

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

SPAIN

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SECTION I – 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.**

Articles 249 to 300 of the Spanish Civil Code¹ [hereafter CC], as amended by **Act 8/2021 of 2 June**², provide the legal framework for the protection and empowerment of adults in Spain.

The autonomous regions of Catalonia³, Aragon⁴ and Navarre⁵ have also enacted rules on adult protection⁶, which are to be applied in preference to the CC. However, the CC directly governs conflicts of laws.⁷ Moreover, the procedural

¹ Updated version available online (in Spanish only) at [https://www.boe.es/eli/es/rd/1889/07/24/\(1\)/con](https://www.boe.es/eli/es/rd/1889/07/24/(1)/con).

² Act 8/2021, of 2 June, reforming civil and procedural legislation for supporting people with disabilities in the exercise of their legal capacity (*Boletín Oficial del Estado* [hereafter BOE] no. 132, 03.06.2021).

³ Art 221-1 ff Civil Code of Catalonia [hereafter CCCat]. Updated version (only in Catalan) in <https://portaljuridic.gencat.cat/ca/normativa/dret-a-catalunya/Codis-legislacio/codi-civil-de-catalunya-i-legislacio-complementaria/>. See particularly Art 226-1 to 226-8 which underwent substantial amendments through Decree-Act 19/2021, of 31 August, which adapts the Civil Code of Catalonia to the reform of the procedure for judicial modification of capacity (*Diari Oficial de la Generalitat de Catalunya* no. 8493, 02.09.2021). A bill on measures to support the exercise of legal capacity was presented on April 2023 and is going to enter the Catalan Parliament by the end of 2023.

⁴ Art 34 to 45 and 100 to 159 *Foral Code of Aragon* [hereafter CDFa], consolidated text approved by Legislative-Decree 11/2011, of 22 March (*Boletín Oficial de Aragón* no. 67, 29.03.2011).

⁵ Navarre had some provisions on lasting powers of attorney (see *Ley 49 Fuero Nuevo de Navarra* [hereafter FNN] as updated and consolidated by *Foral Act 21/2019*, of 4 April), but this regulation has been recently supplemented by *Foral Act 31/2022*, of 28 November, on care for people with disabilities in Navarre and guarantee of their rights. In addition to adapting the regional legislation to the new terminology and procedures set out by Act 8/2021, this Act includes some provisions on measures of support the exercise of legal capacity.

⁶ Galicia included a section on self-guardianship (Art 42 to 45 Act 2/2006, of 14 June, on Civil Law of Galicia) but the Constitutional Court annulled it by judgment no. 133/2017, of 16 November.

⁷ Art 16 CC.

law⁸, the regulation of civil⁹, commercial and land law registries, and the rules on notarial deeds¹⁰ are centralised. A national basic health law lists patients' rights (including the right to grant advance directives).¹¹

After the reforms introduced by Act 8/2021, the CC no longer refers to *protection* measures for allegedly vulnerable adults. Instead, it sets up measures to *support the exercise of legal capacity*, allowing persons with disabilities to act on an equal basis with others. According to Article 249 II CC, the function of the support measures consists of assisting in the exercise of the legal capacity in the areas in which it is necessary, respecting the person's will, wishes and preferences. By so doing, Spanish legislation intends to comply with Article 12 UNCRPD.

The concerned persons may use voluntary measures to appoint someone to provide the support needed to exercise their legal capacity and set the scope of this support.¹² Voluntary support measures have priority over other instruments.¹³

There are two types of voluntary measures: (a) support agreements¹⁴ which aim to provide support already needed by the person, and (b) *poderes o mandatos preventivos* (continuing powers of attorney [hereafter **CPA**])¹⁵, whereby the granter gives powers to a representative in contemplation of the *future* event of their need for support. Both instruments have to be formalised in a notarial deed, which involves the explicit consent of the person concerned.

Article 250 I CC lists *other measures* legally available:

- a) *Guarda de hecho* (which could be roughly translated as 'de facto custody') points to informal or non-formalised support typically provided by relatives, family members, or non-professional carers.¹⁶ If support is provided *de facto* by a person, courts are prevented from appointing others to provide support

⁸ Civil Procedure Act 1/2000, of 7 January [hereafter **LEC**]. Updated version available online (in Spanish only) at <https://www.boe.es/eli/es/l/2000/01/07/1/con>.

⁹ Civil Registry Act 20/2011, of 21 July [hereafter **LRC**]. Updated version available online (in Spanish only) at <https://www.boe.es/eli/es/l/2011/07/21/20/con>.

¹⁰ See Art 16 ff Notary Act 1862 and its regulation, approved by decree 2 June 1944.

¹¹ Art 11 Basic Act 41/2002, of 14 November, concerning the autonomy of the patient and the rights and duties vis-a-vis clinical information and documentation (BOE no. 274, 15.11.2002) [hereafter **LBAPIC**]. Updated version available online (in Spanish only) at <https://www.boe.es/eli/es/l/2002/11/14/41/con>.

¹² Art 250 II CC.

¹³ Art 249 I CC.

¹⁴ Art 255 I CC.

¹⁵ Art 256 to 262 CC.

¹⁶ See also Art 263 to 267 CC.

or from issuing supplementary orders, unless there is evidence that their assistance is insufficient or improper. The adult may at any time end such support and ask for a judicial measure, or enter into a support agreement.

b) *Judicial measures*. There are two types:

1. *Curatela*¹⁷ is a measure reserved for continuous support, even if its scope may differ greatly from one person to another depending on their situation and needs, and
2. *Defensa judicial*¹⁸ is a measure available when assistance is only needed sporadically, even if the same necessity may arise from time to time.

These measures cannot be ordered *ex officio*. They result from a procedure filed by the person in need of support or by one of the relatives named by the law (i.e., non-separated spouse or cohabitant, parent(s), children, siblings). The public prosecutor¹⁹ can also do it.

Emergency support measures. When a person is in a situation that urgently requires support for the exercise of their legal capacity and lacks informal support, the support will be provided provisionally by the public body entrusted with the protection of adults in the region.²⁰

A particular type of judicial measure, which may be adopted independently from any other procedure, is the deprivation of liberty on the grounds of mental disorder (*internamiento involuntario por razón de trastorno psíquico*). Article 763 LEC demands judicial permission before committing a person in an institution. However, committals without judicial order are possible in emergency cases. The judge must be informed within 24 hours by the head of the institution where the person is placed. Emergency measures must be confirmed or annulled within 72 hours.

Specific rules apply to the decision-making process concerning health matters and have been left untouched by the 2021 reforms. Article 9 LBAPIC authorises an ‘informed consent by representative’ for *incompetent* patients. The relevant information on medical treatments and procedures will be offered to the legal representative or a close person linked to the patient ‘by family or *de facto* bonds.’ Yet the patient must be allowed to *participate* in decision-making according to their

¹⁷ Art 250 V CC.

¹⁸ Art 250 VI CC.

¹⁹ See Art 42 bis a), 3 Act 15/2015, of 2 July, on voluntary jurisdiction [hereafter **LJV**]. Updated version available online (in Spanish only) at <https://www.boe.es/eli/es/l/2015/07/02/15/con>.

²⁰ Art 253 CC.

capacity.²¹ Article 11 LBAPIC also introduced advance directives (*instrucciones previas*) as the document made by ‘competent and free’ persons of legal age, in which they state their will concerning care and health treatments that might be needed at a time when they are in a condition preventing them from stating their will. The granter of the document can also designate a representative in charge of ensuring compliance with their will.

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

Support measures (*medidas de apoyo*) - Voluntary or state-ordered measures used to provide adults with the support they need to exercise their legal capacity; the measures may involve assistance to act legally and, in non-voluntary measures only as a last resort, representative powers to act on behalf of the adult.

Curatela - a court-ordered measure reserved for instances where permanent and continuous support is needed.

Curador - a person that is judicially appointed to provide support

Continuing powers of attorney (*Poderes/mandatos preventivos*) - Mandate given by an adult with the purpose that it shall either be effective immediately or enter into force in the future and shall remain in force in the event the granter needs support.

Defensa judicial - judicially-ordered support measure available when assistance is only needed sporadically.

Advance directives (*instrucciones previas*) - instructions given or wishes made by a competent adult concerning medical treatments and other related matters that may arise in the event of their incapacity [hereafter abbreviated as **AD**].

Attorney (*apoderado*) - representative/support person appointed by the adult through a CPA.

²¹ See Art 9.7 LBAPIC as amended by Act 26/2015, of 28 July.

Granter (*poderdante*) - an adult giving the CPA.

Guarda de hecho - non-formalised support where the support person (*guardador de hecho*) is granted authority by law to assist the adult and to act on their behalf in certain cases, some of them only after seeking judicial permission.

Voluntary measures (*medidas voluntarias*) - Formal support measures established by the adult without external compulsion and through notarial deed in order to obtain assistance or representation to exercise legal capacity.

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.

As of June 2021, almost 9.5 million people aged 65 years or older were living in Spain.²² That is 19.77% of the population.²³ The ageing index is 129.11%. In 1998, both magnitudes were 15.97% and 95.98%, respectively. The share of older people that may need protection and support measures and the number of those subject to such measures is unknown. Regarding the prevalence of disability, comprehensive data published in 2007 pointed to almost 4 million, roughly 9% of the population at the time.²⁴ Of these, 19% suffered from learning disabilities, intellectual disability, dementia, and mental health disorders (around 800,000).²⁵ A new wave of data presented in 2022 shows that the number would have increased by 18 points in 15 years, up to 4.38 million. The new survey focused on the difficulties people face in their daily lives. Data show that around 2.2 million suffer difficulties in communication, learning, or interaction with other people.²⁶

²² INE Base, Demografía y población. Principales series desde 1971 Población residente por fecha, sexo y edad.

²³ INE Base, Demografía y población Indicadores de Estructura de la Población, Proporción de personas mayores de cierta edad.

²⁴ INE, Encuesta sobre Discapacidad, Autonomía personal y situaciones de Dependencia 2008.

²⁵ The prevalence of disability in Spain would be higher according to EHSIS: more than 6.5 million people in 2011. 2 million suffer severe disabilities and/or need assistance. EUROSTAT, Prevalence of disability (Source: EHSIS). By type of longstanding health problem, 42,407 suffer learning disabilities, 385,516 chronic depression and 263,726 other mental, nervous or emotional problems. EUROSTAT, Prevalence of disability (Source: LFS) <https://ec.europa.eu/eurostat/data/database>.

²⁶ Relevant diagnosis recorded are schizofrenia (94,100 [2.1%]), bipolar disorder (107,400 [2.49%]), Chronic depression (826,900 [9.15%]), Autism (83,800 [1.9%]), Parkinson disease (137,700 [3.99%]), Alzheimer disease (239,600 [5.5%]), Brain damage (435,000 [10%]), Down syndrome (32,000 [0.79%]). INE Base. Encuesta de discapacidad, autonomía personal y situaciones de dependencia (EDAD 2020). Tabla Discapacidad. Enfermedades crónicas diagnosticadas por sexo y edad. Población de 6 y más años con discapacidad.

According to the General Act on the rights of persons with disabilities and their social inclusion²⁷, disability can be certified officially. The legal threshold is set at a certified disability amounting to 33% of impairment or above (Art 4.2).²⁸ As of 31 December 2019, 3,257,058 persons had their disability certified. Intellectual disabilities and mental health disorders involve more than 800,000 persons (25.5%); almost three-quarters of them have a certified degree of disability amounting to a 45% or higher.²⁹

Another source of information about disabilities and vulnerabilities are the assessments made by the administration to grant allowances in case of dependency due to disability or older age. The criteria for assessing dependency are not exactly the same as for disability, and some individuals have only been assessed in one track. Some 630,133 persons have been assessed and recognised as both disabled and dependent.³⁰

Detailed data. Empirical information about the operation of the legal framework of protection and support in Spain is almost non-existent. In particular, there is no single source from which data about existing or new support measures can be extracted. Judicial statistics are flawed because they only show the number of procedures concerning capacity issues handled each year.³¹ By 2019, the number of procedures on legal capacity amounted to 27,934. The petitions filed by the public prosecutor were 16,970 whereas those filed by family members were

²⁷ Consolidated text approved by RD-Leg 1/2013, 29.11.2013 (BOE no. 289, 03.12.2013). It defines *disability* as the ‘situation that results from the interaction between persons with predictably permanent deficiencies and any type of barriers that limit or prevent their full and effective participation in society, on equal terms with others’. It also states that persons with disabilities are those ‘with physical, mental, intellectual or sensory deficiencies, predictably permanent, which, by interacting with various barriers, may prevent their full and effective participation in society, on equal terms with others’ (Art 4.1).

²⁸ Royal Decree 1971/1999, 23.12.1999, on the procedure for the recognition, declaration and qualification of the degree of disability. A degree of disability between 50 and 74% is deemed to be severe disability. This legal framework has been updated recently. See Royal Decree 888/2022, of 18 October, establishing the procedure for the recognition, declaration and qualification of the degree of disability.

²⁹ IMSERSO, Base Estatal de Datos de Personas con Valoración del Grado de Discapacidad. Año 2019 (Report released on 7.7.2021), at pp 19-22.

³⁰ See Observatorio Estatal de la Discapacidad Informe Olivenza 2019, sobre la situación general de la discapacidad en España (available at www.observatoriodeladiscapacidad.info) p 143 table 45. According to EDAD 2020, 979,100 out of 4,318,000 persons with disability would have been recognised as entitled to dependency services and allowances.

³¹ These data only show that there has been a huge increase in capacity procedures between 2014 and 2017. In 2014 the procedures initiated was around 54,500 and three years later they were 65,500, an increase of 17%. However, by 2021, at the eve of the reform, the number of procedures on legal capacity and support measures amounted to 25,731. The explanation could be found in the decision of the public prosecutor to limit the applications for incapacitation as a result of the influence of CRPD principles (see in this sense *Memoria Fiscalía General del Estado 2021*, p. 1095).

11,745. The number of judgments modifying legal capacity was that year 24,101, and only 260 actions were dismissed. Petitions for rehabilitation of legal capacity were only 297. Particular procedures involving guardianship or trusteeship amounted to almost 40,000 files, apart from rendering of accounts (21,583 applications). Forced detention involved more than 65,000 procedures. Another limited source of information is provided by regional adult protection services concerning persons placed under public guardianship or other similar measures.³² In addition, reports issued by NGOs involved in supported decision-making allow the identification of some trends.

As regards CPA, public data have only existed since 2007.³³ They reveal a huge increase in the last ten years. Still, figures are hardly reliable because most CPAs are granted with immediate effect, and this type of information is not included separately in the notarial database.

After the new system entered into force in September 2021, the number of applications for court-ordered support measures by the public prosecutor diminished a 33.74%, whereas the number of applications filed by family members was stable around 12,000 per year.³⁴ The review of measures ordered under the old system is taking an apparently low pace across the country.

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.

CRPD. Spain signed the CRPD on 3 December 2007. The instrument of ratification³⁵ and the Optional Protocol³⁶ have been in force since 3 May 2008. Following the adoption of the CRPD, several special statutes were enacted regarding the social and economic rights of persons with disabilities.³⁷ Concerning the right to legal capacity, however, the legal reforms to comply with Article 12 CRPD only took off at the end of 2018, when the government presented a comprehensive bill

³² Information available for Catalonia shows for instance that, in 2020, 8,708 judicial orders were in force that had appointed a legal person as guardian or legally responsible person for an incapacitated adult. Ten years earlier, this number was 4,250. An average of 500 new cases were activated every year until 2021.

³³ In 2022 17,341 CPA were granted, whereas in 2013 the figure was 2581. Data available at <http://www.notariado.org/liferay/web/cien/estadisticas-al-completo> (Last accessed: 27.6.2023).

³⁴ *Memoria Fiscalía General del Estado 2022*, p. 886.

³⁵ BOE no. 96, 21.04.2008.

³⁶ BOE no. 97, 22.04.2008.

³⁷ Currently consolidated in the General Act on the rights of persons with disabilities and their social inclusion, approved by Royal Legislative Decree 1/2013, of November 29 (BOE no. 289, 03.12.2013).

prepared by the General Commission of Codification to abolish incapacitation and adult guardianship as recommended by the Committee on the Rights of Persons with Disabilities.³⁸ The bill was eventually passed with substantial amendments as Act 8/2021 of 2 June. The reform entered into force on 3 September 2021.

The Hague Convention of 13 January 2000 on the International Protection of Adults. Spain has not yet adopted the Hague Convention. Many scholars have called for its adoption, but few advances have been made. The internal system of international private law has nonetheless been amended to account for it. For instance, Art 22 *quater* Organic Act on Judicial Power uses ‘habitual residence’ in Spain as the main criterion to grant jurisdiction to Spanish courts for adopting measures of protection.³⁹ The applicable law is also the law of the State of the adult’s habitual residence.⁴⁰ However, Spanish law must be applied to adopt provisional or emergency protective measures.

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

The original wording of the Spanish Civil Code 1889 on adult protection law was in line with centuries-old rules based on Roman law and the deprivation of legal agency to those considered mentally insane. The regulatory framework was based on their inability to act and paved the way to permitting their detention in psychiatric institutions without due process of law.⁴¹

After the constitution of 1978 came into force, the adult protection law was substantially reformed to protect the interests of people suffering from impairments that prevented them from managing their personal and economic interests.⁴² The reform was based on the judicial procedure of incapacitation. Under Article 200 CC (as of 1983), the only grounds to incapacitate a person were the ‘permanent physical or psychic diseases or impairments that prevent a person from making his or her own decisions.’ Article 760.1 LEC also demanded that any decision on incapacitation lay down its scope and the limits it stipulated on the person’s legal capacity. It pointed thereby to the principles of legality, necessity, and pro-

³⁸ § 34 Concluding observations on the first report submitted by Spain under article 35 of the Convention (CRPD/C/ESP/CO/1) (19.10.2011).

³⁹ Art 5(1) Hague Convention.

⁴⁰ Art 9.6 II Civil Code (as amended by Act 8/2021).

⁴¹ R. BERCOVITZ provided a vivid account of injustices in his remarkable book *La marginación de los locos y el Derecho*, Taurus, Madrid 1976. See also F. DE CASTRO, *Derecho civil de España*, vol. II-1, Instituto de estudios políticos, Madrid 1952 (new ed. Civitas, Madrid 1984).

⁴² Act 13/1983, of 24 October, on the reform of the Civil Code in matters of guardianship (BOE no. 256, 26.10.1983).

proportionality. Furthermore, the Supreme Court stressed the principle of subsidiarity, holding that there was no need to incapacitate persons with mental health problems or intellectual disability who, with the informal support of the family or close persons or following medical treatment, could take care of their interests.⁴³ In practice, however, most people with impaired decision-making capacity were deprived of their legal autonomy outright.

Once incapacitated, the individual was subject to the decision-making power of the guardian. The guardian was supervised by the public prosecutor and accountable to the judge. In addition, Article 201 CC stated that the parents of a minor child could ask to extend their legal powers of representation and support once the child reached the age of legal majority (*patria potestad prorrogada*, Art. 171 CC). The legal capacity of the incapacitated persons was modified and restricted to the extent of their impairments to make decisions. They could not give effective consent to most legal acts, which were voidable if they acted alone.⁴⁴

After the entry into force of the CRPD, it was suggested that it automatically entailed the repeal of incapacitation. Such a view was, however, categorically rejected by the Civil Chamber of the Supreme Court. In a judgment issued on 29 April 2009 it said:

‘[The] Civil Code would not be contrary to the values of the Convention because the adoption of specific measures for this group of people is justified, given the need for protection of these persons on the grounds of their lack of understanding and will.’

The Court believed that the existing protection measures complied with the CRPD so long as they were effectively tailored to the incapacitated person’s needs and impairments. Case law prompted thus lower courts to give priority to the most flexible measure already available in the adult protection system. Instead of guardianship (*tutela*), courts used trusteeship (*curatela*) more frequently. They reframed it as a supported decision-making tool allegedly CRPD-compliant. Courts also adapted their approach to individual cases⁴⁵ and the judgments’ language, focusing on personal issues such as the right to vote or to marry and trying to strike a fair balance between autonomy and protection regarding financial issues.

For many reasons, most of the adults that could be protected using incapacitation were not incapacitated. As a result, the persons helping them –normally their parents or children- supervised their daily activities and acted on their behalf when

⁴³ *Tribunal Supremo* 17.10.2008.

⁴⁴ See Art 1263.2 CC on legal capacity to enter into contractual agreements.

⁴⁵ See *Tribunal Supremo* 20 October 2015.

needed (*guarda de hecho*). According to Art 304 CC (repealed), a legal act they entered into in their name could not be declared null if it was useful for the vulnerable person. If requested by the judge, these persons had the legal duty to provide information to the court about the situation of the vulnerable person and the state of their assets.⁴⁶ In 2015, the CC was amended to allow the judges to formally grant these *guardadores de hecho* additional powers of representation, such as those of a guardian.

Previously, Act 41/2003 of 18 November⁴⁷ had brought in several provisions to increase private autonomy and the availability of non-judicial protection and support measures for adults with disabilities or who could be subject to incapacitation procedures. Firstly, it created the so-called ‘protected assets’ (*patrimonio protegido*), which consist of funds or assets kept apart from other assets of a person with a disability and whose transfer benefits from tax exemptions and a special legal regime of management aimed at ensuring that needs of that person are covered in the future. In addition, Act 41/2003 also amended the Civil Code to permit an adult to decide who will be appointed as guardian if incapacitated (*autotutela*; Art 223 Civil Code). Act 41/2003 also provided a minimal legal framework for CPA.

The final milestone has been the passing of Act 8/2021. The presentation of the initial draft bill triggered a reaction from hundreds of social agents, individuals, and institutions, who sent comments to public consultation. The bill also resulted in observations from different consultative bodies. Among them, the judiciary council voiced the harshest critique pointing to the lack of financial and human resources to execute the reform as it was planned. In the Parliament, hundreds of proposals for its amendment were filed. After intense negotiation between the majority and the other political parties in both Chambers, the Act was eventually passed with a large majority of votes.⁴⁸

- 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.**

⁴⁶ Art 303 CC (repealed).

⁴⁷ *BOE* no. 277, 19.11.2003.

⁴⁸ The only group that opposed the text was the extreme-right group *Vox*.

Since Spain has recently substantially reformed its legal framework on adult support and protection, discussions currently focus on implementing the new system.⁴⁹

At any rate, particularly after the ratification of the CRPD, many voices requested a reform of substantive and procedural laws on adult protection measures. The leading voice was the *Comité Español de Representantes de Personas con Discapacidad* (CERMI).⁵⁰ Other organisations for persons with disability and their families, as well as providers of guardianship and support services, lobbied to have the laws changed.⁵¹ They were encouraged by the CRPD Committee when in 2011, it required the following:

*“The State party reviews the laws allowing for guardianship and trusteeship, and takes action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will, and preferences.”*⁵²

At a political level, the consensus seemed easy. On two occasions, the Spanish Parliament set a deadline for the government asking it to present a bill on this issue. Yet successive deadlines expired, and no project or draft bill saw the light of day for more than ten years.

Academics were split among those aligned with the views finally held by the CRPD Committee in GC no. 1 and those who shared a more nuanced view of the challenges the CRPD posed to traditional capacity law. The former produced philosophical work around the need to enshrine universal legal capacity in the codes

⁴⁹ See Questions 31, 49 and 61.

⁵⁰ Pursuant to Article 33.2 CRPD, the Royal Decree 1276/2011, of 16 September, officially designated CERMI as the independent mechanism for monitoring the application of CRPD in Spain. See CERMI Estatal, *Derechos humanos y discapacidad. Informe España 2009* (27.5.2010) (including a *Propuesta de esquema básico del CERMI para instaurar un nuevo procedimiento de provisión de apoyos para la toma de decisiones de acuerdo con la Convención Internacional sobre los Derechos de las Personas con Discapacidad* [see pp. 66-70]).

⁵¹ See more references in M. PEREÑA VICENTE, ‘La Convención de Naciones Unidas sobre los derechos de las personas con discapacidad. ¿El inicio del fin de la incapacitación?’ (2011) 4 *La Ley* 1423-1424.

⁵² § 34 Concluding observations on the report submitted by Spain under Art 35 UNCRPD (CRPD/C/ESP/CO/1) (19.11.2011).

and against procedures depriving people of their legal capacity based on disability.⁵³ CSOs took the same approach in non-official proposals of law reform.⁵⁴ The second position was represented by academics who followed the approach taken by the Supreme Court, pointing out that limitation of legal capacity and substitutive decision-making were reasonable means of protecting people with cognitive and psychosocial disabilities.⁵⁵ A proposal for a new Civil Code by the Association of Civil Law Professors also relied on the automatic restriction of legal capacity by court-ordered measures.⁵⁶

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

The reforms introduced in September 2021 were received unevenly.

As mentioned, the Spanish Parliament stood almost unanimously when approving the reforms.⁵⁷ CSOs representing persons with disability and their families expressed their support for the reform. Non-profit organisations that provide guardianship services also endorsed the change, even if they expressed concerns about applying the law, the lack of proper funding for their services, and the extent to which they need to adapt their current practices.⁵⁸

Legal practice and academia appear divided. Although the reforms' principles and goals are widely shared, applying the new rules raises criticisms. Courts feel

⁵³ See INSTITUTO DE DERECHOS HUMANOS BARTOLOMÉ DE LAS CASAS DE LA UNIVERSIDAD CARLOS III DE MADRID, *El impacto de la Convención internacional sobre los derechos de las personas con discapacidad en el ordenamiento jurídico español* (2009) pp. 16-8 (available at http://www.tiempodelosderechos.es/docs/informe_huri-age1.pdf). The Spanish Bioethics Committee took a similar approach: *Informe del Comité de Bioética de España sobre la necesidad de adaptar la legislación española a la Convención de Derechos de las Personas con Discapacidad*, 20.12.2017 at pp. 20-23.

⁵⁴ SUBCOMISIÓN DE EXPERTOS SOBRE EL PROCEDIMIENTO DE MODIFICACIÓN DE LA CAPACIDAD DE OBRAR DEL REAL PATRONATO SOBRE DISCAPACIDAD, *Propuesta articulada de reforma del Código Civil y de la Ley de Enjuiciamiento Civil para su adecuación al artículo 12 de la Convención Internacional de los Derechos de las Personas con Discapacidad* (13.06.2012).

⁵⁵ C. AMUNÁTEGUI RODRÍGUEZ, '¿Crisis de la incapacitación? La autonomía de la voluntad como posible alternativa para la protección de los mayores' (2006) 90 *Revista de Derecho Privado* 9-68 and G. GARCÍA CANTERO '¿Incapacitación vs. Persons with disability... o viceversa?' (2014) 88 *Revista jurídica del notariado*, 743-819. See also C. MARTÍNEZ DE AGUIRRE Y ALDAZ, *El tratamiento jurídico de la discapacidad psíquica: reflexiones para una reforma legal* (Thomson Reuters Aranzadi: Cizur Menor 2014).

⁵⁶ Art 172-1.3 *Propuesta de Código Civil* (Tecnos, Madrid 2018) p. 286.

⁵⁷ Simultaneously, the Catalan Government and Parliament approved emergency legislative measures to adapt Catalan substantive laws to the new procedural framework introduced by Act 8/2021.

⁵⁸ For instance, see press notes issued by LIBER (<https://fundacionestutelares.org/espana-asume-desde-manana-la-mayor-reforma-legal-de-su-historia-relacionada-con-las-personas-con-discapacidad/>) and PLENA INCLUSIÓN ESPAÑA (<https://www.plenainclusion.org/noticias/entra-el-vigor-la-mayor-reforma-legal-sobre-discapacidad/>).

overwhelmed with the prospect of reviewing thousands of old incapacitation and guardianship orders. Legal practitioners express their doubts about the actual scope of the reform and how to handle new cases.⁵⁹ In addition, academics focus on the many deficiencies of a reform involving more than 300 articles from different statutes. The old divisions of opposing views remain under new forms. Those who were reluctant to the change now complain of the inconsistencies of the reform and warn about the risks of prioritising the will and preferences of the person concerned.⁶⁰ Those who supported the reforms now cheer the legislators' steps but regret missed opportunities due to the compromises made during the drafting process.⁶¹

Time will tell whether the reform changed much of the practical issues of the persons concerned. The first accounts point to the possibility of a mere nominal change. In addition, the Supreme Court's initial statements about the new legislation's principles watered down the expectations of the new law's emancipatory effects, particularly concerning persons with psychosocial disability and mental health disorders.

SECTION II – LIMITATIONS OF LEGAL CAPACITY

8. Does your system allow limitation of the legal capacity of an adult?

After the 2021 reform, the limitation of legal capacity as such is not legally possible. On whether applying an adult protection measure may automatically result in deprivation or limitation of legal capacity, see Question No. 14 below.

[...]

⁵⁹ In spite of individual voices being very critical, legal institutions have backed the reforms by producing good practices documents and guidelines. For instance, see *Guía Jurídica sobre la gran reforma de la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica*, prepared by the General Notary Council and the Foundation Aequitas with the support of CERMI and Fundación ONCE (available at <https://fundacionestutelares.org/recursos/el-impacto-de-la-reforma-del-derecho-civil/>).

⁶⁰ C. MARTÍNEZ DE AGUIRRE Y ALDAZ, 'La observación general primera del Comité de Derechos de las Personas con Discapacidad: ¿interpretar o corregir?' in G. CERDEIRA BRAVO DE MANSILLA, L.B. PÉREZ GALLARDO (dirs.), M. GARCÍA MAYO (coord.), *Un nuevo Derecho para las personas con discapacidad*, Ediciones Olejnik, Santiago de Chile 2021 pp. 85-112. See also, among others C. ROGEL VIDE, '¿Capacidad de los discapaces?: Notas en torno al proyecto de ley 121/27' (2021) 1 *Revista general de legislación y jurisprudencia* 7-19 and T. RUBIO GARRIDO, 'La Ley 8/2021, de 2 de junio, sobre personas con discapacidad: ¿un ejemplo de buenismo y adanismo legislativos?' (2022) 3 *InDret* [available at www.indret.com].

⁶¹ M.P. GARCÍA RUBIO, 'La reforma de la discapacidad en el Código Civil. Su incidencia en las personas de edad avanzada', *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 25, 2021, p. 81-109.

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

Mental capacity, defined as a person's de facto decision-making and decision-communication skills, is a general requirement for the validity of any legal act.⁶² Once the 2021 reforms abolished incapacity, any person of legal age, even if they suffer from an intellectual or developmental disability, dementia, mental disorders, or any other impairment that permanently or occasionally affects their mental capacity, shall be treated as any other person without a disability. Accordingly, the act cannot be validly concluded if a person lacks mental capacity. It will be null and void for lack of valid consent.⁶³ If the legal act has to be concluded under a notarial seal, the notary must verify that the person concerned has the decision-making skills in conformity with the act's complexity and consequences.⁶⁴

The ability to consent is not excluded from the outset on the grounds of a judicial order of incapacitation but must be assessed *in casu*. Since all adults of age are deemed legally capable, anyone interested in arguing that a person lacked the required decision-making skills to give valid consent for a specific legal act bears the burden of proving so.

The relevance of *mental* capacity differs depending on the issues at stake. Several provisions of the CC are still based on the requirement of 'legal capacity to act.' However, given the general principle of universal legal capacity, this condition has lost meaning. Other provisions of the CC have shifted the focus from the limitation of legal capacity to whether support measures are in place. Several provisions rely on assessing mental capacity *in casu* to declare the validity of a legal act, irrespective of whether support measures are in place.

a) **Property and financial matters**

The main rule concerns the *contractual capacity* of vulnerable adults. The original wording of Article 1263 II CC stated that 'crazy or insane, as well as the deaf and dumb who do not know how to write,' could not give valid consent. Since 1996, however, this provision has applied only to judicially '*incapacitated persons*.' Irrespective of their actual mental capacity, incapacitated persons could not make fully valid contracts. The 2021 reforms eliminated this statement because incapacitation was no longer available. However, Article 1302.3 CC stipulates that

⁶² For contracts, Article 1261.1 CC states that 'there is no contract except when the consent of the contracting parties concurs'. This rule can certainly be extended in general to all voluntary acts and legal transactions.

⁶³ Art 1261.1 CC.

⁶⁴ Art 17bis 2.a) Notarial Act and 141 I Notarial Regulations.

a contract can be annulled if a person with a disability concludes it without using support measures. The reform has triggered different interpretations. For some authors, it is irrelevant whether the person had the mental capacity to agree to the contract; if they made it without the intervention of the support person, the contract should be void.⁶⁵ Other authors contend that the support measures must have been required in the case at issue.⁶⁶ If the person concerned had enough mental capacity to enter into the contract, it should be valid, even if they did not use the support in place.

b) Personal and family matters

The reform of 2021 amended some provisions of the CC concerning nationality and regionality, marital contracts, and acknowledgement of fatherhood.

Regarding nationality, support measures (such as a curatela) impede the person acting alone to ask for Spanish nationality, regardless of their actual mental capacity, when filing the petition.⁶⁷ Oddly enough, the regulation for regionality differs because here, the person providing the support needs to intervene only when the person concerned cannot act alone.⁶⁸

The legal capacity to consent to marry has never been linked to legal capacity but to the natural ability to consent. Marriage was, therefore, open to incapacitated people. Yet they had to provide medical evidence of competence to give valid consent to marry. Such a requirement was deemed discriminatory for persons with a disability, and legal reforms undertaken in 2015 and 2017 amended the CC to replace the requirement of medical evidence of competence with the provision of support.⁶⁹ Concerning marital contracts, the 2021 reform repealed the provision

⁶⁵ See S. DE SALAS MURILLO, 'La reforma de la legislación civil para el apoyo a las personas con discapacidad en materia de obligaciones y contratos', *Diario La Ley*, 9841 (2021), and more references therein. Other requirements must be met, concerning the other party to the contract: that he or she knew about the existence of the support measures or that he or she unduly gained an unfair advantage from the situation of disability of the other party (see Art 1302.3 II and 1304 CC). See also Art 1163 CC concerning payments made to a person with disability without the intervention of the support person.

⁶⁶ They argue on the basis of the wording of Art 1301.4 CC ('*cuando fueran precisas*'). See R. TENA ARREGUI, 'El régimen de ineficacia de los contratos celebrados sin apoyo por las personas con discapacidad' (2022) 101 *El notario del siglo XXI: Revista del Colegio Notarial de Madrid* 40-46. See also Art 1304, 1314 III and 1765 CC.

⁶⁷ See Art 20.2 e) CC. M.E. TORRES COSTAS, 'Artículo 20.2' in M.P. GARCÍA RUBIO/M.J. MORO ALMARAZ (Coord), *Comentario articulado a la reforma civil y procesal en materia de discapacidad*, Thomson Reuters-Civitas, Madrid 2022, p. 102.

⁶⁸ See Art 15.1 II CC.

⁶⁹ As an exception, the need of the medical evidence remains if 'the health condition of the party may obviously, categorically and substantially impair, him or her, from giving consent to marry' (Art 56 II CC).

that stated that incapacitated persons needed the assistance of their parents or guardians to conclude them. Currently, these contracts are subject to the general contract rules.⁷⁰

Regarding acknowledgement of fatherhood, the reform seems to have introduced internally inconsistent rules. If a vulnerable adult wants to acknowledge a child, the terms of the decision ordering the support are decisive and need to be supplemented in case of silence.⁷¹ Concerning acknowledging a vulnerable adult as a child, the adult shall consent alone or with support if needed.⁷² However, they cannot challenge their father's paternity while support measures are in force.⁷³

c) Care and medical matters

Article 3 LBAPIC sets the principles applicable to medical matters: 'The dignity of the human person, the respect for their autonomy and privacy shall guide all the activities aimed at obtaining, using, archiving, safeguarding and transmitting clinical information and documentation.' Concerning vulnerable patients, Art 5.3 LBAPIC states that 'when the patient, according to the physician's judgement, cannot understand the information because of their physical or mental state, the information shall be made available to close persons related to him or her by family or *de facto* bonds.' As regards the right to give informed consent, Art 9.3 LBAPIC also allows the 'consent by representation,' which is given by the same persons, in two types of settings: (a) incompetent adults and (b) patients whose legal capacity was judicially modified, and for whom the court authorised the consent by representation. In both cases, the Act demands that 'consent by representation be appropriate to the circumstances and proportionate to the needs that must be met, always in favour of the patient and respecting their dignity. The patient shall participate as far as possible in decision-making throughout the health process. If the patient is a person with a disability, adequate support measures are to be offered, including accessible and understandable information based on the principle of universal design, to favour that people with disabilities can consent by themselves'.⁷⁴

⁷⁰ C. GUILARTE MARTÍN-CALERO, 'Comentario del artículo 1330' in C. GUILARTE MARTÍN-CALERO (ed), *Comentarios a la Ley 8/2021 por la que se reforma la legislación civil y procesal en materia de discapacidad*, Aranzadi, Cizur Menor 2021 [hereafter *Com Ley 8/2021 Guilarte*] pp. 1027-30.

⁷¹ Art 121 II CC.

⁷² Art 123 II CC.

⁷³ Art 137.1 II CC.

⁷⁴ Concerning advance directives, Art 11 LBAPIC requires that the granter is 'a person of age, capable and free', pointing to medical competence instead of legal (in)capacity. However, in practice people with intellectual disabilities or mental impairments have been excluded from the possibility to grant advance directives.

The general rules on medical information and informed consent of the LBAPIC apply as default rules for other specific medical settings such as medical research projects, organ extraction, organ transplantation, and assisted human reproduction techniques.⁷⁵ However, Act 14/2007, of 3 July, on biomedical research points to several restrictions to give ‘consent by representation’ to involve ‘incapacitated’ adults in biomedical research or clinical essays.⁷⁶ Concerning extracting organs of living persons, the specific regulation does not allow ‘consent by representation.’ It requires that a donor is a person of age ‘with full mental capacities.’⁷⁷ Extractions from persons suffering mental health problems or any other condition that ‘prevents them from granting informed consent’ are forbidden. Finally, Act 14/2006, of 26 May, on human reproduction techniques, requires the fully informed consent of the woman before using the techniques (Art 3) but also that she is not ‘incapacitated’ (Art 6.1). Act 14/2006 does not allow ‘consent by representation’ either. Concerning the donation of reproductive material, Art 5.6 Act 14/2006 demands that donors are older than 18 years and ‘in good psychophysical health and with full legal capacity.’

d) Donations and wills

According to Article 624 CC, the ability to donate depends on having the contractual capacity and the free disposal of one’s assets. Regarding acquisitions through donation, Article 626 CC implies that a person who cannot contract may nonetheless accept *pure* donations regardless of any restriction in their legal capacity.

Article 663 CC denies testamentary capacity (*testamentifacio*) to minors below fourteen years of age and adults who, when making the will, cannot produce or communicate their will, even with any available support. To assess the testator’s capacity, their state of mind is to be considered when granting the will.⁷⁸ Specific rules for the wills of vulnerable persons provide that they may make a will when, to the notary’s judgement, they can understand the consequences of their acts of disposition and communicate their will. Notaries shall ensure that the testators develop their decision-making process by supporting them in their understanding and reasoning and affording the adaptations needed to communicate their will.⁷⁹

e) Civil proceedings and administrative matters

⁷⁵ See Additional Provision no. 2 LBAPIC.

⁷⁶ See Art 4.2 and 20 Act 14/2007 (which essentially require that no alternative is available and that the research is going to be directly or indirectly beneficial for the persons involved or other persons of the same age and condition).

⁷⁷ Art 4, b) Act 30/1979, of 27 October.

⁷⁸ Art 666 CC.

⁷⁹ Art 665 CC (as amended by Act 8/2021).

According to Art 7 LEC, ‘any person may appear in court.’⁸⁰ However, the legal ability of vulnerable adults to appear in court depends on whether support measures are in place: ‘The scope and content of the support measures’ will determine their actual procedural capacity. If a person lacks this, the court shall appoint a *defensor judicial* (interim representative) to act on their behalf.⁸¹ At any rate, to ensure that persons with disability participate in equal conditions as others in any legal proceedings in which they may be involved, the Courts must provide the adaptations needed to guarantee that these persons can communicate, understand the procedure and interact with the administration of Courts.⁸²

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

See Questions no. 6 and 7 above.

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:

State-ordered measures under Spanish law are ‘stable support’ (*curatela*) and ‘occasional support’ (*defensa judicial*). In both cases, the measure is ordered by a court. The former is reserved for instances where continuous or structural support is needed.⁸³ The latter applies when support is only needed sporadically, even if the same necessity arises from time to time.⁸⁴

a. can different types of state-ordered measures be applied simultaneously to the same adult?

⁸⁰ Other judiciary orders, such as administrative or labour courts, rely on the criteria set by civil procedure legislation to deal with the right to appear in their special proceedings. See Art 11 Act 36/2011, of 10 October, of the social jurisdiction and 18 Act 29/1998, of 13 July, about administrative jurisdiction.

⁸¹ See Art 8 LEC. The lack of procedural capacity may be ascertained by the court *ex officio* at any time during the proceedings (Art 9 LEC).

⁸² See Art 7 bis 1.2 LEC, introduced by the 2021 reform.

⁸³ Art 250 V CC.

⁸⁴ Art 250 VI CC.

As a general rule, no. However, support through a *defensa judicial* can also be applied when some particular circumstance frustrates the functioning of the support measure in force (e.g., in a conflict of interest between the person concerned and the support person or when this person is temporarily unable to help).

b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;

Yes. If a judicial order is needed, it must be proportionate to the needs of the individuals. Accordingly, appointing a *defensor judicial* shall be enough if they require assistance for a single act only. If assistance is needed permanently, the court shall order the appointment of a *curador*. The statutory provisions do not provide more details about when to apply one measure or the other; it is for the courts to analyse and decide what to apply in each case.

c. does your system provide for interim or ad-hoc state-ordered measures?

Yes. If a person needs support, the court may issue interim orders (*medidas cautelares*) to afford protection to the person concerned or their assets while the steps are taken to set up the corresponding measure of support.⁸⁵ However, these measures are available regarding contentious procedures, not before or during the non-contentious legal proceedings that must be conducted first (see **Question No. 19**).

Permanent support – Curatela

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.

Old Article 200 CC stated that ‘persistent illnesses or deficiencies of a physical or mental nature’ could be grounds to modify or restrict the legal capacity of an adult if the person concerned could not govern their affairs alone. The person concerned could then be placed under guardianship (*tutela*) or curatorship (*curatela*). After the 2021 reform, the above-mentioned legal grounds have been removed from the CC. The new Title XI of the First Book of the CC has been renamed as

⁸⁵ Art 762 LEC.

support measures for persons with disability to exercise their legal capacity. The legal starting point of any support measure, including court-ordered measures, is that a person ‘needs support for the proper exercise of their legal capacity’ to achieve ‘the full development of their personality and their legal development in conditions of equality.’⁸⁶ There is no longer reference to certain types of disability, impairments, or health conditions as grounds for a judicial order.⁸⁷

In practice, however, the orders focus on persons whose health conditions, intellectual disability, or mental health problems place them in serious difficulties handling their affairs alone. For that reason, Article 249 II CC states that support measures shall pursue that the persons ‘can develop their decision-making process by informing them, helping them understand and reason, and facilitating that they can express their preferences.’⁸⁸

Prodigality led to court-ordered measures resulting in limitations on the freedom to dispose of one’s assets.⁸⁹ This measure aimed to protect a person's dependents when spending habits threatened their legal right to maintenance. The 2021 reform removed this specific ground and the corresponding legal procedure from Spanish laws.

18. Which authority is competent to order the measure?

Only courts have the competence to order these measures. The procedure is held before the first instance court of the concerned person’s residence.⁹⁰

19. Who is entitled to apply for the measure?

The 2021 reform introduced changes in procedural law by imposing that any petition must be first filed through a non-contentious procedure (*jurisdicción voluntaria*).⁹¹ If this procedure ends without a result, support measures can also be sought through a contentious procedure. If the concerned person, the public prosecutor or «any person interested in the measures» rejects the provision of judicial

⁸⁶ See new Art 249 I CC.

⁸⁷ M. PEREÑA VICENTE, ‘Una contribución a la interpretación del régimen jurídico de las medidas de apoyo en el ejercicio de la capacidad jurídica consagradas en la ley 8/2021 de 2 de junio’, in M. PEREÑA VICENTE/M.M. HERAS HERNÁNDEZ (dirs), *El ejercicio de la capacidad jurídica por las personas con discapacidad tras la ley 8/2021 de 2 de junio*, Tirant lo blanch, València 2022, p. 172.

⁸⁸ See also M.P. GARCÍA RUBIO/M.E. TORRES GARCÍA, ‘Artículo 249’ in M.P. GARCÍA RUBIO/M.J. MORO ALMARAZ (Coord), *Comentario articulado a la reforma civil y procesal en materia de discapacidad*, Thomson Reuters-Civitas, Madrid 2022, p. 209

⁸⁹ See Art 286.3 CC and 757.5 LEC, both in their wording before the 2021 reforms.

⁹⁰ Art 42 bis a).2 LJV and 756.2 LEC.

⁹¹ See Art 42 bis a) LJV and 756.1 LEC.

support, the court of voluntary jurisdiction shall close the procedure.⁹² The way is then opened to start a contentious procedure. Temporary support measures may be put in place *ex officio*, but they may last only up to twenty days unless a new petition for judicial measures is filed.⁹³ The contentious procedure is to be processed in an adversarial manner following the pattern of the old incapacitation procedure.⁹⁴

The non-contentious procedure can be filed by the public prosecutor, the concerned person, and this person's spouse (not legally or de facto separated), partner, descendants, ascendants, or siblings.⁹⁵ The same persons can file the contentious procedure. However, in this case, the public prosecutor files the petition only when none of the other entitled persons does.⁹⁶

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

The procedure is based on an interview the judge must hold with the adult. The latter must be informed about possible alternatives to any judicial measure (i.e., social or community resources, voluntary support measures). The procedure ends if the adult agrees to any of these alternatives. If no alternative is available, or the person does not accept it, the judge decides which support measure best fits the person's situation. According to Article 268 CC, the judicial support measures shall be proportionate to the person's needs and be aimed at 'maximising their autonomy in exercising legal capacity.' The measure shall also 'take into account, in any case, their will, desires, and preferences.'

The adult's opposition 'to any kind of support' brings the non-contentious procedure to an end and must be closed.⁹⁷ Moreover, the persons entitled to apply for support measures may file a petition through the contentious procedure, regardless of the opposition of the person concerned.

The Spanish Supreme Court examined the consistency of this possibility with the principle of respect to the adult's will and preferences. The case involved a 68-year-old man who kept enormous amounts of garbage in his apartment. Neighbours and the local council complained to the public prosecutor, who asked the

⁹² But see Art 42 bis b) 5 II LJV: Mere opposition to the appointment of a specific person as *curador* does not allow the closing of the non-contentious procedure.

⁹³ See Art 42 bis b) 5 LJV.

⁹⁴ Art 758 ff LEC.

⁹⁵ Art 42 bis a) 3 LJV.

⁹⁶ Art 757.2 LEC.

⁹⁷ Art 42 bis b).5 LJV. However, the mere opposition to the nomination of a certain person as permanent support does not allow closing the non-contentious procedure.

court for an order for the coercive appointment of a guardian. The guardian could have the apartment cleaned and the person medically treated for his Diogenes syndrome. The Supreme Court concluded affirmatively, holding that, after the 2021 reform, the regional social service was to be appointed as *curador* and be permitted to enter the defendant's home, discuss with him, if possible, the apartment's cleaning, and ensure that he received 'effective medical care ... concerning the disorder he suffers.' These measures were to be reviewed every six months.⁹⁸ Although the court acknowledged that the person's cognitive abilities were not substantially affected, the judgment focused on his 'conduct disorder': 'The disorder not only causes him a clearly and objectively degrading situation but also prevents him from being aware of its pathological nature and his need for help.' The Court added that:

'Not intervening in these cases, for the reason that the contrary will of the person be respected, would be social cruelty, [it would mean] abandoning to their misfortune those who, due to the direct effect of a (mental) disorder, are not aware of the process of personal degradation they are suffering. ... the [coerced] provision of support in these cases entails a judgment or assessment that, if these persons were not affected by their pathological disorder, they would agree to avoid or mitigate their personal degradation.'

The Supreme Court concluded that the new Article 268 CC does not necessarily mean that courts always need to follow the opinion of the person concerned about the support measures proposed:

'Even if usually the court must yield to the will and the opinion of the concerned person, in some cases, such as the case at issue, it might be otherwise, provided that there are grounds of justification. This Court is aware that it is impossible to determine in advance in which cases such justification will exist since each case's circumstances must be considered. But the case at stake is relevant since the opposition of the person concerned, as occurs in many mental disorders, is the result of a disorder to which a lack of consciousness of the disease is associated.'

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

According to Article 42 bis a).4 LJV, the adults for whom support is required 'may act with their defence and representation.' However, 'if it is not foreseeable

⁹⁸ *Tribunal Supremo* (Plenary Section, Civil Chamber) judgment no. 589/2021 of 8 September.

that they will appoint an attorney, the petition can also ask for the appointment of a *defensor judicial*.⁹⁹ In this case, the defensor's judicial task is to appear in the legal proceedings on behalf of the person and to choose the *abogado* (lawyer) and *procurador* (court representative) to defend the person's interests. It is worth mentioning, however, that when a party other than the public prosecutor files the petition for support measures, it is the public prosecutor who legally assumes the representation of the adult. The Spanish Constitutional Court has said nonetheless that the person concerned must always have the opportunity to appear with their own legal counsel and representation.⁹⁹

b. availability of legal aid

In principle, for the non-contentious procedure, persons needing support do not need to hire a lawyer, and they may act personally with or without the informal support they require. For the contentious procedure, they have access to legal aid in the same conditions as other citizens; if they want their defence and representation, they can apply for legal aid if their financial means stand below a certain threshold.¹⁰⁰ This threshold is higher if the claimant is a person with a disability.¹⁰¹

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

Family members are entitled to ask for support measures in their own right.¹⁰² In addition, these persons are also to be called witnesses in the proceedings to provide information about the needs and situation of the person concerned.¹⁰³

In non-contentious proceedings, the judge may also request a report from the regional public entity that promotes autonomy and support to persons with disabilities. This report can also be provided by CSOs supporting persons with disability if they are officially recognised as collaborators of the administration of justice. The report's content is the possible alternatives to court-ordered support measures.¹⁰⁴ Besides that, the intervention of vulnerable adults' organisations is not mentioned. However, they can intervene as witnesses or produce a report if ordered by the judge at the request of any of the parties.

d. requirement of a specific medical expertise / statement

⁹⁹ In this sense, see judgment 7/2011, of 14 February.

¹⁰⁰ See Art 3 Act 1/1996, of 10 January.

¹⁰¹ Art 5 Act 1/1996, of 10 January (*exceptional recognition of the right*).

¹⁰² Art 42 bis a).3 LJV and 757.1 LEC

¹⁰³ Art 42 bis b).2 LJV. See also Art 759.2 LEC (for contentious proceedings).

¹⁰⁴ Art 42 bis b).2 II LJV.

In the non-contentious procedure, when the circumstances of the case so demand, the judge ‘*may order a report by expert witnesses before the appearance.*’ In the contentious procedure, however, the judge cannot decide about the support measure unless medical and social expert witnesses have provided their report about the situation of the person concerned. Other professionals may also intervene to advise about the suitable support measures in the case.¹⁰⁵

e. hearing of the adult by the competent authority

Both in non-contentious and contentious procedures, a hearing of the adult by the judge is required as an essential step. The 2021 reform also emphasised that the judge must talk with the person concerned instead of merely *exploring* that person, as the hearing was described before the reform. The new legislation says that the judge must *interview* them.¹⁰⁶ As a general rule, courts shall also make adaptations and adjustments so that the persons concerned ‘understand the object, purpose, and procedures of the case.’¹⁰⁷

f. the possibility for the adult to appeal the order

In the non-contentious procedure, the adult’s opposition means the procedure ends. In the contentious procedure, the order for support measures is to be appealed by the adult who opposes it. Any party can indeed appeal the decision of the judge.¹⁰⁸

Besides the right to appeal, after the reform of 2021, all support measures must be periodically reviewed according to the timetable set by the judicial order.¹⁰⁹ At any rate, any person entitled to ask for the measure of support can also ask for its review before the time set in the order has elapsed.¹¹⁰ In this case, however, there must have been a change in the person’s situation that demands modifying or ending the support measure.¹¹¹

¹⁰⁵ Art 759.3 LEC. The omission of medical evidence triggers the procedure’s nullity (*Tribunal Supremo* 15 October 2001).

¹⁰⁶ Art 42 bis b).3 LJV and 759.1 LEC.

¹⁰⁷ See Art 42 bis a).5 LJV.

¹⁰⁸ In the event of an appeal, the expert witness’ report, as well as the adult’s and family’s hearings, must be repeated before the appellate court (*Tribunal Supremo* 15 July 2005 and Superior Court of Catalonia 59/2019, of 26 September). See Art 759.4 LEC.

¹⁰⁹ Art 761 LEC. The support measures adopted judicially shall be reviewed periodically within a maximum period of three years. Exceptionally the review period may be longer, but never beyond six years (Art 268 II CC).

¹¹⁰ Art 42 bis c).1 LJV.

¹¹¹ Art 268 III CC.

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

Yes. The court-ordered support measure must be registered in the Civil Registry¹¹² because *res judicata* affects *erga omnes* only after registration.¹¹³ The order is thus communicated *ex officio* by the Court's secretary¹¹⁴ and registered in the person's individual file. The Civil Registry informs of 'the extension and limits of the judicial support measures.'¹¹⁵

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.)?

The *curador* may be either a natural or a legal person. Natural persons must be of legal age. Legal persons must be *non-profit* entities, either private (i.e., foundations, associations) or public.

The CC does not mention the relationship with the adult as a requirement¹¹⁶, but the judge must consider whether the person 'is suitable for the proper performance of their duties.' Art 276 IV CC gives great weight to the ability 'to understand and interpret the adult's will, wishes and preferences.' In the case of legal persons, their purpose must be 'the promotion of autonomy and support to persons with disabilities.'¹¹⁷ Some exclusion grounds are also laid down, which point to persons who had been totally or partially deprived of parental responsibilities or removed from guardianship or other grounds that entail a suspicion of likely bad performance of support tasks, including conflict of interests.¹¹⁸

¹¹² Art 300 CC.

¹¹³ Art 223.3 II LEC.

¹¹⁴ Art 755 I LEC. At the request of the party, the support measures will also be communicated to the Land Registry, the Commercial Registry, the Movable Property Registry or any other public registry (Art 755 II LEC).

¹¹⁵ Art 72.1 LRC.

¹¹⁶ Compare with Art 214 CC regarding guardianship for minors.

¹¹⁷ Art 275.1 CC. See also Art 276 II 7 CC.

¹¹⁸ See Art 275.2 CC.

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

In principle, the preferences of the concerned person are to be prioritised. First of all, persons excluded by the adult cannot be appointed.¹¹⁹ This may have been decided in advance, in a notarial deed (*autocuratela*),¹²⁰ but it can also result from the views they expressed during the legal proceedings to set up the support measures.¹²¹ Regarding the wishes of the adult as to the appointment of certain persons expressed in advance in a notarial deed, they are also binding for the judge. The judge may depart from the adult's wishes only if 'serious circumstances, unknown by the person' are proven, or there has been a 'change as to the reasons he or she expressly gave or that presumably took into account to make the nomination.'¹²²

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?

If the person's will is lacking, Article 276 II CC lays down a ranking of persons from among which the judge should appoint the *curador*:

- 1st The spouse or partner, provided that they live with the adult.
- 2nd The child or grandchild, firstly, those living with the adult.
- 3rd The parent, or by default grandparent, firstly those living with the adult.
- 4th The person who the spouse or partner, or the parents, have named in a will or public deed.
- 5th Whoever was acting as *guardador de hecho*.
- 6th A sibling, relative, or close person living with the adult.
- 7th A legal entity.

In principle, thus, some family members have a preference, particularly over legal entities. Moreover, the parents (but also spouses and partners) may have designated support persons for their adult children (or spouse/partner), and their decision also takes precedence over other persons. At any rate, the judge, 'once the

¹¹⁹ See Art 275.2 no. 1 CC.

¹²⁰ Art 271 I in fine CC.

¹²¹ S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281' in *Com Ley 8/2021 Guilarte*, p. 743 comments that transient opinions expressed as a result of an anger episode could be disregarded.

¹²² See Art 272 II CC and *Tribunal Supremo* 19 October 2021 and 2 November 2021. S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281' in *Com Ley 8/2021 Guilarte*, p 731 considers that the judge may also depart from the wishes expressed by the adult if there is a risk of conflict of interest or undue influence.

adult has been heard’ and even when their will is not clear, may ignore the legal ranking and ‘appoint the most suitable person to understand and interpret their will, wishes and preferences’.¹²³

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

In principle, whoever has a conflict of interest with the person needing support cannot be appointed as their *curador*. However, the judge can do so under ‘exceptional circumstances’.¹²⁴ At any rate, Article 250 VIII CC strictly forbids ‘those who provide care, residential or similar services to the person under a contractual relationship’ to exercise any measure of support.¹²⁵

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

Article 277 CC sets the general principle in this subject matter. The appointment of more than one *curador* can be ordered ‘if the will and needs of the person who needs the support justify it’. The law does not mention the possibility that the judge appoints someone as a substitute for the person appointed to act as *curador*.

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

Persons judicially appointed to act as supports need to accept their appointment, unless they can provide grounds justifying their exemption in the case at issue.

The grounds for exemption rely on the fact that the function is, or has become, too burdensome or entails serious difficulties for the appointed person. Legal entities may adduce that ‘they lack enough resources for the proper performance’ of the tasks but also that the conditions ‘are not in accordance with their statutory purposes’.¹²⁶ For instance, the entity aims to support persons with types of disability very different from the concerned person’s impairment.

¹²³ Art 276 IV CC.

¹²⁴ Art 275.3, 2 CC.

¹²⁵ A. Vaquer Aloy, ‘El sistema de apoyos como elemento para el ejercicio de la capacidad jurídica’, in F. Lledó Yagüe, et al (eds), *Reformas legislativas para el apoyo a las personas con discapacidad : estudio sistemático de la Ley 8/2021, de 2 de junio, al año de su entrada en vigor* (Dykinson: Madrid 2022) p. 517.

¹²⁶ Art 279 II CC

During the measure

Legal effects of the measure

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

After the reform of 2021, the possibility of a general limitation of legal capacity for adults under particular grounds no longer exists under Spanish laws. The reform eliminated the procedure of ‘incapacitation’ (which since 2015 had been renamed as ‘*modificación judicial de la capacidad*’ - judicial modification of capacity). The judicial modification of capacity was a prerequisite for the adoption of adult protection measures and the appointment of guardians.

By merging the traditional concepts of *capacidad jurídica* -capacity to hold rights and duties (legal standing)- and *capacidad de obrar* -capacity to exercise those rights and duties (legal agency)- under the umbrella of *capacidad jurídica* (legal capacity), Spanish civil law now starts from the principle of universal legal capacity for all persons of age, regardless whether they need -or are provided- support to exercise this legal capacity. From that point of view, applying a support measure could not affect the legal capacity of the adult.

The reform also prohibited judicial orders from withdrawing rights based on disability. Accordingly, the practice of prohibiting incapacitated persons from entering into legal transactions, marrying, making a will, voting at elections and so on is barred by new legislation.¹²⁷ And yet, the Supreme Court argues that by forbidding ‘mere deprivation of rights’, the law intends to avoid that disability justifies outright deprivation of rights, ‘without prejudice of any limitation that derives from the support measures ordered.’ Moreover, several legal provisions still link the provision of support with restrictions to the freedom of the concerned persons to act alone in certain types of legal acts.¹²⁸ After the 2021 reform, the judicial orders granting measures of support generally also start from the assumption that the person concerned cannot legally act on their own in the subject-matters belonging to the responsibility of the *curador*. To that extent, in practice, the effects of a court-ordered support measure vis-a-vis limitation of the exercise of legal capacity are the same as for incapacitation.

Powers and duties of the representatives/support person

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

¹²⁷ See Art 269 CC.

¹²⁸ See Question no. 14 .

- 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;**

Yes. The need for support may involve all kinds of matters. The CC mentions, on different occasions, the possibility that support is provided concerning personal issues and the administration of assets.¹²⁹

Regarding personal and family matters, the CC repeatedly mentions the possibility of support in forming the person's will.¹³⁰ Art 287,1 CC even allows the *curador* to ask permission from the court to conclude on their behalf 'acts of *personal or family importance*, when the person concerned cannot act on their own'.¹³¹ As to care and medical matters, case law admits the so-called *curatela de salud* ('health assistance'), whereby the support person assists and supervises that medical and pharmacological treatments are properly followed by the person concerned.¹³² In addition, the *curador* may provide 'consent by representation' to medical procedures under Article 9.3 LBAPIC.¹³³

Article 255 V CC states that the powers of the *curador* shall be determined 'corresponding with the situation and circumstances of the person with a disability and with their support needs'.¹³⁴ Art 249 III CC states that 'in exceptional cases, when, despite considerable effort, it is not possible to determine the will, desires and preferences of the person, the support measures may include representative functions'. The Preamble of Act 8/2021 admits that the powers given to the *curador*, in this case, may be general and for every aspect of the financial and personal life of the individual. Article 269 II and III CC also highlights that the judicial order must specify the legal acts in which the person concerned is to be 'assisted' by the *curador* and where, as a last resort only, the *curador* may act on behalf of the person concerned.

¹²⁹ See Question no. 26.

¹³⁰ See Question no. 14 b) and c).

¹³¹ This provision follows previous Constitutional Court rulings allowing the guardian to ask the courts permission to file a divorce petition or to end the matrimonial property regime. See *Tribunal Constitucional* 311/2000, of 18 December, and *Tribunal Supremo* 21 September 2011.

¹³² Among many, see *Tribunal Supremo* 16 May 2017.

¹³³ See Art 287.1 in fine CC. See Question no 14 c).

¹³⁴ See also Art 268 CC on the requirement of proportionality. Prior case law had highlighted that support measures must be tailored to the situation of the person. See *Tribunal Supremo* 20 October 2015.

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

The main *leitmotiv* of the reform of 2021 is to place the will and preferences of the adult at the centre of the legal framework for support in decision-making. Accordingly, instead of the adult's best interest, Article 249 II CC states that support persons 'must act in accordance with the will, desires and preferences of the person concerned'.¹³⁵ In the case that there is no possibility of knowing the real will of the person, the law requires that 'the life history of the person with a disability, their beliefs and values, as well as the aspects that they would have taken into consideration, must be considered, to make the decision that they would have adopted if not being represented'.¹³⁶

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?

Article 282 II CC only recalls that support persons must exercise their functions with due care. One should bear in mind that, as a rule, after the reform, the judicially appointed supports do not represent the adult but only assist them in decision-making. In doing so, the support person needs to share information and provide advice but not substitute the person concerned in their decision.¹³⁷

The judicial order must set out the control measures to ensure that the adult's rights and will are respected, particularly against the risks of abuse, conflict of interest, and undue influence.¹³⁸ When the support person holds representative powers, this usually entails that the person is impaired in expressing their will or unable to control the activities of the support effectively. The support person is thus subject to the general duty of informing and consulting as much as possible with the adult. However, the law still focuses on the fact that the support person must report to the court on the person's situation and the assets under administration, typically annually. The reports are to be communicated to the adult, to any party involved in the legal proceedings, and to the public prosecutor, and a hearing can be scheduled at the request of any of them.¹³⁹ Notwithstanding the duties of

¹³⁵ See also Art 282 III CC.

¹³⁶ Art 249 III in fine CC.

¹³⁷ As a result, if the *curador* knows that a certain act is objectively useless or damaging for the adult, he or she must provide the support unless it is against the law or risks harming third parties. N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in R. BERCOVITZ RODRÍGUEZ-CANO (coord.), *Comentarios al Código Civil*, 5th ed. Aranzadi, Cizur Menor 2021 [hereafter *Com CC Bercovitz*] p. 534.

¹³⁸ Art 270 I CC.

¹³⁹ Art 51 LJV.

reporting and rendering accounts arising from the order appointing the *curador*, Article 270 I CC also states that the judge can require information about these items at any time.¹⁴⁰

No mention is made in the law of the duty of informing the adult's relatives or family members about the development of the support tasks.

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

Article 282 II CC requires the *curador* to keep personal contact with the adult but not to live with them. Caring and giving personal attention is neither a legal obligation. Instead, the curador needs to assist effectively, and sometimes act in the place of the adult, in handling personal care issues, for instance, helping in contracting residential and care services or obtaining access to public allowances and specialised social services.

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

In addition to reimbursement of expenses incurred in their tasks and compensation for damage suffered, the curador may receive remuneration if the adult's financial situation allows it. The judge decides whether remuneration is due and its amount in the case at issue, considering the tasks to be carried out and the assets' value and productivity.¹⁴¹

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?

As already mentioned, subsidiarity means that voluntary measures or *de facto* care take preference to court-appointed support persons. It may well be that informal or voluntary support measures are insufficient and that a *curador* or at least a *defensor judicial* needs to be appointed. In the last case, coordination is easy since the intervention of the *defensor judicial* is limited to a single issue, and after its conclusion, the support tasks end. In the case of stable assistance through *curatela*,

¹⁴⁰ Art 270 II CC also confers powers to the *public prosecutor* to ask information at any time if deemed necessary to ensure the proper exercise of the support function.

¹⁴¹ Art 281 I CC.

the latter, in theory, only fills the gaps that could have been left in the legitimation conferred by a CPA. Yet, in practice, the coordination of the activities of the *curador* and the holder of the powers of attorney could be complicated and eventually lead to the revocation of the powers of attorney.

- 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)?**

In practice, the judicial appointment of several persons has been almost unheard of, but it is not forbidden. The only case mentioned by the law is where two persons are appointed, one dealing with the adult's personal interests and the other being in charge of the assets.¹⁴² When the support is entrusted to several people, the judge must set up how they must organise, 'respecting the will of the person who needs the support.'¹⁴³

Safeguards and supervision

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

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

The supervision of *curatela* falls with the judge of the adult's residence, to whom the support person must render reports about the personal situation and the financial accounts.

A crucial role is also given to the public prosecutor, who is provided with broad supervision powers and may ask the judge to issue new orders based on the support persons' poor performance or the adult's actual needs. The public prosecutor is also the focal point for receiving information about persons lacking the assistance they need or being abused by support persons. Information on these matters usually

¹⁴² Here the distribution of functions makes it easier to coordinate their respective activities, although some problems may arise, for instance when they need to agree upon financial issues derived from the costs of residential or medical needs. From the standpoint of third parties, the individual acts of the person in charge of the corresponding sphere of interests according to the judicial order shall be valid, irrespective of the internal disagreements between the support persons.

¹⁴³ Art 277 II CC. In case of disagreements, Art 219 CC by analogy provides the preference for the rule of majority (C. GUILARTE MARTÍN-CALERO, 'Comentario a los arts. 268 a 271 y 282 a 295', in *Com Ley 8/2021 Guilarte*, p. 778).

comes from social services, health and education professionals, and public bodies and legal entities promoting the autonomy and support of adults in need.

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

The judge needs to examine and eventually approve or disapprove the accounts rendered by the *curador*, and issue the orders needed to deal with any malfunctioning of the support tasks. Courts should also ask for this information if the support person does not timely provide it.

The public prosecutor must notify the judge of any malfunctioning and ask for measures to prevent further abuse.

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

The legal grounds for dismissal of the *curador* are a) intentional or negligent infringement of their support duties, and b) serious and continuous problems between the adult and the support person when living together.¹⁴⁴ Anyone can give notice to the court. After a hearing, it may order the dismissal *ex officio* or at the request of the adult or the public prosecutor. The possibility of allowing the person to keep on with their tasks and adding extra supervision (for instance, by judicially appointing a supervisor or a second guardian) was not used under the old law. The usual path has been to remove the guardian and replace them with a legal entity. Nothing in the new law suggests that the legal response to malfunctioning will change.

Beyond civil liabilities, the CC does not provide for private law sanctions for the poor performance of support functions. However, private legal entities providing support services may be subject to fines and be disqualified from acting as support. Moreover, in egregious cases, former guardians have been criminally prosecuted for the adult's personal mistreatment or fraudulent misbehaviour in administering their assets.

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

After the dismissal, the support person has to render the general account of the administration of the adult's assets. Accounts must be rendered within three

¹⁴⁴ Art 278 CC.

months unless the judge accepts there is ground to extend this deadline. The adult or their representatives may ask for the general account for five years. When the appointment ends because the supported person dies, there is also a duty to present the final accounts to the court. But even though the court approves the accounts, the adult or their heirs can still claim for the damage caused by the fraudulent or negligent conduct of the support person.¹⁴⁵ They may claim until three years since the presentation of the final accounts.¹⁴⁶

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

Either in acting in place of the adult or when providing them assistance to enter into legal transactions with other parties, the legal position of the support person is that obligations arising from the contract, or any liabilities vis-à-vis third parties flowing from it, fall with the adult. If there is evidence of misbehaviour on the part of the support person, and the contractual party of the adult is harmed by the breach of the contract, a tort claim could be filed by the adult against the support person who wrongfully contributed to this result. The third party may also have a claim based on the same grounds.

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

The court's approval is needed for certain types of legal acts of the support person holding representative powers to act on behalf of the adult. Judicial approval is unnecessary when the support person merely assists the adult in consenting to a certain legal act. In this case, the risk of conflict of interest, abuse, or undue influence by the support person gives rise to other safeguards.¹⁴⁷

The *curador* needs the court's approval for any act specifically mentioned in the judicial order appointing them, but also, in any case, for any of the acts listed in Article 287 CC. This provision mentions the most relevant economic acts, including, among others, the disposition of assets for free and any transaction involving price concerning the disposition or encumbering of the adult's real estate, shares in commercial enterprises, and extraordinarily valued assets. The provision

¹⁴⁵ Art 292 CC.

¹⁴⁶ Art 294 CC.

¹⁴⁷ Basically, *ex post* liabilities of the person of support violating their duties towards the adult.

also mentions assets of personal or family significance regardless of their face value.

The Court's approval must be obtained beforehand, and there shall be a hearing with the person concerned and the public prosecutor.¹⁴⁸ The Court decides 'taking into account the justification offered by the support person and assessing the convenience of the legal act to the interests of the adult.'¹⁴⁹

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

The CC does not have a specific provision regarding the unauthorised acts of the support person acting in the place of the adult. Case law took the view that the act is valid unless challenged by the adult or their heirs, without a particular limitation period.¹⁵⁰ The act could also be confirmed by seeking judicial approval afterwards. However, *Tribunal Supremo* 10 January 2018 changed the criterion and decided for the voidability of the unauthorised act. The 2021 reform did not mention the question, and the commentators disagree about the legal regime applicable.¹⁵¹

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

There are different possibilities:

- a) The adult is not placed under formal support¹⁵² that applies to the act type. Since the adult has full legal capacity, if the consent was not vitiated, the fact that the act was ill-conceived does not change their legal position: the act is binding for both parties, and the adult shall take full responsibility vis-a-vis

¹⁴⁸ Art 290 CC. See Art 61 ff LJV.

¹⁴⁹ Art 65.1 LJV.

¹⁵⁰ See *Tribunal Supremo* 22 April 2010 and more recently 12 May 2016; in the sense that it is a voidable act within four years, see 3 March 2006. All these cases involve parents acting on behalf of their minor children.

¹⁵¹ C. GUILARTE MARTÍN-CALERO, 'Comentario a los arts. 268 a 271 y 282 a 295', in *Com Ley 8/2021 Guilarte*, p. 795 (arguing for nullity)

¹⁵² Some authors claim that if the concerned person concludes a legal act together with their *guardador de hecho* the latter's intervention would confer legal validity on the act. C. Guilarte Martín-Calero, 'Las grandes líneas del nuevo sistema de apoyos regulado en el Código Civil español', in: Asociación de profesores de derecho civil, *El Nuevo sistema de apoyos a las personas con discapacidad y su incidencia en el ejercicio de su capacidad jurídica* (Thomson Reuters Aranzadi: Cizur Menor 2022) p. 73 ('unless there is undue influence'). This could also mean that the omission of informal support might lead to declare the legal act as void. But this consequence is contentious due to the lack of previous determination of the sphere of responsibility of the *guardador de hecho*.

their contractual parties. If there are vices in consent in the conclusion of the legal act, the general rules on the matter do apply.

- b) The adult is placed under support that assists them in concluding this legal act. If the support was correctly provided by delivering proper information and advice, and the adult's consent was not vitiated, the result is the same as in a), and there is no liability of the support person for the bad results coming from the act.¹⁵³
- c) The adult concludes the ill-conceived acts without the support required for that kind of legal act. The legal act is voidable.¹⁵⁴ The action may be filed within four years from the conclusion of the legal act at the request of the person concerned (with support if needed), their heirs, and the support person. The act may be confirmed before the end of the limitations period, and the effects of annulment can be opposed to third parties, even in good faith.¹⁵⁵ However, in the case of an action brought by the support person, avoidance requires that the contracting party 'knew the measures of support at the time of the contract or had abused the situation of disability to obtain an unfair advantage.'¹⁵⁶
- d) The adult is placed under support involving representative powers for this act, and *the support person* concludes the act. The contract validly concluded by the support person on behalf of the adult entailing a severe economic disadvantage (*lesion*) of at least 25% of the contract value for the adult¹⁵⁷ may be rescinded within four years from the end of the measures of support. The rescission purports the restitution of the assets only if they are in possession of the contracting party. Third parties' acquisitions in good faith are protected, and the contracting party is liable to the adult for monetary damages.¹⁵⁸

¹⁵³ C. GUILARTE MARTÍN-CALERO, 'Comentario a los arts. 268 a 271 y 282 a 295', in *Com Ley 8/2021 Guilarte*, pp. 829-30 points that there is a conflict between the duties of the *curador* to respect the adult's will and preferences and the need to avoid ill-conceived acts that objectively damage the person concerned. Accordingly, she suggests that support measures include limits to the effect of supported decisions that might be objectively harmful, for instance by requiring judicial authorisation or additional hearings with the adult. Other authors point to the legal tools to avoid the legal act when the *curador* disagrees with the adult, for instance triggering the need of judicial intervention (N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267', in *Com CC Bercovitz*, 2021, p. 521, quoting S. DE SALAS MURILLO, '¿Existe un derecho a no recibir apoyos en el ejercicio de la capacidad?' (2020) 780 *Revista Crítica de Derecho Inmobiliario* 2227-68).

¹⁵⁴ Concerning the discussion among scholars about the conditions of this nullity action see Question no 14 above at a).

¹⁵⁵ They cannot claim the protection of appearance based on the legal situation recorded by the Land Registry, because mere registration does not validate a legal act that is null and void (Art 33 Land Registry Act).

¹⁵⁶ Art 1302.3 II CC.

¹⁵⁷ Art. 1291,1 CC. But note that this provision applies to legal acts for which the support person does not need the authorisation of Art 258 CC. In the case that the permission of the court was required and omitted the act can be avoided and does not bind the vulnerable person.

¹⁵⁸ Art 1295 II CC.

d. conflicts of interests

The support person cannot exercise their functions when they are in conflict of interests with the adult, such as contracting in their own name and on behalf of the adult.¹⁵⁹ The alternative is appointing a *defensor judicial*.¹⁶⁰ The acts concluded violating the prohibition are null and void. However, the CC does not have a specific provision about the support person acting while in a conflict of interest with the adult. Following the same criteria as unauthorised acts of the support person, the act is valid unless it is challenged by the adult or their heirs, without a particular limitation period.¹⁶¹

End of the measure

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

According to Article 291 CC, *curatela* ends *automatically* with the adult's death or declaration of death. It can also be terminated *by court order* 'when this measure of support is no longer necessary or when a more appropriate form of support is adopted.' The assessment is to be made within a review procedure that may be initiated at the request of the adult or other persons entitled by the law or that has started to comply with the deadlines for review set in the original order providing the measure of support, also at the request of these persons.¹⁶²

The review procedure is the same as the legal proceedings leading to the appointment of a *curador*. Accordingly, the same persons are entitled to file the review petition and to ask for the dissolution of the measure if they think and can demonstrate that it is no longer needed or that it may be better substituted by other forms of support, such as *guarda de hecho* or a voluntary support measure. The support person is also entitled to demand the review.¹⁶³ The evidence required to

¹⁵⁹ Art 251,2 CC.

¹⁶⁰ Art 283 I CC.

¹⁶¹ But see above Question no 45 b) on the discussion around the remedy available in cases of this sort. See A. VAQUER ALOY, 'El sistema de apoyos como elemento para el ejercicio de la capacidad jurídica', in F. Lledó Yagüe, et al (eds), *Reformas legislativas para el apoyo a las personas con discapacidad : estudio sistemático de la Ley 8/2021, de 2 de junio, al año de su entrada en vigor* (Dykinson: Madrid 2022) p. 527 (arguing for limited voidability instead of nullity, and the possibility of confirmation)

¹⁶² R. GARCIMARTÍN MONTERO, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters, Cizur Menor 2021, pp. 96-7 highlights that the law does not allow the judge to review the decision *ex officio* and that if the review does not take place the measure of support remains in force. See C. GUILARTE MARTÍN-CALERO, 'Comentario a los arts. 268 a 271 y 282 a 295', in *Com Ley 8/2021 Guilarte*, p. 687.

¹⁶³ Art 42 bis c).1 II LJV.

decide on the dissolution of *curatela* is compiled before a hearing; medical and social evidence can be requested; family members must be heard and the judge will interview the adult.¹⁶⁴

The effects of the dissolution of *curatela* are that the support person is no longer expected to assist the adult and loses the legal authority to intervene in their personal or financial matters. If the *curatela* encompassed representative powers, they are put to an end once the judicial order enters into force.

Occasional support – Defensa judicial

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.

Historically, the *defensa judicial* was based on the sporadic need to intervene in the case that, for temporary reasons, a legal representative was unavailable or could not intervene.¹⁶⁵ However, the 2021 reform introduced the possibility of appointing support that is not permanent or stable but operates only on certain occasions, even if one can anticipate that the situation may occur from time to time.¹⁶⁶ Legal scholarship points to the utility of this measure of support for people suffering from pathologies that have cyclic critical episodes.¹⁶⁷

18. Which authority is competent to order the measure?

The general procedure to appoint a *defensor judicial* is laid down by Art 27 ff LJV. These provisions state that the court clerk is to appoint the *defensor judicial*. However, in the particular hypothesis of Art 295.5 II CC -which deals with appointing a support person- it seems that the judge shall appoint them, considering their aptitude to respect, understand, and construe the adult's will. The legal grounds for the appointment are the same as for the *curatela*, always bearing in mind that the adult only asks for temporary support.

¹⁶⁴ Art 42 bis c).3 LJV. See also Art 761 LEC.

¹⁶⁵ R. GARCIMARTÍN MONTERO, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters, Cizur Menor 2021, p. 153.

¹⁶⁶ Art 250 and 295.5 CC.

¹⁶⁷ N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267', in *Com CC Bercovitz*, 2021, p. 537. See also R. GARCIMARTÍN MONTERO, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters, Cizur Menor 2021, p. 153.

19. Who is entitled to apply for the measure?

Procedural rules applicable to the appointment of *curatela* and *defensor judicial* are not the same, although both share a support function. Art 28 LJV mentions the concerned person, any person acting in their interest, and the public prosecutor as entitled to apply for the measure.

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?

See the answer to **Question No. 20** above on *curatela*.

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.**

Since the procedural rules for appointing a *defensor judicial* were conceived to solve particular temporary instances of lack or ineffectiveness of legal representations, they do not provide adequate room for the type of evidence required to appoint occasional support for exercising one's legal capacity.¹⁶⁸ However, focusing on the identity of the goals pursued by *curatela* and *defensa judicial* as measures of support, one may conclude that the appointment of *defensor judicial* can be obtained through the same procedures that apply to *curatela*. These entail the same issue regarding the interview with the adult, the evidence produced during the hearing, and the need for expert evidence to get as much information as possible about the need for support.¹⁶⁹

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

¹⁶⁸ R. GARCIMARTÍN MONTERO, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters, Cizur Menor 2021 p. 156 complains about the insufficiency of Art 28 ff LJV.

¹⁶⁹ N. ÁLVAREZ LATA, 'Comentario del art. 295' in *Com Ley 8/2021 Guilarte*, p. 844.

As a judicially ordered support measure, it must be registered in the Civil Registry despite being activated only sporadically according to the terms of the judicial order appointing the support person.

Appointment of representatives/support persons

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

The requirements of the support person acting as *defensor judicial* are the same as for a *curador*.¹⁷⁰ The same principles concerning the respect of the adult's will do apply to the designation of a person among family members or close persons. They must accept the appointment unless a ground for exemption is accepted.

During the measure

Legal effects of the measure

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

See answer to **Question No. 24** above on *curatela*.

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

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

¹⁷⁰ See Art 297 CC.

In the case of *defensa judicial*, the powers of the support person are confined to the occasional need for support determined in the judicial order.¹⁷¹ The intervention of the *defensor judicial* might be, in theory, in financial and personal issues. A broad scope of action and faculties is nonetheless hardly imaginable. The *defensor judicial* may be simply assisting in the decision-making or may also be conferred representative faculties for acting on behalf of the concerned person in a specific issue. At any rate, Article 297 CC also points to their duty of knowing and respecting the will and preferences of the person concerned. The *defensor judicial*, however, is not legally obliged to keep regular contact with the adult.¹⁷²

Article 298 II CC states that once the tasks assigned to the *defensor judicial* have ended, they must provide a report to the court in the same terms as the *curador*.¹⁷³

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)?**

Experience is lacking regarding appointing several *defensores judiciales* in the context of the new legal framework. However, the precedents in using this institution seem to point to the idea of a single person performing this task.

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;**

¹⁷¹ N. ÁLVAREZ LATA, ‘Comentario del art. 297’ in *Com Ley 8/2021 Guilarte*, p. 850

¹⁷² N. ÁLVAREZ LATA, ‘Comentario del art. 297’ in *Com Ley 8/2021 Guilarte*, p. 848.

¹⁷³ N. ÁLVAREZ LATA, ‘Comentario a los arts. 263 a 267’, in *Com CC Bercovitz*, 2021, p. 538. See above § XX.

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

The supervision of the performance of the *defensor judicial* is a responsibility of the court that appointed them, even if the public prosecutor must be proactive in controlling their acts.

The judge needs to examine and eventually approve or disapprove the accounts rendered by the *defensor judicial* and issue the orders needed to deal with any malfunctioning of the support tasks. Courts should also ask for this information if the support person does not timely provide it.

- 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**

As a specific measure of support, there are no special rules concerning the liability of the person of support towards the concerned person or third parties, or regarding ill-conceived acts of the adult.

End of the measure

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

The legal grounds for dismissal of the *curador* are also applicable to the *defensor judicial*.¹⁷⁴

The grounds and procedural rules for terminating the measure correspond to those applied to the *curatela*.¹⁷⁵

Reflection

¹⁷⁴ Art. 297 CC.

¹⁷⁵ See N. ÁLVAREZ LATA, 'Comentario del art. 298' in *Com Ley 8/2021 Guilarte*, p. 854-5.

30. Provide statistical data if available.

See answer to **Question No. 3** above.

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?

Reviewing old guardianship appointments has been the main practical problem to be solved since the entry into force of the 2021 reforms. Due to the huge number of appointments needing review, the legal situation has often remained substantially the same, except for the terminology change. Instead of restrictions to legal capacity, courts use the language of the CC about adapting the support to the adult situation. But they obtain the same results in terms of adult protection through control and supervision of their conduct and restrictions in managing their personal and financial issues.

The most significant cases involved the adult's opposition to the support measures. The Supreme Court endorsed the view that, regardless of the principle of respect to the adult's will, desires and preferences, under certain circumstances, the court does not need to yield to their opinion.

Several projects are aimed at evaluating the application of the reform of 2021 in the light of UNCRPD. Results shall be available soon. The preliminary results of examining more than 300 rulings issued during the first year after the enactment of the new law show that many do not respect the reform's principles, and some ignore the reform altogether. Only a minority seems to have taken the reform seriously and applied the support measures according to the principles set in the law.¹⁷⁶

SECTION IV – VOLUNTARY MEASURES

Overview

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

¹⁷⁶ *Primer informe del Observatorio de jurisprudencia sobre sistemas de apoyo al ejercicio de la capacidad jurídica* (December 2022) Available at <https://www.plenainclusion.org/l/observatorio-jurisprudencia/materiales/>.

The following voluntary measures are available:

- a) Self-chosen curator [*Autocuratela*]. Unilateral legal act by which a person anticipates the possibility of being subject to legal proceedings leading to the appointment of a *curador* and expresses wishes and preferences regarding the person that is to be appointed or who must not be appointed, and how to carry out the exercise of the *curatela*.
- b) Continuing powers of attorney (CPA) [*Poderes/Mandatos preventivos*]. Mandate given by an adult with the purpose that it shall either be effective immediately, or enter into force in the future, and that shall remain in force if the granter needs support to exercise legal capacity.
- c) Advance directives (AD) [*Instrucciones previas*]. Instructions given or wishes made by a competent adult concerning medical treatments and other related matters that may arise in the event of their incapacity.
- d) Support agreements [*Acuerdos de apoyo*]. Legal acts signed under a notary seal in which a person in need of support designates someone as a support person, and they agree to provide the support needed to exercise legal capacity.

Self-chosen curator [*Autocuratela*]

33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measures. Please consider, among others:

- a. the existence of specific provisions regulating voluntary measures;**
- b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

Article 271 I CC acknowledges the possibility of a unilateral legal act by which a person anticipates the possibility of being subject to legal proceedings leading to the appointment of a *curador* and expresses wishes and preferences regarding the person who is to be appointed or who must not be appointed, and how to carry out the exercise of the *curatela*.¹⁷⁷

Autocuratela is, therefore, a voluntary measure inherently connected with a state-ordered measure. It differs from CPA, where the granter directly appoints the support person. In *autocuratela*, the concerned person assumes that the decision

¹⁷⁷ See S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281', in *Com Ley 8/2021 Guilarte*, p. 702 ff.

about their support will eventually be with the judge.¹⁷⁸ The legal act is personal, and nobody can substitute the person in making it.¹⁷⁹

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.

Autocuratela is a legal act that provides information to the judge called to appoint a support person about the will and preferences of the person concerned. The advance directives are enclosed in a unilateral legal act to anticipate the decision to be taken regarding medical treatments when the person can no longer communicate their will and preference. It is thus unrelated to any legal procedure for supporting the exercise of legal capacity.

Nonetheless, in *autocuratela* the person may also anticipate who shall receive medical information and consent to medical treatments acting on their behalf as *curador*. From this standpoint, the advance directives and *autocuratela* are instruments for the person to communicate their will on these matters in advance.

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)?

Autocuratela consists necessarily of a proposal of one or several persons to be appointed as *curador* if a *curatela* must be judicially ordered in the future, or excluding one or several persons from this task. In addition, the legal act may also include rules about the scope and operation of the future *curatela*, for instance, as regards the administration of assets, the rights and duties of the *curador*, and supervision instruments.¹⁸⁰ The document may therefore include proposals regarding the matters to be covered, including personal, family, and financial matters.

Start of the measure

Legal grounds and procedure

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

¹⁷⁸ S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281', in *Com Ley 8/2021 Guilarte*, p. 701.

¹⁷⁹ However, Art 274 CC allows the granter to set a list of candidates and delegate the decision to their spouse or any other person.

¹⁸⁰ See Art 271 II CC.

Persons of legal age can grant a deed of *autocuratela*, as well as emancipated minors and even minors over 16 years of age who are not emancipated.¹⁸¹ As currently all adults have legal capacity, only mental capacity is required to grant this legal act. If the person needs support when granting the deed, this should not be an obstacle since the act may refer to support required in the future. The act will be valid and effective to the extent that, with support, the person with a disability can grant it.¹⁸²

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.

The *autocuratela* must be in a public deed granted before a notary as a validity requirement.¹⁸³ No additional procedure is required. The legal effects depend on the opening of a judicial procedure for the provision of support, in which case the document will be taken into account to decide on the appointment of a curator.

The notary must communicate the granting of *autocuratela* to the Civil Registry and shall be registered in the person's individual registry, including the name of those designated (or excluded) by them, and the content of the support measure. The aim of registration is that the judge is aware of the planning measures already set up by the concerned person.¹⁸⁴

There are no limits regarding the moment of granting the document, although it is usually long before a procedure for providing judicial support is opened.¹⁸⁵

38. Describe when and how voluntary measures enter into force. Please consider:

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

¹⁸¹ See Art 254 CC. S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281', in *Com Ley 8/2021 Guilarte*, p. 716

¹⁸² S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281', in *Com Ley 8/2021 Guilarte*, p. 715.

¹⁸³ Art 271 I CC.

¹⁸⁴ S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281', in *Com Ley 8/2021 Guilarte*, p. 726.

¹⁸⁵ But it may also coincide with it. See S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281', in *Com Ley 8/2021 Guilarte*, p. 717.

Autocuratela enters into force when it becomes necessary to bring a procedure for the judicial provision of support to the grantor of that document. As a general rule, the judge must abide by what it stipulates when appointing a *curador* and defining their functions.

The legal effects of the measure depend on whether the judge considers that the requirements for judicial support in the form of *curatela* are met. The procedural rules of the *curador*'s appointment do apply.

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 speciality of *autocuratela* lies in that it is an act of private autonomy dependent on the result of the judge's assessment of the evidence produced in the relevant legal procedure. The private autonomy underpins changes concerning the requirements to be met by the support person. Accordingly, even if the *curador* is a court-appointed measure, the exclusion grounds ordinarily applicable (see above answer to **Question No. 23.a**) could be set aside in the deed of *autocuratela*.¹⁸⁶ In this case, the person designated must be appointed despite the existing exclusion ground (for instance, conflict of interest), provided that the grantor knowingly and expressly condoned this circumstance in the deed. Relying on Art 276 CC, which points to the judicial assessment of the *suitability* of any possible candidates, some authors contend that, at least as a last resort, the judge could override the designation by the grantor of a person who should have been disqualified under legal exclusion grounds.¹⁸⁷

¹⁸⁶ S. DE SALAS MURILLO, 'Comentario a los arts. 272 a 281', in *Com Ley 8/2021 Guilarte*, p. 720. See *Tribunal Supremo* 19 October 2021.

¹⁸⁷ M. PEREÑA VICENTE, 'La curatela: los nuevos estándares de intervención, nombramiento, remoción y actuación tras la Ley 8/2021', in Asociación de profesores de derecho civil, *El Nuevo sistema de apoyos a las personas con discapacidad y su incidencia en el ejercicio de su capacidad jurídica* (Thomson Reuters Aranzadi: Cizur Menor 2022) p. 151-152.

The granter can designate one or several persons. If the granter does not state the rules concerning their activities, the judge must set them up. Article 273 CC refers to the appointment of substitutes. It states that the last document governs the order of substitution and that when several persons are proposed in the same document, the one proposed first is preferred.

During the measure

Legal effects of the measure

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

The general rule is that the judge is bound by what was decided by the adult in the notarial deed¹⁸⁸ regarding who should be appointed¹⁸⁹ and who could not be.¹⁹⁰ However, the rule has two exceptions: (a) the judge may totally or partially dispense with the voluntary provisions ‘if there are serious circumstances unknown to the granter, or the reasons expressed by them or that they presumably took into account, have changed.’ In addition, legal scholarship points to the fact that deeds that the person granted lacking natural capacity or that entail a conflict of interest or undue influence are null and void.¹⁹¹

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

The application of *autocuratela* involves the judicial appointment of a curator, which does not affect the person’s legal capacity. After the 2021 reforms, no support measure entails limiting the granter’s legal capacity.

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?**

¹⁸⁸ Art 272 I CC.

¹⁸⁹ Art 276 I CC.

¹⁹⁰ Art 275 III CC.

¹⁹¹ S. DE SALAS MURILLO, ‘Comentario a los arts. 272 a 281’, in *Com Ley 8/2021 Guilarte*, p. 731.

- 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)?**

When the deed of *autocuratela* only names the future *curador*, the judge must determine the scope, the criteria of operation, and the rights and duties of the *curador* following the default legal regime. If the granter has set up operating rules, the judge must, in principle, respect the rights and duties of the *curador*, as well as the safeguards. However, if the support organised by the granter is insufficient or inadequate, the judge may add whatever they consider most appropriate in the case circumstances.

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

See answer to **Question no 39** above.

- 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?**

The most important case of simultaneous voluntary measures is where the person who has granted a deed of *autocuratela* is under *guarda de hecho*, or has also granted (simultaneously or not) a CPA already in force. While these forms of support are operational, *autocuratela* remains without legal effect. When these support measures are insufficient or do not provide adequate support, judicial

measures may be available. When appointing a *curador*, the judge must abide in principle by the provisions of the *autocuratela* deed.

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.

Not applicable to *autocuratela*. See generally on *curatela* **Question No. 28 b), c) and d)** above and on CPA **Question No. 45** below.

46. Describe the system of supervision, if any, of the voluntary measure. Specify the legal sources. Please specify:

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

Art 271 II CC mentions that the person concerned may establish a supervisory body for the operation of the *curatela*, despite the *curador* having been appointed by the judge. The supervision measures are thus approved by the judge when appointing the *curador* but are governed by the rules set up by the granter.

In theory, the granter can dispose of any official supervision. However, the judge could also set apart the granter's decision if the situation does not allow sufficient and adequate support.

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.

The only specific ground for termination of *autocuratela* while the granters are alive is revocation. The deed of *autocuratela* may be revoked at any time provided they still have the mental capacity to do so validly. Besides, once the *curador* has been appointed according to the wishes of the granter and under the rules they may have stipulated, the grounds and the procedure to terminate the *curatela* are the general ones. Granters may, however, add specific grounds for termination.

Continuing powers of attorney [Poderes/Mandatos preventivos]

33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measures. Please consider, among others:

- a. **the existence of specific provisions regulating voluntary measures;**
- b. **the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

The CC admits the CPA since 2003: Article 1732 II CC treated them as an exception to the extinction of mandate due to the principal's incapacity, provided that such circumstance was anticipated when granting the mandate. Being a special type of mandate, the legal rules on mandate were applied by default. The 2021 reform incorporated a specific chapter devoted to CPA to the CC, so they are now considered primarily a voluntary support measure.¹⁹²

The rules applicable to CPA are based upon the autonomy of the granter to decide on any aspect thereof. However, Article 259 CC states that once the need for support has arisen, the default rules are those of *curatela* when the CPA is of general scope, or embraces all the interests of the granter (*poder general*). The granter can nonetheless stipulate that the rules on *curatela* are not to be applied in their case. It is, however, doubtful that a CPA without any safeguards can be effective under the requirements of CRPD.¹⁹³

The CC admits two types of CPA. Firstly, a unilateral legal act through which the granters provide the attorney with legal powers to act on their behalf within the scope of the CPA.¹⁹⁴ In this case, the legal act is valid and effective before and regardless of whether the person appointed is aware of the granting of the CPA, and they are free to accept or reject it.¹⁹⁵ This type of CPA can be created as an

¹⁹² Art 256 to 262 CC.

¹⁹³ See J. RIBOT IGUALADA, 'Comentarios de los arts. 256 a 262' in *Com Ley 8/2021 Guilarte*, p. 585.

¹⁹⁴ J. RIBOT IGUALADA, 'Comentarios de los arts. 256 a 262' in *Com Ley 8/2021 Guilarte*, p. 600.

¹⁹⁵ M.P. GARCÍA RUBIO, 'Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio' (2018) 5 *Revista de Derecho Civil* 37-38.

ordinary power of attorney ‘with a subsistence or continuity clause’¹⁹⁶ or as a power of attorney in which the entry into force is postponed to the moment set in the act of granting in connection with the need for support.¹⁹⁷ The second type of CPA is the so-called *mandato preventivo*, that is, a bilateral contract of mandate that, from its conclusion, generates rights and obligations for both parties and which can be concluded without granting representative powers.¹⁹⁸

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.

Spanish Law knows both CPA and AD. The first is based upon the appointment of one or more representatives, and its scope can be personal and financial. In contrast, in AD the granters do not need to name anybody. On a more practical level, however, the contents of some CPA may partially overlap with those of AD¹⁹⁹ because the attorney may also have representative powers regarding decision-making on medical treatments, and AD can include naming a ‘representative’ to ensure that the patient’s will is respected. However, not every CPA may be simultaneously treated as AD unless the notarial deed has singled out the attorney as the granter’s representative regarding medical decisions. This position must be communicated to AD’s corresponding registry to reach the medical team treating the person.

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)?

Before the 2021 reform, CPA were considered only suitable for financial matters because the agent did not have legal representative status.²⁰⁰ For personal matters, the adult’s will should be channelled through AD and *autotutela*, subject to

¹⁹⁶ Art 256 CC.

¹⁹⁷ Art 257 CC.

¹⁹⁸ See Art 262 CC.

¹⁹⁹ Art 11 LBAPIC. Art 5.2 Organic Act 3/2021, of 24 March, regulating euthanasia, equates AD with any ‘legally recognized equivalent documents’, which allows including the CPA.

²⁰⁰ See J. PÉREZ DE VARGAS MUÑOZ, ‘Las reformas del derecho español en materia de autotutela y de poderes preventivos», in J. PÉREZ DE VARGAS MUÑOZ, M. PEREÑA VICENTE (Coords.), *La encrucijada de la incapacitación y la discapacidad*, La Ley Wolters Kluwer, Las Rozas 2011, pp. 98-99. M.A. PARRA LUCÁN, «Instituciones de guarda (1). La tutela» en: YZQUIERDO TOL-SADA, M.; CUENA CASAS. M. (dirs.), *Tratado de Derecho de la Familia*, vol. VI, 2^a ed. Thomson Reuters – Aranzadi, Cizur Menor, 2017. <Aranzadi ProView> Cap. 42 § IV, 1.2.

their own rules and safeguards.²⁰¹ Currently, however, CPAs are voluntary support measures that may include the personal sphere of the adult.²⁰²

Start of the measure

Legal grounds and procedure

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

The capacity to grant a CPA must be recognised to any person who wishes to do so, provided they have the mental capacity required. The fact that the person may need support to exercise their legal capacity should not prevent the granting of CPA since they may obtain that support and be able to do it.²⁰³

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.

Art 260 I CC demands a notarial public deed for the CPA's validity. However, it does not provide specific rules for the procedure, let alone a minimum content of the CPA. As a result, the procedure is the same as granting an *ordinary* power of attorney. The notary has to ensure that the granter has given free and informed consent and that their will has been duly formed.²⁰⁴ However, the CPA is not an ordinary power of attorney since its reason for being lies in the potential need for support. That is why the deed must state that it is a CPA and how the need for support is to be verified to make the CPA enter into force.²⁰⁵

Once granted, the notary gives notice of the CPA *ex officio* to the Civil Registry, where it is annotated in the granter's individual registry.²⁰⁶ The CPA's validity or legal effects are not conditioned upon its registration, nor between the parties or for third parties. The purpose of registration in the Civil Registry is to avoid the risk of overlapping if, in the future, the need for judicial support arises. The CPA can also be notified to the Land Registry so that it can be registered in the Book

²⁰¹ C. DE AMUNÁTEGUI RODRÍGUEZ, *Incapacitación y mandato*, La Ley, Las Rozas 2008 p. 263.

²⁰² Art 261 CC *in fine*. See further Question no 42 below.

²⁰³ M.P. GARCÍA RUBIO, 'Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio' (2018) 5 *Revista de Derecho Civil* 36.

²⁰⁴ Art 145 RN.

²⁰⁵ M.P. GARCÍA RUBIO, 'Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio' (2018) 5 *Revista de Derecho Civil* 37.

²⁰⁶ Art 260 II CC.

on the administration and disposition of real estate²⁰⁷ if the CPA's terms restrict the granter's free administration and disposition of assets.²⁰⁸

38. Describe when and how voluntary measures enter into force. Please consider:

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

The factual basis of CPA is the same as any other support measure: the entry into force occurs when the granter needs support.²⁰⁹ Reference to incapacity or other descriptive formulas, such as the impossibility to personally attend one's affairs, was ruled out.

Article 257 CC states that the granter can decide how the need for support will be proven. In practice, reference is made to the official certification of a disability or dependency degree. But the usual practice is that a notary formally compiles the conclusions of one or several physicians regarding the granter's loss of cognitive abilities.²¹⁰ Other possibilities are their admission to a nursing home, with or without a medical report. In addition, the CPA may also allow the attorney or a trusted third party to state that the support measure is to be activated.²¹¹

Once the situation has been accredited following the granter's provisions, no additional procedure is required to validate or homologate the CPA, neither from the notary nor from another public authority (i.e. courts, adult protection authority).

Appointment of representatives/support persons

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

²⁰⁷ Art 2.4 LH.

²⁰⁸ Art 242 bis LH.

²⁰⁹ See Art 249 I and 250 IV CC.

²¹⁰ C. DE AMUNÁTEGUI RODRÍGUEZ, *Incapacitación y mandato*, La Ley, Las Rozas 2008 p. 232; J.M. VALLS I XUFRE, *El poder preventivo*, Tirant lo blanch, València, 2018, p. 265.

²¹¹ J.M. VALLS I XUFRE, *El poder preventivo*, Tirant lo blanch, València, 2018, pp. 329-333;

- 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 CC does not specify any requirement. The attorney may be a natural person, in which case they must be of legal age and not subject to support measures incompatible with exercising the powers conferred by the CPA. They can also be legal entities, both non-profit but also for-profit.²¹²

The grantor can avoid the application of the legal exclusion grounds applicable to support persons (see above answer to **Question No. 23 a**), including potential conflicts of interest. On the other hand, it is legally prohibited that ‘those who, under a contractual relationship, provide care, residential or similar services to the person who needs the support.’²¹³

CPA can be granted in favour of one or several representatives. The appointment of several attorneys may be simultaneous, or they may act successively or alternatively. In practice, granters usually appoint their spouse as an attorney and the children in the event of their death or incapacity.

During the measure

Legal effects of the measure

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

Under the old legislation, a CPA was to be applied as a private contract only because it was assumed that, in any event, a judicial procedure of capacity modification might be opened and allow supervising the CPA’s execution and even revoking it. Currently, however, the adoption of judicial measures is only possible in the absence or insufficiency of voluntary support measures.²¹⁴ The principle of subsidiarity entails that the granters’ decision that the support be channelled through a CPA must be respected in the manner in which they decided.

²¹² M.P. GARCÍA RUBIO, ‘Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio’ (2018) 5 *Revista de Derecho Civil* 50. J.M. VALLS I XUFRÉ, *El poder preventivo*, Tirant lo blanch, València, 2018, p. 203

²¹³ Art 250 VIII CC.

²¹⁴ Art 255 V CC.

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

Before the 2021 reform, neither the granting of a CPA nor its entry into force affected the granters' legal capacity. Only with the judicial modification of legal capacity, the grantor was prevented from acting within the scope established by the decision, which may or may not overlap with the matters entrusted to the attorney. In the meantime, the granters could act independently, provided they have the mental capacity to consent to the corresponding legal act. After the 2021 reform, this approach has been reinforced by the fact that the previous legal condition of being "a person with judicially modified capacity" has been repealed.

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)?**

The starting point regarding the attorney's power is the granters' will. The law admits they may include 'all the grantor's affairs (*todos los negocios del otorgante*).²¹⁵ The granters may also stipulate how the attorneys shall act in these matters and the scope of their support.²¹⁶

(a) Property and financial matters

There is no legal limit regarding the CPA's scope in financial matters: the law does not exclude any affairs. It is even possible that the granters attribute the faculty to donate or to guarantee third party's debts. If there is an abuse of the power of representation, the acts performed by the attorney might be annulled.²¹⁷

²¹⁵ Art. 259 CC.

²¹⁶ Art 253 II CC.

²¹⁷ *Tribunal Supremo* 642/2019, 27 November 2019 (RJ 2019, 4811).

(b) Personal and family matters

The CPA may include instructions about the place of residence and with whom to live, the provision of personal care, the exercise of rights in employment, training, or leisure matters, as well as the protection of the rights of the personality or on the personal data, among other aspects. However, as in the *curatela*,²¹⁸ while the granters can express their will, desires, and preferences, any action of the holder of a CPA in this sphere demands their explicit or implicit consent. The powers to act conferred in the CPA are not sufficient.

On the other hand, the CPA does not allow the attorney to represent the adult in legal acts that are considered highly personal and where substituted decision-making is not possible. Among these acts are marriage²¹⁹ and will.²²⁰

(c) Care and medical matters

As noted above, the 2021 reform does not include the specific legal regulation of detention, informed consent, and ‘other special laws,’ such as the one that regulates the participation of persons with disability in clinical trials or the exercise of their personality rights. In all these cases, it seems reasonable that the position attributed to the *curador* can also be attributed to the attorney holding a CPA that deals with the personal sphere or is general.

As a support measure, CPAs are subject to the general criteria outlined in Art 249 CC. Therefore, exercising the powers granted must be based on respecting the person's dignity and protecting their fundamental rights. The prevalence of the granters’ will does not end at the time of granting the CPA, nor when it enters into force. As in any support measure, respect for the will of the adults, and offering them ways to form and express their will, is crucial for an effective exercise of support through a CPA.²²¹ If it is not possible to determine it, the attorney must make the decision that the person would have adopted, taking into account their life history, beliefs and values, as well as the factors that the granter would have taken into consideration.

²¹⁸ See Art 287 1 CC.

²¹⁹ Art 56 II CC.

²²⁰ Art 663.2 and 665 CC. Other instances are the donation of reproductive material and consent to artificial reproductive techniques (Art 5.6 and 6.1 Act 14/2006, of 26 May) or organ donation by living persons (Art 4 Act 30/1979, of 27 October).

²²¹ M.P. GARCÍA RUBIO, ‘Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio’ (2018) 5 *Revista de Derecho Civil* 52.

The CPA will most likely determine whether or not the attorney is paid. In practice, the most frequent is that no remuneration is received in the case of spouses or relatives. On the other hand, it is likely that when the CPA appoints an entity or a professional, remuneration is established. If the CPA is silent on this issue, the default rules for *curatela* point to the conclusion that the attorney, in a general CPA, would be entitled to remuneration as long as the assets allow it, taking into account the tasks to be carried out and the value and profitability of the assets.²²²

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

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

The adult may establish a plurality of voluntary measures, which remain in force unless otherwise provided.²²³ Several CPAs can be in force simultaneously, although the appointed representatives usually deal with different areas. For instance, a general CPA for all matters and a special CPA to manage certain assets. A CPA may also deal with property matters, whereas another CPA with personal issues. In practice, the CPA granted later likely implies the modification or revocation of those granted previously, but this does not happen automatically. The granter, who consciously allowed for the simultaneity of titles, bears the risk of incompatible actions by future representatives. However, a diligent exercise of their assignments implies that if any attorney becomes aware of that simultaneity, they must coordinate with the others not to harm the adult's interests, who is possibly no longer in a position to modify or revoke the concurrent titles. Bona fide third parties would be protected to the extent that they can rely on the title provided by the CPA. If the simultaneity of CPA makes it difficult to manage the interests of the person in need of support, this may be one of the reasons leading to its termination by the judge.²²⁴

When the granter appoints a plurality of attorneys, it is most likely that detailed rules would have been issued on how they should act: all must agree for all or

²²² Art 281 II CC.

²²³ Art 258 I CC.

²²⁴ Art 258 IV CC.

some of the entrusted matters, or any of them can act individually with full effects in the adult's sphere. There are countless variations depending on the type of acts, the assets they concern, and many other personal and family factors that the concerned person may consider. Third parties will be affected by the rules established in the CPA since they provide the title for the agent to act on the adult's behalf.

In the unlikely event of a gap in the notarial instrument regarding how the different attorneys must act, the default legal rules on *curatela* do not clarify the question.²²⁵ Combining the need to protect the interests of vulnerable persons with the flexibility needed for managing their assets, it is suggested that individual action should suffice for ordinary administration. In contrast, joint action would be necessary to carry out acts of extraordinary administration.

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?**

The CPA remains in force even if other voluntary or judicial support measures are implemented.²²⁶ Indeed judicial measures will only be possible if the CPA is insufficient or inadequate to provide the support the adult needs. For example, when the CPA only involves financial matters, and the adult needs support in personal matters. If the judicial measure is eventually set in motion, the attorney and the *curador* act simultaneously in their respective area of responsibility. The *curador* does not have powers of supervision or control over the attorney. Moreover, if a conflict arises in interpreting the scope of the coexisting measures, the provisions of the voluntary measures should prevail over the judicial ones.²²⁷ Regarding *guarda de hecho*, the provisions of the CPA also prevail while they are sufficient and applied *effectively* by the appointed attorney.²²⁸

In the CPA, third parties obtain information on the scope of the attorneys' powers through the document, which they display when concluding the legal act. The

²²⁵ See Art 277 II CC.

²²⁶ Art 258 I CC.

²²⁷ M.P. GARCÍA RUBIO, 'Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio' (2018) 5 *Revista de Derecho Civil* 54.

²²⁸ Art 263 *in fine* CC.

distribution of functions also results from the CPA and the judicial order instituting additional support measures. In the latter case, the judge must consider the scope of the CPA in force when stipulating the scope of *curatela* (or of *defensa judicial*).

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.

Neither the granting nor the entry into force of the CPA implies the loss of legal capacity of the granters nor the limitation of their disposition faculties. Unless otherwise provided in the CPA, the adult does not require the authorisation of the attorney or the judge to carry out any legal act. If any such limitation is established and recorded in the corresponding public registry, it shall be opposed to the other party, and the act in question can be annulled.

If the CPA is one of general scope, the attorney must request judicial authorization for the same acts as the *curador* with representation powers. Failure to do so will render the act voidable.²²⁹ The granter may nonetheless exclude the need for judicial authorization when granting the CPA.

The granters may act freely before and after the CPA enters into force. Their acts will be fully valid and effective unless the CPA establishes a limitation of their disposition powers or the consent is defective. In the latter case, the act may be annulled by resorting to the general rules on avoidance of legal acts based on defective contractual consent.

The CPA is based on the granting of limited representative powers. The attorney must respect the adult's will. The attorney must reconstruct the adult's hypothetical will if it has not been expressed nor can it be known. In the exercise of this function, the agent must act with prudence, loyalty and apply the required due care. The acts concluded within the scope of the CPA bind the adult. The other party is protected unless they acted in bad faith. However, if there was abuse, the

²²⁹ But see above the answer to **Question no 45 b**) on the discussion around the remedy available in cases of this sort.

attorney's acts might be avoided, and the other party may claim against them for the damages suffered.

The acts concluded despite a conflict of interest between the adult and their representative are also voidable on the grounds of abuse of power. The other party, even in good faith, is not protected, but has a claim for damages against the attorney in the case of annulment of the contract.

46. Describe the system of supervision, if any, of the voluntary measure. Specify the legal sources. Please specify:

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

The fact that the legal rules on *curatela* are the default rules for CPA implies that the attorneys appointed in a general CPA are subject to the same requirements, limitations, and responsibilities as court-appointed *curadores*.²³⁰ The attorney must thus periodically render accounts of the asset management²³¹ and inform the judge and the public prosecutor about the person's situation.²³²

The application by default of the legal rules on *curatela* can avoid some risks but at the cost of increasing the rigidity of the CPA and making it less useful and attractive. For this reason, the granters of CPA normally exclude these rules and include safeguards allowing quick and efficient management of their interests. The law does not mention it, but the granter may appoint a supervisor to control the proper execution of the CPA. Until now, however, CPAs are usually granted with immediate effect and without establishing any safeguard such as appointing supervisors. In these CPAs, official supervision is not applicable *a priori*, and any abuse can be verified and remedied only *ex post facto*. The 2021 reform did not change that and was rather inclined to admit very few restrictions on the autonomy of the adult when it comes to excluding safeguards legally available.²³³

End of the measure

²³⁰ See Question no 23 above.

²³¹ Art 292 CC.

²³² Art 270 CC.

²³³ An example is the general prohibition of self-contracting, which in the CPA will not be applicable 'when the granter has expressly excluded' (Art 251 II CC).

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.

The CPA does not terminate even if it is necessary to establish additional judicial support measures because the support it provides is deemed to be insufficient or inadequate. Courts cannot simply order the CPA's termination because they consider it more convenient that another person deals with the adult's affairs. Termination of a CPA is only possible if the attorney is guilty of conduct that would mean the removal of a *curador*.²³⁴ The decision to remove the attorney is made in a judicial procedure that can begin as non-contentious and become contentious if the attorney opposes the removal.

There is a specific case of termination of the CPA granted to the spouse or unmarried partner when the marriage or stable non-married partnership breaks up.²³⁵ Termination operates unless it is proved that the granter would have wanted the spouse or partner to continue acting as an attorney despite the breakup.

In addition, grounds for termination of *curatela* and the contract of mandate also apply: (a) the death of the concerned person²³⁶; (b) the death of the attorney; (c) bankruptcy of the attorney; and (d) the resignation of the attorney.²³⁷

Revocation is possible both before and after the CPA has entered into force. The fact that the CPA enters into force does not allow us to presume that granters lack the aptitude to revoke the CPA. Therefore, if they can conform and express a free and informed will, or if they can do so with the available support, they may revoke the CPA.²³⁸

Article 258 III CC mentions the 'specific forms of termination of power' that the granter could have established in the CPA, such as a limited duration or its termination due to some condition (for example, that the appointed attorney reaches a certain age).²³⁹ The CPA may also include situations in which it is

²³⁴ Art. 258 IV CC. M.P. GARCÍA RUBIO, 'Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio' (2018) 5 *Revista de Derecho Civil* 54.

²³⁵ Art 258 II CC.

²³⁶ Art 291 and 1732 3º CC. Including *declaration of death* as for *curatela* (see Art 291 CC).

²³⁷ Art 1732, 2 CC.

²³⁸ M.P. GARCÍA RUBIO, 'Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio' (2018) 5 *Revista de Derecho Civil* 57.

²³⁹ J.M. VALLS I XUFRE, *El poder preventivo*, Tirant lo blanch, València, 2018, p. 265.

deemed to have been revoked²⁴⁰ or stipulations that empower third parties or the supervisory body to revoke it and replace the attorney.²⁴¹

Finally, the 2021 reform raises the question of whether the CPA should be reviewed periodically. In the absence of particular stipulations, it seems that as a support measure, it must be subject to review under the same terms and conditions as judicial-ordered support measures.

Advance directives [*Instrucciones previas*]

33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measures. Please consider, among others:

- a. the existence of specific provisions regulating voluntary measures;**
- b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

The basic requirements for AD are set by national health legislation.²⁴² Regional regulations, however, supplement these rules regarding the capacity to grant AD, their content and the formalities.²⁴³

Legal nature. Advance directives are unilateral, *inter vivos*, inherently personal legal acts, which lead to indirect obligations for the medical staff, who must honour the will and preferences of the patient unless there are specific grounds to disavow them, and to direct obligations for the *representative*. Upon acceptance, the latter is responsible vis-à-vis the patient to fulfil their lawful desires.

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.

See answer to **Question No. 34** above regarding CPA.

²⁴⁰ M.P. GARCÍA RUBIO, 'Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio' (2018) 5 *Revista de Derecho Civil* 57.

²⁴¹ J.M. VALLS I XUFRE, *El poder preventivo*, Tirant lo blanch, València, 2018, p. 125.

²⁴² Art 11 LBAPIC.

²⁴³ See L. NORIEGA RODRÍGUEZ, 'Análisis de la legislación estatal y autonómica en materia de instrucciones previas o voluntades anticipadas, *Anuario da Facultade de Dereito da Universidade da Coruña* 2016 (20) 29-71. Autonomous Communities have their own regional registries of advanced directive. However, there is also a centralised *Registro Nacional de Instrucciones Previas* set up by Royal Decree 124/2007, of 2 February. Full synchronisation of regional records in this central registry is operative since January 2013.

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)?

According to basic state law, the purpose of AD is to record the will ‘about the medical care and treatment or, upon death, about the destination of the body or the organs.’ Some regional regulations develop this idea by pointing to three different issues. Firstly, AD expresses vital objectives, quality of life and personal expectations, which are necessary to contextualize medical decisions. Secondly, AD also determines the situations where the medical team must resort to the instructions given by the patient. Finally, AD should anticipate treatments the patient does not want to submit.²⁴⁴ The regional legislation tends to emphasise decision-making regarding highly invasive life support treatments, such as CPR, artificial ventilation, dialysis, etc. In recent years, regional legislation has evolved to include end-of-life planning rules. In line with these developments, national legislation has recently allowed to request help in dying. If the patient is deemed incompetent and suffers from a serious and incurable disease or a serious, chronic and disabling condition (euthanasic context), AD can also be applied, and the medical team must abide by their provisions.

Start of the measure

Legal grounds and procedure

The entry into force of AD occurs when it is necessary to undergo a treatment or medical act included in its scope of application and the granter is (temporarily or permanently) incapable of expressing their will.

As long as the person is capable, with or without support, of deciding about medical care or treatment, the AD will not apply, nor will the representative act as such. Regardless of what the AD says, the actual will of the person is to be followed.

The procedure is channeled through the medical services that are treating the person. These become aware of the will expressed in the AD through the clinical documentation, communication from family members or close friends and by accessing the information provided by the regional or national AD registry.

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

²⁴⁴ This is the approach in the regulation of La Rioja (Art 5 Act 9/2005, of 30 September).

The basic norm requires legal age, capacity and freedom to grant AD. Some regional acts also allow emancipated minors (over 16), minors over 14 years of age (in Aragon or Navarre), or even minors of that age with the support of those who hold parental authority or guardianship.

Regarding the capacity requirement, in many cases, people with disability were excluded because they were *incapacitated*. However, some regional regulations required that this exclusion results specifically from the court-ordered measure. In general, what is currently assessed is the person's competence to grant that act and whether they have the mental capacity required for it. In addition, persons with a disability could use the support they need to grant AD. In any case, a representative cannot grant the AD on their behalf.

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.

National regulation does not admit oral forms of AD. It requires AD to be in writing. The regional norms have supplemented this rule with details about formalities, which differ in some regions. Accordingly, granting AD is possible a) before a notary without the need for witnesses; or b) in writing before 2 or 3 witnesses (meeting certain requirements to secure their impartiality) who sign the document together with the concerned person; or c) before public officials specially authorized (for instance, the officials of the regional AD registry).

There is a national registry and 17 regional registries. Registration is not a requirement for validity, but in some regions, AD granted before witnesses have to be registered to have full legal effect. The AD must be sent to the regional registry within seven days. The adult's data and a copy of the AD are recorded, and notice is given to the national registry. Regional regulations also indicate who can access these data. Usually, access is restricted to the granter, their representative and the medical team responsible for the treatment.

38. Describe when and how voluntary measures enter into force. Please consider:

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

AD comes into force when it is necessary to decide about treatments or interventions and the situation anticipated in the AD has eventuated. The AD should serve to guide the medical decision in a way that respects what the patient would have wanted if they had been able to decide at that time. Access to AD is online via national and regional registries. A notice about AD is usually displayed as reserved information in the patient's clinical history.

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?**

Some regional regulations indicate the person's requirements to act as the patient's representative to enforce the AD. Legal age and full legal capacity are regularly required. The authorizing notary, the witnesses, the official in charge of the registry and the professionals called to apply the AD are excluded. The possibility of appointing a plurality of representatives, who may act successively or simultaneously, is also admitted.

During the measure

Legal effects of the measure

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

Article 11 LBAPIC states that AD 'contrary to the legal system, to the *lex artis*', as well as those that do not correspond to the situation foreseen by the granter at the time of granting them, shall not be applied. Therefore, except in these cases, the general rule is that AD is binding, even when the AD includes the rejection of some treatment. Courts have disavowed the practice of hospitals that do not abide by AD rejecting blood transfusions when the patient falls into a state of unconsciousness.²⁴⁵

²⁴⁵ For instance, order of the Provincial Court of Biscay (Section 2) no 90147/2018, of 26 of March.

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

Entry into force of AD does not affect the person's legal capacity. However, they are based upon the lack of natural capacity to form a judgment on their own and to express valid consent regarding medical care or treatment.

Powers and duties of the representative/support person

According to Article 11.1 LBAPIC, the representative may “if needed, serve as interlocutor with the doctor or the medical team to ensure compliance with AD’. The function is thus not actually to represent but to ensure that the patients' plans are carried out to the extent legally possible. Their function is neither to assist nor to provide support because if that was the case, the person would be able to decide.

It is not possible to name a representative to act as a substitute or to decide on the place of the patient. There must always be a decision of the adult. However, some regional laws have expanded the role of the representative, including the power to construe the AD, and have even admitted substituted-decision making when the AD is ambiguous or has lacunae. In this case, the representative's task would be making the decision that best fits the adult’s values, beliefs and life course.

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)?**

AD only deals with decisions involving health care and medical treatment or, upon death, the body's or the organs’ destination.

In any case, the criterion for decision-making is the respect for the will and preferences expressed in the AD, provided that it can be said that they are lawful, do not violate the good clinical practice and fit with the situation that the patient

envisaged. The regional regulation adds that if there is a representative, they must ensure respect for the dignity of the patient and their will.

The representative is entitled to access the clinical record, to receive the corresponding information about the medical condition and the treatment, and, where appropriate, to consent to the intervention or to reject it if this is what the adult would have decided had they been able to do so. If the hypothetical will is unknown and cannot be reconstructed, the representative's acts must be oriented towards the decision that serves the best interest of the concerned person.

The current regulation does not mention the possible remuneration of the representative appointed in the AD. Legal scholarship points to the gratuitous nature of the act, which would rule any remuneration out.²⁴⁶

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

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

Basic regulations do not mention it, but some regional regulations refer to the possibility of appointing several representatives, in which case the regulations demand that it be indicated if they will act successively or simultaneously and, in the latter case, if so, they will do jointly or severally.

In the event that several representatives are appointed in different instruments, the last one governs as a rule. However, the person concerned may have saved the validity of the entitlement conferred on the representatives previously appointed and have established how the different representatives should act.

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?**

²⁴⁶ T. ECHEVARRÍA DE RADA, 'Voluntades anticipadas: cuestiones controvertidas', *Revista Doctrinal Aranzadi Civil-Mercantil* 6 (2017) § I.

- 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?**

The person appointed as representative in AD enjoys preference in decision-making on healthcare matters over those who are entitled to intervene as *curador* or who claim to be *guardadores de hecho*.

Where a state-ordered measure or a *guarda de hecho* is in place, the said preference is easily made known to third parties because AD is written in a document easily accessible to healthcare providers. This document specifically points to this area of decision-making, and the general powers conferred to the *curador* or those recognized by the law to the *guardador de hecho*, must yield to the powers conferred by the AD.

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.

Basic legislation indicates that the will expressed in AD cannot be applied if they are 'contrary to the legal system', to the '*lex artis*' (that is good clinical practice), or if the situation does not fit that envisaged by the concerned person when granting the AD.²⁴⁷ In any of these cases, the decision to act against the stated will of the patient shall be recorded in the clinical history, and the medical team shall proceed as required by good clinical practice.

After the legalization and decriminalization of active euthanasia and assisted suicide²⁴⁸, help in dying can be requested in AD since it is no longer a practice 'contrary to the legal system'.

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;**

²⁴⁷ Art 11.3 LBAPIC.

²⁴⁸ See Organic Act 3/2021, of 24 March.

- **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.**

In case of discrepancies between the representative and the responsible medical team, regional regulations state that the conflict must be referred to the hospital or regional ethics committee. Either at the request of the health centre or the representative, the issue can also be raised before the judge, who, in light of the AD and the conflicting points of view, shall decide with respect for the will of the person and, if this cannot be established in any way, of their best interest.

The supervision of the representatives' actions, in particular their respect for the dignity and the will of the patient, remains in the hands of the responsible medical team, which will check whether they are complying with the wishes of the person, or either hiding their will or distorting it for whatever reason.

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.

AD can be modified, revoked and replaced by the persons concerned at any time as long as they can do so knowingly and freely.

AD does not have an expiration date, although legal scholarship suggests periodically reviewing the document to accommodate it to the real will of the granter, which different circumstances may have modified over time since the granting. Some even argue that if such an update is not made, AD could have, at most, an indicative value.²⁴⁹

AD that, due to their content, can be classified as unlawful, does not produce any effect, will cease to be applied if necessary and does not need to be declared null.

The appointment can be annulled if it is shown that the representative does not respect the dignity and the will stated by the patient through AD. The regulations,

²⁴⁹ T. ECHEVARRÍA DE RADA, 'Voluntades anticipadas: cuestiones controvertidas', *Revista Doctrinal Aranzadi Civil-Mercantil* 6 (2017) § II.

however, do not establish any legal framework on this matter, and it is only possible to invoke a principle of protection of vulnerable people who are not in a position to express a will about the issues that concern them, in particular about the health care or medical treatment.

Support agreements [Acuerdos de apoyo]

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

Along with voluntary measures that aim to regulate decision-making when the person cannot express their will, the 2021 reforms also introduced the possibility that the person with a disability who already requires support designates someone to provide it to them. The admission of support agreements is mentioned in Art 255 CC, but the provision does not state particular rules on the issue.²⁵⁰

The regulation of this type of agreement is found, firstly, in the general rules on support measures and CPA, and, secondly, in the particular legal rules on *curatela*. The regulation of the mandate and the general law of obligations and contracts may also be applied as a last resort.

- 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.**

See the answer to **Question No. 34** above regarding the CPA.

- 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)?**

²⁵⁰ Criticisms in C. GUILARTE MARTÍN-CALERO, 'Comentario al art. 250' in *Com Ley 8/2021 Guilarte*, p. 536, and C. DE AMUNÁTEGUI, 'Comentario al art. 255' in *Com Ley 8/2021 Guilarte*, p. 574.

As in the case of the CPA, the support agreements can include personal and financial aspects and be specific for a single act or involve more stable or permanent support. They may consist of assisting in decision-making, deciding jointly with the person concerned, or acting in the name or on behalf of this person.²⁵¹

Start of the measure

Legal grounds and procedure

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

The capacity requirements are not regulated since the law indirectly mentions support agreements but does not provide a detailed legal regime. However, it is important to underline that it is an act aimed at providing the opportunity of offering support to people who need it to exercise their legal capacity. Therefore, the only requirement regarding capacity is that the person has the necessary discernment to understand and consent to the type of act at issue. In particular, to agree that a third person may intervene in their lives by advising, informing, and even acting on their behalf in what is decided in the agreement.²⁵²

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.

The support agreement must be in a public deed. A verbal agreement or a private deed is not enough (in which case, it could be a form of *guarda de hecho*). Once granted in a public deed, the support agreement is valid and effective between the parties and in relation to third parties. It doesn't need to be registered in the Civil Registry or other public registries. However, by analogy with the CPA, they should be communicated to the Civil Registry so that judges can know about the support agreement if a petition for court-ordered support measures is filed later.

38. Describe when and how voluntary measures enter into force. Please consider:

a. the circumstances under which voluntary measures enter into force;

²⁵¹ C. GUILARTE MARTÍN-CALERO, 'Comentario al art. 250' in *Com Ley 8/2021 Guilarte*, p. 536.

²⁵² C. GUILARTE MARTÍN-CALERO, 'Comentario al art. 250' in *Com Ley 8/2021 Guilarte*, p. 538. A. CASTRO-GIRONA, 'Artículo 255', in M.P. GARCÍA RUBIO/M.J. MORO ALMARAZ (Coord), *Comentario articulado a la reforma civil y procesal en materia de discapacidad*, Thomson Reuters-Civitas, Madrid 2022, p. 267 argues that full and complete comprehension of the legal act is not the same as the 'full knowledge of its scope and effects', which is the requirement for valid legal acts entered into by persons with or without disability.

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

Unlike the CPA, support agreements are based on a current need for support. As a consequence, they enter into force immediately after being granted before the notary. The notary will carry out the necessary checks on the conditions required to set up this support measure. Firstly, the need for support. Then, the mental capacity to grant the legal act and the legal aptitude of the person chosen to carry out the function. The notary should be aware also of possible risks of conflict of interest, abuse or undue influence. Legal scholars stress thus the need that, although the concerned person can visit the notary accompanied by the person they want to designate, the notary must interview them separately.²⁵³

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 same criteria for the CPA apply in this matter.

During the measure

Legal effects of the measure

- 40. To what extent are the voluntary measure and the wishes expressed within it legally binding?**

See the answer to **Question No. 40** above regarding CPA.

²⁵³ C. DE AMUNÁTEGUI, 'Comentario al art. 255' in *Com Ley 8/2021 Guilarte*, p. 576.

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

A support agreement designating the person who will provide it does not affect the grantor's legal capacity, which remains intact. However, the content of the support agreement may include limitations on the powers of administration or disposition or a commitment consisting of requiring the consent of the support person before carrying out certain acts or making certain decisions.²⁵⁴

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)?**

The support agreement is based on the idea that, despite the disability, the person can carry out all kinds of legal acts and take part in social life with the support of the designated person. From this point of view, the scope of the support agreement is general because it covers the personal and financial spheres of the concerned person. The agreement can even include representative powers in the areas where the person considers that needs to be represented by the support person. On the other hand, when the person's conditions do not allow passing a minimal threshold of mental capacity needed to recognize and agree on the scope and functions of the agreement, this instrument is not adequate. Any entitlement resulting from such an instrument may be questioned.

Decision-making through support agreements must lead to effectuating the will and preferences of the person concerned, who shall be able to decide by themselves and state their will, thanks to the task undertaken by the support person.

²⁵⁴ C. GUILARTE MARTÍN-CALERO, 'Comentario al art. 250' in *Com Ley 8/2021 Guilarte*, p. 537.

The relationship established through the support agreement entails the duty to inform and consult the person concerned regarding any aspect that may be relevant to them. A proactive attitude of asking their opinion is a prerequisite of any initiative the designated person takes.

There is the possibility of agreeing a remuneration to the person who provides the support. See answer to **Question no 42** above regarding CPA.

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

We lack experience in support agreements. As a result, the general criteria developed for other voluntary measures have to be applied. See the answer to **Question No. 43** above regarding CPA.

- 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?**

See the answer to **Question No. 44** above regarding CPA.

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.

In the agreement designating support, the person can stipulate limitations on their future action in response to their current need for support. For instance, the agreement can introduce the need for authorisation of certain acts before they can be effectively undertaken. In that case, the acts carried out without authorisation will be voidable.

Regarding unauthorised acts of the support person, there could be an abuse of powers derived from the support agreement. The resulting legal act could only bind the person with a disability if that person confirmed it. Otherwise, the responsibility falls on the support person who has overstepped their powers. They are liable vis-à-vis the party who relied on their apparent powers.

As has already been pointed out, if, through the support agreement, the person receives all the support they need before making a decision, the fact that the resulting legal act is not completely in their interest does not impinge upon its validity. If, as a result of the agreement, the support person has representative powers and carries out ill-conceived acts on behalf of the concerned person, the legal consequence is that the latter is bound and must comply with the resulting obligations. They can claim against the support person if a breach of loyalty or due care can be proven.

Regarding possible conflicts of interest upon appointment and during the duration of the agreement, see the answer to **Question No. 45** above regarding CPA.

- 46. Describe the system of supervision, if any, of the voluntary measure. Specify the legal sources. Please specify:**
- a. is supervision conducted:**
 - by competent authorities;
 - by person(s) appointed by the voluntary measure.
 - b. in each case, what is the nature of the supervision and how is it carried out?**
 - c. the existence of measures that fall outside the scope of official supervision.**

The supervision of the support designated in voluntary measures contemporary to the need for support is governed by criteria similar to the CPA. These must be modulated in view that a support agreement is granted by people who suffer impairments that affect, albeit do not exclude, their cognitive abilities.

Although there is no practical experience, the supervision might include appointing someone in charge of it in the same agreement (for instance, a support entity acting as a trusted third party for controlling the support provided).

As in the CPA, the granter might waive official safeguards regarding the support activity in this voluntary measure. Under certain circumstances, this agreement might easily be qualified as insufficient or inadequate support, and this would mean that the judge could issue supplementary or additional support measures.

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.

In addition to the grounds applicable to CPA, particular attention is to be paid to a) revocation or withdrawal by the adult, which requires that the adult meets the mental capacity requirements to be able to make that specific decision, and b) substantial changes of the health condition of the person who granted the support agreement, to the extent that they might lack the aptitude needed to enter into legal acts with the support of the designated person or to grant representative powers to the support person. Termination of the support agreement may lead to court-ordered measures activated *ex officio* or at the request of the public prosecutor.

The law does not clarify whether the support agreements must be reviewed periodically. In this case, it would be very convenient because the person's conditions may worsen, and the support agreement may become insufficient or inadequate. Applying the default rules on curatela would require reviewing the instrument at least every six years.²⁵⁵ If the person with a disability has excluded the review, the only way to adapt the support to the changing circumstances is to put in motion court-ordered measures that add some safeguards²⁵⁶ or even terminate the support agreement.

Reflection

48. Provide statistical data if available.

(a) Autocuratela

According to official data from the Spanish Notary College, the total amount of *autotutela* (precedent of current *autocuratela*) deeds was 3,228 in 2022.²⁵⁷

²⁵⁵ C. GUILARTE MARTÍN-CALERO, 'Comentario al art. 250' in *Com Ley 8/2021 Guilarte*, p. 537.

²⁵⁶ See Art 249 IV CC.

²⁵⁷ The number in 2011 was already 2598. Source: <https://www.notariado.org/liferay/web/cien/estadisticas-al-completo> (Grupo 01 - Actos de orden familiar y personal / 108 - Autotutela). Last accessed 27.06.2023.

(b) Continuing Powers of Attorney

According to official data from the Spanish Notary College, the number of CPAs granted in Spain increased from 1,295 in 2011 to 17,342 in 2022. Accordingly, even if the total amount is modest, the number of instruments passed each year is ten times greater than ten years ago.²⁵⁸

(c) Advance Directives

As of April 2022, the number of active advance directives registered was 373,400, a rate of 7.88 per thousand inhabitants nationally.²⁵⁹ In 2021, 9,938 AD were created via notarial deeds.²⁶⁰

(d) Support agreements

This instrument is very new; no prior experience existed before the 2021 reform.

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)? Have the measures been evaluated, if so what are the outcomes?

The main problems that have arisen in practice concern CPA, particularly the riskiest type of them in which the granter conferred general representative powers to the attorney without specific safeguards preventing the latter from abusing these powers. Several incidents of fraudulent use of CPA and the disastrous consequences of the leeway granted to the representative have been reported. Nonetheless, the 2021 reform has kept the same formal safeguards and ratified the liberal approach vis-à-vis this support measure by insisting on the possibility of waiving all the statutory safeguards.

SECTION V – EX LEGE REPRESENTATION

Overview

²⁵⁸ Source: <https://www.notariado.org/liferay/web/cien/estadisticas-al-completo> (Grupo 14 - Apoderamientos / 1410 - Poder preventivo para el caso de incapacidad). Last accessed 27.06.2023.

²⁵⁹ Source: *Declarantes con IP activa por Comunidad Autónoma y grupos de edad. Registro Nacional de Instrucciones Previas. Abril 2022*. Available at <https://www.sanidad.gob.es/ciudadanos/rnip/home.htm>

²⁶⁰ The number of notarial AD grew from 4,164 in 2011 to 9,938 in 2021 and 13,230 in 2022. Source: <https://www.notariado.org/liferay/web/cien/estadisticas-al-completo> (Grupo 01 - Actos de orden familiar y personal / 103 - Voluntades anticipadas). Last accessed: 27.06.2023.

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

Under Spanish law, the only situation that fits with the definition of *ex lege* representation is the so-called *guarda de hecho* ('de facto custody'). The underlying practical idea is that the 'de facto custodians' (*guardadores de hecho*) assist the person with a disability to make their own decisions and act on their behalf. They can ask for judicial permission for the most important legal acts instead of starting '[a] general procedure for the provision of support'.

The 2021 reform has strengthened the legal relevance of this situation. Before, it was deemed a temporary situation, whereas now it is named as a measure of support on equal footing with voluntary and state-ordered measures.²⁶¹ Article 263 CC states that:

Whoever properly exercises the *guarda de hecho* of a person with a disability shall continue in the performance of this function even if there are voluntary or judicial measures of support in place, provided that these are not applied effectively.

Start of the ex-lege representation

Legal grounds and procedure

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

No reference is made to the legal grounds beyond the person's *disability*, which the law links to the need for support in exercising legal capacity. Before the 2021 reform, the term *guarda de hecho* was extensively used for assistance provided to persons who could be -but were not- incapacitated or when the appointed guardian was inoperative.

Guarda de hecho is not defined in the law. The legal terminology (*guarda* -custody) points to protection instead of supported decision-making²⁶². Still, the scope and content of the measure must conform to the principles of 2021 reform,

²⁶¹ See A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, pp. 647-8. According to the preamble of Act 8/2021, '[R]eality shows that in many cases the person with a disability is adequately assisted or supported in decision-making and the exercise of their legal capacity by a de facto custodian –generally a family member, because the family continues to be the basic group of solidarity and support in our society, especially with regard to its most vulnerable members–, which does not require a formal judicial appointment that the person with a disability does not want either'.

²⁶² Art 237 CC uses the same words for minor children.

which promote assistance instead of representation as far as possible. The legal scholarship also highlights that *guarda de hecho* is *permanent* and the support provided *informally* on the grounds of a family or trust relationship.²⁶³

It must not be identified with *care*. Those caring for the person with a disability are not necessarily their *guardadores* from a legal standpoint. Indeed, after the 2021 reform, professional carers can no longer undertake support functions.²⁶⁴ Co-habitation between the adult and the *guardador de hecho* is not necessary either.

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

The *guardadores de hecho* do not need to register a medical statement nor present it in every case that they need to act on behalf of the adult. They only need to prove that they are *guardadores de hecho* for the legal acts they can perform without judicial authorisation. In practice, this point is difficult to handle legally. They may use documents issued by social services showing that they are the contact person for the adult regarding administrative, medical or social issues.²⁶⁵ However, this might not be sufficient for legal acts involving insurance companies, hospitals or banks. Some voices suggest the possibility that notaries issue proof of *guarda de hecho* through a declaration affirming that the parties intend to act as such.²⁶⁶ Other possibilities point to asking the court to appoint the person as *guardador de hecho*, when authorising a specific legal act.²⁶⁷ Finally, some authors suggest using the possibility enshrined in Art 40.3.9 LRC to obtain a purely informative reference of the existence of *guarda de hecho* by filing a statement in the Civil Registry.²⁶⁸ Conversely, it will not be enough to prove that the adult and a person claiming to be *guardador de hecho* live in the same residence.²⁶⁹

Regarding acts that need to be approved by a judge, the *guardador de hecho* shall seek permission through a non-contentious procedure whereby the judge interviews the adult and may also request expertise concerning that person's situation. This expertise is likely medical but may also concern other dimensions (e.g.

²⁶³ A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, p. 652.

²⁶⁴ See Art 250 VIII CC. N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p. 493.

²⁶⁵ R. GARCIMARTÍN MONTERO, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters, Cizur Menor 2021, p. 62.

²⁶⁶ See *Circular de la Comisión permanente del Consejo General del Notariado* 3/2021, of 27 September.

²⁶⁷ Against this opinion see R. GARCIMARTÍN MONTERO, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters, Cizur Menor 2021, p. 54.

²⁶⁸ A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, p. 659.

²⁶⁹ *Ibid* p. 660.

financial, social, and family support). The judge can summon other persons or experts before granting permission to act.²⁷⁰

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

The situation of *guarda de hecho* does not need to be communicated to the judge or adult protection authority.²⁷¹ It does not need to be registered in the Civil Registry either.

The judge only grants permission to the *guardador de hecho* to carry out certain legal acts on behalf of the adult. There is, therefore, no formal appointment as *guardador de hecho*.²⁷² If there is a need to act again on behalf of the adult, the *guardador* must ask for new permission from the judge. It must be recalled that the *guardador*, as a purely factual situation, may have changed in the meantime.

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 *guarda de hecho* is not legally confined to spouses, partners, or relatives. Support is provided by the person who handles the interests of a person with a disability. The only requirement is evidence of this fact, which, as already mentioned above, is not easy and must be proven each time the support person wants to act as a representative. There might be problems in identifying the actual *guardador de hecho* if the adult has several relatives and close persons. Conflicts regarding the adult's representation will likely end with the court appointing a support person unless the adult is deemed capable of organising formalised support through a notarial deed.

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.

²⁷⁰ See Art. 52.3 LJV.

²⁷¹ N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p. 496.

²⁷² R. GARCIMARTÍN MONTERO, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters, Cizur Menor 2021, p. 55.

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

Guarda de hecho may involve all kinds of legal issues where the law allows support and representation.²⁷³ However, the representatives can act on a limited number of issues without judicial authorisation, namely filing applications for social benefits and concluding transactions involving assets of limited value (unless they had personal or family significance for the adult).²⁷⁴ At any rate, following the general principles of the 2021 reform, substitute-decision making may only take place when adults cannot decide by themselves with the support of the *guardadores de hecho*. In this case, the representatives must follow their hypothetical will if feasible.²⁷⁵

As already mentioned, however, banks, insurance companies or even public administrations too often reject representative steps taken by *guardadores de hecho* regarding everyday contracts and transactions.²⁷⁶ On the other hand, in medical decision-making regarding an incompetent patient, a factual approach is taken, which points to asking close persons when no formal appointment of a representative is in place. At any rate, no judicial authorisation is required to consent in this case.²⁷⁷

56. What are the legal effects of the representative's acts? Can an adult, while still mentally capable, exclude or opt out of such *ex-lege* representation (a) in general or (b) as to certain persons and/or acts?

The acts of the *guardador de hecho* are legally binding for the adult. A judge must authorise the most important acts. If the *guardador de hecho* acts without

²⁷³ N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p. 495 (no limit to ordinary administration of assets).

²⁷⁴ Asking for economic benefit ('provided that this does not imply a significant change in the person's way of life') and performing legal acts concerning assets 'that have little economic relevance and lack special personal or family significance' (Art 264 III CC). N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p. 495 (no analogy allowed). In any case, the acts listed in Art 287 CC (for which the curador needs judicial permission) do require judicial authorization (art 264 IV CC).

²⁷⁵ A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, p. 662-4. Other authors suggest that in this case the best interest of the adult must be applied: N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p. 495.

²⁷⁶ For instance, see C. PRADOS GARCÍA, 'Negativa de un banco a reconocer la condición de guardador de hecho. Comentario al Auto 8/2022 del Juzgado n.º 3 de Córdoba, de 11 de enero de 2022', (2022) 10018 *Diario La Ley* 1-4.

²⁷⁷ See Question no 14 c) above.

such authorisation, the act is voidable and not necessarily null.²⁷⁸ Before the reform, a legal provision explicitly stated that legal acts undertaken by the *guardador de hecho* were to be legally valid, provided they were beneficial for the adult. Currently, such a requirement is no longer in force, and representative acts within the sphere of legitimate intervention of the support person are valid regardless of their economic result.

Excluding potential or actual candidates to act as *guardadores de hecho* is always possible, provided that the adult's mental capacity is sufficient. The exclusion may be general and result from a written document formalised under a notarial seal (*autocuratela*, CPA) or focusing on single areas (such as personal issues or residential decisions). Once *guarda de hecho* is in place, the opinion of the adult is channeled through the authorisation procedure, where the judge must interview them, or by setting up alternative support means (e.g. by filing a petition of judicial support or by entering into a support agreement with a third party).

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

The *guarda de hecho* may operate simultaneously with voluntary or judicial support measures *if these are not working properly*.²⁷⁹

Moreover, *guarda de hecho* amounts, in principle, to a valid title for assisting a person in need of support and acting on their behalf.²⁸⁰ The judge can only appoint a *curador* 'in the absence of a *guarda de hecho* that provides sufficient support...'.²⁸¹

Safeguards and supervision

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

Article 265 CC specifically states that the judge 'may ask the *guardador*, at any time, *ex officio* or at the request of the public prosecutor or 'any interested

²⁷⁸ *Tribunal Supremo* 10 January 2018. But see the reasons that call for absolute nullity instead of mere avoidability in A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, p. 666. See also N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p. 496 (quoting the different opinion held in *Tribunal Supremo* 17 March 2016).

²⁷⁹ Art 250 III CC.

²⁸⁰ A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, p. 650 (quoting M. PEREÑA VICENTE, 'La transformación de la guarda de hecho en el Anteproyecto de Ley' (2018) 5 *Revista de Derecho Civil* 61-8368)..

²⁸¹ Art 255 V pr CC.

party'²⁸², to provide information about the actions undertaken on behalf of the adult. The judge may also, at any time, ask for a detailed report on managing the adult's financial assets. The law grants full discretion to the judge to set up the necessary safeguards.²⁸³

End of the ex-lege representation

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

The representation conferred to the *guardador de hecho* ends under different circumstances.²⁸⁴ On the one hand, when the adult requests that the support be organised in another way (including giving up any support).²⁸⁵ This element indicates the priority given by Spanish law to the will of the adult.²⁸⁶ Secondly, '[w]hen the causes that motivated it disappear.' When *guarda de hecho* arises because voluntary or judicial measures are temporarily inoperative, resuming their activity means the former must end.²⁸⁷ The *guardadores* may also give up their task at any time, in which case they must notify the adult protection authority. Finally, the judge may terminate the *guarda de hecho* if that is 'convenient' at the request of the public prosecutor or any person interested in providing support to the adult.²⁸⁸

Reflection

60. Provide statistical data if available.

No statistical data is available concerning the number of persons supported and represented through *guarda de hecho*. More often than not, vulnerable adults are cared for and supported by their spouses (mostly wives), children (mostly daughters) and siblings (sisters, nephews, cousins). Persons living in residential premises

²⁸² Art 52 ILJV adds the vulnerable adult. R. GARCIMARTÍN MONTERO, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters, Cizur Menor 2021, p. 58 proposes a broad interpretation of possible interested persons.

²⁸³ A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, p. 670 critically points that these controls are excessive and rely on the mistrust against informal carers that the 2021 reform has given up.

²⁸⁴ See Article 267 CC.

²⁸⁵ N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p.498.

²⁸⁶ A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, p. 649.

²⁸⁷ N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p.499.

²⁸⁸ Again very critical of this possibility, that needs to be countered by the subsidiarity principle and the preference for informal supports, see A. LECIÑENA IBARRA, 'Comentario a los arts. 263 a 267' in *Com Ley 8/2021 Guilarte*, p. 679. N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p. 499 recalls that a judicial procedure must be opened and considers that a legal ground must be proven to remove the *guardador de hecho*.

without formal support are usually under the *guarda de hecho* of their close family relatives, who are also the contact person responsible for medical issues and other practical matters concerning the resident.

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)?

The main problem is that the lack of a formal appointment undermines the legal standing of *guardadores de hecho* when they try to represent the vulnerable adult before banks, public bodies and other organisations for basic financial or administrative matters. On the other hand, they usually act without safeguards and controls. Finally, some scholars point to the risk that, for most of the *guardadores de hecho*, it may be difficult to change the paternalistic view of their role into a new approach aimed at empowering and assisting the person whose interests they represent.²⁸⁹

Specific cases of ex lege representation

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

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

Since 1981, none of the spouses can hold the representation of the other without it being conferred.²⁹⁰ This notwithstanding, Article 1319 I CC authorises any of them to enter into transactions to meet everyday needs according to local usage and the family's circumstances (*potestad doméstica*). As a result, each spouse can incur ordinary household expenses acting individually and legally binding the other spouse, regardless of the latter's capacity. At any rate, the debts arising from such expenses will be paid out of community property and by the spouse who incurred the debt. The other spouse is subsidiarily liable only.²⁹¹

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

²⁸⁹ N. ÁLVAREZ LATA, 'Comentario a los arts. 263 a 267' in *Com CC Bercovitz*, p. 494.

²⁹⁰ Art 71 CC.

²⁹¹ Art 1319 II and III CC. Under Catalan Law, both spouses are held solidarily liable for family ordinary expenses (Art 231-8 CCCat).

property? Please consider both cases: where a spouse has/has no mental impairment.

The general rule under the community property regime is that spouses administer community assets jointly unless they have agreed otherwise in a marital agreement.²⁹² Yet both spouses do not need to act together. It suffices that one spouse acts with the explicit or tacit consent of the other spouse.

In addition, there are exceptions. Some are general, whereas others apply in case one of the spouses has a mental impairment.

(a) General exceptions

In addition to the power to enter into transactions to meet family needs and incur debts that shall be paid by community property²⁹³ (see above **Question No. 62**), any spouse can also make acts of *administration* of the assets and even *dispose* of cash or titles, provided that these assets are on this spouse's name or possession.²⁹⁴ Any spouse may also act individually to defend the community property²⁹⁵, incur urgent necessary expenses -such as those needed to provide emergency medical treatments- and make gifts out of a moral or social obligation (*liberalidades de uso*).²⁹⁶ Spouses are allowed to borrow community money, if necessary, according to the social usage and the family's circumstances, for activities related to the exercise of their profession or the ordinary administration of their personal assets. The other spouse's consent is unnecessary, but they must be informed before or after the money is disposed of.²⁹⁷

(b) Specific rules in case of mental impairment of one of the spouses

This situation could be broken into two, pointing to *transient* and *permanent* impairment.

In the first case, the other spouse can request the Court to authorise them to act individually without the consent of the spouse suffering a mental impairment. If consent is necessary for acts of administration, the Court may substitute for the spouse's consent if the act is deemed well-founded.²⁹⁸ The Court may also author-

²⁹² Art 1375 CC.

²⁹³ Art 1362.1 and 1365.1 CC.

²⁹⁴ Art 1384 CC.

²⁹⁵ Art 1385 II CC.

²⁹⁶ Art 1378 CC.

²⁹⁷ Art 1382 CC.

²⁹⁸ Art 1376 CC.

ise one or several acts of disposition on community property if this is ‘in the interest of the family’. The Court may *exceptionally* set up appropriate limitations or safeguards.²⁹⁹

If the mental impairment is permanent and one of the spouses cannot give their consent to legal acts concerning community property, Spanish law considers two situations. On the one hand, when the other spouse is appointed as *curador*, Article 1387 CC stipulates that ‘administration and disposition of the assets of the community property shall be transferred *by operation of law* to the spouse’.³⁰⁰ However, a simple appointment as *curador* is not enough; they must be appointed holding ‘full powers of representation’. On the other hand, when the spouse cannot give consent but has not been provided with a court-ordered support measure, the Court may confer the ‘administration of community property’ to the other spouse.³⁰¹ In both cases, the spouse shall enjoy ‘full powers’ to act on behalf of the other spouse. The Court may set up appropriate limitations or safeguards if so required by ‘the interest of the family’ and, in any event, the spouse must ask for judicial permission to carry out acts of disposition on real estate, commercial establishments and valuable chattels.³⁰² If the judicial authorisation is omitted, the act is voidable based on an analogical application of Article 1322 CC. Moreover, the general safeguards apply against harmful intentional or fraudulent acts of a spouse acting on behalf of the other.³⁰³

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

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

Historically, *ex post facto* legalisation of acts carried out by a person who looked after the interests of a person with a disability took place by resorting to the rules of the *negotiorum gestio*.³⁰⁴ With the legal recognition of *guarda de*

²⁹⁹ Art 1377 CC. Emphasis added.

³⁰⁰ Emphasis added.

³⁰¹ Art 1388 CC. Although the provision only mentions *administration* the prevailing view is that the Court may also confer powers to enter into acts of disposition regarding the community property.

³⁰² Art 1389 CC.

³⁰³ See Art 1390 and 1391 CC. See M.T. MARTÍN MELÉNDEZ, ‘El nuevo artículo 1387 CC: su interpretación a la luz de la regulación de la discapacidad de la Ley 8/2021 y propuestas de Lege Ferenda’ (2021) 74 *ADC* 1289-1372.

³⁰⁴ Art 1888-1894 CC.

hecho by the 1983 reform³⁰⁵ and especially after its reinforcement in 2015, *negotiorum gestio* lost its relevance in this area of law. Currently, the only cases that would be handled with the rules on *negotiorum gestio* are benevolent interventions of third parties, which do not behave formally or informally as support persons but engage in managing the personal or financial interests of a vulnerable adult *on a particular occasion* only.³⁰⁶

SECTION VI – OTHER PRIVATE LAW PROVISIONS

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

No.

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

Until the 2021 reform, it was possible for the parents to nominate, in a will or notarial deed, the person who should be appointed as guardian of their *incapacitated* children.³⁰⁷ Currently, such possibility is limited to children during their minority.³⁰⁸ However, Article 276 II no 4 CC mentions the persons named in a will or public deed by the spouse, the partner or the parents as a possible choice for the judicial appointment as *curador*.³⁰⁹

The estate of vulnerable adults who cannot make a will is to be deferred *ab intestato* because the traditional ‘substitution *ad exemplum*’ was repealed by the 2021 reform.³¹⁰ Historically, this substitution involved not only the assets of the parent who made the will but also those that belonged to the child with a disability unable to make their own will. As a transitional provision for old dispositions that the parents made in their wills in favour of the incapacitated children, the 2021

³⁰⁵ See Question no 5.

³⁰⁶ See P. LESCANO FERIA, *La guarda de hecho*, Dykinson, Madrid 2017, pp. 37-48.

³⁰⁷ Art 223 CC repealed.

³⁰⁸ See Art 201 CC.

³⁰⁹ Pointing to the non-binding character of the list, and accordingly to the lesser legal effects of the third party’s designations, see A. FERNÁNDEZ-TRESGUERRES GARCÍA, *El ejercicio de la capacidad jurídica: Comentario de la Ley 8/2021, de 2 de junio*, Aranzadi, Cizur Menor 2021, p. 83.

³¹⁰ Art 776 CC (repealed): ‘The ascendant may appoint a substitute to the descendant older than fourteen years of age, who, according to law, has been declared incompetent on the basis of mental alienation. / The substitution... shall be rendered ineffective if the incapacitated person made a will during a lucid interval or after having regained their cognitive abilities.’

reform considers them as if given as a life estate. If the tenant dies without a valid will, the remainder shall pass to the persons designated by the parents.³¹¹

The parents of a child with a disability and other persons, including the person with a disability, can create the so-called ‘protected assets of a person with disability’ (*patrimonio protegido*). This legal device enjoys tax advantages and is based on transferring certain assets to the beneficiary to cover specific expenses connected with their essential needs. The status of these assets and management rules are set in a special act outside the CC.³¹² The central element of the regulation is a special administration, which departs from the rules applicable to support measures and is based exclusively on what is established in the title. Before the 2021 reform, special rules differentiated between cases where the beneficiary managed the protected assets and cases where they could not. In this second case, judicial authorisation was compulsory for the same legal acts the guardian needed to obtain.³¹³ Currently, however, there is much more room to organise the safeguards as appropriate and even dispense from judicial authorisation. Protected assets are bound to the satisfaction of the beneficiary’s vital needs. However, since they belong to the person with a disability, they can be seized for debts or liabilities other than those resulting from the beneficiary’s living expenses.³¹⁴

Finally, there is the possibility of setting up a *separate administration* for assets donated or transferred by succession to a person in need of support. The donor can stipulate ‘the rules of administration and disposition, as well as designate the person to whom these powers are entrusted’ and the ‘supervision bodies that are deemed necessary for the exercise of the conferred powers’.³¹⁵ This possibility is not limited to parents or the spouse or stable partner. To be effective, however, the benefit must be expressly accepted by the person with a disability, if necessary, with support or by those representing them (*guardadores de hecho, curador or defensor judicial*), in this case, with judicial authorisation. The powers not conferred on the administrator remain with the adult, who will exercise them, where appropriate, with the support they need. Thus, the adult is kept aside from the ad-

³¹¹ Transitional Provision 4th Act 8/2021.

³¹² Act 41/2003, of November 18, on the patrimonial protection of persons with disabilities and which modifies the Civil Code, the Law of Civil Procedure and the Tax Regulations [hereafter **LPPD**].

³¹³ Art 5.2 I LPPD repealed.

³¹⁴ In the CCCat, the protected assets do not belong to the contributor nor to the beneficiary. They have their own legal personality. By doing so, Catalan law ensure its autonomy and immunity against debts that have nothing to do with the purpose of the institution. On the other hand, the beneficiary can waive the benefit, which would have the destination foreseen in the original deed of constitution, and cannot be the administrator himself. See Art 227-1 ff CCCat. The CC does not mention the resignation of the beneficiary as one of the possible causes of extinction of the special regime of administration and disposition (see Art 6 LPPD).

³¹⁵ Art 252 CC.

ministration and disposition of these assets in all matters assigned to the administrator. Moreover, the separate administration is not subject to the general safeguards applicable to all supports in exercising legal capacity.³¹⁶

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.**

In theory, the 2021 reform has removed the legal obstacles to empowering vulnerable persons with disabilities. The new law repeatedly states the CRPD principles and the UN Committee's views. However, up to now, the application of the new rules by the judiciary seems to be reconstructing the old system under the new legal language, thereby limiting the possibilities of the new system.

For instance, the Preamble of Act 8/2021 highlights the need to shift from a substitute to a supported decision-making system. However, the new law does not develop supported decision-making but confines itself to providing some guiding principles. Where legal provisions are developed, this is because old provisions on guardianship, *autotutela* or *guarda de hecho* have been redrafted to accommodate the new legal language. As a result, support measures regulated by the CC are still generally based on the granting of representative powers: the rules on *guarda de hecho* focus on the legal acts that can be performed on behalf of the concerned person; the CPA, by definition, involves the exercise of future representative powers; and the rules about *curatela* mainly concern which legal acts the *curador* can do on behalf of the adult with judicial permission only, and with the safeguards governing the (representative) administration and disposal of the adult's assets. As

³¹⁶ I. PALOMINO DÍEZ, 'Comentario del art.252', in *Com Ley 8/2021 Guilarte*, p. 558.

the law stands, it is difficult for practitioners, judges and support providers to grasp the contents of the (new) tasks that the support person must perform and their legal liabilities. Therefore, the rulings tend to proceed as usual, changing the name of the court-ordered measure.

The 2021 reform has notably reinforced the subsidiarity principle. Judicially appointed supports are deemed exceptional, particularly given the weight given to *guarda de hecho*. However, the latter is not, strictly speaking, a voluntary measure since it can operate regardless of the adult's will. Vulnerable adults living with their family or relatives typically abstain from giving an opinion. On the other hand, an expansion of voluntary measures established through notarial deeds is to be expected, in which case the relevance of the subsidiarity principle shall increase.

The new provisions state that representation or substitute decision-making is justified as a last resort only when the person's will cannot be known. However, in practice, the new procedures and the review of old judicial measures under the transitional provisions of Act 8/2021, show that judges are reluctant to limit the use of representative measures to exceptional cases. Wide representative powers are frequently granted to judicially appointed support persons.

Universal legal capacity means that court-ordered measures do not impinge upon abstract legal capacity; they can nonetheless place restrictions upon the validity or legal effect of specific legal acts of the concerned person.

Support measures shall be tailor-made to the individual needs of the concerned person. The 2021 reform focused on judicial orders detailing the support person's intervention spheres. However, in practice, judges keep on granting the support persons wide powers of representation and supervision, thereby limiting the freedom of action of vulnerable persons. Moreover, the application of CPA assumes that general powers of representation are granted to the attorney, possibly beyond the actual needs of the vulnerable person.

One of the 2021 reform goals is to replace the best interest standard with the will and preferences criterion when dealing with issues in which support is needed. However, since the reform's entry into force, both legal scholarship and case law have emphasised that some provisions of the CC still rely upon the best interest standard. As a result, courts have overridden the opposition of the vulnerable adult to the support measures and granted substitutive decision-making powers to act on their behalf according to their best interest.

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 law sets both procedural and substantive safeguards. To counter the risks faced by vulnerable adults, the CC counts basically on the public prosecutors and the courts. Due to the limited resources available for supervision tasks, however, in too many cases, the reaction of the law will take place *ex post facto* when harm to the vulnerable adult cannot be remedied. In addition, the 2021 reform has re-framed optimistically the safeguards to which voluntary measures must be subject. Expressions of personal autonomy resulting in limited or non-existent safeguards are thus admitted, placing the individual at severe risk of abuse in case they need support.

Court procedures do not result in deprivation/limitation of legal capacity.

The issue of adult protection during the procedure to set up support measures entails two different questions. On one side, the law gives the person due process rights, particularly the right to participate in the procedure with their representation. The different steps of the procedure also protect them against abusive proceedings, and hearing the adult in person is compulsory except for extreme cases. The public prosecutor must protect the defendant's interests in such proceedings when third parties file the claim. On the other hand, the protection of the interests of vulnerable adults before a legal procedure starts or while it is in motion is based upon the possibility of granting interim measures *ex officio* (Art 752 LEC) and also on the responsibilities legally assigned to the regional authorities dealing with the protection of adults (Art 253 CC). To the extent that the need for protection of a vulnerable adult is known, the judge or the regional authorities must activate the measures needed.

The protection of the vulnerable adult during the operation of the support measures

- (a) *against their own acts* is unsatisfactory and internally inconsistent. The new law states that acts entered into without support when needed are void. Still, the conditions of avoidance, who is entitled to file the claim for avoidance, and its effects, are not clearly stated.
- (b) *against conflict of interests, abuse or neglect by the representative/supporting person* is insufficient insofar as the judiciary and the public prosecutor lack the personnel and the means to supervise and effectively discover and prevent most cases of abuse or neglect; in addition, the 2021 reform allows waiving up most if not all legal safeguards to prevent conflicts of interest in the execution of voluntary measures.
- (c) *against conflict of interests, abuse or neglect in the institutional representation of persons in residential-care institutions by those institutions* is legally tackled through a prohibition of these institutions being named as support persons (Art 250 VIII CC). However, the prohibition could be circumvented in voluntary support measures.

The protection of the privacy of vulnerable adults has been another of the guiding principles of the 2021 reform. It has found, however, strange legal expressions, such as the possibility of omitting, at the request of the concerned person, the hearing of their relatives and close persons in the legal proceedings leading to appoint a support person (Art 759.2 LEC); or the provision that considers support measures ordered by the courts as a data subject to limited publicity in the Civil Registry (Art 84 I LRC) although according to the same law, the legal effects of the support measures could only be opposed to third parties since registration (Art 73 LRC).