acting as a deputy). A proxy vote can only be cast on behalf of a person who has capacity to nominate someone as their proxy voter. It is said that the precise test for capacity to appoint a proxy has yet to be established;<sup>588</sup> in light of the abolition of the former common law principle that a person has a legal incapacity to by reason of his mental state, there is, in law, no test of ‘mental capacity to vote’.<sup>589</sup>

The *Electoral Administration Act 2006* makes it clear that a person cannot be determined as having legal incapacity to vote by reason of his or her mental state, and **section 29 of the MCA prevents anyone, including the courts, from making a decision on voting** or casting a vote on behalf of a person lacking capacity to vote.<sup>590</sup>

## 8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?

The present UK Government has indicated that it sees **no need to make any formal changes to the legislative framework**, and a 2019 Act which amended parts of the MCA did not adopt recommendations with regard to supported decision-making. This is discussed below.

As referred to above, the second principle of the MCA provides that, “*A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*”<sup>591</sup> Arguably, it is said, this **already makes adequate provision for supported decision-making.**<sup>592</sup>

<sup>584</sup> *Human Rights Act 1998*, available at <http://www.legislation.gov.uk/ukpga/1998/42/contents> (26.09.2019).

<sup>585</sup> *Representation of the People Act 1983*, *op. cit.*, sections 1 and 2.

<sup>586</sup> *Electoral Administration Act 2006*, *op. cit.*

<sup>587</sup> *Ibid*, section 7.

<sup>588</sup> Gordon Ashton, *Mental Capacity – Law and Practice*, *op. cit.*, para. 2.211.

<sup>589</sup> *Ibid*.

<sup>590</sup> See sections 7.1.2. and 7.1.2. of this country report, above.

<sup>591</sup> MCA, *op. cit.*, section 1(2).

<sup>592</sup> See Law Commission, *Mental Capacity and Deprivation of Liberty – A Consultation Paper*, Consultation Paper no. 222, 2015, Crown Copyright, available at [http://www.lawcom.gov.uk/app/uploads/2015/07/cp222\\_mental\\_capacity.pdf](http://www.lawcom.gov.uk/app/uploads/2015/07/cp222_mental_capacity.pdf) (30.09.2019), para. 12.10.

There is, however, **little guidance as to what form this support should take**, or who has the legal obligation to provide it.<sup>593</sup> Indeed, evidence received by a committee of the House of Lords, the UK's upper house of parliament, stated that the MCA principles were not working effectively, and that supported decision-making under the Act was "*rare in practice*". The committee subsequently concluded that, "**supported decision-making, and the adjustments required to enable it, are not well embedded,**" and that a, "*fundamental change of attitudes among professionals is needed in order to move from protection and paternalism to enablement and empowerment.*"<sup>594</sup>

In 2015, the Law Commission,<sup>595</sup> published a consultation paper on the regulation of mental capacity in England and Wales, and made a provisional **proposal that a formal legal process should be introduced**, like that which exists in other common law jurisdictions, in which a person may be appointed to assist with decision-making. This, it emphasised, would not be as part of an abolition of best interests decision-making, but rather, to bolster the existing provisions of the MCA.<sup>596</sup> This view was subsequently confirmed in its final report, published in 2017, as a **firm recommendation to Parliament** as follows:

*"Recommendation 42: The Secretary of State and Welsh ministers should be given the power, by regulations, to establish a supported decision-making scheme to support persons making decisions about their personal welfare or property and affairs (or both)."*<sup>597</sup>

This was incorporated into a proposed draft Bill, attached to the Law Commission's report, as a new section 63A of the MCA. On 3<sup>rd</sup> April 2018, the **Department of Health published a policy paper, responding to the Law Commission's recommendations**. On the subject of supported decision-making, it reiterated its commitment to the principle of supported decision-making as set out in the MCA. However, it states that, along with the Ministry of Justice, **there are concerns that the proposal would be an example of an, "unnecessarily legalistic approach"**, that there may be overlap with other provisions such as advocacy and that there would be a potential cost to the public purse of providing a new statutory form of support for people in all aspects of their lives.<sup>598</sup>

The *Mental Capacity (Amendment) Act 2019*,<sup>599</sup> introduced in May 2019, made **no changes to the MCA** to introduce a supported decision-making scheme.<sup>600</sup>

<sup>593</sup> Gordon Ashton, *Mental Capacity – Law and Practice*, *op. cit.*, para. 1.210.

<sup>594</sup> House of Lords Select Committee on the Mental Capacity Act, *Report of Session 2013-14: Mental Capacity Act 2005: Post-legislative Scrutiny*, 2014, HL 139, paras 79, 104 and 108.

<sup>595</sup> The Law Commission is an independent commission set up by Parliament to keep the law of England and Wales under review and to recommend reforms.

<sup>596</sup> Law Commission, *Mental Capacity and Deprivation of Liberty – A Consultation Paper*, *op. cit.*, paras 12.12 – 12.24.

<sup>597</sup> See Law Commission, *Mental Capacity and Deprivation of Liberty*, 372, HC 1079, 2017, Crown Copyright, available at [http://www.lawcom.gov.uk/app/uploads/2017/03/lc372\\_mental\\_capacity.pdf](http://www.lawcom.gov.uk/app/uploads/2017/03/lc372_mental_capacity.pdf) (30.09.2019), para. 14.56.

<sup>598</sup> See Department of Health and Social Care, *Policy Paper - Department of Health response to the Law Commission's consultation on mental capacity and deprivation of liberty*, Updated 3<sup>rd</sup> April 2018, available at <https://www.gov.uk/government/publications/deprivation-of-liberty-standards-dols-consultation-response/department-of-health-response-to-the-law-commissions-consultation-on-mental-capacity-and-deprivation-of-liberty> (30.09.2019).

<sup>599</sup> *Mental Capacity (Amendment) Act 2019*, available at <http://www.legislation.gov.uk/ukpga/2019/18/contents/enacted> (30.09.2019).

<sup>600</sup> The failure to include a delegated power to introduce such a scheme have been described as "*a missed opportunity for positive reform*": See Parliament.uk, *Mental Capacity (Amendment) Bill [HL] – written evidence from Professor Rosie Harding, Birmingham Law School, University of Birmingham*, Session 2017-2019, available at

**9. Are there current developments to change the voting rights of persons under guardianship?**

None known.

## M. UNITED STATES

### INTRODUCTION

#### 1. Introduction

In the United States, questions relating to mental health cross the federal-State law divide. While there is **much law on mental disability falling squarely within the federal Americans with Disabilities Act (ADA)**, the **law on mental health treatment is primarily a question of State law**. Moreover, to the extent that there is no federal law to preempt the State rules on mental disability, or **where the federal law is less protective of persons with mental disabilities, State law may govern**.

All **questions of legal guardianship are ones of State law** rather than federal law. Currently, while there are general similarities, the **differences** in guardianship rules remain **significant among the States**. The differences include terminology and the relevant courts (many States give exclusive jurisdiction on guardianship matters to probate courts, other States do not have probate courts at all) as well as the standards to be applied. The **lack of systematic information** on adult guardianship decisions in State courts hinders comparative research on the legal issues in this context and makes statistical indications unreliable.<sup>601</sup>

That said, the **move to supported decisionmaking** has been an action point for the disabilities rights movement **since at least the 1970s** (under the conceptual framework of “independent living”), gaining adherents from a range of stakeholders for widely differing reasons (including anti-professionalism, budget-cutting, and fear of the “guardianship industry’s” abuses).<sup>602</sup> Since the turn of the millennium, attention to supported decisionmaking has grown rapidly, with the American Association of Retired People (AARP) helping raise awareness of the issue and the American Bar Association (ABA) creating a program on guardianship law. The ABA program’s materials set forth State-by-State legal information and in 2018 endorsed the Uniform Law Commission’s 2017 model Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) that aims to make guardianship rules largely the same in all States.<sup>603</sup> Currently, only four States have ratified the UGCOPAA, but this number could rise quickly.<sup>604</sup>

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<sup>601</sup> See Administrative Conference of the United States, *SSA Representative Payee: Survey of State Guardianship Laws and Court Practices* (2014) (available at [https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee\\_State%2520Laws%2520and%2520Court%2520Practices\\_FINAL.pdf](https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee_State%2520Laws%2520and%2520Court%2520Practices_FINAL.pdf); viewed 14 August 2019).

<sup>602</sup> See generally, Eliana J. Theodorou, Supported Decision-Making in the Lone-Star State, 93 NYU L. Rev. 973, 983-989 (2018) (recounting the political history of the supported decisionmaking movement in the United States and Texas in particular).

<sup>603</sup> See <https://www.uniformlaws.org/viewdocument/final-act-no-comments-13?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c&tab=librarydocuments> (viewed 28 August 2019). The UGCOPAA was preceded by the Uniform Guardianship and Protective Proceedings Act (UGPAA) of 1982, itself preceded by the Uniform Probate Code (UPC) of 1969. See Deirdre M. Smith, Keeping it in the Family: Minor Guardianship as Private Child Protection 18:2 Conn. Pub. Int. L.J. 53, 64-65 (2019).

<sup>604</sup> Maine and Washington have enacted the model already, and Montana and Utah have each introduced a bill based on the model. <https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c> (viewed 28 August 2019). Note, the 1997 Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act is widely adopted, allowing for ease in interstate guardianship actions. It does not contain standards relating to guardianship.



**Voting rights are similarly situated** in the United States legal system. There are **Constitutional guarantees** protecting individual rights and a number of federal voting rights acts, **but the election laws** that determine the registration of voters and the management of the electoral process itself are **State laws**. State voting laws may have restrictions on the right to vote for persons with mental incapacity or for persons that are under guardianship.<sup>605</sup>

What can be said in general about voting rights of persons under guardianship in the United States is that in every case there **must be a court order to restrict an individual's right to vote**. The order must either be one declaring the person mentally unfit to vote or an order to place the person under guardianship due to mental incapacity. While this individuality ensures every person has the opportunity to oppose limitations on her rights, the process **introduces greatly diverging practices**, as the application of rules can vary from courtroom to courtroom.

The following will attempt to draw a generalized view of the issues of guardianship and voting rights in the United States as a whole. It will use examples from individual State laws to illustrate some of the main variants of the existing legislation, but cannot be used as a substitute for in-depth research for particular fact-patterns.

## GUARDIANSHIP

### 2. What forms of guardianship for adults exist?

Legal guardianship exists for youth and adults. Guardianship, conservatorship, and/or custody of minors is a legal situation in which the court (usually a trial court) appoints an adult to have legal responsibilities over a child. This may occur in a number of situations, including ones in which a child is orphaned or where the child's parent is unable to make decisions in the interest of the child, such as if both parents are addicted to illegal drugs or are mentally unfit to care for the child. Alternatively, guardianship or conservatorship may be granted to one of a child's parents in case of divorce. Such arrangements can have numerous variations, including joint or sole managing conservatorship and possessory conservatorship.<sup>606</sup> In some States, the terms "guardian", "conservator", and/or "custodian" are used to indicate differences in the powers of the agent, while in other States, there are no differentiations and only one term has a legal definition. This report will not examine guardianship for minors further.

For adults, the terms **"guardian", "conservator", and or "custodian" are used to indicate a role in which one person has court-appointed authority to make legal decisions for another.**<sup>607</sup> In some States, there may be **"guardianship of the person" separate from "guardianship of the estate"** (or guardianship of property). In that case, the guardian/conservator/custodian of the person has the authority to make decisions for the ward's personal care (including medical treatment) and living arrangements, while the latter relates to management of the ward's financial affairs. In the

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<sup>605</sup> See the excellent overview of the voting rights associated with guardianship in: Bazelon Center for Mental Health Law, Autistic Self-Advocacy Network, National Disability Rights Network, and Schulte, Roth & Zabel LLP, **VOTE. It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities** (2016) (available at [www.bazelon.org/issues/voting](http://www.bazelon.org/issues/voting)).

<sup>606</sup> See, e.g., Romano & Sumner, Conservatorship and Family Law (explaining the general outline of Texas rules on child guardianship and conservatorship) (<https://romanosumner.com/2016/05/20/difference-conservatorship-guardianship/>; viewed 14 August 2019).

<sup>607</sup> The term "power of attorney" refers to a related authority, but the individual with the power of attorney is appointed by the principle (ie, the one whose authority is being substituted) rather than by a court.

UGCOPAA, the terms “guardian” and “conservator” refer to the personal care and financial/property issues, respectively.<sup>608</sup>

**Many States also provide for limited guardianship/conservatorship/custody.** A limited guardian has decisionmaking authority over a part of the ward’s interest (e.g., over non-healthcare personal decisions or over only certain property). **In most cases, the guardianship order must specify those decisions over which the guardian has competence** and/or the particular property interests subject to the guardian’s powers. In certain jurisdictions and the UGCOPPA, **limited guardianship may be the default** – requiring a petition for unlimited guardianship to specify the reasons that comprehensive competences would be required.<sup>609</sup>

**Other forms** of guardianship include: temporary guardianship/conservatorship/custody, assigned in cases of contestation of a move to appoint a guardian;<sup>610</sup> **co-guardianship**/co-conservator, appointed to make joint decisions with the guardian in the case of a certain event happening; and **guardianship *ad litem***, whereby a judge assigns a guardian to represent a person in a court proceeding if s/he is unable to adequately defend his or her own interests.<sup>611</sup>

Depending on the State, the differing types of guardianship/conservatorship/custody may be determined by the level of incapacity or on the type of incapacity. In the State of New York (NY), for example, there are **different regulations on securing adult guardianship for persons with developmental disabilities<sup>612</sup>, intellectual disabilities<sup>613</sup> and for guardianship over a person who loses the capacity to care for his/her personal needs and/or to manage his/her finances** (“persons who become incapacitated”)<sup>614</sup>. The rules regarding guardianship of persons with developmental and/or intellectual disabilities (New York Surrogate Court’s Procedure Article 17A guardianship) are broadly similar (and to a large extent overlapping), whereas those for guardianship of persons who become incapacitated are separate and codified in the general provisions on Mental Hygiene, Article 81.

### 3. What are the criteria (or, the degree of incapacity required) for legal guardianship?

Legal capacity of persons 18 years of age and older is presumed in the United States, so **proof of an incapacity is required to assign a guardian** to an adult. Medical certificates (the number may vary, as do the qualifications of those eligible to submit such a report) will accompany any petition for guardianship and will often be the main basis for decisions regarding the guardianship. Thus, the medical report needs to indicate the individual’s **“functionality”** and ability to live independently and may be required to set forth an opinion on the proper scope, if any, of a guardianship. Judges may also be required to take into consideration the individual circumstances of the prospective ward.

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<sup>608</sup> UGCOPPA, § 102(5) (definition of “conservator”)and §102(9) (definition of “guardian”).

<sup>609</sup> E.g., Illinois law includes the sentence, “Guardianship shall be ordered only to the extent necessitated by the individual’s actual mental, physical and adaptive limitations.” 755 ILCS 5/11a-3(b)

<sup>610</sup> See Talbot Law Group, When You Need a Conservatorship and What to do if it’s Contested, 3 June 2016 (<https://www.matthewbtalbot.com/blog/2016/6/2/contested-conservatorship>; viewed 14 August 2019).

<sup>611</sup> The terms short-term guardian and stand-by guardian exist as well. These are persons appointed by the guardian to take decisions in case the guardian is unavailable.

<sup>612</sup> New York Surrogate Court’s Procedure, Article 17A, Section 1750.

<sup>613</sup> New York Surrogate Court’s Procedure, Article 17A, Section 1750a.

<sup>614</sup> 2018 New York Consolidated Laws, Mental Hygiene, Article 81.

In defining incapacity, guardianship laws exhibit **variations as to the criteria** (functionality, cognition, necessity, and/or specific conditions) **as well as to the standards** within each of the criteria that need to be proven in court.<sup>615</sup>

Functionally the prospective ward must be unable to take care of his-/herself in terms of addressing personal needs (health and safety and/or welfare). A large minority of States<sup>616</sup> and the UGCOPPA specify that the focus is on “essential” needs, some<sup>617</sup> put a time period within which the incapacity was demonstrated (for example, within the six months before the petition or “recently”), and some<sup>618</sup> expand the required functioning to include care of dependents. A final **notable difference exists between jurisdictions** (including the Uniform Act, Colorado, and South Carolina) **that define incapacity as an inability to meet one’s needs “even with” assistance, Minnesota, that rejects the relevance of assistance, and the rest that are silent about this.**<sup>619</sup>

The cognitive deficiencies are usually those of understanding information and making and communicating decisions.<sup>620</sup> Some States specify that this requires an incapacity to make “rational” or “responsible” decisions.<sup>621</sup>

A number of States (although not the UGCOPPA) also list **medical or similar conditions that may make an individual subject to guardianship**. These often include mental or physical illness and mental “deficiency”, and some include alcoholism or addiction to drugs as well.<sup>622</sup>

In most States, the petitioner must prove the incapacity of the person to the standard of “clear and convincing” evidence. This is a higher standard of proof than normally used in civil cases, presumably providing more protection for the prospective ward.

Research did not reveal States in which the standards of capacity for supported guardianship differed from those for substituted guardianship. Rather, the standard remains whether the person can make life-relevant decisions and the level of guardianship is determined on the basis of the judge’s assessment of the individual’s capacity.

#### 4. Can guardianship of a person with disabilities be compelled?

A mentally incapacitated adult **can be compelled** if there is a petition for guardianship that the court upholds. While guardianship orders are subject to trial, if contested, and the prospective ward (or others on behalf of the prospective ward) can argue against the appointment of a guardian, if the judge (or jury, as most guardianship trials may be jury trials) is persuaded of the need for a guardian, the guardianship may be compelled against the expressed wishes of the ward and/or his or her family members.

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<sup>615</sup> See ABA Commission on Law and Aging, Capacity Definition & Initiation of Guardianship Proceedings (Statutory Revisions as of December 31, 2018), Chart (2018) (). Interesting is that in New York, there are different criteria used for guardianship of persons with intellectual and developmental disabilities on the one hand and “mentally incapacitated” persons on the other. Due to time limitations, this point was not researched for other States.

<sup>616</sup> E.g., Kansas, Missouri, Montana, Oklahoma, Oregon, South Dakota, West Virginia. Id.

<sup>617</sup> E.g., Kentucky, New Hampshire, New Mexico, Vermont. Id.

<sup>618</sup> E.g., Ohio, Texas, Virginia, West Virginia. Id.

<sup>619</sup> Id.

<sup>620</sup> Id.

<sup>621</sup> Id.

<sup>622</sup> Id.

Compelled guardianship may also result from the need for an Emergency Guardian. As conceived in the Universal Act, the **court may appoint an emergency guardian** if there is a likelihood of substantial harm to the person or property of an individual and the individual is deemed mentally incapable.<sup>623</sup> There are a number of procedural safeguards limiting the appointment, including a requirement of notice as soon as feasible and a maximum period of the emergency guardianship.

## 5. Can a person legally challenge a guardianship decision?

There is a **constitutional right to an appeal** of the decision because legal guardianship is ordered by a court decision. The challenge can be to the granting of the request for guardianship, to the choice of guardian, or to the scope of the guardian's powers granted.

## 6. What are the obligations and rights of the guardian?

Guardianship laws set out the general rights and duties of guardians within their individual jurisdictions. In general, the duties would include the **provision for the ward's well-being and/or care of the ward's property**.<sup>624</sup> The general duties of a guardian to **take any decisions necessary within the scope** of the guardianship may be specified to include the **duty to investigate the ward's wishes** and to **assist the ward in maintaining independence** to the extent possible.

Guardians have the **general right to receive compensation** for their work and to be paid from the ward's estate for their **expenditures** in the service of the ward. **Specific rights** of the guardian, however, will be **contained in the court order** in any particular case. This can depend on the powers the guardian wishes to have combined with the powers the court believes have been proven necessary to place with the guardian.

**Some State law explicitly removes the right of the guardian to make certain types of decisions.** Illinois, for example, a guardian may not place the ward in a mental hospital without the ward's consent<sup>625</sup> nor consent to the ward's sterilization without a court order granting special permission for this decision<sup>626</sup>.

## VOTING RIGHTS

### 7. Do persons with disabilities have the right to vote/on what does a denial of the right to vote depend?

The United States Constitution's 15<sup>th</sup>, 19<sup>th</sup>, and 26<sup>th</sup> Amendments establish that neither the federal government nor the States may deny US citizens aged 18 and older the right to vote on account of their race, color, prior status as a slave, sex, or age. For persons with disabilities, there are additional

<sup>623</sup> UGCOPAA § 312.

<sup>624</sup> See, e.g., 755 ILCS § 5/11a-17 (“(a) To the extent ordered by the court and under the direction of the court, the guardian of the person shall have custody of the ward and the ward's minor and adult dependent children and shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance, and professional services as are appropriate [...]. The guardian shall assist the ward in the development of maximum self-reliance and independence. [...]”). <http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=075500050K11a-17>

<sup>625</sup> Id. See also Illinois Mental Health and Developmental Disabilities Codes, Article IV.

<sup>626</sup> See generally 755 ILCS 5/11a-17.1.

specific protections against de jure and de facto discrimination. The most **direct protections** are found in the Voting Accessibility for the Elderly and Handicapped<sup>627</sup> Act (**VAEHA**), the Help America Vote Act of 2002 (**HAVA**), and the Americans with Disabilities Act<sup>628</sup> (**ADA**).

The HAVA was passed to improve accessibility of federal voting to persons with disabilities<sup>629</sup>, and its requires “voting systems” to permit “the same opportunity for access and participation (including privacy and independence) as for other voters”<sup>630</sup>. This, together with the Voting Rights Act’s requirement of equality in treating voters<sup>631</sup>, means that any requirements – such as **competency tests** – or practices that would only target persons with mental disabilities would be **unlawful**. The HAVA, moreover, **requires** voting officials to permit persons to complete a **provisional ballot** that can be counted (or not) if the individual is later determined to be competent (or not).<sup>632</sup>

The VAEHA requires States and local election places to make **voting places accessible** to persons age 65 and older as well as to persons with temporary or permanent disabilities, while the **ADA prohibits election officials from restricting the right to vote** in federal, State, or municipal elections on grounds of the individual’s disability.<sup>633</sup> The provisions of the ADA in particular ensure that **election officials are required to accommodate voters with disabilities** by ensuring that voters are offered alternative ways (or location) of voting if a voting place is physically inaccessible, that voting materials are available in formats that are accessible to persons with communication impairments (or that helpers are present), that voters can bring helpers or animals with them even if other pets are prohibited, and that the type of identifying documents necessary be available to persons with disabilities.<sup>634</sup>

These broad protections, however, **do not grant every citizen with a disability the right to vote**. Rather, they exclude certain grounds upon which the basic right can be denied. **State election laws determine the conditions under which persons are considered capable of voting**. Many of these **restrict the right** to vote to persons considered **intellectually and mentally capable** of making decisions. Not all do, however, and there are cases in which local regulations (or local officials’ decisions to) restrict the voting have been held unconstitutional.<sup>635</sup>

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<sup>627</sup> 52 USC Chapter 201 (1985).

<sup>628</sup> Pub. L. No. 101-335, 104 Stat. 327 (1990).

<sup>629</sup> See 42 USC Chapter 146 (Election Administration Improvement), §§ 15301 et seq.

<sup>630</sup> Id. at §§ 15481(a)(3)(A).

<sup>631</sup> 42 U.S.C. § 1971(a)(2)(A). The National Voter Registration Act also has a provision that requires and voter registration requirements be “uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965”. 42 USC § 1973gg-6(b)(1). See generally Bazelon Center, Vote! It’s Your Right at 6-11 (setting out federal laws affecting voting rights of persons with disabilities).

<sup>632</sup> 42 USC § 15482.

<sup>633</sup> ADA § 12132 (“[... no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity [...]).

<sup>634</sup> See US Department of Justice, The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities (September 2014) ([https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm); viewed 14 August 2019).

<sup>635</sup> See Bazelon Center, supra. n. 630 at ftnts. 14 and 50 (citing, *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. App. Div. 1976); *Boyd v. Board of Registrars of Voters of Belchertown*, 334 N.E.2d 629 (Mass. 1975); *Doe v. Rowe*, 156 F.Supp. 2d 35 (D. Me. 2001); *Minnesota Voters Alliance v. Ritchie*, 890 F. Supp. 2d 1106, 1116 (D. Minn. 2012), *aff’d*, 720 F.3d 1029 (8th Cir. 2013); *Missouri Protection and Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 808-09 (8th Cir. 2007)); *In re Guardianship of Brian W. Erickson*, 4th Judicial District, Dist. Ct., Probate/Mental Health Division (Oct. 12, 2012).

There is **no uniform answer to the question of whether a person has a right to vote under guardian-, custodian-, or conservatorship.** The answer in any specific case will depend largely (but not solely) on the State in which the person became a ward or in which the ward wants to vote. Current studies indicate that 39 States and Washington, D.C. have laws that would allow individuals under guardianship to lose their right to vote.<sup>636</sup>

**Whether any particular person will *in fact* lose the right to vote, however, is not certain,** because in addition to the differences in standards applied from one jurisdiction to the next, there may be **varying interpretations given to even the same standard by different judges.** This situation was summed up by one expert, who noted: “Whether or not you lost the right to vote can depend on the county you live in, what judge you have, how supportive your guardian is.”<sup>637</sup>

The interpretations are not always to the detriment of the prospective ward. While some persons are denied the right to vote even when they would be mentally capable of making such decisions, in some jurisdictions where loss of the right to vote is inherent in the law relating to guardianship (such as Massachusetts), authorities are interpreting the law so as to preserve the right to vote unless the guardianship order specifically prohibits the ward from voting.<sup>638</sup> Recently, too, there have been reports of guardianships that originally denied the right to vote that have been revised.<sup>639</sup>

On the other hand, guardianship orders may deny the ward the right to register to vote or to cast a vote if the order is based on a petition for guardianship that includes registration or vote casting as one of the competences on a list of powers granted the guardian. **If full guardianship is requested, the ward’s right to vote will be denied in these cases.**<sup>640</sup>

## 8. Has the lawmaker committed itself to broadly implementing supported decisionmaking?

The United States is signatory to the CRPD, but has refused to bring it into effect by ratification. Nevertheless, the past decade has witnessed many protections being built into the guardianship regimes across the country. The **UGCOPAA clearly adopts a support-oriented, but still substituted decisionmaking framework,** stating:

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<sup>636</sup> Priya Khatkhate, Disabled people under guardianship often lose voting rights, ABA Journal, 1 October 2018 ([http://www.abajournal.com/magazine/article/disabled\\_guardianship\\_voting\\_rights](http://www.abajournal.com/magazine/article/disabled_guardianship_voting_rights); viewed 14 August 2019).

<sup>637</sup> Id. (citing Michelle Bishop from the National Disabilities Rights Network). In addition, the right to vote may be lost unintentionally, due to the mistake of the person requesting the guardianship, because in many locations, guardianship request forms contain a checklist of decisionmaking authorities requested to be transferred to the guardian. Where these include aspects of voting (such as voting itself or registration to vote), an applicant may select this without realizing that the prospective ward will be denied the vote. See Khatkhate, *supra*.

<sup>638</sup> Frederick M. Misilo, Jr., Voting Rights of Persons Under Guardianship, The Arc, 18 June 2018 (<https://thearcofmass.org/voting-rights-of-persons-under-guardianship/>; viewed 20 March 2019).

<sup>639</sup> Matt Vasilogambros, Thousands Lose Right to Vote under “Incompetence” Laws, Statline (21 March 2018) (<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws>; 29 August 2019).

<sup>640</sup> This may occur unbeknownst to the guardian and against the will of both ward and guardian. See Priya Khatkhate, Disabled people under guardianship often lose their voting rights, ABA Journal (October 2018) ([http://www.abajournal.com/magazine/article/disabled\\_guardianship\\_voting\\_rights](http://www.abajournal.com/magazine/article/disabled_guardianship_voting_rights); 20 March 2019).

“(b) A guardian for an adult shall promote the self-determination of the adult and, to the extent reasonably feasible, encourage the adult to participate in decisions, act on the adult’s own behalf, and develop or regain the capacity to manage the adult’s personal affairs. [...]”<sup>641</sup>

While State legislatures differ in their commitment to implementing supported decisionmaking, as of 2018, **Alaska**<sup>642</sup>, **Delaware**<sup>643</sup>, **Texas**<sup>644</sup>, **Wisconsin**<sup>645</sup>, and **the District of Columbia**<sup>646</sup> **recognize supported decisionmaking agreements**<sup>647</sup>, several have passed bills to study supported decisionmaking<sup>648</sup>, and over half of the States have defined the decisionmaking powers of the guardian to require searching for and taking into account the ward’s personal preferences to the greatest extent possible. Illinois, for example, describes the decisionmaking considerations within its section on powers of the guardian:

“Decisions made by a guardian on behalf of a ward may be made by conforming as closely as possible to what the ward, if competent, would have done or intended under the circumstances, taking into account evidence that includes [...] the ward’s personal, philosophical, religious and moral beliefs, and ethical values relative to the decision to be made by the guardian. Where possible, the guardian shall determine how the ward would have made a decision based on the ward’s previously expressed preferences, and make decisions in accordance with the preferences of the ward. If the ward’s wishes are unknown and remain unknown after reasonable efforts to discern them, the decision shall be made on the basis of the ward’s best interests as determined by the guardian. [...]”<sup>649</sup>

The New York law on guardianship for mentally incapacitated persons also clearly demonstrates a support-oriented substituted decisionmaking goal. In the initial provisions on “Legislative findings and purpose”, the law contains references to the dignity of the individual and the guardian’s role as helping the ward take decisions. Further, **some public agencies** (such as State Guardianship Offices or public commissions) **are offering advice** on websites and published factsheets **on alternatives to guardianship** as a way to preserve the person’s autonomy. There is also **advocacy activity** nationwide to reduce the scope of substituted decisionmaking.

Where the term “best interests” of the prospective ward continues to be used<sup>650</sup>, it is often in the context of guardian decisionmaking in contexts in which the ward’s own likely decision cannot be established. This may be in cases of a health emergency. Often the “best interest” is defined to be that which the ward would have preferred.<sup>651</sup>

<sup>641</sup> UGCPAA, § 313(b) (Duties of Guardian of Adult).

<sup>642</sup> Chapter No. 108, SLA 2018 (effective 26 December 2018).

<sup>643</sup> DEL. CODE ANN. tit. 16, §§ 9401A–9410A (West 2018).

<sup>644</sup> TEX. EST. CODE ANN. §§ 1357.001–.102 (West 2017).

<sup>645</sup> WIS. STAT. §§ 52.01–32 (2018).

<sup>646</sup> D.C. CODE §§ 7-2131–2134 (2018).

<sup>647</sup> American Bar Association Commission on Law and Aging, State Adult Guardianship Legislation Summary: Directions of Reform – 2018, p. 1 (text available at: [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2018-adult-guardianship-legislative-summary.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-adult-guardianship-legislative-summary.pdf); 29 August 2019).

<sup>648</sup> See Eliana J. Theodorou, Supported Decision-Making in the Lone-Star State, 93 NYU L. Rev. 973, 977, ftnt. 18 (2018).

<sup>649</sup> 755 ILCS 5/11a-17(e) (<http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=075500050K11a-17>; 22 August 2019).

<sup>650</sup> E.g., in New York, the statute requires the court to grant guardianship over persons who are intellectually or developmentally disabled if the “best interests of the person who is intellectually disabled or person who is developmentally disabled will be promoted by the appointment of a guardian of the person or property, or both”. NY SCP Art. 17-A, §1754(4).

<sup>651</sup> E.g., 755 ILCS 2/11a-17(e) continues: “[...] In determining the ward’s best interests, the guardian shall weigh the reason for and nature of the proposed action, the benefit or necessity of the action, the



## 9. Are there current developments to change the voting rights of persons under guardianship?

Voting rights advocates note significant improvements in the context of voting rights for persons under guardianship.<sup>652</sup> This is due in part to the continuing adoption of the UGCOPPA and legal changes in State laws, some of which are now requiring probate courts to consider the right to vote separately from other decisionmaking powers during guardianship proceedings.<sup>653</sup> In addition, there is also a greater awareness of the issue on the part of lawyers representing clients in guardianship proceedings, judges, and election officials and assistants.

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possible risks and other consequences of the proposed action, and any available alternatives and their risks, consequences and benefits, and shall take into account any other information, including the views of family and friends, that the guardian believes the ward would have considered if able to act for herself or himself.”

<sup>652</sup> E.g., Special Needs Answers, Guardianship, Mental Incapacity and the Right to Vote (last modified 16 October 2017) (<https://specialneedsanswers.com/guardianship-mental-incapacity-and-the-right-to-vote-16317>; viewed 7 November 2019); Disability Justice, Right to Vote (<https://disabilityjustice.org/right-to-vote/>; viewed 7 November 2019).

<sup>653</sup> See American Bar Association Commission on Law and Aging, State Adult Guardianship Legislation Summary: Directions of Reform - 2018 ([https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2018-adult-guardianship-legislative-summary.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-adult-guardianship-legislative-summary.pdf); 22 August 2019). See particularly id. at 1 (between 2011 and 2018 “states have enacted approximately 270 adult guardianship bills – ranging from a complete revamp of code provisions to minor changes in procedure”).



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