

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

SWEDEN

Prof. Margareta Brattström and
ass. prof. Therése Fridström Montoya

SECTION 1 - GENERAL

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

The Swedish legal system can be described as a continental-like, but not fully codified, legal system. Court cases are of great importance, but not binding as in common law-systems. Also, preparatory works (for instance Governmental Bills [*prop.*]) to the legislation are of great importance for arguing the law. The Swedish legal system is also a dual system, meaning that international conventions and other treaties are not directly legally binding, unless they have been adopted as legal acts. Instead, Swedish legal acts are supposed to be harmonized with ratified conventions. Hence, even though Sweden has ratified the CRPD, the convention does not have status as directly applicable law.

Measures for protection and empowerment for vulnerable adults are found in both public and civil law. In terms of the CRPD, one might however hesitate to describe any of the measures in Swedish law as truly empowering. In public law, the different measures focus mainly on social care and services, given by the mu-

nicipality and based on consent. Some of these measures can be described as empowerment, especially the personal assistant [*personlig assistent*],¹ but not all of them. On the protection side, there is only one public law measure that can be described as protective, which however only concerns persons with severe psychiatric disorders. An administrative court can decide that a person with a severe psychiatric disorder shall be admitted coercively to a hospital for psychiatric care. To coercively be admitted to psychiatric care, the persons' need for protection must however be of a very qualified nature.²

Turning instead to civil law, a necessary starting point in explaining the system of protective measures for vulnerable adults, is that the concept of "legal capacity" is complicated to translate into Swedish law. The odd nature of this concept in Swedish law is reflected in the way that it has different meanings in different contexts – sometimes referring to legal power, to legal competence, or to legal capability.³ The Swedish tradition is to never deem persons "unfit" as legal agents – not even in criminal law, where there is no concept of legal insanity. Instead, the Swedish way is to consider the legal implications of an agent's personal abilities/capacity at the specific point in time when a legal action was taken. A contract can thus be considered void because a party entered the contract under the influence of a psychiatric disorder, or a person might not be committed for a crime since he or she at the time of the action could not be held responsible due to a lack of wilfulness.⁴ It is alleged that a person due to mental deficiencies in every given legal action situation might lack the personal legal capacity to take the action with legal validity.

In Sweden, all human beings, even infant children, are recognized as legal persons. Not everyone, however, is recognized as a legal agent. A person might lack capacity to take a legal action due to personal deficiencies or because of a court's decision to limit his or her capacity (more on this follows below). This stands in

¹ Act on Support and Service for some persons with disabilities [*lag (1993:387) om stöd och service till vissa funktionshindrade*] § 9 no 2.

² Act on Psychiatric Coercive Care [*lag (1991:1128) om psykiatrisk tvångsvård*] § 3.

³ T. SPAAK, *The Concept of Legal Competence. An Essay in Conceptual Analysis*, Dartmouth Publishing Company Limited, 1994.

⁴ Act on Contracts Concluded under the Influence of a Psychiatric Disorder [*lag (1924:323) om avtal som slutits under påverkan av en psykisk störning*].

contrast with the way legal capacity is defined and positioned in the context of the CRPD, where legal capacity is distinguished from mental capacity. The CRPD Committee has underscored this separation of legal and mental capacity in its General Comment (GC) regarding article 12. Recognition as a person with legal capacity is a crucial part of a person's right to equality before the law, and this shall be understood in the following way:⁵

Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships.⁶

Indeed, in its general wording, the CRPD demands that everyone – including persons with mental or intellectual disabilities – shall be recognized and protected both as legal persons with the ability to have rights and as legal agents with the ability to act on these rights. A condition or a disability that makes it difficult for someone to be an agent under the law must *never be the reason for denying a person his or her legal capacity*. Such practices, in fact, constitute discrimination under the CRPD.⁷

When ratifying the CRPD, the Swedish Government quite surprisingly – in our opinion – concluded that no regulatory changes were needed regarding good men [*gode män*] and administrators [*förvaltare*] – the civil law measures for protection of vulnerable adults.⁸ A possible explanation to this might be a misunderstanding of the conceptualisation of legal capacity. Indeed, much of the significance of the CRPD appears lost in translation in Sweden, as the Swedish Government's legal documents supporting the ratification of the CRPD translated “legal capacity” into “*rättskapacitet*”. In Swedish law, however, *rättskapacitet* only refers to the standing as a legal person with the ability to have rights and duties, not the person's

⁵ CRPD/C/GC/1, paras. 13 and 15.

⁶ CRPD/C/GC/1, para. 12.

⁷ CRPD/C/GC/1, para. 15.

⁸ Parliamentary Bill, Prop. 2008/09:150.

capacity to act under the law and thereby enjoy legal capacity on an equal basis with others in all aspects of life. In the Swedish government's defence, it must be pointed out that the GC regarding article 12 was issued a number of years after the CRPD was ratified. However, the difference between the two strands of legal capacity – to have standing as both a person and an agent under the law – has not been formally recognised in Sweden since. This ongoing conflict of meanings is problematic, given that article 12 states in the first two paragraphs that State parties shall not only recognize persons with disabilities as persons under the law, but shall also ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

When it comes to the status of agents under the law, different areas of Swedish law operate with different concepts (e.g. *rättshandlingsförmåga*, *processbehörighet*). These concepts refer to a finding as to whether individuals have both the *formal* legal power to make certain legal actions [*behörighet*] and the actual, *personal* capability to be agents. For instance, children lack both the formal and personal capabilities required for “*rättshandlingsförmåga*”, but with growing age and maturity, depending on the legal action or decision, they usually, gradually gain both the formal and personal ability to be recognized as actors under the law. In some cases, however, adults might also be found to lack the actual capabilities required to “engage in or create, modify, or end a specific legal relationship”⁹ because they are perceived to lack a required ability to understand a legal action or to make informed decisions. This means that individuals’ personal capabilities may have implications for their standing as legal agents: their legal capacity might be denied based on their personal, mental insufficiencies. However, in Sweden, this is always a finding made in reference to a specific legal action – a person can never be declared to lack capacity overall. In short: there are no categorical judicial decisions of incapacity in Swedish law, but a person’s legal capacity can be formally limited in regards to specific matters.

Sweden abolished the concept of guardianship for adults in 1989, replacing it with a system of judicial appointment of two types of legal representatives for

⁹ CRPD article 12.

adults who due to disability or illness require help to protect their rights and interests. Translated into English, these representatives are called “good man” [*god man*] and “administrator” [*förvaltare*]. The appointment of a good man (who may be a woman, though the wording may suggest otherwise) is the less intrusive of these two forms of legal representation [*ställföreträderskap*]. Both these measures can be described as help and protection, but not empowerment. Both an administrator and a good man have the legal power to act in place of a vulnerable adult and have a duty under the law to act in the best interest of the person represented – there are no demands in law to respect the will and preferences of the person represented, and no duty to support the vulnerable adult in the legal actions her or she wants to take or to make his or her own decisions. See more about these matters below under question 25.

The assignment as good man or administrator is viewed as a private matter in Swedish law, although a civil court decides that a good man or administrator shall be appointed. A person takes on the assignment as good man or administrator voluntarily and is not (in most cases) controlled or remunerated for his or her services by an authority although the Chief Guardian supervises all the cases on a yearly basis. See more about these matters below under question 21 and 23.

Conceptually, the good man and the administrator differ in significant respects when it comes to the effects for a vulnerable adult’s self-determination. Before appointing a good man, a civil court generally requires the consent of the vulnerable adult. If the person due to his or her condition is unable to express his or her will in the matter, a good man can however still be appointed if such a measure is needed. Once appointed, a good man as the main rule needs consent from the person represented to be able to take legal actions in his or her place. This means that a good man has no legal power to make decisions regarding the person in question if he or she is able to communicate his or her will, but has the legal power to represent him or her in various situations and matters. The formal legal capacity of the person represented is unaffected by an appointment of a good man. At least formally, the person represented by a good man can still act under the law without the consent of the good man. In practice however, the person might be practically

unable to make decisions due to his or her condition, and might therefore be denied legal capacity in regards to specific legal actions.

In contrast, consent is not required for the appointment of an administrator. The appointment of an administrator, however, is limited to the cases where this measure is deemed necessary to prevent a vulnerable adult from taking legal actions that can harm his or her own interests. Once appointed, the administrator gets “sole powers” over the matters included in the administrator’s assignment, which means that the administrator doesn’t need the vulnerable adult’s consent to take legal actions in his or her place. If an administrator is appointed, the person represented is deprived of his or her formal legal power to act under the law in all matters covered by the administrator’s assignment.

Both the appointment of a good man and of an administrator are forms of substituted decision-making, even though a good man, if the vulnerable adult is able to, in many situations needs consent for the legal actions from the vulnerable adult. Certain kinds of legal actions, however, can never fall under the legal powers of a good man or administrator. A person can never be deprived of his or her legal power to vote in public elections, or his or her self-determination in “exceptionally personal matters” [*utpräglat personliga rättshandlingar*] such as consenting to marriage or signing a will.¹⁰

Beside the good man and the administrator, which are measures with a long history in Swedish law, there are also two alternative, recently enacted forms of legal representation for vulnerable adults available under Swedish law: the continuing power of attorney [*framtidfullmakt*] and *ex lege* representation by family members [*anhörigbehörighet*]. The Act (2017:30) on Continuing Power of Attorney was enacted in 2017, along with new rules in the Parents and Children’s Code about *ex lege* representation for family members to a vulnerable adult in matters concerning everyday life. The continuing power of attorney is a completely voluntary and a more private alternative than the state-ordered measures in the form of good man or administrator. However, this measure has a limited scope since it

¹⁰ Children and Parents Code, Chapter 12, § 2 para. 3.

cannot be used to represent someone in health care decisions. *Ex lege* representation by family members is a form of legal power that follows from a statute, and this power is limited to daily matters.

2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets).

[Anhörigbehörighet] – *ex lege* representation by a family member

[Behörighet] – legal power as a representative

[God man] – good man

[Framtidsfullmakt] – continuing powers of attorney

[Förvaltare] – administrator

[Högsta förvaltningsdomstolens domar, HFD] – Yearly publication of the Swedish Administrative Supreme Court’s cases, starting from when this court changed name in 2011 from Regeringsrätten (see below RÅ)

[Nytt Juridiskt Arkiv, NJA] – Yearly publication of the Swedish Supreme Court’s cases

[Proposition (Prop.)] – Parliamentary Bill

[Regeringsrättens årsbok (RÅ)] – Yearly publication of the Swedish Administrative Supreme Court’s cases, before this court changed name in 2011 from Regeringsrätten to the Administrative Supreme Court (see above, HFD)

[Rättshandlingsförmåga] – legal capacity in the ”legal agency”-meaning. To have

means that a person fulfils both formal and personal demands. Formal demands are met if the person taking a legal action of some sort has legal power over the question – for instance the owner of a thing being sold –, that the person is not underaged and therefore have limited *rättshandlingsförmåga*, or is an adult but has limited legal capacity due to a court’s decision. Such a decision can be made if someone has been made bankrupt, or if an administration has been appointed. Personal demands have to do with the persons actual abilities. To have *rättshandlingsförmåga* a person must be able to communicate a reasonable will to take a specific legal action. A person might for instance lack personal legal capacity to take a specific legal action due to a mental disorder or a psychiatric condition.

[Rättskapacitet] – legal capacity in the “legal standing”-meaning

[Statens offentliga utredningar (SOU)] – Committee Report

[Överförmyndare] – The Chief Guardian is a local authority who investigates persons need for legal representation and has the right to apply to the court in these cases.

[Ställföreträdarskap/ställföreträdare] – legal representation/legal representative

Föräldrabalken (1949:381) – Children and Parents Code

Lag (2017:310) om framtidsfullmakter – Act on continuing powers of attorney

Lagen (1993:387) om stöd och service till vissa funktionshindrade – Act on Support and Service for some Persons with Disabilities

Äktenskapsbalken (1987:230) – Marriage Code

Ärvidabalken (1958:637) – Inheritance Code

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

In the end of year 2021 the Swedish population consisted of 10 452 327 persons. Aged 65 and older was 20.3 percentage of the population. Limited to aged 80 and older, the percentage of the population was 5.4. In detail, the number of 65-69 years old persons was 540 220, 70-74 years 536 116, 75-79 years 482 796, 80-84 years 291 011, 85-89 years 167 321, 90-94 years 77 748, 95-99 years 20 892 and 100+ years: 2 662. For a long time, the trend has been that, the proportion older persons has grown.¹¹ In 2040 the percentage aged 80 and older is estimated to be 8 percent of the population.¹² This fact is one important reason behind new legislation on legal protection and empowerment of vulnerable adults.¹³ Other reasons can also explain the development, such as an increased respect for self-determination and part autonomy.

Within the group of people older than 65 a need for some kind of help due to physical or mental impairment, is more present than for those who are younger.¹⁴ The estimation is that one percentage of the Swedish population (around 100 000 totally and 20 000 older than 64) has some kind of intellectual disability, for instance Down syndrome.¹⁵ When it comes to dementias, diseases that are more common among elderly compared to younger, approximately 130 000 – 150 000

¹¹ Committee Report, SOU 1994:20 p. 112.

¹² www.scb.se/hitta-statistik/statistik-efter-amne/befolkning/befolkningsframskrivningar/befolkningsframskrivningar/pong/statistiknyhet/den-framtida-befolkningen-i-sveriges-lan-och-kommuner-2022-2040/

¹³ Governmental Bill, Prop. 2016/17:30.

¹⁴ See about service provided 2021 in accordance to the Swedish Social Services Act (*Socialtjänstlagen* 2001:453) for elderly www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/statistik/2022-4-7871.pdf and for those younger than 65 years with physical or mental impairment www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/statistik/2022-4-7811.pdf

¹⁵ www.fub.se/utvecklings-storning

persons have such a diagnosis.¹⁶ The number of persons with dementia is expected to grow at the same rate as the population will be older.

Statistics on state-ordered measures, such as good man [*god man*] and administrator [*förvaltare*] have for long been a regional task, but a national register is available since year 2015. The number of vulnerable adults who had a good man in the end of 2021 was 68 150, and 13 017 had an administrator.¹⁷ Between 2015 and 2021 the number of these two state-ordered measures had increased with approximately 10 000 (14 % - good men) respectively 2 500 (24 % - administrators). When it comes to continuing power of attorney [*framtidfullmakt*] there are no register nether on how many who have written such a power of attorney, or how many who has come into force.

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

As explained above in question 1, the Swedish legal system is dual, which means that ratified international conventions are not legally binding, unless they are adopted as Swedish Law. Sweden has adopted The European Convention on Human Right as national Law since 1994. The CRPD was ratified in 2009, but has not been adopted as Swedish law, meaning that the Swedish authorities and courts are not directly bound by the convention when they try cases, as they are when it comes to Swedish legislation. Sweden has investigated, but not yet ratified the Hague Convention of 2000 regarding protection for vulnerable adults in international situations.¹⁸

¹⁶ www.demensforbundet.se/om-demens/

¹⁷ <https://overformyndarstatistik.lansstyrelsen.se>

¹⁸ Committee Report, SOU 2015:74.

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

In 1989 the regulation regarding guardianship for adults was abolished and replaced by the current legislation about good man [*god man*] and administrator [*förvaltare*].

In 1994 the Act (1993:387) on Support and Service for Persons with Disabilities was enacted. This act introduced a new form of support and help to persons with severe disabilities: the personal assistant [*personlig assistent*]. Certain persons with severe disabilities have, under conditions given in the Act, a right to a personal assistant.

In 2017 the Act (2017:30) on Continuing Power of Attorney was enacted, along with new rules in the Parents and Children's Code about *ex lege* representation for family members to a vulnerable adult in matters concerning everyday life.

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

The discussion in Sweden about how to fulfil the standards set by the CRPD has been very poor. In 2014 the CRPD Committee reviewed Sweden's implementation of the convention and found reason to raise critical questions to Sweden regarding article 12 and specifically the role of the administrator [*förvaltare*], which (on good grounds) was perceived as a form of substituted decision-making.¹⁹ The Swedish government however seemed to misunderstand the critique since they – quite surprisingly in our opinion – found no need to change the rules about administrators.²⁰

¹⁹ CRPD/C/SWE/CO/1 Concluding observations on the initial report of Sweden.

²⁰ Governmental Promemoria 2019-10-22, p. 43-46.

In 2017 new goals were set by the Government concerning the politics regarding persons with disability. The starting point for these goals was that Sweden shall fulfilment the demands of the CRPD.²¹

In 2021 a Swedish Committee Report (SOU 2021:36) suggested changes in the legislation regarding good men [*gode män*] and administrators, partially with the purpose of making these rules more compliant with the CRPD. To our knowledge, the suggested changes were however not at all sufficient to meet the demands of CRPD article 12. There seems to be little understanding of what article 12 in the CRPD actually encompasses. The need to have support-mechanisms in place to ensure persons with disabilities the possibility to exercise their legal capacity seems completely overlooked in Sweden, as are also the difference between supported and substituted decision-making and the demanded transition from the principle of best interest to the principle of will and preferences.

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

There are no upcoming reforms today in Sweden, although several suggestions have been made in parliamentary investigations over the recent years – for instance regarding the legislation concerning good men [*gode män*] and administrators [*förvaltare*] (SOU 2021:36). Already in 2015, a Swedish Committee Report suggested to enact a new act concerning support and legal representation in matters of social and medical care (SOU 2015:80). These suggestions have however not yet been realised.

Constantly, changes have been made over the last years regarding the right to personal assistance according to the Act (1993:387) on Support and Service to persons with Disabilities. These changes have however not been driven by the will to fulfil human rights, but by cost reductions.

²¹ Governmental Bill, Prop. 2016/17:188.

The disability rights movement is currently demanding the adoption of the CRPD as Swedish law. As of today, there seems to be no political response to that demand.

A new Swedish Committee Report was recently presented (SOU 2022:41), suggesting introducing a new act regarding health care and social services for elderly persons. The theme of protection and empowerment for the elderly was however not the topic of the Report or the changes suggested.

SECTION II – LIMITATIONS OF LEGAL CAPACITY

8. If your system allows limitation of the legal capacity of an adult, a. on what grounds?

As described above in section I, the consequence if a civil court appoints an administrator [*förvaltare*] for a vulnerable adult is that his or her formal legal capacity is limited. An administrator can be appointed if a person due to illness, a mental disorder, frailty or similar conditions is unable [*ur stånd*] to safeguard his or her rights, manage her assets or provide for his or her well-being. A decision to appoint an administrator can however only be made by the court if a less intrusive measure – such as the appointment of a good man [*god man*], or the possibility that the person can get other less intrusive forms of help – is deemed insufficient to help or protect the vulnerable adult.²² Situations where it is held that it is not enough to appoint a good man, are mainly when the person is at risk to be harmed and needs to be protected from his or her own legal actions, or from being taken advantage of by other persons. The limitation of the person's legal capacity aims to protect the vulnerable adult from such risks.

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

²² Children and Parents Code, Chapter 11, § 7.

A: The limitation of legal capacity follows from a statute, stating that an administrator [*förvaltare*] has “sole powers over the represented person’s assets, and represents him or her in all matters included in the assignment”.²³ When appointing an administrator, the court must therefore also decide the scope of the administrator’s assignment – and thereby the scope of the limitation of the vulnerable adult’s formal legal capacity.²⁴ The assignment is supposed to be tailor-made, in the meaning that it shall not be made wider than necessary and shall meet the individual’s need of help and protection. These assignments are however often quite general, and referring broadly to the matters the person need help with or can’t manage him- or herself, such as “manage assets” in general.²⁵

There are however certain exceptions from the main rule that the limitation of legal capacity follows from the assignment. According to another statute, an administrator (or a good man [*god man*]) is prohibited to represent someone regarding “exceptionally personal legal actions” such as consenting to marriage, claiming fatherhood, signing a will, or similar legal actions.²⁶ According to the preparatory works other examples of exceptionally personal legal actions are to consent to sterilization or consent to adoption.²⁷

Another statute of importance for the scope of the limitation of someone’s formal legal capacity states that a person keeps his or her formal legal capacity in regards to entering into a contract of employment, and also controls the wages he or she earns from the employment.²⁸ However, this area of self-determination might be limited if the court finds that the person needs to be protected from such decisions. If that is the case, the court can decide that the administrator has sole powers also over these matters.

²³ Children and Parents Code, Chapter 11, § 9.

²⁴ Children and Parents Code, Chapter 11, § 7.

²⁵ T. FRIDSTRÖM MONTROYA, *Leva som andra genom ställföreträdare – en rättslig och faktisk paradox*, Iustus, Uppsala, 2015, s. 329-331.

²⁶ Children and Parents Code, Chapter 12, § 2, section 3.

²⁷ Governmental Bill, Prop. 2016/17:30 s. 135.

²⁸ Children and Parents Code, Chapter 11, § 8.

B: Limitations of personal legal capacity can, regarding a person who is not under administratorship, retrospectively be decided in reference to a single legal action, such as a contract. According to an act from 1924, Act on Contracts Concluded under the Influence of a Psychiatric Disorder,²⁹ a contract – or, according to case law, also other kinds of legal actions – may be declared legally void because the contract was concluded under the influence of a psychiatric disorder.

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

The purpose in law is that it should be a tailor-made limitation, but in reality, the assignments for administrators are quite wide. For a richer description, see the answers above in 8a and 8b.

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

Yes, formal legal capacity that was limited by a court's decision to appoint an administrator can be restored. If an administrator [*förvaltare*] (or a good man [*god man*]) is no longer needed, the appointment shall be dissolved.³⁰ This can be the case when the personal capacity of an individual has been restored, for instance when a vulnerable adult has come to terms with his or her addiction or if a person's health has improved to the point where he or she no longer needs the protection of a formal limitation of legal capacity.

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

²⁹ *Lag (1924:323) om verkan av avtal, som slutits under inflytande av en psykisk störning.*

³⁰ Children and Parents Code, Chapter 11, § 19.

No, but this question is quite tricky since the measures of protection hardly can be described as supported decision making.

When a good man [*god man*] is appointed, the *formal* legal capacity of the person represented remains unaffected. However, in practice, a person in need of a good man often lacks *personal* legal capacity and cannot exercise his or her rights and duties. A good man normally needs consent from the person represented to take legal actions in his or her place.³¹ However, in situations where the person due to personal incapability lacks the capacity to consent, or if the legal action in matters concerning everyday life, consent from the vulnerable adult is presumed.³² A good man has the legal power to represent the vulnerable adult in all matters covered by the assignment decided by the court when deciding to appoint a good man. A good man has no duty to support someone to make his or her own decisions.

If an administrator [*förvaltare*] is appointed, the person represented is deprived of his or her formal legal capacity in all matters covered by the administrator's assignment.³³ However, some matters are never, as mentioned above, covered by the administrator's formal legal powers. One such important exception is the right under the constitution to vote in public elections. Also, there are limitations for an administrator's legal powers in exceptionally personal legal actions.

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

As also described above, a contract can be declared void according to a special act on contracts concluded under the influence of a psychiatric disorder.³⁴ In

³¹ Children and Parents Code, Chapter 11, § 5.

³² Children and Parents Code, chapter 11, § 5.

³³ Children and Parents Code, Chapter 11, § 9.

³⁴ *Lag (1924:323) om verkan av avtal, som slutits under inflytande av en psykisk störning.*

practice, this means that a mental disorder of a party in an individual case might have retroactive effect on that person's legal capacity. This however only effects the legal action in question, and has no implications on the person's legal capacity in general terms.

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

a. property and financial matters;

The limitation shall be tailor-made in each case by the court, and might be specified for instance to a certain property.³⁵ Limitation of legal capacity on property means, as a main rule, that the vulnerable adult loses his or her formal legal capacity to make decisions and take any actions on disposal of things he or she owns. When it comes to financial matters, this often means that the vulnerable adult cannot use his or her money, make decisions on management, or investments of money, stocks, funds etc.

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

As it has been described above in question 8, legal actions that are "exceptionally personal" can never, according to a statute, be exercised by a legal representative.³⁶ When it comes to personal rights, a vulnerable adult always has the formal legal capacity to make decisions regarding such rights by him- or herself. The action at hand – e.g. entering into marriage or signing a will – will be legally valid if it is done voluntarily and by a person who can fully understand the consequences of the action. This means that individuals never *formally* lack the legal capacity to take those action, but may, due to mental insufficiencies of different kinds, be found to lack the *personal* legal capacity to make them. A divorce has both personal and financial consequences. In some cases, a vulnerable spouse might be

³⁵ Children and Parents Code, Chapter 11, § 7.

³⁶ Children and Parents Code, Chapter 12, § 2.

harmed by staying in a marriage but lacks the personal capacity to apply for a divorce. This has led the Swedish Supreme Court to decide, in NJA 2021 p. 547 I and II, that a good man [*god man*] or administrator [*förvaltare*] may, in exceptional cases, be entitled to apply for a divorce on behalf of his principal. In case NJA 2021 p. 1181, the Supreme Court has clarified that the conditions for a legal representative's competence to apply for a divorce are that the vulnerable adult is unable to express his or her own opinion and, in addition, risks suffering some form of harm that can be prevented by a divorce. This however does not mean that the vulnerable spouse is deprived of his or her own formal legal capacity in the question – it only means that a legal representative has the legal power to apply for a divorce in the principal's place if her or she lacks the personal ability to do so him- or herself.

c. medical matters;

In medical matters the formal legal capacity is intact for someone who has an administrator [*förvaltare*]. But even in these matters it is held that a good man [*god man*] or an administrator has the legal power to represent the vulnerable adult regarding voluntary medical matters – if the vulnerable adult cannot express his or her own will. It is not allowed to force someone to get medical treatment that he or she refuses. It may however be mentioned that the legal power for both administrators and good men in questions on medical care is an unclear question in Swedish law.³⁷ A Committee Report in 2015, SOU 2015:80, proposed to solve this uncertainty by enacting a new act. However, this suggestion has not been realised yet.

d. donations and wills;

The possibilities for a person with formal limitations of legal capacity to make donations often follows from the tailor-made decision. Limitations often follow

³⁷ T. FRIDSTRÖM MONTROYA, 'Samtycke till vård – en fråga om rättshandlingsförmåga och ställföreträdarskap' [2020] *Ny Juridik* 1:20.

because of regulation on property or financial matters. According to a statute, a good man [*god man*] or an administrator [*förvaltare*] is not allowed to give away the vulnerable adult's assets, unless it is a matter of a personal gift to someone and the value is reasonable. With the consent from the Chief Guardian [*överförmyndaren*], a vulnerable adult's assets may however be used to provide for family members or other persons close to the vulnerable adult.³⁸

To make a will is in Sweden a personal right that can *only* be exercised by the person himself or herself.³⁹ A will of a person with a mental disorder (which can lead to personal limitation of legal capacity) is valid if the will expresses the wishes of the testator no matter of the mental disorder.⁴⁰ A will can however be declared invalid if the heirs prove that the will does not reflect the true will of the testator, but is a consequence of a mental disorder.⁴¹

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

A vulnerable adult is never *formally* limited to take legal actions in matters like these – unless they clearly fall within the scope of the administrator's [*förvaltarens*] legal powers, decided by the court. However, a vulnerable adult can be found to lack the *personal* legal capacity to for example apply for a benefit from the social security system or to file a public complaint or make an appeal.⁴² An important case in reference to this is the one where The Supreme Court found NJA 2020 s. 179 that a person's legal capacity shall not be questioned – neither on formal or personal grounds – when he or she has issued a power of attorney to

³⁸ Children and Parents Code, Chapter 14, § 12.

³⁹ Children and Parents Code, Chapter 12, § 2.

⁴⁰ G. WALIN and G. LIND, *Ärvdabalken En kommentar, Del I*, Wolters Kluwer, Sverige, 2016, p. 402 and M. BRATTSTRÖM and A. SINGER, *Rätt arv*, Iustus förlag, 2020, p. 108.

⁴¹ Swedish Supreme Court, NJA 2009 p. 249. See also the Swedish Inheritance Code, Chapter 13, § 2 and Chapter 14, § 5.

⁴² See for examples of situations where persons with limited capacity due to an administratorship was found unprohibited because of this to take legal actions regarding administrative matters: RÅ 1989 ref 11 (complaint regarding healthcare to a disciplinary board), HFD 2020 not 38 (appeal regarding a decision on coercive psychiatric care).

someone to represent him or her in a proceeding regarding administratorship.

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

Appointment of a good man [*god man*] or an administrator [*förvaltare*] normally has no retroactive effect. However, ordinary powers of attorney issued by the principal before the appointment of an administrator are thereafter not legally valid in larger extent than the principal's legal capacity is intact in the issue at hand.⁴³ Limitations on legal capacity due to an appointment of an administrator therefore effects any powers of attorney issued before the appointment of the administrator. Sometimes, for protective reasons, there is a need for a rapid decision. In these situations, the civil court can make an interim decision to appoint an administrator.⁴⁴

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

Civil courts have the authority to appoint a good man [*god man*] or an administrator [*förvaltare*] and to dissolve such a decision.⁴⁵ From this it follows that it is the civil courts who decides on limitation and restoration of legal capacity.

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

An adult is entitled him- or herself to apply for an administrator [*förvaltare*]. Also, this is a right for his or her spouse or cohabitee, closest relatives, attorney appointed by a continuing power of attorney and the Chief Guardian and by an appointed good man.⁴⁶ The same persons that can apply for an administrator can also request restoration of legal capacity via the demand for a dissolution of a decision

⁴³ Act (1915:218) on Contracts, § 22.

⁴⁴ Children and Parents Code, Chapter 11, § 18.

⁴⁵ Children and Parents Code, Chapter 11, §§ 4, 7 and 19.

⁴⁶ Children and Parents Code, Chapter 11, § 15.

to appoint an administrator. An appointed administrator is also entitled to make such a request.⁴⁷

13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:

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

When a civil court tries a case of appointing a good man [god man] or an administrator [*förvaltare*], they always require an investigation from the Chief Guardian [*överförmyndaren*], even if the application is made by someone else than the Chief Guardian.⁴⁸ This follows from a statute stating that the court has the responsibility to make sure that a case is not decided if it is not sufficiently investigated.⁴⁹ According to a statute, the court must make sure that there is a medical doctor's statement or something of similar weight to confirm there is a need of an administrator. The same goes for cases regarding the appointment of a good man for someone, if the person, due to his or her mental state, is unable to consent.⁵⁰ In the medical doctor's statement it must be made clear on what grounds the person need a legal representative, and what the assignment should cover.⁵¹

In cases about appointing an administrator or to widen an administrator's assignment (and thereby the limitations of the persons formal legal capacity) the

⁴⁷ Children and Parents Code, Chapter 11, § 21.

⁴⁸ Children and Parents Code, Chapter 11, § 17 a.

⁴⁹ Act (1996:242) on Court Matters, § 12.

⁵⁰ Children and Parents Code, Chapter 11, § 17

⁵¹ Special documents from the Health and Welfare Board shall be used for this purpose.

court normally has to appoint a lawyer to represent the vulnerable adult. This however is not necessary, if the court finds that a lawyer isn't needed. The same goes for situations where a person has demanded that the court shall decide that her or she no longer needs an administrator.⁵²

The vulnerable adult shall get the chance to state his or her mind about the case, and the same goes for other persons close to the vulnerable adult.⁵³ There is however no need for the court to *hear* the person in question him- or herself, unless the vulnerable adult demands a session or the court finds that it is necessary for some other reason. The court must hold a session before deciding the case if the vulnerable adult demands a session.⁵⁴ In NJA 1993 s. 109 The Supreme Court found reason to declare a mistrial since a court session was not held – despite the fact that the vulnerable adult had demanded a court session. The Supreme Court referred to the statute in question, to the general regulation in § 12 in the Act (1996:242) on Court Matters (other matters than the normal civil- or criminal proceedings),⁵⁵ and article 6 in The European Convention on Human Rights.

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

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

See above under question 8.

⁵² Children and Parents Code, Chapter 20, § 2 a.

⁵³ Children and Parents Code, Chapter 11, § 16.

⁵⁴ Children and Parents Code, Chapter 11, § 16.

⁵⁵ *Lagen (1996:242) om domstolsärenden.*

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

See above under question 6 and below under question 67-68.

SECTION III – STATE-ORDERED MEASURES

Overview

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

Measures of state-ordered protection of vulnerable adults are of two kinds in Sweden: there is the possibility for an administrative court to order coercive medical care for persons with severe psychiatric disorders, and there is the possibility for a civil court to order – voluntarily or coercively – a legal representative in the form of an administrator [*förvaltare*]. Also, there is the state-ordered voluntary form of legal representation called good man [*god man*]. Nothing hinders that a person simultaneously is the object of several of these measures. Coercive psychiatric care takes place at a hospital and means coercive medical care within a locked facility, while legal representation is a measure concentrating on the persons legal

standing – to safeguard his or her rights and duties, manage his or her assets and provide for his or her well-being.⁵⁶

The good man is the less intrusive legal representation measure, and is based on consent – both for the appointment, and for the legal actions the good man takes in the vulnerable adult’s place (if the vulnerable adult is able to express his or her will). An administrator needs no consent from the vulnerable adult. Therefore, the administrator can only be appointed if the court finds that the appointment of a good man – or any other measure for protection and help – is not enough to ensure that the vulnerable adult gets the help required.⁵⁷ One reason for appointing an administrator instead of a good man can be the risk that the vulnerable adult use his or her intact formal legal capacity under a goodmanship to take legal actions that collide with the actions the good man takes in the same matters. It is allowed to appoint an administrator directly; there is no need to first appoint a good man to find out if that measure provides sufficient protection.

Sometimes, for protective reasons, there is a need for a rapid decision. In these situations, the civil court can make an interim decision to appoint an administrator.⁵⁸

Start of the measure

Legal grounds and procedure

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

A good man [*god man*] can be appointed by a civil court if an adult due to illness, mental disorder, weakened health or similar conditions, *needs help* to safeguard his or her rights, manage her assets or provide for his or her well-being, but only

⁵⁶ Children and Parents Code, Chapter 11, § 4.

⁵⁷ Children and Parents Code, Chapter 11, § 7.

⁵⁸ Children and Parents Code, Chapter 11, § 18.

if a good man is *needed*.⁵⁹ The latter assessment means that other forms of assistance, such as an ordinary power of attorney, must be deemed insufficient. In both NJA 2015 p. 851 and in NJA 2018 s. 825 the Swedish Supreme Court appointed a good man for a person who had the capacity to establish a power of attorney but could not, due to illness, give instruction and monitor the attorney. The different types of medical grounds cover both physical and psychiatric conditions. “A similar condition” can, according to the preparatory works, include alcohol- or drug abuse.⁶⁰ The Supreme Court decided in NJA 2019 s. 837 that “a similar condition” also includes abuse of gambling for money.

An administrator [*förvaltare*] can be appointed on the same ground as a good man, but with the extra condition that the vulnerable adult *is unable to* safeguard his or her well-being or assets. According to the preparatory works, *being unable to* means that the person is in clear need of the protection that an administrator can offer because there is either a risk that the vulnerable adult will harm him- or herself or that someone else will see the opportunity to take advantage of the vulnerable adult.⁶¹ In sum: the vulnerable adult must need the protection that comes from his or her formal legal capacity being limited.⁶² Also, as already mentioned, an administrator can only be appointed if the court finds that the appointment of a good man is not enough to ensure that the vulnerable adult gets the help required.⁶³

The Supreme Court have only tried a handful of cases regarding the appointment of an administrator over the years. In NJA 2018 s. 350 the Supreme Court emphasized that the “evidence” in a case – the medical doctor’s statement of the condition at hand – must make clear why an administrator is needed.

⁵⁹ Children and Parents Code, Chapter 11, § 4.

⁶⁰ Governmental Bill, Prop. 1987/88:124 p. 145 och 168.

⁶¹ Governmental Bill, Prop. 1987/88:124 s. 132.

⁶² T. FRIDSTRÖM MONTOYA, *Leva som andra genom ställföreträdare – en rättslig och faktisk paradox*, Iustus, Uppsala, 2015, pp. 308-313.

⁶³ Children and Parents Code, Chapter 11, § 7.

18. Which authority is competent to order the measure?

A civil court decides if someone needs an appointment of a good man [*god man*] or an administrator [*förvaltare*]. The civil courts also have the authority to make interim decisions.⁶⁴

19. Who is entitled to apply for the measure?

An adult is by him- or herself entitled to apply for a good man [*god man*] or an administrator [*förvaltare*]. A vulnerable adult's spouse or cohabitee, closest relatives, attorney by a continuing power of attorney and the Chief Guardian also has such a right. A good man can also apply for an administrator.⁶⁵ The same persons that can apply for a good man or an administrator can also request restoration of legal capacity by a dissolution of the administratorship for a vulnerable adult. An appointed good man or administrator can also make such a request.⁶⁶

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

Yes, as already explained above, a vulnerable adult must consent to the appointment of a good man [*god man*] – if he or she is capable to consent. If he or she due to his or her condition lacks such ability, a good man can nevertheless be appointed, without consent. If the vulnerable adult has the ability to consent but refuses to do so, there might instead be grounds for appointing an administrator [*förvaltare*]. Such an appointment however can only be made if the vulnerable adult is unable to safeguard his or her assets or him- or herself.⁶⁷ Consent is not needed to appoint an administrator.

⁶⁴ Children and Parents Code, Chapter 11, § 18.

⁶⁵ Children and Parents Code, Chapter 11, § 15.

⁶⁶ Children and Parents Code, Chapter 11, § 21.

⁶⁷ Children and Parents Code, Chapter 11, § 7.

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

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

Cases about appointing a good man [*god man*] or an administrator [*förvaltare*] are tried in a civil court after an application. Such applications can be made by a guardian for an underaged person who is over 16 years (and therefore on the verge to become a vulnerable adult), by the person him- or herself if he or she is over 16 years old, the vulnerable adult's spouse or cohabitee, his or her closest relatives, the Chief Guardian [*överförmyndare*] and an attorney with a continuing power of attorney. An application for an administrator can also be made by a good man.⁶⁸

The Chief Guardian is a local authority who investigates persons need for legal representation and has the right to apply to the court in these cases. The Chief Guardian is also responsible for recruiting persons for assignments as good man or administrator, and supervises the continuing cases of good men and administrators. Every year good men and administrators must file a report to the Chief Guardian, describing his or her exercising of the assignment.⁶⁹

The Chief Guardian is always involved in a case at court since the court doesn't do the investigations required in the case itself, but requests the Chief Guardians assistance in fulfilling its obligation to make sure that there are sufficient evidence to make a lawful decision in the case.⁷⁰ The local Social Services are obliged by law to report to the Chief Guardian if they gain knowledge about someone needing a good man or administrator – or if someone does not need that

⁶⁸ Children and Parents Code, Chapter 11, § 15.

⁶⁹ Children and Parents Code, Chapter 14, § 15.

⁷⁰ Children and Parents Code, Chapter 11, 17 §, 17 a §.

kind of legal representation anymore.⁷¹ If such a report comes in to the Chief Guardian, an investigation will be started with the purpose of deciding if application to court for a good man or administrator on behalf of the vulnerable adult is needed. Aside from that, anyone can report to the Chief Guardian that they believe that a person is a vulnerable adult in need of protection. The Chief Guardian will also in these situations investigate the case.

Before the court tries the case, the vulnerable adult shall – if possible – be given the opportunity to give a statement about his or her view of the case.⁷² The court shall also ask for statements from the vulnerable adult's spouse or cohabitee, children, attorney and from the Chief Guardian and from a facility of care if the vulnerable adult receives care in such an institution. If deemed necessary, statements should also be provided from other persons close to the vulnerable adult and from the local Social Services. The vulnerable adult shall also be heard in person before the court if that can be done without any risk of harm for the person, and it is not obvious that he or she can't understand what the case is about. The court can however decide the case without a hearing if the vulnerable adult has made the application him- or herself, or if there are other reasons to not hear him or her.⁷³ Before the court tries a case about appointing an administrator, there must be an investigation regarding the vulnerable adult's health condition. A medical doctor's statement – or a similar statement – is required. This is also a requirement in cases about appointing a good man when the vulnerable adult due to his or her condition has not given his or her consent.⁷⁴

In cases regarding appointing an administrator for someone who, due to his or her condition, has no understanding of the matter or would be harmed by being personally involved in the case, the court shall appoint a good man to safeguard the vulnerable adult rights in the case.⁷⁵ In cases about appointing an administrator

⁷¹ The Social Services Regulation [*Socialtjänstförordningen (2001:937)*], Chapter 5, § 5 and the Act on Support and Service for some Persons with Disabilities [*lagen (1993:387) om stöd och service till vissa funktionshindrade*] § 15.

⁷² Children and Parents Code, Chapter 11 § 16.

⁷³ Children and Parents Code, Chapter 11 § 16.

⁷⁴ Children and Parents Code, Chapter 11 § 17.

⁷⁵ Children and Parents Code, Chapter 20, § 20.

or to widen an administrator's assignment (and thereby the limitations of the persons formal legal capacity) the court must appoint a lawyer to represent the vulnerable adult. The same goes for situations where a person has demanded that the court shall decide that her or she no longer needs an administrator.⁷⁶

The court's decision can be appealed by the vulnerable adult or by the same persons who are allowed to apply for a decision to appoint a good man or an administrator.⁷⁷

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

A decision to appoint an administrator [*förvaltare*] will immediately be registered in a public publication [*Post- och Inrikes Tidningar*].⁷⁸ This is not the case regarding the decision to appoint a good man [*god man*]. The difference is that the appointment of a good man has no effects on the vulnerable adult's formal legal capacity, as when appointing an administrator.

Appointment of representatives/support persons

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

- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**
- b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?**

⁷⁶ Children and Parents Code, Chapter 20, § 2 a.

⁷⁷ Children and Parents Code, Chapter 20, § 3.

⁷⁸ Children and Parents Code, Chapter 11 § 27.

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

The assignment as good man [*god man*] or administrator [*förvaltare*] is viewed as a private matter in Swedish law, although a civil court decides that a good man or administrator shall be appointed. A natural person must take on the assignment voluntarily and is not (in most cases) controlled or remunerated for his or her services by an authority. However, it is possible that the natural person has an organization such as a company behind him or her. The vulnerable adult provides for the costs related to the assignment and for the remunerations (decided by the Chief Guardian [*överförmyndaren*]) for a good man or administrator on a yearly basis, provided that the vulnerable adult has the means to pay.⁷⁹

The Chief Guardian supervises all cases of appointed good men and administrators on a yearly basis. Before someone can be appointed as good man or administrator, the Chief Guardian controls that the person is “righteous, experienced and suitable” for the assignment.⁸⁰ There is no need for the person for the assignment to be a relative or even an acquaintance of the vulnerable adult. If the vulnerable adult suggests a certain person, that person shall however be considered for the assignment but he or she must meet the requirements of righteousness, experience and suitability. If a person for example has debts or has committed crimes, he or she will not be found suitable for the assignment. Neither a person who is under-

⁷⁹ Children and Parents Code, Chapter 12 § 16.

⁸⁰ Children and Parents Code, Chapter 11 § 12.

aged, or who him- or herself has an administrator can be appointed for the assignment. Also, if there are some conflicting interests between the vulnerable adults and the person considered for the assignment, the person is not deemed suitable for the assignment.⁸¹ Suitability is also a question of being able to exercise the assignment in the best interests of the vulnerable adult. If the vulnerable adult for example has special assets that someone needs certain skills to safeguard, the person assigned might need to have such skills.⁸²

Several persons can be appointed good man or administrator within the framework of a single assignment if the circumstances motivate it.⁸³

Before 1989 guardianship could be decided by civil courts, as has been explained above in section 1. Relatives to vulnerable adults had a duty by law to take on an assignment as a guardian until 1975, when the guardianship-system changed in a number of ways. The duty was abolished with the argument that the prospects of someone doing a good job as legal representative was better if the assignment was taken on voluntarily. Also, nothing hindered – then as well as now – that a person who is appointed as good man or administrator is a relative to the vulnerable adult.⁸⁴

During the measure

Legal effects of the measure

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

If a good man [*god man*] is appointed for a vulnerable adult, the latter's *formal* legal capacity will remain intact. However, the adult's *personal* legal capacity is in many cases limited – not in reference to the appointment of the good man, but

⁸¹ Governmental Bill, Prop. 1987/88:124, pp. 173-174.

⁸² NJA 1991 s. 545.

⁸³ Children and Parents Code, Chapter 11 § 13.

⁸⁴ Governmental Bill, Prop. 1974:142 p. 72.

because the vulnerable adult lacks the required mental abilities to perform valid legal actions.

If an administrator [*förvaltare*] is appointed, he or she formally takes over the legal capacity for the vulnerable adult in all the areas covered by the tailor-made assignment. Some areas however are never covered by the administrator's assignment. The right under the constitution to vote in public elections remains unaffected by the administratorship, an administrator can never represent the vulnerable adult in "exceptionally personal questions", and the vulnerable adult can, in most cases, decide for him- or herself to enter into a contract of employment and thereafter dispose freely over the income from the employment.

Powers and duties of the representatives/support person

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

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
 - **property and financial matters;**
 - **personal and family matters;**
 - **care and medical matters;**
- b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
- c. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?**
- d. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?**
- e. is there any right to receive remuneration (how and by whom is it provided)?**

To start with, the assignments of good men [*gode män*] and administrators [*förvaltare*], and thereby these legal representatives' legal powers, are very broad.

They are always able to act *in place of the adult* – there is no demand in law that they should act together with, or assist a vulnerable adult in making his or her own decisions. If not limited by how the assignment has been designed, they can act in place of a vulnerable adult in regards to his or her rights and duties, assets and personal matters, which pretty much covers every kind of matter.⁸⁵ As already has been explained above under question 24, a good man or administrator however is unable to act legally in the vulnerable adult’s place in certain matters, such as voting in public elections and in “exceptionally personal questions”.⁸⁶ It is also held to be uncertain if a good man or administrator can represent a vulnerable adult in matters of voluntary care and medical treatments.⁸⁷

The criteria for decision-making in a vulnerable adult’s place, for good men as well as for administrators, are the person’s *best interests*. In “matters of great importance” the vulnerable adult and his or her spouse or cohabitee must, according to law, be *consulted* before the good man or administrator takes a legal action in the vulnerable adult’s place.⁸⁸ According to the preparatory works, matters of great importance are the same legal actions that according to chapter 14 in the Children and Parents code require a consent from The Chief Guardian [*överförmyndaren*] to be legally valid.⁸⁹ Examples of such matters that needs the Chief Guardian’s consent are disposal of the vulnerable adult’s real property or making the vulnerable adult liable for debts. Even if there is a demand to consult the vulnerable adult, his or her will in the matter has no legal implication – the good man or administrator is still able to make another decision if her or she finds that it is in the best interest of the vulnerable adult.

There are however important differences between good men and administrators. In most cases, a good man must have the vulnerable adult’s consent to any legal action in his or her name – but, and this is of course a game changer – only if the vulnerable adult has the personal ability to express his or her will in the

⁸⁵ Children and Parents Code, Chapter 12, § 3.

⁸⁶ Children and Parents Code, Chapter 12, § 2.

⁸⁷ T. FRIDSTRÖM MONTROYA, ‘Samtycke till vård – en fråga om rättshandlingsförmåga och ställföreträdarskap’ [2020] *Ny Juridik* 1:20.

⁸⁸ Children and Parents Code, Chapter 12, § 7.

⁸⁹ Governmental Bill, Prop. 1993/94:251 pp. 215-216.

matter.⁹⁰ If not, the good man has legal power to take legal actions in the vulnerable adult's place. Another exception lies in the fact that a good man doesn't need an explicit consent from the vulnerable adult in daily matters. In these matters, it is presumed that the vulnerable adult consents unless he or she has protested beforehand. An administrator according to law has sole powers over the vulnerable adult's assets and represents him or her in all matters that fall within the scope of the assignment.⁹¹

There are no demands in law that the good man or administrator must keep the vulnerable adult or his or her family members informed of how the assignment is performed. The good man or administrator must however report the assignment every year to the Chief Guardian and the vulnerable person him- or herself as well as his or her family members or other persons close to the vulnerable adult are entitled to access to these reports – they are not hindered to read them by rules of secrecy.⁹² Good men and administrators must, however, keep accounts over the assets they control because of the assignment and thereby take notes regarding legal actions taken in the place of the vulnerable adult.⁹³ They must also make sure to keep the vulnerable adult's assets apart from their own or from assets they control as part of other assignments.⁹⁴

Apart from the duty to always act in the best interests of the vulnerable adult when safeguarding his or her rights and assets and providing for their personal well-being,⁹⁵ good men and administrators have an explicit duty to make reasonable use of the vulnerable adult's assets for his or her living, education and general benefit. Assets that are not used for these purposes shall be invested in a way that secures them and gives reasonable outcome.⁹⁶

If a vulnerable adult has enough income, her or she shall, on a yearly basis, provide for costs related to the assignment and the remuneration for the good man

⁹⁰ Children and Parents Code, Chapter 11, § 5.

⁹¹ Children and Parents Code, Chapter 11, § 9.

⁹² Children and Parents Code, Chapter 16, § 7.

⁹³ Children and Parents Code, Chapter 12, § 5.

⁹⁴ Children and Parents Code, Chapter 12, § 6.

⁹⁵ Children and Parents Code, Chapter 12, § 2 and § 3.

⁹⁶ Children and Parents Code, Chapter 12, § 4.

or administrator. The Chief Guardian decides the remuneration, based on the yearly report from the good man or administrator.⁹⁷

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

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

Several good men [*gode män*] or administrators [*förvaltare*] can be appointed for the same assignment, or for different assignments for the same vulnerable adult. For example, one person can be appointed to safeguard a vulnerable adult's assets, while someone else provides for the well-being.⁹⁸

When several good men or administrators are appointed for safeguarding the assets of a vulnerable adult, the court, or the Chief Guardian [*överförmyndaren*], can decide how the legal powers over the assets shall be divided. If no such decision has been made, the good men or administrators shall make the decisions regarding the assets together. If they disagree in some matter, the Chief Guardian's opinion settles the matter. The Chief Guardian shall give all of the good men or administrators the opportunity to argue his or her case before settling the matter.⁹⁹

⁹⁷ Children and Parents Code, Chapter 12, § 16.

⁹⁸ Children and Parents Code, Chapter 11, § 13.

⁹⁹ Children and Parents Code, Chapter 12, § 12.

A measure not described earlier, because it is a benefit that some persons with disabilities have the right to apply for and not a state-ordered measure, is the personal assistant [*personlig assistent*].¹⁰⁰ A vulnerable adult who fulfills the requirements stated in the act can receive a personal assistant from the local Social Services, or fundings to be able to employ such an assistant. This measure, however, is only available for persons with severe disabilities, who require help with their fundamental needs, such as eating, go to the bathroom, get cleaned and dressed etc. The fact that a vulnerable adult has a personal assistant does not hinder that he or she might also need and get a good man or an administrator. A personal assistant has no legal standing as a legal representative for a vulnerable adult, and cannot take legal actions in his or her place, nor take legal actions together with the vulnerable adult or provide support in legal matters. To be able to assist in legal matters a personal assistant gets a regular power of attorney from the vulnerable adult. That, on the other hand, is not possible if the vulnerable adult lacks the personal – mental – capacity to issue a legally valid power of attorney which often is the case for persons who needs good men or administrators.

Safeguards and supervision

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

- a. what competent authority is responsible for the supervision?**
- b. what are the duties of the supervisory authority in this respect?**
- c. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;**
- d. describe the financial liability of the representative/support person for damages caused to the adult;**

¹⁰⁰ See the Act on Support and Service for some persons with disabilities [*lag (1993:387) om stöd och service till vissa funktionshindrade*].

- e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

The Chief Guardian [*överförmyndaren*], which is a public local authority, is responsible for supervision over good men [*gode män*] and administrators [*förvaltare*]. The Chief Guardian controls the assignments by scrutinizing the yearly reports that good men and administrators must give in to the Chief Guardian. If the Chief Guardian demands a clarification of anything in the report, the good men and administrators must also provide an explanation.¹⁰¹ The Chief Guardian shall in its supervision pay specific attention to the duty for good men and administrators to, to a reasonable extent, make a vulnerable adult's assets useful for his or her benefit and that the rest of the assets are securely invested to give a reasonable outcome.¹⁰²

If the Chief Guardian finds that there is reason to criticize something that a good man or administrator has done in an assignment, the good man or administrator shall be given the opportunity to make a statement within a given timeframe. If the good man or administrator doesn't make the statement in time or if the explanation is deemed unsatisfactorily, a note about the complaint shall be made in the file of the supervision. The Chief Guardian shall also decide if a decision according to chapter 14 in the act must be made, or if the good man or administrator should be replaced, or if some other action should be taken. The Chief Guardians must inform the good man or administrator of such actions from The Chief Guardians side.¹⁰³

A good man or administrator must pay damages if he or she wilfully or recklessly has caused the vulnerable adult damages. If several good men or administrators have caused the damage, they will answer "with solidarity" for the damages which means that the vulnerable adult can request that any one of them pays for

¹⁰¹ Children and Parents Code, Chapter 12, § 9.

¹⁰² Children and Parents Code, Chapter 16, § 1.

¹⁰³ Children and Parents Code, Chapter 16, § 5.

all of the damages. The person who paid can in return demand that the other pay their part to him or her.¹⁰⁴

28. Describe any safeguards related to:

- a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;**
- b. unauthorised acts of the adult and of the representative/support person;**
- c. ill-conceived acts of the adult and of the representative/support person;**
- d. conflicts of interests**

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

When a vulnerable adult gets a good man [*god man*] or administrator [*förvaltare*], there are some safeguards in relation to the kinds of decisions the good man or administrator can make in the vulnerable adult's place. One example is that a good man or administrator is not allowed to give away the vulnerable adult's assets, unless it is a matter of a personal gift to someone and the value is reasonable. With the consent from the Chief Guardian [*överförmyndaren*], a vulnerable adult's assets may however be used to provide for family members or other persons close to the vulnerable adult.¹⁰⁵

The Chief Guardian's consent is needed for a number of decisions regarding the vulnerable adult's assets. See above, question 25. Without such a consent, legal actions taken by the legal representative is invalid.

If a good man or an administrator enters a contract on behalf of a vulnerable adult without the consent from the Chief Guardian, despite the fact that the decision needs such consent to be legally valid, the third party cannot however withdraw from the contract if the good man or administrator demands the Chief Guardian's consent within a month from the entering of the contract and no other

¹⁰⁴ Children and Parents Code, Chapter 12, § 14.

¹⁰⁵ Children and Parents Code, Chapter 14, § 12.

exceptions has been made when entering the contract. If the Chief Guardian doesn't consent, the third party is allowed to withdraw from the contract. If the contract means that the vulnerable adult gets a debt, and the good man or administrator has entered the contract in the vulnerable adult's place without first getting a consent from The Chief Guardian, the third party is also held to the contract and cannot withdraw after it has been fulfilled.¹⁰⁶ If a contract of the sort now mentioned is not valid, the parties to the contract shall return their respective performances. If it is not possible to return a goods or something alike, the party shall compensate for that with money.¹⁰⁷

If a good man or administrator performs ill-conceived acts that hurt the vulnerable adult, the good man or administrator may have to pay damages to the vulnerable adult.¹⁰⁸

A good man or administrator is not allowed to represent a vulnerable adult in matters where his or her own interests, or the interests or someone close to the good man or administrators, conflicts with the interests of the vulnerable adult. Contracts that the good man or administrator has entered despite conflicting interests are not valid.¹⁰⁹ In special cases of conflict om interests, the Chief Guardian can appoint another good man to represent the vulnerable adult on request of the ordinary good man.¹¹⁰

End of the measure

29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.

If the vulnerable adult no longer is in need of a good man [*god man*] or administrator [*förvaltare*], a civil court shall dissolve the measure.¹¹¹ The “need” is tried

¹⁰⁶ Children and Parents Code, Chapter 12, § 10.

¹⁰⁷ Children and Parents Code, Chapter 12, § 11 and Chapter 9, § 7.

¹⁰⁸ Children and Parents Code, Chapter 12, § 14.

¹⁰⁹ Children and Parents Code, Chapter 12, § 8.

¹¹⁰ Children and Parents Code, Chapter 11, § 2.

¹¹¹ Children and Parents Code, Chapter 11, § 19 and § 19 b.

on the same grounds as the decision to assign a good man or an administrator.¹¹² The same persons who can apply to the court for a decision to appoint a good man or administrator can also apply for the dissolution of an assignment.¹¹³ The Chief Guardian [*överförmyndaren*] has a duty to apply at court for a dissolution if there is knowledge that someone no longer need a good man or an administrator. The Chief Guardian is also obligated to overview all ongoing cases of administratorship every year to see if there are reasons to apply for dissolutions in any case.¹¹⁴

When an administratorship is dissolved by the court, the court shall immediately make that decision public.¹¹⁵ When a good man's or administrator's assignment is dissolved, he or she shall within a month from the dissolution give in a final report to the Chief Guardian regarding the assets that have been under his or her control during the assignment.¹¹⁶ The final report shall be signed on the good man or administrators "honour and conscience" (på heder och samvete). Such a signature is the equivalent of a sworn testament.

Reflection

30. Provide statistical data if available.

For statistics, see above in question 3.

31. What are the problems which have arisen in practice in respect of the state-ordered measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so what are the outcomes?

¹¹² See the ground for good man in Children and Parents Code, Chapter 11 § 4 and for administrator Chapter 11 § 7.

¹¹³ Children and Parents Code, Chapter 11, § 21 with reference to § 15.

¹¹⁴ Förmyndarskapsförordning (1995:379) § 5.

¹¹⁵ Children and Parents Code, Chapter 11, § 27.

¹¹⁶ Children and Parents Code, Chapter 14, § 18.

In the early years of 2000 there was an intensive debate regarding the fact that a lot of parents to young vulnerable adults with severe disabilities were simultaneously appointed as good men [*gode män*] (very seldom administrators [*förvaltare*]) and employed as personal assistants to their adult children. The critique had to do with facts such as the vulnerable adult being completely in the power of a parent with these double roles, that the parent was dependent on the income as personal assistant, and that the role as good man with the assignment to safeguard the vulnerable adult's interests basically had to control him or herself. The risk of conflicting interests but also that the self-determination for the vulnerable adult was limited more than necessary by these mixed roles for parents, led the Government to require the Health and Welfare Board [*Socialstyrelsen*] to investigate and analyse if the legislation needed to change to prevent these risks. The Health and Welfare Board however found that even though there were risks as those mentioned, there were also benefits to the double roles. A parent to a severely disabled young adult had in most cases a deeper knowledge of the young adults needs for well-being, and a much better ability to communicate with him or her than any outsider would have. Therefore the Health and Welfare Board draw the conclusion that they could not recommend that being both a good man and a personal assistant for someone at the same time needed to be prohibited.¹¹⁷

During a number of years there were also repeated critique against the system with good men and administrators, based on recurring reports in the press about vulnerable adults being abused and more or less **robbed** of their assets by good men and administrators. It was obvious that the safeguards in place to prevent such abuse were not sufficient. This was also the conclusion by the National Revision Board [*Riksrevisionen*] that during the first decades of the 21st century investigated the supervision by local Chief Guardians over good men and administrators at several occasions, and found reason to be very critical. Especially so in the latest

¹¹⁷ Report from The Health and Welfare Board: Socialstyrelsen, *Personligt assistans och god man. Är rollerna förenliga?*, 2014.

report from 2018.¹¹⁸ The Government was thereby forced to act, and started a public investigation in 2019, resulting in a report in 2021 (SOU 2021:36). The focus for the investigation was the faults in the system and how to fix them – not to evaluate if the system as a whole, needed changes. The outcome of the investigation was that many changes in the rules regarding good men and administrators were suggested, however in our opinion not nearly enough to ensure the fulfilment of the CRPD.

SECTION IV – VOLUNTARY MEASURES

Overview

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

In Sweden an adult can appoint self-chosen representatives/support persons and give general or specific directives by ordinary powers of attorney [*fullmakt*] – effective immediately or at a stated date. It is also possible to use continuing powers of attorney [*framtidfullmakt*] for the same purpose – a power of attorney enters into force if/when the granter lasting and essentially no longer is capable to safeguard the matters that the continuing power of attorney include.

Another way of saying when a continuing power of attorney will enter into force is to say it is if/when the granter no longer has decision-making abilities regarding the matters the power of attorney includes. This means an ability to make decisions based on considerations of received information that are understood by the person. As has been explained above in question 1, decision-making ability is not the same as legal capacity. Legal capacity refers to a person's ability to enter into a contract himself or herself with legally binding effect, etc. It is pos-

¹¹⁰ Report from the National Revision Board: Riksrevisionen, *Tillsyn av ställföreträdare och överförmyndare – Statens bristande ansvar för samhällets mest utsatta* (RiR 2017:33).

sible to distinguish between formal legal capacity determined by objectively observable circumstances such as the person being of legal age and not being placed under an administrator [*förvaltare*], and personal legal capacity, which presupposes an ability to communicate a sensible will to be given legal effect (compare above Q1).¹¹⁹ Decision-making ability is a part of what is needed to have personal legal capacity. Decision-making ability is thus an important aspect of legal capacity, and it is the loss of this ability that is replaced by a continuing power of attorney when the granter no longer is capable to safeguard the matters that the continuing power of attorney include.

- 33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measure. Please consider, among others:**
- a. the existence of specific provisions regulating voluntary measures;**
 - b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

The Act 2017:310 on Continuing Powers of Attorney¹²⁰ is the legal source of such a measure. The Act of Contracts (1915:218)¹²¹ Chapter 2, §§ 10–27 regulates ordinary powers of attorney.

The motivation for a special law regulating continuing powers of attorney was the fact that it had for a long time been unclear if such a power of attorney could have legal effects according to the Act on Contracts.¹²² The new Act on Continuing Powers of Attorney, enacted in 2017, has however been made with reference to the principles of ordinary powers of attorney (and principles applicable to wills). The new rules are mainly of civil law character. By making a special law on con-

¹¹⁹ T: FRIDSTRÖM MONTOYA, *Leva som andra genom ställföreträdare – en rättslig och faktisk paradox*, Iustus, Uppsala, p. 15 and p. 381.

¹²⁰ *Lag (2017:310) om framtidsfullmakter*.

¹²¹ *Lag (1905:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*, usually referred to as *Avtalslagen*.

¹²² Governmental Bill, Prop. 2016/17:30 p. 24.

tinuing powers of attorney it has been possible to take in to account the extraordinary circumstances when the power of attorney entered into force: if/when the granter due to loss of decision-making abilities lasting and essentially no longer is capable to safeguard the matters in the continuing power of attorney him- or herself.¹²³

The overall purpose behind the new legislation on continuing powers of attorney is to strengthen vulnerable adults self-determination and autonomy by giving people the opportunity to plan the future and thereby in some sense maintain a life-long control of his or her affairs.¹²⁴ At its core lies the respect for the individual's right to self-determination. This fact has motivated rules mainly of civil law character. Other motives behind the new legislation is, for instance, the Recommendation 2009 of the Council of Europe, and the ageing population in Sweden.

General provisions of civil law covering situations when a person takes legal actions in the place of another person, is possible to use when it comes to both continuing powers of attorney and ordinary powers of attorney. One example is the old rules in the Code of Commerce [*Handelsbalken (1736:0123 2)*] Chapter 18 on representatives [*sysloman eller ombudsmän*]. This principle is laid down in the Act on Continuing Powers of Attorney § 20.

34. If applicable, please describe the relation or distinction that is made in your legal system between the appointment of self-chosen representatives/support persons on the one hand and advance directives on the other hand.

There are no rules or principles on legal advanced directives in Sweden. However, if a granter of a continuing power of attorney has given general or specified directive, the directives will govern the chosen representatives' actions.¹²⁵

¹²³ Governmental Bill, Prop. 2016/17:30 p. 24.

¹²⁴ Governmental Bill, Prop. 2016/17:30 pp. 18–24.

¹²⁵ Act (2017:310) on Continuing Powers of Attorney, §§ 2 and 5.

35. Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?

A continuing power of attorney [*framtidssfullmakt*] can cover property and financial matters, and personal matters [*ekonomiska och personliga angelägenheter*]. From the preparatory works to the Act (2017:310) on Continuing Powers of Attorney it follows that placement of the individual's funds in transaction or fund accounts but also other tasks of a financial nature, such as paying bills and sell property, are examples of property and financial matters. Personal matters mainly include providing for the benefit of the individual's living expenses and for the individual's needs for care – that the well-being of the vulnerable adult, are met. The mission does not, however include carrying out the actual care, but to represent granter and to take steps to make sure that the granter receives the necessary care.¹²⁶

Medical matters (at least intrusive ones) and personal rights are excluded from what can be covered. This is stated in the Act on Continuing Powers of Attorney, § 2, with further reference to the Health and Medical Services Act, and the Dental Care Act,¹²⁷ and the Children and Parents Code, Chapter 12, § 2, section 3. The latter makes it clear that at representatives never have the right to enter into marriage, claim fatherhood, make a will and other such personal rights on behalf of the granter (compare above, question 8). The granter himself or herself – the vulnerable adult – may however have the capacity to take such a measure himself or herself even if the power of attorney has entered into force. The action – e.g. marriage, apply for divorce etc. – will be legally valid if it is taken voluntarily by a person who fully can understand the consequences of the action. A divorce has, however, both personal and financial consequences. This has led the Swedish Supreme Court to state, in NJA 2021 p. 547 I and II, that a good man [*god man*] or

¹²⁶ Governmental Bill, Prop. 2016/17:30 p. 28.

¹²⁷ *Hälso- och sjukvårdslagen (2017:30)* and *tandvårdslagen (1985:125)*.

administrator [*förvaltare*] may, in exceptional cases, be entitled to apply for divorce on behalf of his or her principal. In case NJA 2021 p. 1181, the Supreme Court clarified that the legal representative is entitled to apply for a divorce for a vulnerable adult if this person is unable to express his or her own opinion and, in addition, risks suffering some form of harm that can be prevented by the divorce. When it comes to an attorney appointed by a continuing power of attorney, the same conditions as in the mentioned case can expect to be upheld but it has not yet been tried in court.¹²⁸

To make a will is in Sweden a personal right, and can only be done by the person him- or herself. A will of a person with a mental disorder (which may have led to the enter into force of a continuing power of attorney) is valid if the will express the wishes of the testator no matter of the mental disorder.¹²⁹ A will can be declared invalid if the heirs prove that the will does not reflect the desires of the testator, but is the consequence of the loss of decision-making abilities.¹³⁰

When it comes to medical matters, mainly privacy aspects motivate limitations of the right for an attorney to represent the granter.¹³¹ An attorney cannot consent or make some other decision regarding a concrete medical treatment measure or intervention on behalf of the granter of a continuing power even if the continuing power of attorney includes personal matters.¹³²

Start of the measure

Legal grounds and procedure

¹²⁸ The same conclusion can be drawn from a simulaire discussion of A. AGELL and M. BRATTSTRÖM in *Äktenskap & Samboende*, Iustus, Uppsala, 2022, pp. 55-56.

¹²⁹ G. WALIN and G. LIND, *Ärvdabalken En kommentar, Del I*, Wolters Kluwer Sverige, 2016, p. 402 and M. BRATTSTRÖM and A. SINGER, *Rätt arv*, Iustus förlag, 2020, p. 108.

¹³⁰ NJA 2009 p. 249. See also the Swedish Inheritance Code [*Ärvdabalken* 1958:637], Chapter 13, § 2 and Chapter 14, § 5.

¹³¹ Governmental Bill, Prop. 2016/17:30 p. 29. It has been proposed, in a Committee Report (SOU 2015:80 p. 467) that a continuing power of attorney also should be include medical matters. The government is still investigating if a governmental bill will be given on the matter.

¹³² Conclusions drawn by P. WESTMAN in *Lagen om framtidsfullmakter – En kommentar m.m.*, Norstedts Juridik, Stockholm, 2021, p. 80.

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

An adult person who has ability to take care of his or her own affairs – who has decision-making abilities – can be a granter and appoint an attorney by a continuing power of attorney [*framtidspfullmakt*].¹³³

37. Please describe the formalities (public deed; notarial deed; official registration or homologation by court or any other competent authority; etc.) for the creation of the voluntary measure.

In Sweden, it is a private affair to make a continuing power of attorney (as well as an ordinary power of attorney). No public deed, notarial deed or homologation by any competent authority have to be done. A continuing power of attorney needs, however, to be made in writing and signed by the granter in front of two witnesses who know that signing a continuing power of attorney is what they are witnessing. In addition, the witnesses have to sign the continuing power of attorney.¹³⁴ These formal requirements are the same as for wills.¹³⁵ Prerequisites for the witnesses are also the same as for wills. In short; a witness has to be older than 14 years, cannot be married, cohabiting or close relative with/to the granter and has to be able to understand the importance of the witnessing.¹³⁶ The appointed attorney cannot act as a witness.

A granter can revoke a continuing power of attorney as long as he or she has decision-making capacity. It doesn't matter if the granter has decided something else in the continuing power of attorney – such condition is void.¹³⁷

38. Describe when and how the voluntary measure enters into force. Please consider:

¹³³ Act on Continuing Powers of Attorney, § 3.

¹³⁴ Act on Continuing Powers of Attorney, § 4.

¹³⁵ See Inheritance Code, Chapter 10, § 1.

¹³⁶ Act on Continuing Powers of Attorney, § 4, section 2 and 3, with further reference to Inheritance Code, Chapter 10, § 2, section 1 and § 4, section 1 and 3.

¹³⁷ Act on Continuing Powers of Attorney, § 6.

- a. the circumstances under which voluntary measure enters into force;**
- b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?**
- c. who is entitled to initiate the measure entering into force?**
- d. is it necessary to register, give publicity or any other kind of notice of the entry into force of the measure?**

As it has already been explained, a continuing power of attorney enters into force when the granter lasting and essentially no longer him- or herself has capacities to safeguard the matters ruled by the power of attorney.¹³⁸ The appointed attorney assesses if the circumstances for the entering into force of the continuing power of attorney have occurred.¹³⁹ This assessment is assumed to be done in close discussion with the granter, and based on the consequences of the granter's situation.¹⁴⁰ The question of entry into force can be tried by court if the attorney demands it, or if there is a condition about a court's decision in the continuing power of attorney.¹⁴¹

No formalities are required for a decision by an attorney that the continuing power of attorney has entered into force. This reflects the fact that continuing powers of attorney are seen as private affairs. If the court tries the question of entering into force, a medical doctor's statement of diminished capacity for the granter or other relevant information shall be collected and taken into account by the court.¹⁴²

It is not necessary to register, give publicity to or to give any other kind of notice of the entry into force of a continuing powers of attorney. When the attorney considers that a continuing power of attorney has entered into force, he or she has however, as soon as possible, to notify the granter, the spouse or cohabitee of the

¹³⁸ Act on Continuing Powers of Attorney, §§ 1 and 9.

¹³⁹ Act on Continuing Powers of Attorney, § 9, section 2.

¹⁴⁰ Governmental Bill, Prop. 2016/17:30 pp. 44-45.

¹⁴¹ Act on Continuing Powers of Attorney, § 9, section 2 and § 11.

¹⁴² Act on Continuing Powers of Attorney, § 14.

granter and the granters' close relatives.¹⁴³ The notification shall include information on what matters are covered by the continuing power of attorney.

Appointment of representatives/support persons

- 39. Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider:**
- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?**
 - b. what are the safeguards as to conflicts of interests?**
 - c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?**

The attorney – the legal representative – by a continuing power of attorney, has to be a natural person. Designation of public institution, CSO's, private organisations, etc. as attorney has no legal effect as continuing powers of attorney.¹⁴⁴ If a good man [*god man*] or administrator [*förvaltare*] has been appointed for the attorney by the time when the continuing power of attorney enters into force, the power of attorney has no effect.¹⁴⁵

An attorney has no right to represent the granter in a case of conflict of interests between them, or in a case of conflict of interests between the granter and the spouse, cohabitee, children of the attorney or any other person regarding whom a conflict of interest could occur for any reason.¹⁴⁶ If the attorney in a special case is disqualified due to conflict of interests, the Chief Guardian [*överförmyndare*] can, on request of the attorney, appoint a good man (god man) to represent the granter in the case.¹⁴⁷

¹⁴³ Act on Continuing Powers of Attorney, § 10.

¹⁴⁴ Act on Continuing Powers of Attorney, § 1.

¹⁴⁵ Act on Continuing Powers of Attorney, § 29.

¹⁴⁶ Act on Continuing Powers of Attorney, § 17, Section 1.

¹⁴⁷ Act on Continuing Powers of Attorney, § 17, Section 2.

Several natural persons can within one single measure be appointed – simultaneously or as substitutes – as attorneys to support the granter when he or she suffers of incapacity.¹⁴⁸ If two or more persons have been appointed simultaneously, they can either have the assignment together (act jointly) or been given different tasks (act separately).

During the measure

Legal effects of the measure

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

As long as the form prescribed (see above question 37) is fulfilled, and the continuing power of attorney covers matters on property and financial questions, or/and personal matters, there are no limitations in the legislation of legal actions that can be taken by an attorney who acts in accordance with the wishes expressed by the granter.¹⁴⁹ Compare, however, above question 35.

When it comes to gifts, there are special rules.¹⁵⁰ An attorney can only give personal gifts on behalf of the granter, whose value is not disproportionate to the granter's financial circumstances. Personal gifts can be birthday gifts or Christmas presents – the kind of gift that the granter used to give when he or she could take legal actions by him- or herself.¹⁵¹ The attorney can give other kinds of gifts if that is expressly stated in the continuing power of attorney. Under no circumstances, can the attorney be the recipient of a gift from the granter.

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

¹⁴⁸ Act on Continuing Powers of Attorney, § 5, p 2. See also Governmental Bill, Prop. 2016/17:30 p. 113.

¹⁴⁹ Act on Continuing Powers of Attorney, §§ 5 and 15.

¹⁵⁰ Act on Continuing Powers of Attorney, § 19.

¹⁵¹ Governmental Bill, Prop. 2016/17:30 p. 123.

A continuing power of attorney enters into force when the granter lasting and essentially no longer has capacities to safeguard his or her interests ruled by the power of attorney.¹⁵² When the continuing power of attorney enters into force, the formal legal capacity of the granter is unaffected. This however doesn't mean that the person still has legal capacity, because the personal legal capacity is affected; the entering into force of a continuing power of attorney happens when the granter no longer has de facto decision-making and decision-communication skills. The attorney shall anyway, if possible, consult the granter on important matters.¹⁵³ The attorney has to find out, which matters are of importance for the vulnerable adult. Some examples that according to the preparatory works can be viewed as important matters are how and where the granter shall live, management of his or her property, and regular activities of importance for that person.

Powers and duties of the representative/support person

- 42. Describe the powers and duties of the representative/support person:**
- a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:**
 - **property and financial matters;**
 - **personal and family matters;**
 - **care and medical matters?**
 - b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
 - c. is there a duty of the representative/support person to inform and consult the adult?**
 - d. is there a right to receive remuneration (how and by whom is it provided)?**

A continuing power of attorney makes it possible for the representative/support person to act in the place of the adult on matters ruled by the power of attorney,

¹⁵² Act on Continuing Powers of Attorney, §§ 1 and 9.

¹⁵³ Act on Continuing Powers of Attorney, § 15.

such as property and financial questions, or/and personal matters, see above question 35. If an adult wants to act together with a support person or be provided with assistance, other arrangements have to be taken.

An attorney shall act in the interest of the grantor, and, if possible, consult the grantor in important matters.¹⁵⁴ According to the preparatory works, this means that the attorney shall act in the way the grantor presumably would have wanted or preferred if he or she could have made an informed decision.¹⁵⁵ This means that even though the wording in the statute imply otherwise, an action will not necessarily have to comply with what can be seen as the best interests of the vulnerable adult, but the guiding principle for the attorney is supposed to be the will and preferences of the said adult.

This is, in our opinion, quite inconsequent and confusing, and also a sign that the government actually has not understood the demands of the CRPD. It is of great importance that it is clear what the guiding principle for a legal representative to a vulnerable adult is: his or her best interest – decided by whom? – or the will and preferences of the vulnerable adult. See more below in question 67.

As mentioned above (see question 40), the attorney shall, if possible, consult the grantor in important matters covered of the power of attorney.¹⁵⁶

To become an attorney is to accept a position of trust. A right to receive remuneration requires regulation in the written continuing power of attorney.¹⁵⁷ If there are such a right but nothing about the amount, the attorney decides an amount that is reasonable in relation to the nature and the scope of the assignment.

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

- a. if several voluntary measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**

¹⁵⁴ Act on Continuing Powers of Attorney, § 15.

¹⁵⁵ Governmental Bill, Prop. 2016/17:30 p. 120.

¹⁵⁶ Act on Continuing Powers of Attorney, § 15.

¹⁵⁷ Act on Continuing Powers of Attorney, § 19.

b. if several representatives/support persons can be appointed in the framework of the same voluntary measure how is the authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?

If a vulnerable adult has appointed more than one person to be his or her attorney, it is also up to the granter to decide how the attorneys shall coordinate their activities. The granter decides how the legal powers are distributed among or between the attorneys. In case nothing is said about this coordination in the written continuing power of attorney, and nothing can be presumed about the will of the granter, the option is to make an analogy to the rules about good men [*god man*] and administrators [*förvaltare*].¹⁵⁸ The rule in chapter 12, § 12 of the Children and Parents Code is that the appointed persons shall exercise the assignment jointly. The consequence of that is that they have to agree to all the legal actions taken in the vulnerable adult's place.

When it comes to third parties, it is always the attorney/s who is/are responsible for acting within their legal power.¹⁵⁹ Acts of an attorney that goes beyond his or her legal power according to the continuing power of attorney are not binding for the granter. In such a situation, rules in the Act on Contracts¹⁶⁰ will determine the position of the attorney and third parties.¹⁶¹ The situation will be the same as if an attorney of an ordinary power of attorney has acted beyond his or her legal powers.¹⁶²

¹⁵⁸ Children and Parents Code.

¹⁵⁹ See Act on Continuing Powers of Attorney, § 21, with further references to The Act on Contracts [*Avtalslagen (1915:218)*] § 25.

¹⁶⁰ *Avtalslagen (1915:218)*.

¹⁶¹ See Act on Continuing Powers of Attorney, § 22, with further references to The Act on Contracts [*Avtalslagen (1915:218)*] in general.

¹⁶² For further information see for example O. LANDO et al., *Restatement of Nordic Contract Law*, Jurist och økonomiforbundets forlag, Copenhagen 2016, p. 124–126.

44. Describe the interaction with other measures. Please consider:

- a. if other measures (state-ordered measures; *ex lege* representation) can be simultaneously applied to the same adult, how do the representatives/support persons, acting in the framework of these measures, coordinate their activities?**
- b. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?**

Even if there is a continuing power of attorney in use, a good man [*god man*] or an administrator [*förvaltare*] can be appointed by the court for a vulnerable adult. This can be the case when either an additional legal representative is needed to take care of measures not covered by the continuing power of attorney, or when an attorney wants to leave his or her mission, has abused, seriously neglected or shown to be unable to safeguard the interests of the grantor.¹⁶³ In the first case, the coordination between the legal representatives will follow from the continuing power of attorney and the tailor-made decision of appointment from the court. In case of any incapacity of the attorney, the continuing power of attorney can be revoked – in part or totally – by a decision of the Chief Guardian. A continuing power of attorney cannot be used after a good man or an administrator is appointed by the court to cover the same matters included in the continuing power of attorney. Other forms of assistance, such as an ordinary power of attorney, must be deemed insufficient.

Ex lege representation (see below part V, Q65 etc.) is secondary to a continuing power of attorney.¹⁶⁴ The *ex lege* representative can continue his or her representation if ordinary financial matters related to the vulnerable adults' daily life are not covered by the continuing power of attorney, or if the attorney asks the relatives to do so.¹⁶⁵

¹⁶³ Children and Parents Code, Chapter 12, § 2, Act on Continuing Powers of Attorney, § 27. See also Governmental Bill, Prop. 2016/17:30 pp. 129–131.

¹⁶⁴ Children and Parents Code, Chapter 17, § 3.

¹⁶⁵ Compare Act on Continuing Powers of Attorney, § 29.

Each legal representative has the responsibility to act within his or her legal power, and to inform third parties of these legal powers.¹⁶⁶ The legal power is either stated in the continuing power of attorney or by the court's tailor-made assignment for a good man or an administrator. Legal acts in the vulnerable adult's place by a legal representative beyond his or her legal power are not binding for the granter.¹⁶⁷ A spouse, cohabitee or relatives who have acted as *ex lege* representative will be notified if a continuing power of attorney enters into force.¹⁶⁸

Safeguards and supervision

45. Describe the safeguards against:

- a. unauthorised acts of the adult and of the representative/support person;**
- b. ill-conceived acts of the adult and of the representative/support person;**
- c. conflicts of interests**

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

An attorney is supposed to act in the interest of the granter, and is responsible for acting within the legal power laid down by the continuing power of attorney.¹⁶⁹ Acts of an attorney beyond his or her legal power are, which was stated in the question closest above, not binding for the granter. In such a situation, rules in the

¹⁶⁶ Children and Parents Code, Chapter 11, §§ 4 and 7, Act on Continuing Powers of Attorney, §§ 1 and 15.

¹⁶⁷ Children and Parents Code, Chapter 11, §§ 5 and §§, Act on Continuing Powers of Attorney, §§ 21 and 22 (with further references to the Act on Contracts [*Avtalslagen (1915:218)*]).

¹⁶⁸ Act on Continuing Powers of Attorney, § 10.

¹⁶⁹ See Act on Continuing Powers of Attorney, §§ 15 and 21, with further references to The Act of Contracts [*Avtalslagen (1915:218)*] § 25.

Act on Contracts will determine the legal position of the attorney and third parties.¹⁷⁰ The situation will be the same as if an attorney of an ordinary power of attorney has acted beyond his or her right.¹⁷¹

One way to prevent a vulnerable adult to use his or her legal capacity when he or she has lost his or her decision-making abilities, is to spread the information on the continuing power of attorney having entered into force. Legal actions taken by a vulnerable can in some cases be declared void according to a special act on contracts concluded under the influence of a mental disorder.¹⁷² This can be a task for the attorney.

When it comes to ill-conceived act of an attorney on behalf of the granter, damage liability can arise.¹⁷³ Ill-conceived acts done by a vulnerable adult may in some cases be declared void according to a special act on contracts concluded under the influence of mental disorder. To evoke this law to get a contract declared void by a court can be a task for the attorney.

An attorney is disqualified to represent the vulnerable adult in cases of conflicts of interests, or in case of conflict of interest between the granter and the spouse, cohabitee, children of the attorney or any other person where a conflict of interest could occur of any reason.¹⁷⁴ In special cases of conflict of interests, the Chief Guardian [*överförmyndare*] can appoint a good man to represent the granter, on request of the attorney.¹⁷⁵

46. Describe the system of supervision, if any, of the voluntary measure.

Specify the legal sources. Please specify:

a. is supervision conducted:

- **by competent authorities;**

¹⁷⁰ See Act on Continuing Powers of Attorney, § 22, with further references to The Act of Contracts [*Avtalslagen (1915:218)*] in general.

¹⁷¹ For further information see for example O. LANDO et al., *Restatement of Nordic Contract Law*, Jurist och økonomforbundets forlag, Copenhagen 2016, p. 124–126.

¹⁷² *Lag (1924:323) om verkan av avtal, som slutits under inflytande av en psykisk störning.*

¹⁷³ Act on Continuing Powers of Attorney, § 20, with further references to general rules in Code of Commerce [*Handelsbalken, (1736:0123 2)*] Chapter 18 on representatives (*syssemän eller ombudsmän*).

¹⁷⁴ Act on Continuing Powers of Attorney, § 17, Section 1.

¹⁷⁵ Act on Continuing Powers of Attorney, § 17, Section 2.

- **by person(s) appointed by the voluntary measure.**
- b. in each case, what is the nature of the supervision and how is it carried out?**
 - c. the existence of measures that fall outside the scope of official supervision.**

The granter may, in the written continuing power of attorney, appoint someone to conduct supervision of the attorney.¹⁷⁶ On the request of such a conductor, the attorney have to make an accounting for his or her mission. If no conductor is appointed, the attorney has to make an accounting upon request of the granter's spouse or cohabitee, or close relatives – at least once a year.¹⁷⁷

Upon request of the Chief Guardian an attorney always has to make an accounting and leave information on the exercising of his or her assignment according to the continuing power of attorney and all the measures taken by him or her.¹⁷⁸ Anyone is free to report suspected unauthorised or ill-conceived acts of an attorney to the Chief Guardian. If there is evidence for abuse, serious neglect, or the unbleness of an attorney to safeguard the interests of the grantor, the continuing power of attorney can be revoked – in part or totally – by a decision of the Chief Guardian.¹⁷⁹ A decision like that has direct effect, but it can be appealed to the court.

End of the measure

47. Provide a general description of the termination of each measure.

Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.

Different reasons can cause termination of a continuing power of attorney.

¹⁷⁶ Act on Continuing Powers of Attorney, § 23.

¹⁷⁷ Act on Continuing Powers of Attorney, § 24.

¹⁷⁸ Act on Continuing Powers of Attorney, § 25.

¹⁷⁹ Act on Continuing Powers of Attorney, § 26.

If a granter's capacity to safeguard his or her interests is lasting and essentially restored, the attorney's right to represent the granter is dissolved. In case of bankruptcy or death of the granter after the entering into force of a continuing power of attorney, rules on ordinary powers of attorney are used.¹⁸⁰

As already mentioned above, for instance in questions 39 and 45, an attorney has no power if a good man [*god man*] or administrator [*förvaltare*] is appointed for the attorney him- or herself by the time the continuing power of attorney enters into force. If there is evidence of abuse, serious neglect, or incapacity of an attorney to safeguard the interests of the grantor, the Chief Guardian [*överförmyndaren*] can revoke the continuing power of attorney – partially or totally.¹⁸¹ A continuing power of attorney cannot be used when a good man or an administrator is appointed by the court to control the same matters that are included in the power of attorney.¹⁸² An adult who believes he or she is vulnerable, can him- or herself apply for a good man or an administrator. Entitled to apply for a good man or administrator are also his or her spouse or cohabitee, closest relatives, an attorney appointed by a continuing power of attorney and the Chief Guardian. An appointed good man can also apply for an administrator.¹⁸³

Reflection

48. Provide statistical data if available.

The legislation on continuing powers of attorney was enacted quite recently; it came into force 1 July 2017. Since no registration is needed, there is no statistical data available on the number of written continuing powers of attorneys, neither on how many of those that are in force. It is however assumed to be a popular thing to make such a power of attorney, especially amongst persons older than 50 years. The experience of legal practitioner's is that many of the established continuing

¹⁸⁰ Act on Continuing Powers of Attorney, 28, with further references to Act on Contracts [*Avtalslagen (1915:218)*] §§ 21, 23, 24 and 26.

¹⁸¹ Act on Continuing Powers of Attorney, § 26.

¹⁸² Act on Continuing Powers of Attorney, § 29.

¹⁸³ Children and Parents Code, Chapter 11, § 15.

powers of attorney are generally formed and include all possible matters (compare above question 35), rather than specified to certain matters or with specific advance directives.¹⁸⁴

There is not yet any case law from the Swedish Supreme Court regarding continuing powers of attorney. One can however assume there will soon be such cases. Already in 2017 five cases were initiated in the lower courts, and the figures have been growing ever since. Last year, 2021, in total 110 cases were initiated, of which 101 were settled in the first instance.¹⁸⁵

49. What are the problems which have arisen in practice in respect of the voluntary measures (e.g. significant court cases, political debate, proposals for improvement)? Has the measures been evaluated, if so what are the outcomes?

When an attorney has decided that a continuing power of attorney has entered into force, it has often shown to be difficult to take legal action in the place of the granter; especially when it comes to bank transactions. The lack of trust that third parties sometimes have towards attorneys in this regard can however be cured by a decision by a court that the continuing power of attorney has entered into force. Such proceedings will, however, render the consequence that continuing powers of attorney will no longer be the private institute that was intended, but rather a variant of appointment of a good man [*god man*].¹⁸⁶ Already in the preparatory works to the legislation, registration in some way of the enforcement of a continuing power of attorney – like in some Nordic countries – was discussed to meet this problem.¹⁸⁷ Such a solution was however rejected; a continuing power of attorney was meant to be a civil law institute and the Government suggested that

¹⁸⁴ P. WESTMAN, *Lagen om framtidsfullmakter – En kommentar m.m.*, Norstedts Juridik, Stockholm, 2021, p. 76.

¹⁸⁵ M. BRATTSTÖM and A. SINGER, 'Fullmakt för framtiden' in M. LINTON and M. SAYED (eds) *Festskrift till Maarit Jänterä-Jareborg*, Iustus, Uppsala 2022 p. 49.

¹⁸⁶ The problem have been discussed by M. BRATTSTÖM and A. SINGER, 'Fullmakt för framtiden' in M. LINTON and M. SAYED (eds) *Festskrift till Maarit Jänterä-Jareborg*, Iustus, Uppsala 2022 p. 51.

¹⁸⁷ Committee Report (SOU 2004:112) and Departmental Promeoria from the Law Department (2014:16) and Governmental Bill, Prop. 2016/17:30 pp. 46-47.

once it has been an established form of legal representation it can be assumed to be as trusted as an ordinary powers of attorney.¹⁸⁸ In the meantime, the problems linger.

There are, as has been showed above, lots of references in the Act on Continuing Powers of Attorney to the Act on Contracts.¹⁸⁹ In the literature, it has been questioned if the legislator fully took into account the effects of the fact that a continuing power of attorney can rule personal and family matters as well as property and finance matters whilst the Act on Contracts only covers property rights.¹⁹⁰ If this will cause problems in cases to come is a question for the future.

Already before the Act on continuing power of attorney was enacted in 2017, it was suggested in a Committee Report regarding help and support for vulnerable adults that an attorney appointed by a continuing power of attorney would be entitled to represent a vulnerable adult in decisions regarding medical care and social services.¹⁹¹ A law proposition on this question is however still lacking.

SECTION V – EX LEGE REPRESENTATION

Overview

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

Since the 1 of July 2017 the Swedish system contains specific provisions for *ex lege* representation of vulnerable adults. The rules can be found in the Children and Parents Code, Chapter 17.

Start of the ex-lege representation

¹⁸⁸ Governmental Bill, Prop. 2016/17:30 pp. 40-47.

¹⁸⁹ *Avtalslagen*, (1915:218).

¹⁹⁰ P. WESTMAN, *Lagen om framtidsfullmakter – En kommentar m.m.*, Norstedts Juridik, Stockholm, 2021, p. 158.

¹⁹¹ SOU 2015:80 p. 467.

Legal grounds and procedure

51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?

When it is obvious that an adult no longer can handle his or her ordinary financial affairs due to illness, mental disorder, frailty or similar conditions, a family member or other relative or relatives have *ex lege* power to take legal actions in the place of the vulnerable adult, if these are related to his or her daily life.¹⁹² This means that such a representation can be used if/when an adult no longer has decision-making abilities – ability to make decisions based on considerations of received information that is understood by the person. The requirements are similar to those of the entering into force of a continuing power of attorney (see above questions 32 and 38). A difference is, however, that it shall be *obvious* the mentioned requirements are at hand.

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

No medical expertise/statement of a presumed vulnerable adult is required in cases of action by an *ex lege* representative.

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

No registering or other kind of notice of the *ex lege* representation is required. It is the *ex lege* representative who assesses if the circumstances have occurred that entitle him or her to represent the vulnerable adult.¹⁹³ This assessment is assumed

¹⁹² Children and Parents Code, Chapter 17, § 1.

¹⁹³ Governmental Bill, Prop. 2016/17:30 pp. 94–96.

to be done in close discussion with the vulnerable adult, and based on the consequences of his or her situation.

Representatives/support persons

54. Who can act as *ex lege* representative and in what order? Think of a partner/spouse or other family member, or other persons.

The authorization as *ex lege* representative applies in turn to 1) spouse or cohabitee, 2) children, 3) grandchildren, 4) parents, 5) siblings and 6) nieces and nephews.¹⁹⁴ To act as an *ex lege* representative, the relative has to accept the task, be an adult, and have the capability to take care of his or her affairs – he or she has to have decision-making abilities. If two persons or more, for instance the vulnerable adult's children, are the *ex lege* representatives, they shall act jointly. That means they have to agree on the legal actions taken in the vulnerable adult's name. In such a situation where there are several *ex lege* representatives, the representatives can give each other an ordinary power of attorney to act on behalf of the vulnerable adult.

During the ex-lege representation

Powers and duties of the representatives/support person

55. What kind of legal or other acts are covered: (i) property and financial matters; (ii) personal and family matters; (iii) care and medical matters. Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.

The *ex lege* representatives have the power to take care of ordinary financial matters related to the vulnerable adult's daily life.¹⁹⁵ This means that the representative

¹⁹⁴ Children and Parents Code, Chapter 17, § 2.

¹⁹⁵ Children and Parents Code, Chapter 17, § 1.

can pay expenses necessary for the maintenance of the vulnerable adults living conditions, such as periodical costs connecting to housing, transport, social service, assurance, telephone, television, and more sporadically costs such as medical expenses or vacation trips. The representative can also buy things that the vulnerable adult needs for his or her daily life, for example food, clothes or a new mobile phone. Included in the power to represent the vulnerable adult is also to apply for social benefits and tax declarations. In every case, necessary measures are determined by the needs of the vulnerable adult.¹⁹⁶ To buy a car, a new home, represent the vulnerable adult in a court case, make gifts on his or her behalf, or other personal matters are not included in the legal power of an *ex lege* representative.¹⁹⁷ For such legal actions, a legal representative needs to be a good man, an administrator or an attorney by force of a continuing power of attorney.

56. What are the legal effects of the representative's acts?

Ex lege representation makes it possible for the representative person/persons to act in the place of the vulnerable adult when it comes to ordinary financial matters related to the vulnerable adults' daily life. If the representative takes legal actions in other matters, the acts are not binding for the vulnerable adult.¹⁹⁸

Can an adult, while still mentally capable, exclude or opt out of such *ex-lege* representation (a) in general or (b) as to certain persons and/or acts?

Yes, but only if the vulnerable adult gives someone else a continuing power of attorney regarding the same matters as the *ex lege* representation covers, or if a good man or administrator is appointed by a court.

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

Think of subsidiarity

¹⁹⁶ Governmental Bill, Prop. 2016/17:30 p. 136.

¹⁹⁷ Governmental Bill, Prop. 2016/17:30 p. 136.

¹⁹⁸ Children and Parents Code, Chapter 17, § 6.

Ex lege representation is only relevant if there is no other legal representation in place to make sure that the vulnerable adult's need of help when it comes to ordinary financial matters related to his or her daily life are met. If there is an appointment of a good man [*god man*], an administrator [*förvaltare*] or a continuing power of attorney that covers the same matters, there is no legal power for *ex lege* representatives.¹⁹⁹ An adult can thus, while still mentally capable, exclude *ex lege* representation by making a continuing power of attorney covering ordinary financial matters related to his or hers daily life or apply for a good man or administrator. See above question 44.

Safeguards and supervision

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

There are no specified safeguards or supervision regarding *ex lege* representation. A representative has no obligation to leave information to anyone on measures taken by him or her, neither upon request of other relatives or the Chief Guardian [*överförmyndare*]. However, an *ex lege* representative shall act in the interest of the vulnerable adult and thereby take into account his or her wishes, or presumed desire.²⁰⁰ The representative also has to keep the vulnerable adult's assets apart from his or her own and to keep books for the legal actions taken in a manner that is appropriate given the circumstances.²⁰¹ The accounting can consist of making notes and saving verifications. When it comes to conflicts of interests between the vulnerable adult and the *ex lege*

¹⁹⁹ Children and Parents Code, Chapter 17, § 3.

²⁰⁰ Children and Parents Code, Chapter 17, § 4, Section 1, para 1.

²⁰¹ Children and Parents Code, Chapter 17, § 4, Section 1, para 2 and 3.

representative, the situation is regulated the same way as for good men [*gode män*] and administrators [*förvaltare*].²⁰²

Anyone who suspects any misconduct of an *ex lege* representative can report the suspicion to the Chief Guardian, who has the duty to take necessary actions for appointment of a good man or an administrator to safeguard the interests of vulnerable adults.²⁰³

An *ex lege* representative who causes damages to the vulnerable adult, or wilfully or carelessly, is liable for compensation.²⁰⁴ Legal acts that he or she has taken that go beyond his or her legal powers are not binding for the vulnerable adult. In such a situation, the representative can be obliged to pay compensation to third parties.²⁰⁵

End of the ex-lege representation

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

Different reasons can cause termination of an *ex lege* representation.

If a vulnerable adult's capacity to safeguard his or her own interests is restored, the *ex lege* representation is dissolved. The same happens upon the death of the vulnerable adult.

As we have mentioned above, in question 57, an *ex lege* representative loses his or her legal power if a good man [*god man*] or an administrator [*förvaltare*] is appointed by the court to meet a vulnerable adult's need of help in the same matters that the *ex lege* representation covers: ordinary financial matters related to his or her daily life. An adult believing that he or she is vulnerable can hence go to court and apply for the appointment of a good man or an administrator. Also his or her spouse or cohabitee, closest relatives, an attorney appointed by a continuing

²⁰² Children and Parents Code, Chapter 17, § 4, Section 2, with further references to Chapter 12, § 8, Section 2 and 3.

²⁰³ Regulation on Guardianship [*Förmyndarskapsförordningen (1995:379)*], § 5. Children and Parents Code, Chapter 11, § 17 a, Section 3.

²⁰⁴ Children and Parents Code, Chapter 17, § 5.

²⁰⁵ Children and Parents Code, Chapter 17, § 6.

power of attorney, and the Chief Guardian are entitled make to such an application on behalf of the vulnerable adult, and an appointed good man is entitled to apply for an administrator.²⁰⁶

Reflection

60. Provide statistical data if available.

It can be assumed that *ex lege* representation is commonly used. No statistical data is however available. A reason for introducing the new legislation on *ex lege* representation in 2017 was to give judicial sanctioning to relatives who help a vulnerable adult with ordinary financial matters related to his or her daily life – something it was assumed that they already did.²⁰⁷

61. What are the problems which have arisen in practice in respect of *ex lege* representation (e.g. significant court cases, political debate, proposals for improvement)?

There are no court cases or political debates on *ex lege* representation. A concern that has been discussed in different contexts is if banks and other third parties will accept such a representation.²⁰⁸ No practical problems have however been reported so far. In the literature, the rationality of the fact that *ex lege* representation only can take place when an adult has lost his or her decision-making abilities has been questioned.²⁰⁹ Persons with disabilities from earlier ages might also benefit from *ex lege* representation.

Specific cases of ex lege representation

²⁰⁶ Children and Parents Code, Chapter 11, § 15.

²⁰⁷ Governmental Bill, Prop. 2016/17:30 p. 81.

²⁰⁸ For example, see Governmental Bill, Prop. 2016/17:30 p. 93 and P. WESTMAN, *Framtidsfullmakter*, Norstedts juridik, Stockholm, 2019, p. 130.

²⁰⁹ P. WESTMAN, *Framtidsfullmakter*, Norstedts juridik, Stockholm, 2019, p. 127.

ex lege representation resulting from marital law and/or matrimonial property law

62. Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then also legally bind the other spouse?

The Swedish system on property relationship between spouses is deferred community of property. During marriage each spouse alone owns all of his or her property, which he or she also administers on his or her own.²¹⁰ A spouse can, however, by an ordinary power of attorney, or a continuing power of attorney, been given the legal power to administer the other spouse's assets and/or to enter into transactions on behalf of the other spouse such as household expenses.²¹¹

During marriage both spouses shall, each according to his or her ability, contribute to the maintenance needed to meet the spouses' joint and personal needs.²¹² If a spouse is ill or absent and because of that cannot take care of his or her affairs, the other spouse has the legal power to enter into transactions necessary for the spouses' joint needs. A requirement for a spouse to be able to represent the other spouse is that the couple is living together. Another condition is that there is no other person who represents the owner, such as an attorney, a good man or an administrator.²¹³

63. Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.

²¹⁰ See the *Swedish CEFL-report on Property Relation*, written by M. JÄNTERÄ-JAREBORG, M. BRATTSTRÖM and K. WALLENG ceflonline.net/wp-content/uploads/Sweden-Property.pdf

²¹¹ See the Act on Contracts [*Avtalslagen* 1915:218], § 10 and the Act on Continuing Powers of Attorney, § 1.

²¹² Marriage Code, Chapter 6, § 1

²¹³ Marriage Code, Chapter 6, § 4.

See above question 62.

ex lege representation resulting from negotiorum gestio and other private law provisions

64. Does the private law instrument *negotiorum gestio* or a similar instrument exist in your jurisdiction? If so, does this instrument have any practical significance in cases involving vulnerable adults?

Negotiorum gestio is a principle in the Swedish jurisdiction.²¹⁴ This fact has however not had any practical significance in cases involving vulnerable adults.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

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

No, at least not any of interest when it comes to vulnerable adults.

66. Are there provisions regarding the advance planning by third parties on behalf of adults with limited capacity (e.g. provisions from parents for a child with a disability)? Can third parties make advance arrangements?

No, there are no such instruments in Swedish Law.

²¹⁴ For example see NJA 1952 p. 63 and T. HÅSTAD, E. P. BJÖRKDAHL, M. BRATTSTRÖM and L. ZACKARIASSON, *Civilrättens grunder*, Iustus, Uppsala, 2020, p. 70.

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

- 67. Provide an assessment of your system in terms of *empowerment* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
- a. the transition from substituted to supported decision-making;**
 - b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;**
 - c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;**
 - d. effect of the measures on the legal capacity of vulnerable adults;**
 - e. the possibility to provide tailor-made solutions;**
 - f. transition from the best interest principle to the will and preferences principle.**

If empowerment means measures to make sure to uphold and strengthen a person's resources to be self-determinate, the Swedish system comes off very poor. The bottom line is that there are no such measures regarding vulnerable adults. Also, there have been almost no public discussions in Sweden regarding a transition from substituted to supported decision-making. We can only speculate about the reasons for this. As Sweden progressively abolished guardianship for adults already in 1989, the impression is that the politicians in Sweden thereby were content with having made an effort of importance for the self-determination for persons with disabilities and other vulnerable adults, and were no longer open to evaluate the system or to take on the new paradigm concerning supported decision-making promoted by the CRPD. Although the assignment of a good man has no implications on the vulnerable adult's formal legal capacity, there is clearly *no* duty for the good man to make sure that the vulnerable adult participates in decisions or makes them on his or her own if he or she has the mental capacity to do

so. The good man has legal powers to act in place of the vulnerable adult in a number of situations, even though the main rule is that he or she must have a consent from the vulnerable adult. If the vulnerable adult is not able to express his or her will, a consent is not needed, and in daily matters the consent to the good man's actions is presumed – since consent is needed for the court's appointment of a good man.

Subsidiarity exists in the Swedish system since a decision to appoint an administrator can only be made if it is deemed insufficient to help or protect the vulnerable adult by appointing a good man. Also, it is held that to need a good man is must be deemed that the vulnerable adult cannot get the help her or she needs in a less intrusive way – for instance through family members legal power to represent them or through a lasting power of attorney. A decision to appoint an administrator which means that the vulnerable adult's formal legal capacity is limited is a last hand measure, when all other means to help and protect are deemed insufficient. The systems proportionality lies in the subsidiarity described above which is present when choosing between measures. Once a good man or administrator is appointed, there is no duty for the legal representative to act proportionally in the performance of his or her assignment. He or she has the sole legal power to act in place of the vulnerable adult if appointed administrator, but needs consent in some matters, but not all, if appointed as good man – however only if the vulnerable adult is deemed to have the mental capacity to consent.

When the civil court decides to appoint a good man or administrator, the assignment shall be tailor-made. However, in most cases this means only that very general limits for the assignments are drawn, and with unclear scope. Normally, the assignment consists of one of or all three parts of the legal duties: to safeguard a person's rights and duties, his or her assets, and/or provide for his or her well-being. Needless to say, it is in practice hard to draw lines between the actual matters that fall in either of these parts of the assignment. It is, for instance, the act of paying the rent or mortgages for a vulnerable adult's house an act of safeguarding the person's rights and duties in the contractual relationship with the landlord or the bank, an act safeguarding his or her assets, or an act securing his or her need for a home, providing for his or her well-being? These uncertainties mean that

limitations normally are very loose, and often unclear to everyone involved: to the vulnerable adult, to the legal representative and to third parties.

There has been no transition in the legislation regarding good man and administrators from the best interest principle to the will and preference principle; good men and administrators still have the duty by law to always act in the best interests of the vulnerable adult. There actually seems to be no awareness in Sweden that such a transition is necessary to fulfil the demands of the CRPD. This unawareness shows clearly in reference to the fact that two new, private measures for legal representation were enacted simultaneously in Swedish Law in 2017. Regarding the legal power for family members to act in place of a vulnerable adult, there is a statute saying that this power shall be exercised according to the will and preferences of the vulnerable adult – or his or her presumed will. An attorney on the other hand, exercising an assignment in a continuing power of attorney, shall exercise his or her assignment “according to the interests of the granter, and, if possible, consult him or her in matters of importance”. Even though these rules were enacted as late as 2017, there was no discussion in the preparatory works about their compliance with the CRPD. There wasn’t even a discussion as to why the rules were formulated differently for these two forms of legal representation.

- 68. Provide an assessment of your system in terms of *protection* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
- a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;**
 - b. protection during a procedure resulting in the application, alteration or termination of adult support measures;**
 - c. protection during the operation of adult support measures:**
 - protection of the vulnerable adult against his/her own acts;**
 - protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**

- **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;**
- **protection of the privacy of the vulnerable adult.**

The only protective function in the Swedish system to prevent such things as abuse, neglect, intrusion of privacy etc by good men and administrators for vulnerable adults is the supervision from the local Chief Guardian. As the State Revision Board has repeatedly held, with emphasis in 2018, this protection is very weak. In a Committee Report (SOU 2021:36), changes have been suggested to make the system safer for vulnerable adults, but so far none of these suggestions have been realised.