

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

BULGARIA

Dr. Velina Todorova

SECTION 1 – GENERAL

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

The current legal framework in Bulgaria regarding vulnerable adults is focused on protection rather than on empowerment. It consists of the Constitution, Persons and Family Act of 1949, which is the substantive Act on the limitation of legal capacity; Civil Procedure Code of 2008 that regulates the procedural issues and the Family Code of 2009 governing the appointment of guardians, their duties and the safeguards for the rights of vulnerable adults. Some recently adopted Acts such as the Persons with Disabilities Act of 2019, Social Services Act of 2020 and Personal Assistance Act of 2019 deal with the social empowerment and protection of vulnerable adults.

The Bulgarian Constitution of 1991 stipulates that adult persons that do not have close relatives and cannot support themselves as well as the persons with physical and mental disabilities are under the special protection of the state and society (Art. 51, para 3 of the Constitution). According to Article 42 para 1 of the Constitution, persons whose legal capacity is limited have no right to vote.

The termination or limitation of legal capacity of a vulnerable adult is considered to be the measure for protection of these persons. The legal frameworks for incapacitation and guardianship remain to a large extent unchanged since 1949, reflecting the dominant attitudes at that time towards people with mental health problems or intellectual disabilities in Bulgarian society. So far the legislation does not regulate any voluntary measures for protection and empowerment of vulnerable adults.

The Persons and Family Act (PFA) sets up the grounds for full and partial incapacitation (capacity to act) of mentally sick person who cannot take care of his/her own affairs. The Family Code sets out two types of legal support to the incapacitated adults: guardianship and partial guardianship. Guardians are appointed to represent adults that are deprived of legal capacity and their legal status is equated with minor children. Partial guardianship allows the person to act but in an assisted manner (ie assisted decision making). The legal capacity to exercise some personal rights is restricted only for adults under full guardianship (right to marry, right to acknowledge paternity, right to exercise parental responsibilities or to write a will).

The deprivation/limitation of capacity follows a special procedure before the District (second instance) Court. The application may be submitted by the spouse, by a relative, by the Public prosecutor or by any interested third person. The court must have a personal impression of the person. The incapacitation decision is a ground for the administration - the Guardianship authority (GA) – to appoint guardian or a partial guardian from the circle of close relatives of the incapacitated adult. The Mayor of the municipality is assigned with the function of GA.¹ The job of the guardian is voluntary. The spouse or the parent becomes *ex lege* guardian of the incapacitated adult, where there is such. The guardian is obliged to take care of person, his or her rights, obligations and well-being, administer property and report yearly before the guardianship and curatorship body. The GA shall dismiss the guardian in case of established conflict of interests. Guardians should live with and care of the person under guardianship, but they also may facilitate his/her placement in residential care reflecting the wishes and preferences of the adult, which is a recent amendment in the legislation. This brief review suggest that the protection/empowerment of vulnerable adults is still to a large extend viewed as a protection issue but not as a matter of personal autonomy and empowerment.

Certain breakthrough comes recently with the Persons with Disabilities Act (PDA), Personal Assistance Act (PAA) and Social Services Act (SCA) that entered into force in 2019-2020.² This package of legislation was adopted following massive and lasting street protests of mothers of children with disabilities.³ The PDA (2019) aims to implement the principles and major norms of CRPD into the national legislation. The social inclusion of persons with disabilities should result from the individual needs assesment, increased public investments in rehabilitation programmes, inclusive education and vocational training, access to the labour

1 Article 154 of the Family Code.

2 The Persons with Disabilities Act and Personal Support Act were passed following a one year of street protests of the mothers of children with disabilities in 2018.

3 The protests lasted one year: <https://www.investor.bg/a/332-ikonomika-i-politika/268644-maykite-na-detsa-s-uvrezhdaniya-gotvyat-novi-efektivni-protesti>; <https://webcafe.bg/bulgaria/247204238-mayki-na-detsa-s-uvrezhdaniya-otnovo-izlyazoha-na-protest.html>

market and public spaces, reasonable accommodation and improved mobility as well as targeted financial support. Despite declaring a human rights approach to disability, the Act still promotes the medical approach particularly as far as the individual needs assessment is concerned.⁴

The PAA (2019) sets up an individual support by a personal assistant to a person with disability following their individual needs assessment. Although being acclaimed as progressive, this Act received some critique from the civil society experts on the following: 1/ the priority given to family members to be appointed as personal assistants increases the dependency of a vulnerable adult on the family; 2/ the wishes and preferences of vulnerable adult are given less significance since he/she is not a party to the contract with the personal assistant, but rather the service is contracted between the Service providers (which usually is the municipality) and the assistant; 3/ persons living in residential community-based services are not eligible to personal assistance.⁵ Thus, instead strengthening the personal autonomy in everyday life decisions, the personal assistance, which has a potential to provide a tailored support, turns to be 'used primarily as an additional source of income for the person's family circle. Applied in the manner established, it gives the impression of a method of supplementing household budgets without actually assisting those most in need'.⁶

The SCA (2020) provides for a modern regulation of social services as instruments for prevention and combat of social exclusion. Preference is given to community based services, accessible free of charge if based on an individual needs assessment, and placement in residential care of adults under guardianship by a court order.

In conclusion, the legislator in Bulgaria is still much more occupied to address the social protection issues rather than legal empowerment of the vulnerable adults. This actually is the message conveyed to the legislator by the organisations of persons with disabilities, which do not consider the legal empowerment as an issue of their concern.

4 See the report of the Bulgarian Centre for Independent Living: Disability and the Social inclusion of Persons with Disabilities, 2021, at: <https://cil.bg/wp-content/uploads/2022/07/Analysis-Disability-Act-2020.pdf>

5 Personal Assistance Act (1.01.2019), Art.9, para. 2 and ANED 2018-19 – Living independently and being included in the community – country report, p. 39, at: <https://www.disability-europe.net/country/bulgaria>

6 See the report of the Bulgarian Centre for Independent Living: Personal Assistance – a Safeguard for the Right of Persons with Disabilities to Independent living in Their Communities, 2021, at: <https://cil.bg/wp-content/uploads/2021/07/Review-PA-2020-final.pdf>

- 2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *опека - опека*]. 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.**

Guardian (настойник - *nastoinik*) – is **the legal representative** of the adult, which has been deprived of legal capacity, could be considered as a (legal) substitute of the incapacitated adult.

Partial guardian (попечител - *popечitel*) – a person who assists the partially incapacitated adult to perform legal actions. The partial guardian acts together with the adult and thus could be considered as their **support person**.

The institute of ‘deprivation and limitation of the legal capacity of adults’ is called *zapreshtenie* (запрещение). It attaches a legal status to the adult as incompetent to perform legal actions. The incapacitation is considered as the protection measure but not the guardian or partial guardian. The concept in Bulgaria is that the protection is a result from the incapacitation, because due to it the person can not perform legal actions that may jeopardise their rights and interests. The guardians and partial guardians are appointed by the Guardianship Authority based on the court decision for incapacitation.

- 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.**

By the end of 2020 the Bulgaria’s population is 6 916 548 persons; 21,8% of the population is 65+ years of age, and the ageing index is 56.7%.⁷ According to

7 National statistics in: <https://www.nsi.bg/sites/default/files/files/pressreleases/Population2020_IVGTQG5.pdf> last visited July, 2023. Ageing index represents the ratio between the numbers of post-productive population (aged 65+) compared to a number of pre-productive population.

EUROSTAT projections, the share of 65+ population in the Republic of Bulgaria will increase to 32,7% in 2060.⁸

A reliable statistical data about the total number of adults with disabilities is not available in Bulgaria.⁹ According to the last census there were around 465,000 adults with disabilities.¹⁰ Social Assistance Agency's annual reports during the period 2013-2017 mention over 500,000 adults as recipients of disability allowances.¹¹ It is said that in Bulgaria 70 thousand people suffer from Alzheimer's disease. It is claimed because there are no exact statistics.¹²

According to Eurostat data from 2017, 19% of Bulgarians report having health problems that make it difficult for them to be active in society, and one in five Bulgarians over the age of 16 has a long-term physical disability. At the same time, statistics show that Bulgaria is among the top three countries with the lowest number of people with a permanent disability of working age. Nearly 45% of Bulgarians over the age of 65 have a permanent disability. Statistics for the over 75s show that six out of ten people have similar problems. For Bulgaria it is assumed that there are 100 000 patients with dementia and at least 50 000 with Alzheimer's disease.¹³ It is estimated that in Bulgaria around 7 000 adults are fully or partially deprived of legal capacity.¹⁴

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.

On 26 January 2012, the Bulgarian Parliament ratified the UN CRPD but decided not to ratify the Optional Protocol at the same time as the Convention. The

8 In slide 2: <https://unece.org/fileadmin/DAM/pau/age/WG.12/Presentations/2_National-Strategy-Active-Ageing-Bulgaria.pdf> last visited July, 2023.

9 Admitted by the Government in National Strategy on Long-Term Care (2012-2020), p. 9.

10 National Statistical Institute, 2011 Census, <http://www.nsi.bg/sites/default/files/files/pressreleases/Census_Disability2011.pdf> last visited July, 2022.

11 All Social Assistance Agency annual reports are available in: <<http://www.asp.government.bg/web/guest/godisen-otcet>> last visited July, 2022.

12 In: <https://alzheimer-bg.org/dementia/statistics/> last visited in August 2023.

13 See National Strategy on long-term care (2012-2020), page 9 and a new National Strategy for Active Ageing in Bulgaria (2019–2030) <https://unece.org/fileadmin/DAM/pau/age/WG.12/Presentations/2_National-Strategy-Active-Ageing-Bulgaria.pdf> last visit September, 2022.

14 Draft Concept for Legislative Reform in Relation to Article 12 of CRPD, 2012, in: <https://www.justice.government.bg/api/part/getblob?hash=F24ED78A10D56ABCE0339B1325B7C615> last visited I July, 2023.

ratification of the OP became as a strategic objective of the Action Plan to amend the Bulgarian legislation in line with CRPD 2013-2014.¹⁵ The translation of the Protocol was completed though no public information on that fact was made available.¹⁶ Apparently, the ratification was delayed by a lack of initiative of various Ministries to amend necessary legislation in conformity with the CRPD.¹⁷ The Council of Ministers adopted an updated Action Plan for the Implementation of the UN CRPD (2015-2020). According to it the Optional Protocol would be officially translated into Bulgarian in 2017 and ratified until 2020. As of September 2022 Bulgaria has not put any effort to ratify the Optional Protocol, although the UN Committee on the Rights of Persons with Disabilities explicitly expressed its concern about this.

Bulgaria is not a party to the Convention of 13 January 2000 on the International Protection of Adults.

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

The Persons and the Family Act (PFL), that establishes the grounds for and the effects of the limitation of legal capacity of adults in Bulgaria, was adopted in 1949. It holds the concepts and terminology that have been transplanted into the Bulgarian legislation after the establishment of the current independent state in 1878. Then, the Guardianship Act of 1889 regulated the guardianship of children. The Persons Act of 1907 regulated the limitation of legal capacity of adults. In 1949 both regulations were merged into the Persons and the Family Act, including the appointment of a guardian for incapacitated adults. Until today, the PFA is at the core of the system of Guardianship in Bulgaria, which bears the following features:

- it is imposed for an indefinite period of time;
- covers all legal areas of an individual's activity;
- is effective in the future, and, in practice, it is difficult to revoke it in the context of the established case law¹⁸ where the precondition thereof is that the person under guardianship prove their recuperation with a

15 Available in: <<http://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=784>> last visited July, 2022.

16 The Report on the implementation of the Action plan for 2013-2014 is available in: <www.strategy.bg/FileHandler.ashx?fileId=5615> last visited July, 2022.

17 The information is published in the report cited above.

18 Decree No 5/79 of 13.02.1980 r. of the Plenary of the Supreme Court.

medical document or protocol issued by a medical consultative committee;

- does not take into consideration the dynamics of the individual's state, and does not recognize that their inability or difficulties in terms of taking care of their own affairs change over time and vary in respect of the legal spheres;
- shall not be subject to periodic review;
- the individuals under guardianship are deprived of any access to the court and redress for their fundamental rights and interests, the legal consequences from partial guardianship in the Bulgarian context being the same as the ones from full guardianship¹⁹;
- is entirely a form of substitute decision-making: the person under guardianship is assigned a substitute who makes decisions in all civil matters based on their "best interest". The person under guardianship is turned into an "object" who is fully subordinated to their guardian, and does not have any mechanism available to ensure respect for his/her wishes and preferences.

Therefore, in terms of the consequences for the individual, the deprivation and limitation of legal capacity results in lowering of their legal status. Such limitation, in addition to being a protective measure, implies also deprivation of rights in view of the impossibility to exercise them in person: the exercise of the content of legal agency is assigned to other persons.

In 1968 a Family Code where the family law regulations were moved including the guardianship for children left without parental care. The incapacitation regulation including guardianship for vulnerable adults remained in the PFA. The debates around guardianship of that time and until recently were focused on the issue if the accommodation of the regulation in the Family Code is correct mindful on the fact that the incapacitation of adults is an issue of their status. So, finally the incapacitation regulation stays in the PFA and the regulation on appointment, mandate and monitoring of guardians stays in the Family Code since it relates both to adults and children.

19 Findings of ECtHR judgment in the case *Stanev v. Bulgaria*. While in accordance with Decree No 5/79 of 13.02.1980 of the Plenary of the Supreme Court, the person under partial guardianship can, on their own or with the consent of their custodian, including the one under Art. 108 of PFA, request the revocation of their guardianship, Mr. Stanev who had been placed under partial guardianship had not been able to access the court. After ECtHR judgments in the cases *Stanev v. Bulgaria* and *Stankov v. Bulgaria* were delivered, the Civil Code of Procedure was amended accordingly (Art.340 (2) of CCP, amended – SG No 86 of 2017), which allowed a person under partial guardianship to request independently the revocation of guardianship.

Following the ratification of the CRPD in 2012, the Ministry of Justice established a working group on the implementation of Art. 12 of CRPD in the national legislation. The working group was composed of representatives of non-governmental organizations, academia, lawyers, and ministries. In August 2012 it presented a *Concept paper for changes in the national legislation in relation to implementing the standards laid down in Art. 12 of CRPD*, which was adopted by the Council of Ministers on 14 November 2012. The concept paper envisages abolition of the full incapacitation and adoption of protection measures in the form of advanced directives and supportive decision-making.²⁰ The resignation of the Government a year later led to the suspension of work on this topic. The civil society organizations took the effort to draft Persons and Support Measures Act. This draft was supported by the Ministry of Justice in 2015 and went through many expert and public consultations. The Draft was eventually submitted to the Parliament by the Council of Ministers on 4 August 2016 but was stayed.²¹ In 2018 the Draft was submitted again as a civil society initiative but did not reach voting. The draft Act introduces the CRPD recognition of legal capacity concept and elaborates measures for supported decision to replace the substitute decision making as well as voluntary measures.

In 2016, the National Disability Strategy 2016-2020 was adopted, which mentions an intention to move from substitute decision-making to the personal exercise of decision-making, which inevitably has to go through a revision of the legal framework of legal of legal capacity. The next National Disability Strategy 2021-2030 contains the same declarations under the priority area six (pages 33-35).

20 See the summary in: Bulgarian Helsinki Committee, Alternative report about the rights of persons with disabilities in Bulgaria under the CRPD, Sofia, 2017, p. 30: <https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/BGR/INT_CRPD_ICO_BGR_27646_E.pdf> last visited July, 2022.

21 Draft Persons and Support Measures Act, available in Bulgarian in: <<https://www.parliament.bg/bg/bills/ID/44032>> last visited July, 2022.

The debate was further moved by two judgments against Bulgaria by the European Court of Human Rights: *Stanev v. Bulgaria*²² in 2012 and *Stankov v. Bulgaria*²³ in 2015. The judgments were followed by some minor legal amendments. In *Stanev v. Bulgaria* the European Court of Human Rights (ECtHR) found that Mr Stanev's placement in the social care institution, against his will and for an unspecified period of time, on the order of a government employee, meant that Mr Stanev had clearly experienced a deprivation of his liberty, a violation of Article 5(1) ECHR. The Court went on to state that a need for social assistance, such as was clear in Mr Stanev's case, should not automatically lead to measures involving deprivation of liberty. It was the presence of a mental health condition which had led directly to the decision to place Mr Stanev in the institution, and this was not a sufficient justification under the European Convention of Human Rights. The system of guardianship in Bulgaria meant that Mr Stanev had no realisable right to challenge the lawfulness of his detention in the Bulgarian courts (Article 5(4) ECHR). His legal standing to do so had been removed at the time his legal capacity had been limited, which the Court found to be a breach of his rights under this article. Given that Mr Stanev's right to liberty had unlawfully been restricted, the Court went on to assess whether he would be able to have this situation recognised and compensated under Bulgarian law. The ECtHR found that this was not the case, due to Mr Stanev's status as a person under guardianship, and the Bulgarian government had breached his right to compensation (Article 5(5) ECHR).²⁴

The *Stankov v. Bulgaria* case concerned Mr Stankov's legal incapacitation and his subsequent placement by his mother, as his guardian, in a social care home for

22 *Stanev v. Bulgaria*, ECtHR, no. 36760/06; GC Judgment, 17 January 2012. Briefly the facts are: in 2000, Mr Rusi Stanev was placed under partial guardianship by a Bulgarian court and a municipal employee was appointed as his guardian. In 2002, without ever having met Mr Stanev, she had him placed in a social care institution in a remote mountainous area 400 km from his home. Once there, the director of the institution became his guardian and controlled all of his affairs. The conditions in the institution, as documented by the Council of Europe Committee for the Prevention of Torture (CPT), were unliveable. The amount of food was inadequate, the residents had to sleep in their coats in the winter due to the lack of heat, and the sanitary facilities were nothing more than holes in the ground in wooded areas outside the buildings of the institution. Mr Stanev had no ability to challenge this situation as he could not initiate any type of legal proceedings, including a proceeding to have his guardianship lifted, without his guardian's consent.

23 *Stankov v. Bulgaria*, ECtHR, no. 25820/07; GC Judgment, 17 March 2015. The case concerned Mr Stankov's legal incapacitation and his subsequent placement by his mother, as his guardian, in a social care home for people with mental disorders. In June 2006 Mr Stankov, through his lawyer, asked the public prosecutor's office to apply to the Regional Court to have his legal capacity restored on the grounds that his condition allowed him to manage his own interests. The prosecutor refused to institute proceedings for restoration of his legal capacity

24 Unfortunately, Mr. Stanev died on 9 March 2017, without his guardianship being lifted, after 12 years of justice proceedings and 5 years after he won his ECHR case.

people with mental disorders. Mr Stankov submitted in particular that his placement in a social care home was in breach of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights. He complained also that he had been unable to have the lawfulness of his placement in the home reviewed by a court and that he had not been entitled to compensation for the alleged violations of his rights. Relying on Article 3 (prohibition of inhuman or degrading treatment) read separately and in conjunction with Article 13 (right to an effective remedy), he complained in particular about the living conditions in both the homes in which he had been placed. The ECtHR found violations of Art. 3, 5, 6 and 13.

Following the two judgments two amendments were made in the legislation. The Social Assistance Act was amended in 2016 to introduce a court procedure for placement into social care institutions in order to address the arbitrary and unlawful deprivation of liberty of the adult under full guardianship, being placed without their consent.²⁵ The Act required that the court must hear the person under guardianship during the procedure for placement in residential care. The amendment was assessed to be futile for several reasons. The lack of alternatives for independent living, which pushes the courts to justifying deprivation of liberty placing them in institutions rather than guaranteeing the right for persons with disabilities under guardianship to choose where and with whom they live. In addition, the judicial procedures lacks procedural accommodations and rules to guarantee the access to courts and justice, a situation which is compounded by the lack of availability of reasonable accommodations during procedures. The result is that amendment was ineffective to prevent institutionalisation of incapacitated adults. The court procedure for placement in residential care of incapacitated persons now is regulated by the Social Services Act (Articles 95-99). The court needs to hear the adult and to have his/her consent for the placement. In 2017, five years after the ECtHR judgment, the Civil Procedure Code was amended to provide standing to person with limited legal capacity with a view to seeking its restoration (Art. 340, para 2).

As briefly explained in point 1, the Persons with Disabilities Act of 2019²⁶, Social Services Act of 2020 and Personal Assistance Act of 2019 deal with the social inclusion, empowerment, and protection of vulnerable adults. "Supported decision-making" for vulnerable adults with intellectual problems was introduced in the Persons with Disabilities Act. However, the impact of this regulation on the

25 See: NGO and DPO Joint Submission, For Consideration at the 20th Session of the UN Committee on the Rights of Persons with Disabilities, to the First Periodic of Bulgaria, Additional Information to the List of Issues.

26 That repealed the Integration of Persons with Disabilities Act of 2004.

empowerment of vulnerable adults is difficult to predict since it will apply together with the regulation on legal incapacitation.

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

There are three important discussions in Bulgaria that relate to the topic of this study. These are held in the context of the rights of persons with disabilities but not in the broader framework of the protection/empowerment of vulnerable adults. It is worth noting that the theme of vulnerable adults and their protection and empowerment does not attract the academic research in Bulgaria so far. Therefore the developments in the area are driven by the civil society.

The first discussion is about the social inclusion and support to persons with disabilities as decisive factors for their independent living.²⁷ Advocacy efforts of national NGOs and international organisations as well as the Bulgarian EU membership have materialised in numerous policy documents and in the social protection legislation.²⁸

Related to this is the debate around institutional care of vulnerable adults and in particular of those with mental health problems. There are several social and legal issues around the institutionalisation of vulnerable adults in Bulgaria.²⁹ Some were

27 This discussion is led by NGO ‘Centre for Independent Living’ for more than 25 years. See the archive and current issues at: <<https://cil.bg/en/news-en/>> last visited in August 2023.

28 See: National Disability Strategy 2016-2020; National Disability Strategy 2021-2030; National Strategy for Active Ageing (2019-2030) and National Strategy on Long-Term Care (2012-2020), in: <<https://www.mlsp.government.bg/strategicheski-dokumenti>> ; <<https://www.mlsp.government.bg/aktiven-zhivot-na-vzrastnite-khoro-1>> last visited in August 2023.

29 Under the Social Assistance Act (1998) social assistance is available to people who, for medical and social reasons, are incapable of meeting their basic needs on their own through work, through their own assets or with the help of persons required by law to care for them (Art.2 of the Act). Social assistance consists of the provision of various financial benefits, benefits in kind and social services, including placement in specialised institutions. By virtue of the implementing regulations for the Social Assistance Act 1998, three categories of institutions are defined as “specialised institutions” for the provision of social services for adults: (1) homes for adults with disabilities (homes for adults with a mental deficiency, homes for adults with mental disorders, homes for adults with physical disabilities, homes for adults with sensory disorders, homes for adults with dementia); and (3) old people’s homes (Art. 36, para 3). Social services are provided in specialised institutions where it is no longer possible to receive them in the community (Art. 36, para 4). The amendments to SAL of 2016 aimed at decentralisation of the provision of social

linked to the limitation of their legal capacity, which made their placement in institutional care easy, because their consent was not required until 2017. In other cases, the deprivation or limitation of legal capacity followed their placement in care in order to facilitate the management of individual care by the providers. The degrading material conditions in these care institutions, their insufficient staff and other resources,³⁰ including the deprivation of liberty of adults³¹ (although until the ECtHR Judgment on *Stanev v Bulgaria*, the placement of a legally incapacitated person in a social care home was not regarded as a form of deprivation of liberty), were among the issues of the debate.³² The active participants of this debate are again the organisations of persons with disabilities but also human rights organisation and the state as well as the existing monitoring mechanisms.³³ This debate resulted in the National Strategy for Long Term Care that outlines the major policy steps further - deinstitutionalisation of care for elderly, development of community based services, investing in personal assistance and quality of services and care.³⁴

services to the municipalities and to contract out services to private providers including NGOs. In 2017 there were 27 homes for persons with learning disabilities with a total capacity of 2,083 and accommodating 2,065 residents, and 13 homes for persons with psychiatric disorders with a total capacity of 1,020, all places being filled. See: Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 September to 6 October 2017.

- 30 The lack of alternative social services in the community creates similar problems for the persons placed in state social care institutions. Even new group homes which are part of the deinstitutionalization process tend to be located away from bigger towns. This, along with the lack of adequate transportation, deprives persons with disabilities access to quality health and social services, as well as of any real integration in the community, meaning that group homes operate like small closed institutions.
- 31 The main observation of the 2017 CPT's visit to Bulgaria was that a number of patients in the psychiatric hospitals are de facto deprived of their liberty due to reasons such as the lack of adequate care and accommodation in the community resulting in much longer than practically needed hospitalisation. A significant proportion of patients, formally regarded as voluntary, are locked up in hospital wards and subjected to paternalistic control by the staff, including illegal detention.
- 32 NGO information to the United Nations Committee on Economic, Social and Cultural Rights, For consideration when compiling the List of Issues to Bulgaria Prior to Reporting during the 57th Session of the Committee, 2016: <<http://www.mdac.org/en/resources/cescr-submission-bulgaria-10216>> last visited in September 2022.
- 33 Report to the Bulgarian government on the visit to Bulgaria carried out by the CPT from 25 September to 6 October 2017, published on 4 May 2018, p. 57, available at: <https://www.coe.int/en/web/cpt/bulgaria>, and the 2017 Annual report of the Ombudsman acting as National Preventive Mechanism (p. 27, p. 28 and 34), available at: http://www.ombudsman.bg/pictures/file/5751_Annual_Report_NPM_2017_EN.pdf;
- 34 National Strategy for Long Term Care, adopted on 7 January 2014, available in English at: <http://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=882> last visit September 2022.

In 2014-2016 the Bulgarian Helsinki Committee³⁵ had monitoring visits in 81 newly established family type alternative care settings and protected homes for adults with intellectual disabilities and psycho-social problems. The report states that although there are rare examples of good practice of real independent living and social inclusion, the majority of the residents in the so-called community-based services live under similar conditions as in the institutions: 1) placements re done by other persons, not the person with disability and his/her wish often is not explored, contract for using services is signed by guardians or by the person but without his/her being informed properly about the content; 2) buildings vary between luxury and old houses, institutions, in small towns they were used for kindergartens, schools or are separate buildings or corridors of institutions of local hospitals; out of 128 in total, 45 protected homes are located in villages where there is not any opportunity for activities; 3) personal money is not spent according to the wishes of persons with disabilities; 4) guardians of the majority of the users placed under guardianship are staff members of the facility.³⁶

The other discussion is about legal capacity of persons with disabilities, which is led by the human rights NGOs – national³⁷ and international.³⁸ It is worth noting that the organisations of persons with disabilities and particularly the ones that receive state funding, have not associated with this debate. The attitudinal research (2016) suggested about the existence in Bulgaria ‘... of hidden and overt, power and economic interests, pushed in the form of policies to maintain the status quo - passive and disempowered people with disabilities, deprived of freedom and dignity. This leads to measures based on control and dependency formation; activities aimed more at primary care and less at support to overcome the limitations associated with disability. Unfortunately, similar attitudes exist among relatives of people with disabilities, whose expectations of them and their standards of freedom and dignity are far lower than those of their non-disabled relatives. Thus the social attitudes and those in the immediate environment logically lead to people

35 The Bulgarian Helsinki Committee is a non governmental organisation, established in 1992. It is the oldest still-functioning human rights organization in Bulgaria: <<https://www.bghelsinki.org/en/who-we-are/history>> last visited in July 2023.

36 Bulgaria, Bulgarian Helsinki Committee, Unhappening Deinstitutionalization of Persons with Mental Disabilities, monitoring report, 2016, p.30-98.

37 The leading NGO here is the Bulgarian Centre for Non-for-Profit Law (BCNL) <<http://bcnl.org/en/projects/the-next-step-program-fight-for-irreversibility.html>> last visited in August 2023.

38 See for example MDAC Report on Disability and Human Rights in Bulgaria, 2007, available in English in: <http://www.mdac.org/sites/mdac.info/files/Bulgarian_Guardianship_and_Human_Rights_in_Bulgaria.pdf> last visited in August 2023.

with disabilities accepting life without freedom and dignity as the natural state of the world in which they live.³⁹

The leading role of the NGOs in the debate under Article 12 of the CRPD was recognised by the Government in its Initial report to the Committee on the Rights of Persons with Disabilities.⁴⁰ The NGOs took the role to review the national legislation under the CRPD⁴¹, to provide trainings to key state experts, judges and to produce training materials explaining the key concepts of Article 12⁴². The NGOs produce also the first Draft with the aim to abolish the incapacitation regulation under the NPFL. In 2015 the Ministry of Justice took the lead to continue working on this draft. The draft Persons and Support Measures Act was created after an extended process of discussion and consultation with NGOs, legal practitioners and academics, persons with disabilities and their supporters. The process extended from 2012 to 2016, with three official public consultations taking place. The proposed legal instruments in the Draft are based on practical examples that introduce a new formula for legal capacity, in compliance with the standards of Article 12, and would abolish the system of guardianship for persons with disabilities. Unfortunately, after the establishment of the 45th National Assembly in April 2021, there was no political will to reintroduce the Draft into the Assembly. It is the first time since 2012 (when the CRPD was ratified and work on the Draft began) when State authorities expressed strong resistance to the implementation of Article 12. Due to the lack of progress, a nationwide petition campaign led by civil society was initiated on 27 March 2018 calling for adoption of the Draft. Till 27 of June 2018, when the campaign finished, approximately 12,000 individuals supported the initiative.⁴³ However, State authorities have not taken any steps to adopt the draft legislation.⁴⁴

In the meantime the the national Ombudsman entered the debate by requesting on 15 May 2014 that the Constitutional Court in Bulgaria announce Art.5, para. 1 of the NPFL with regards to ‘and they lose their legal capacity’ and Art.5, para 3 of the same act as provisions in violation with Art. 4, para. 2, Art.5, para.4 and Art.51, para.3 of the Constitution of Bulgaria. The Ombudsman stated that

39 Panayotova, K., Petrov, R. Living at will or by someone else's will! Advocacy for the human rights of people with disabilities, Sofia, 2016 available in Bulgarian in: <<https://cil.bg/wp-content/uploads/2020/03/Report-General-Final.pdf>> last visited in August 2023.

40 See: CRPD/C/BGR/1, 2014, para 67.

41 Available in Bulgarian in: <<https://bcnl.org/en/news/born-ready.html>> last visited in August 2023.

42 Events and materials available in: <<http://www.equalrights.bcnl.org/bg/nav/48-%D1%81%D1%8A%D0%B1%D0%B8%D1%82%D0%B8%D1%8F.html>> last visited in August 2023.

43 The legal ground of the initiative is the Direct Participation of Citizens in the State Government and the Local Government Act.

44 See more in: NGO information to the United Nations Committee on the Rights of Persons with Disabilities to the initial report of the Republic of Bulgaria, 2017, INT_CRPD_ICO_BGR_28482_E paras 12-13.

Art. 5 of the NPFL violates the rights of people with intellectual/psycho-social disabilities as it poses a restriction of their legal capacity which is not proportionate to their condition and thus it is discriminatory. The Ombudsman stated also that this legislation in Bulgaria is a violation of Art. 4, para 2 and Art. 12, para. 2 of the UN Convention on the Rights of Persons with Disabilities.

The Constitutional Court considered several observations and statements that could be grouped as follows: the Council of Ministers, the Supreme Cassation Court, the Chief Prosecutor, the Ministry of Labour and Social Policy, the Ministry of Healthcare, the Bulgarian Union of Medical Doctors and the Union of Lawyers in Bulgaria. These were of the opinion that the Ombudsman's request should be rejected because the current regime rather ensures the dignity and the rights of the individuals and provides protection in line with the Constitution. The contrary view was taken in the positions of the Bulgarian Centre for Non-for Profit Law, Bulgarian Lawyers for Human Rights, Bulgarian Helsinki Committee and the Bulgarian Psychiatric Association (NGOs). Bulgarian Centre for Non-for Profit Law and Bulgarian Lawyers for Human Rights expressed the opinion that the deprivation of legal capacity of adults means that they are deprived of their basic constitutional rights on the basis of disability. Bulgarian Helsinki Committee maintains that the state of incapacitation is a kind of civil death.

The Constitutional Court considered the gaps in the legislation concerning people under guardianship. Its decision states that *“the lack of detailed legislative regulation leads to not just limitation of those rights, the exercise of which carries a risk to the interests of incapacitated, third parties or the society, but also limits the exercising of unreasonably wide range of rights, including the constitutional ones”*. The decision also states that *“the current legislative framework does not take into account the requirements of the CRPD – the restrictions of the rights of such persons to be proportionate to their condition, to apply for the shortest possible term and to be subject to regular review by an independent body.”* Despite these comments the Court did not pronounce the legal regulation of deprivation and limitation of capacity to act as unconstitutional. The Court was concerned not to create a legal gap in the protection of persons with disabilities and therefore recommended thorough amendments of the legislation.⁴⁵ The Constitutional Court decision provoked academic discussion but it was just an exchange between opponents and proponents of the regime in force.⁴⁶

45 Constitutional Court, Decision 12/17.07.2014 issued on the case 10/2014. The decision is available in Bulgarian at: <<http://constcourt.bg/acts>> last visited in August 2023.

46 On the site of proponents there was an opinion that ‘while dating back to the early 20th century (1907), this Act is still effective, the case law is not contradictory, and an explicit public need to

In October 2018, the UN Committee on the Rights of Persons with Disabilities, after the review of the initial report of Bulgaria under the Convention, issued its Concluding observations and recommendations. The Committee explicitly stated that it is concerned that Bulgarian legislation still restricts the legal capacity of persons with disabilities and provides for the guardianship of persons with psychosocial or intellectual disabilities. It is also concerned about the delay in the adoption of the Persons and Support Measures Act, the main purpose of which is to harmonize national legislation with article 12 of the Convention. The Committee recommended that Bulgaria amend its legislation and adopt the Persons and Support Measures Act, and uphold and recognize the full legal capacity of all persons, regardless of their impairment, in accordance with the guidelines given in general comment No. 1 (2014) on equal recognition before the law. It also recommended that Bulgaria establish, in consultation with organizations of persons with disabilities, support decision-making procedures and provide continuous training on article 12 of the Convention to the stakeholders concerned, including members of the judiciary and health-care and social protection professionals.⁴⁷ So far no actions have been taken to address this recommendation.

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

The draft Persons and Support Measures Act proposes a very radical reform of the system – to completely abolish any limitation of the legal capacity. The Draft upholds and recognizes the full legal capacity of all persons, regardless of their impairment, in full compliance with article 12 CRPD. Instead of guardianship and substitute decision making, the Draft introduces support decision making, in all actions implying legal consequences according to the personal wishes and preferences. This refers to all personal and life care decisions, social and health care consent, management of property and financial issues, property transactions, and participation in legal proceedings. Support measures shall not be determined for: contracting a marriage or requesting the dissolution thereof; making a will; and exercising reproductive rights. Those rights shall be exercised independently after providing the person with appropriate consultation. The Draft also introduced the

revise it has not been expressed". Tzankova, Tz. Issues of the Legal Capacity to Act. In: Jubilee collection dedicated to the 80th anniversary of prof. Vasil Mrachkov. Sofia, 2014, p. 205. For the opposite view see: Todorova, V., Shabani, N, et al. The new paradigm of legal capacity: Article 12 of the UN Convention on the Rights of Persons with Disabilities, *Pravna Misal*, 2014, 1, paras 80-88.

47 Concluding observations on the initial report of Bulgaria, CRPD/C/BGR/CO/1, paras 29-30.

lasting power of attorney and advance medical directives – both are still not legalised in Bulgaria. There is neither academic nor political discussion in Bulgaria with regard to the pending reforms of the rights of vulnerable adults.

SECTION II – LIMITATIONS OF LEGAL CAPACITY

- 8. Does your system allow limitation of the legal capacity of an adult? N.B. If your legal system provides such possibilities, please answer questions 8 - 15; if not proceed with question 16.**
- a. on what grounds?**
 - b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**
 - c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?**
 - d. can the limited legal capacity be restored and on what grounds?**
 - e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?**
 - f. are there any other legal instruments,⁴⁸ besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

a. on what grounds?

Bulgarian legislation allows a state intervention into the legal capacity of an adult. It could result in deprivation or in limitation of the capacity to act. The legal grounds are specified in the Persons and Family Act (PFA). The court procedure is set out in the Civil Procedure Code (CPC). The appointment of a guardian or of a partial guardian are set out in the Family Code.

As article 5, paras 1 and 2 PFA reads:

“Adolescents and adults who, owing to dementia or mental illness, are unable to look after their own affairs shall be deprived of their legal capacity and and shall become incompetent.

⁴⁸ Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts

The capacity of adolescents with such conditions, whose condition is not so *serious*, shall be partially deprived of their legal capacity.”

The two grounds for incapacitation of an adult: 1/ medical: mental disability or intellectual disability and 2/ legal: the medical status should cause an inability of the adult to take care of their interests and actions must be present cumulatively and there should be a causal link between the health status (dementia or mental illness) and the inability to act.

The former Supreme Court⁴⁹ interpreted the legal grounds under article 5 PFA as follows: *‘The object of the action under Article 5 of the PFA – deprivation of capacity of a person (zapreshenie), is his capacity, and the basis of this action is the existence of mental illness or dementia and the inability of the person suffering from such illness or dementia to take care of his affairs.’* (Resolution No. 5/79 of 13.II.1980, Plenum of the Supreme Court, para.1; also Order № 1301/12.11.2008 of the Supreme Court of Cassation, case № 5560/2007).

The court interpreted the term ‘inability to take care of their affairs’ while discussing the meaning of the ‘ability to act’ as follows: *‘...whether the appellant can take care of his/her affairs, i.e. understands the prescriptions of the legal norms and conform their conduct to them, orient themselves in the social environment and are able to direct their actions, assessing their consequences, their attitude towards society and compliance with the established order’* (Judgment No. 1301/12.11.2008, case No. 5560/07, Supreme Court of Cassation⁵⁰, V d. o. and Judgment No. 379/07.05.2009, case No. 1320/08, Supreme Court of Cassation, I d. o.).

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

The legislation determines the scope of the limitation of legal capacity in general terms and only in regard with the degree of the limitation. Bulgarian law recognises two degrees of incapacity, which are determined by the severity of the diagnosed mental condition and by the functional assessment of the abilities of the person concerned.

49 Acting after 1947 until the adoption of the current Constitution of 1991.

50 The cassation instance in the justice system was restored by the Constitution of 1991 and the Judicial Power Act of 1994.

The Act sets out the scope of the limitation as conditional to the ‘seriousness’ both of the medical situation of the person and their ability to care for their own affairs. According to the degree of suffering, the court may decide on full or partial limitation of the legal capacity and place the person under full or limited guardianship.

- The court has a full discretion to decide about the scope of limitation irrespective of the views of the claimant as well as to reject the request for the limitation of the capacity (*Resolution No. 5/79 of 13.II.1980, Plenum of the Supreme Court, p.4*).

Some of the courts apply the reasoning of Decision No. 12/17.07.2014 of the Constitutional Court in case No. 10/14, where the Court considers that ‘the contested provisions of article 5 of the PFA must be interpreted narrowly and only in a way that fulfils the constitutional requirement to give enhanced protection to the rights of people with mental disabilities. Such protection will be available where the unavoidable restrictions associated with the limitations of the legal capacity do not result in an unjustified interference with the fundamental constitutional rights of those persons. This requires that incapacity under article 5 of the PFA be understood as a condition which must alone ensure that no legal action is taken which may prejudice the interests of the person placed under an incapacity, or of third parties, or of society’ (Judgment No.55/16.07.2021 of the Court of Appeal, Varna, case No. 229/2021).⁵¹

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

The intervention into the legal capacity automatically affects **all aspects** of legal capacity of the person. There is no opportunity within the law for a tailor-made decision.

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

There is no explicit substantive law provision allowing for restoration of the limited legal capacity. The possibility for restoration follows from a procedural

51 See more in: Bulgarian Helsinki Committee, Alternative report about the rights of persons with disabilities in Bulgaria under the CRPD, Sofia, 2017, page 30, in: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCRPD%2FICO%2FBGR%2F27646&Lang=en> last visited in August 2023.

norm. The Civil Procedure Code stipulates that the rules applicable to the limitation shall apply to the restoration of the legal capacity (article 340, para 1).

The law is not explicit either regarding the grounds for the restoration of the legal capacity. In 1980 the Supreme Court referred to ‘change in the circumstances’ (Resolution No. 5/79 of 13.II.1980, Plenum of the Supreme Court, para.10). The courts would rather consider as a ground the improvement of the health situation of the person (Judgment № 232/21.02.2020 District Court Burgas, case № 826/2019) or the factual ability to care for their affairs irrespective of the medical assessment (Judgment No. 260614 of 12.10.2020 of the District Court - Varna in case No. 1148/2020). To challenge the guardianship is still as difficult as it was before ratification of the CRPD. The case law is getting richer but this is due to increased activity by persons with mental disability themselves and NGOs and not because of an increased understanding by the Courts of CRPD principles.

Therefore the observation made in a current paper could be considered as correct ‘Once banned, a person can hardly regain capacity. There is no requirement for ongoing monitoring or periodic review of the need for continued restrictions. There is no provision for the collection of follow-up data to confirm or reject the need for the restraint. Once imposed, it is forever. Only exceptionally may it be replaced or revoked. The initiative for this is left in the hands of the incapacitated person, his relatives and the public prosecutor, who must prove cure or at least improvement of the condition.’⁵²

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

Under Bulgarian legislation it is the opposite. The mere limitation of legal capacity is considered as a protection measure. The court decision depriving or limiting the legal capacity is a ground to appoint a representative for the adult (guardian) or a person to assist and participate in the exercise of legal actions of the adult with partially limited capacity (partial guardian).

52 See. Nedeв, D. Proceedings to change or revoke the incapacitation, 2022, in: <<https://www.challengingthelaw.com/grajdanski-proces/zamiana-i-vidigane-na-zapreshenie/>> last visited in August 2023.

- f. are there any other legal instruments,⁵³ besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

No, there are no such legal instruments.

- 9. Briefly describe the effects of a limitation of legal capacity on:**
- a) property and financial matters;**
 - b) family matters and personal rights (e.g. marriage, divorce, contraception);**
 - c) medical matters;**
 - d) donation and wills;**
 - e) civil proceedings and administrative matters (e.g. applying for a passport);**

In case of deprivation of legal capacity, the adult is excluded from **all** decision-making processes that have legal implications. To a person deprived of legal capacity, the legal regime for a minor child (0 - 14 years of age) is applied (substitute decision making) (article 5, para 3 and article 3, para 2 PFA) and a guardian is appointed who acts as a representative of the adult. To a person whose legal capacity is partially limited, the legal regime for a child (14 - 18 years of age) is applied. Their actions need a confirmation by the partial guardian (supported decision making) (article 5, para 3 and article 4, para 2 PFA). The Civil Procedure Code (article 28) states that persons whose legal capacity is partially limited can have a legal standing personally with the consent of their partial guardians.

Equating adults under guardianship to children is further emphasised in the Family Code, which regulates adult guardianship in the same provisions as applied to children without parental care. Thus, the Family Code contains no special obligations or recognition that acting as a guardian to an adult might have different requirements than acting as a guardian for a child.

⁵³ Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts

a. property and financial matters;

Any action of the adult deprived of legal capacity regarding their property and financial matters would be null and void because of the complete lack of consent (article 26 para 2 of the Obligations and Contracts Act).

Adults with partially limited legal capacity administer their property and financial matters on their own but with the consent of their partial guardians, but they are free to make ordinary small transactions to meet their current needs and to dispose of what they have acquired through their work (article 4, para 2 PFA). Contracts concluded by partially incapacitated persons or concluded by their representative without complying with the requirements established for them, are voidable (article 27 of the Obligations and Contracts Act).

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

The deprivation of legal capacity prevents the vulnerable adults to exercise their personal and family rights that have legal implications. This means that they are denied of these rights.

Adults, which are deprived of legal capacity, do not have a capacity to marry (article 7, para 1/b FC). A marriage that has been concluded by a person deprived of legal capacity should be considered voidable (not null) (article 46, para 1/a FC) and could be dissolved upon a claim of the incapacitated person submitted not later than six months after the restoration of legal capacity or upon a claim of his/ her spouse submitted until the restoration of capacity (article 47, para 4 FC). It is not clear though how the incapacitated adult could claim the voidability of the marriage since he/she should act by a representative. The guardian is not competent to claim voidability of such a marriage.

In case the incapacitation happens during the marriage, the incapacitated adult does not have a standing to petition for divorce. In addition, there will be a clear conflict of interests in such a case since the fully incapacitated spouse should rely on the representation by his/her spouse who is his/her *ex lege* guardian. There is not legal mechanism to facilitate the access to divorce of the fully incapacitated adult.

The partially incapacitated adults can marry but can not chose matrimonial property regime (article 18, para 2 FC). The community property regime is appli-

cable *ex lege* in a marriage where a spouse has his/her legal capacity partially limited. There is no explicit regulation on the right of a spouse under partial guardianship to petition for divorce, but it should be possible.

The family law assumes that adults under full guardianship can not exercise their parental rights and duties and therefore stipulates that in such a case a guardian should be appointed to the children in case there is no other parent (article 153 FC).

There are no specific regulations on the access of incapacitated adults to contraception. The general rules should apply. The Decree 2/1990 on the conditions and procedures for artificial termination of pregnancy, stipulates that abortions for incapacitated women shall be carried out with the consent of their guardians (article 4). The incapacitated adults do not have access to artificial reproductive technologies: they cannot be recipients of gametes neither could they be donors of eggs (article 130 of the Health Act).

The Social Services Act 2020 (SSA) considers the access to social services including residential care conditional on the wishes and preferences of vulnerable adults (article 91, para 1):

‘The provision of social services to an adult under guardianship and the termination of their use shall be in accordance with the wishes of the person and the opinion of his guardian or partial guardian, and in case of conflict the wishes of the person in need of social services shall prevail.

The guardian or partial guardian of a person under guardianship shall comply with the wishes of the person and shall assist the person in directing and using the social service chosen by the person.’

Incapacitated adults could be placed in residential care institutions only on the ground of a court decision. This procedure is regulated in articles 95-101 SSA. The court must examine the will of the person whose placement is requested, including through the participation of expert witnesses. Experts critically examine these new regulations, claiming that a choice of a vulnerable adult in a system where there is no real alternatives of the residential care, and the person faces the risk of literally dying on the street, is not much of a choice. In addition, the lack of supporting measures which to ensure valid communication with the person with disability throughout the process makes these provisions empty and incapable of

really respecting the rights of the person with disability.⁵⁴

c. medical matters;

In general, the same rules apply regarding medical matters: the fully incapacitated adult cannot give a valid consent to any medical treatment. Their guardian is authorised to make all medical decisions:

‘The informed consent for medical activities for fully incapacitated adult shall be given by his or her guardian, except as provided by law (article 87, para 4 Health Act).’

The patients with partially limited legal capacity give informed consent for any medical treatment but together with the consent of their partial guardians. The consent of the partial guardian shall not be required for health consultations, preventive examinations and examinations (article 87, paras 2, 3 Health Act).

The informed consent of the guardian/partial guardian is not required in life saving situations and where it is impossible to obtain the consent timely (article 89, para 3 Health Act).

d. donations and wills;

Fully incapacitated adults can not make donations and wills because their capacity to act has been revoked. As per article 26, para 2 of the Obligations and Contracts Act, contracts which lack consent shall be null and void. The testamentary disposition is voidable where it is made by a person who at the time of its making was incapable of making a will (article 43, para 1/a of Succession Act). Capability of making a will depends on 3 cumulative factors: the person should not be deprived of legal capacity, should have reached the age of majority and should be able to act reasonably (article 13 of Succession Act).

Since the Act is not explicit about the adults under partial guardianship, the case law admits that a person under a partial guardianship may dispose of his prop-

⁵⁴ See: Voices for Justice. Victims of crime with disabilities in Bulgaria. Information and Communication: Cornerstones of justice for victims of crime with disability (878604 — InfoComPWDs) JUST-AG-2019 / JUST-JACC-AG-2019-878604 at: validity.ngo/projects-2/voices-for-justice/ last visit September 2022.

erty after his death by will and it will be valid if he/she have understood its meaning and significance when making the will (has been able to act reasonably) (Supreme Court Judgment No. 2639 of 31.XII.1969 in case No. 1363/69/ I).

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

The fully or partially incapacitated adult have their legal standing in civil and administrative proceedings, however they cannot act by themselves. According to Article 28 of the Civil Procedure Code, which is the general regulation on standing in the civil and administrative law proceedings, persons under partial guardianship can access courts only with their guardian's support and consent. Persons that are deprived of legal capacity have access to administration and courts only through their guardians. This means that incapacitated persons cannot challenge their placement under guardianship.

Neither of the individuals who have won cases relating to guardianship against Bulgaria before European Court of Human Rights – Mr. Stanev and Mr. Stankov – have had access to court proceedings despite their legal capacity has been partially limited. Mr. Stanev has made numerous attempts to have his legal capacity restored but the courts consistently have refused his attempts solely on the basis of his medical diagnosis. Mr. Stankov has not filed an application for restoration of his legal capacity as he has been afraid that by doing so he may lose his place in the supported home in which he has lived since being released from the institution. He has also been was afraid that the legal system will not be able to meet his need for support or formally recognize the supported network he has now established as a legitimate form of support in decision making.⁵⁵

However, following these judgments, article 340, para 2 of Civil Procedure Code was amended only to say that adults, which legal capacity has been partially limited, can claim independently revocation of the legal capacity.

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

The limitation of legal capacity cannot have a retroactive effect. The legal consequences of the incapacitation shall have effect for the future: 'the issue of the moment at which the defendant fell into that state of incapacity is not a matter

⁵⁵ See more in: NGO information to the United Nations Committee on the Rights of Persons with Disabilities to the initial report of the Republic of Bulgaria, 2017, INT_CRPD_ICO_BGR_28482_E

of the proceedings for the limitation of legal capacity. That may be established in another action on general grounds' (Judgment No. 1192/1961 of the Supreme Court in case No. 3354/61/II). The deprivation and limitation of legal capacity comes to effect at the moment when the court decision enters into force.

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

The second instance court – the District court, is competent to decide on deprivation, limitation or restoration of legal capacity (article 104 of the Civil Procedure Code).

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

Article 336 of the Civil Procedure Code (CPC) specifies the range of persons who are eligible applicants: the adult's spouse, the adult's close relatives, the prosecutor and anyone who has a 'legal interest' in the limitation of the legal capacity. The participation of the prosecutor is obligatory in such proceedings regardless of whether the prosecutor has filed the application.

The legislation does not define what is meant by a 'legal interest,' but case law suggests that an acceptable 'legal interest' would be a financial stake, or a risk for the adult's property. As examples of persons who have legal interest in filing an application, the case law points to the creditors of the adult and people who have signed contracts with the individual for whom guardianship is sought. Parents, children and siblings but also other potential heirs of the vulnerable adult are the usual 'close relative' for the purposes of this proceedings.

This raises the major criticism so far in Bulgaria against the status quo – the whole regulation on incapacitation / guardianship is built on the notion to protect the property – the assets or money – of the vulnerable adult in the interests of the family or heirs but not of the vulnerable adult. The legislation makes no specific mention of filing an application for the purpose of protecting the vulnerable individual from abuse or exploitation.⁵⁶

Insofar as the ex-spouse is not among the persons whom the law expressly indicates as having active procedural standing to bring the action, she/he falls

⁵⁶ See more in: Mental Disability Advocacy Center, Guardianship and Human Rights in Bulgaria. Analysis of Law, Policy and Practice. 2007, p. 29.

within the circle of persons having active standing only when they have and establish an interest in bringing the action (Judgment No 711 of 30.12.2010 of the Supreme Court of Cassation in Case No 1915/2009/ III).

Until very recently, a very problematic practice was in place regarding vulnerable adults placed in mental health facilities or in institutional care. Upon the request of their managers the prosecutor could have started a procedure for limitation of their legal capacity. So the previous regulation allowed interference in the legal capacity that was not based on the needs or mental status of the adult, but solely on the basis of the interest of others and even of the management of residential care facilities.⁵⁷

The revocation of the legal capacity may be requested by the guardianship authority or by the guardian, as well as independently by the person whose legal capacity is partially limited (article 340, para 2 CPC). The incapacitated adult may request the guardian, the guardianship authority or the guardianship council to apply to the district court, which has decided on the limitation for its restoration. In such cases, the adult shall legitimize his recovery by a medical document. Where the guardian, the guardianship authority or the guardianship council refuses to apply for the restoration, the adult may apply to the public prosecutor for the latter to bring an action for the restoration of the legal capacity (Resolution No. 5/79 of 13.II.1980, Plenum of the Supreme Court, para.10).

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

a. a requirement of legal representation of the adult;

There is no specific requirement for the representation of the vulnerable adult in the procedure(s) for deprivation/limitation or restoration of legal capacity. The common rules for legal representation apply. The vulnerable adult could hire a

⁵⁷ Ibid.

lawyer or to apply for legal aid if he/she is eligible under the Legal Aid Act (Art. 23, para 2).

The CPC particularly stipulates that if, after the personal examination of the adult, the court considers it necessary, it shall appoint the defendant a temporary guardian to look after his personal and property interests (article 337, para 2 CPC). According to the former Supreme Court the appointment of a temporary guardian limits the defendant's substantive legal capacity but not his procedural capacity. The defendant continues to participate in person in the proceedings for deprivation/limitation of legal capacity until the judgment enters into force (Resolution No. 5/79 of 13.II.1980, Plenum of the Supreme Court, para 6).

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

Family members (such as spouse or close relatives e.g. parents, children or siblings) can participate in the proceedings as claimants (article 336, para 1 CPC). The court should hear the family members (article 338, para 1 CPC). The participation of the the prosecutor is mandatory (article 336, para 2 CPC). Vulnerable adults' organisations or other CSO's cannot participate on the site of parties in the proceedings neither as third party intervenours.

c. requirement of a specific medical expertise / statement;

The medical status of the vulnerable adult is a subject of medical/ psychiatric assessment, which is the leading, but not decisive, evidence in the proceedings. The procedural value of the medical expert report is very high, which illustrates the medical approach to the legal capacity. The (still leading) interpretation of the former Supreme Court sets up that: 'The expert is competent to give a conclusion as to whether the person whose legal capacity's limitation is sought suffers from the diseases or dementia, which the law has in mind. The expert shall also determine the extent of the suffering and, having regard to the state of the person's health, whether he or she can actually look after his or her affairs and interests. Only the court is competent to decide, in the light of the medical and other evidence, whether the person should be deprived or limited of their legal capacity in the light of the requirements of the law. Pursuant to Article 202 CPC (abolished in 2007 and replaced by article 338), the court is not obliged to accept the expert's conclusion, but to consider it together with the other evidence in the case' (Resolution No. 5/79 of 13.II.1980, Plenum of the Supreme Court, para.5).

The expert assessment of the medical status of the adult should be done by specialised medical doctors, which usually are psychiatrists. The problem is that the assessment is most often grounded on the medical records of the person and on what is theoretically known about the diagnosis.⁵⁸ It does not provide answers to the questions that should be essential for the court (how does the person act in relation to various situations or under various conditions). Instead, it reaffirms the person's helplessness and sums up the absence of capacity as a result of the disability. It is worth noting that only a few judges are trying to weight more their own perceptions from the person and to underestimate the medical assessment of the person.

d. hearing of the adult by the competent authority;

Pursuant to article 337 CPC, the court is obliged to examine in person the adult whose legal capacity's limitation is sought. Where the person is in a medical institution and his/her state of health does not permit him/her to be brought in person in court, the judge is obliged to obtain an immediate impression of his/her condition visiting the person in the medical facility. According to the established case law, the meaning of the direct examination illustrates the protective function of the court with regard to the whole personality of the adult and constitutes a guarantee against the conflict of interests within the family (in case the claimants are the relatives). As the leading Supreme Court Resolutions guides: 'The examination of the defendant must precede the taking of any evidence. Failure to comply with this rule is a material breach of the rules of the special action procedure and may prejudice the defendant. It is only after fulfilling the said requirements of law that the court can make a finding as to the condition of the defendant. Such evidence may, however, be of no avail where the court, after examining the defendant in the light of its first-hand impressions and after hearing his relatives, finds that the defendant is neither mentally ill nor feeble-minded but is of normal mental capacity (*Resolution No. 5/79 of 13.II.1980, Plenum of the Supreme Court, paras.3, 4, 6; the same in Order No. 235 of 31.03.2022 of the Supreme Court of Cassation, case No. 3203/2021, IV*).

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

58 Voices for Justice. Victims of crime with disabilities in Bulgaria. Information and Communication: Cornerstones of justice for victims of crime with disability (878604 — InfoComPWDs) JUST-AG-2019 / JUST-JACC-AG-2019-878604 validity.ngo/projects-2/voices-for-justice/

The adult can appeal the decision depriving of or limiting his/her legal capacity according to the general rules of procedure. He/she can do this theoretically by him/herself since the decision has not entered into force.

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

- a) property and financial matters;**
- b) personal and family matters;**
- c) care and medical matters.**

a. property and financial matters;

The mental capacity of the person has a bearing on the validity of the contracts he/she enters into. As article 31, para 1 of the Obligations and Contracts Act (OCA) reads:

“A contract entered into by a person of legal capacity is voidable if he was incapable of understanding or directing his actions when he entered into it.”

In its recent Interpretative Ruling No 5 of 2022, the Supreme Court of Cassation explains that: ‘In the cases of article 31, para 1 OCA, there may be an inability to understand or to direct actions for reasons due to mental and psychological problems, when the person is formally considered to be competent, i.e. not placed under guardianship. It is necessary that this condition was present at the time of the transaction. The negating fact of the will in the hypothesis of article 31, para 1 OCA is the condition of unsound mind, in which the contract has been made. The duration of that condition is irrelevant. The person's inability to understand or direct his or her actions may be due to various causes, both temporary - alcohol intoxication, the effects of drug addiction, etc. - and permanent. The statutory provision fails to distinguish between specific causes according to the type and extent to which they affect the person's capacity to act reasonably. Therefore, on the basis of article 31, para 1 OCA, contracts concluded by persons with legal capacity who are permanently incapable of understanding or directing their actions and where their condition objectively could be a ground for legal capacity limitation, are also void, given that the legal consequences of the incapacitation occur in the future.’

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

The marriage capacity is affected by the lack of mental capacity. In case the adult is suffering from a mental illness or dementia, which would be a ground for a deprivation of his/her legal capacity he/she cannot enter a valid marriage (article 7, para 1/ b FC). In case the marriage has been concluded, it can be voided because of the mental incapacity no matter the adult had not been legally incapacitated (article 47, para 1/ 3 FC).

The mental capacity of a person would not affect other personal and family rights.

c. medical matters;

Three issues are regulated under the Health Act (HA) with regard to the mental capacity of persons: 1/ special health care for persons suffering from mental health problems; 2/ mandatory treatment of persons with psychiatric conditions and mental sickness and 3/ informed consent for regular treatment.

The Health Act (article 146) stipulates that the persons with mental disorders who are in need of *special health care* shall be: 1. mentally ill persons with an established serious impairment of mental functions (psychosis or severe personality disorder) or with a marked permanent mental disability as a result of mental illness; 2. persons with moderate, severe or profound mental retardation or vascular and senile dementia; 3. persons with other disorders of mental functions, learning difficulties and difficulties in adaptation, requiring medical assistance, care and support in order to live fully in the family and social environment.

In the case of patients with established mental disorders who have fallen into conditions, which constitute a direct and immediate danger to their own health or life or to the health and life of other persons, *temporary physical restraint measures* may be applied (article 150 HA). The HA stipulates for various guarantees for the personal freedom and rights in case of such medical treatment:

- These measures shall not replace active treatment and shall be carried out by trained personnel.
- Measures of physical restraint shall be ordered by a physician who shall determine the type of measure and the time limit for its application and should be entered in a special registry. This period may not be longer than 6 hours.

Mentally ill persons who, because of their illness, may commit a crime which poses a danger to their relatives, to others, to society or seriously endangers their health, shall be subject to compulsory accommodation and treatment (article 155

Health Act). The compulsory placement and treatment shall be ordered by the district court at the request of the public prosecutor, or by the head of the medical institution. The compulsory treatment shall be carried out in medical institutions for inpatient psychiatric care and mental health centres, in psychiatric wards or clinics of multidisciplinary hospitals and in medical institutions for specialised psychiatric outpatient care (articles 156-157 HA).

The person whose placement is requested must be interviewed in person by the judge and, if the need arises, brought in involuntarily. Where the person's state of health does not permit his appearance at the hearing, the court shall be obliged to obtain an immediate impression of his condition visiting the person the respected facility. In such cases, as well as in the event of a declared state of emergency, martial law, disaster, epidemic, epidemic emergency or other force majeure, the person whose accommodation is sought, as well as the expert appointed to give an expert opinion, may also participate in the proceedings by videoconference, their identity being certified by the director of the hospital establishment or by a person authorised by him/her (Article 158, para 5/3 HA). The last sentence was amended in 2020 with regard to the Covid 19 related restrictions. The Ombudsman confronted the participation by videoconference'part before the Constitutional Court. The Court found that "the provision of section 158(5)(3) of the Health Act fails to meet the standards of the rule of law in the formal sense, which require laws to be clear, precise and uncontroversial, affects the fundamental right of individuals to personal liberty and security, and fails to meet the standards of effective protection at all stages of the process enshrined in the Constitution".⁵⁹

The court shall appoint a forensic psychiatric examination and after hearing the person and the conclusion of the forensic psychiatric examination shall decide on the necessity for compulsory placement, determine the treatment facility, and the presence or absence of the person's capacity to express informed consent. The court shall determine the duration of the placement and treatment, as well as the form of treatment - outpatient or inpatient (articles 159 – 162 HA).

Where the court accepts that the person lacks mental capacity, it shall order compulsory treatment and appoint a person from the circle of the patient's relatives to give informed consent to the treatment. In the event of a conflict of interest or in the absence of relatives, the court shall appoint a representative of the municipal health service or a person designated by the mayor of the municipality at the seat

⁵⁹ Decision of the Constitutional Court No 14 / 2022 in: <https://www.constcourt.bg/bg/act-9398> last visited in August 2023.

of the institution to express informed consent to the person's treatment (article 162, para 3 HA).

In the case of persons with mental disorders and established incapacity to express an informed consent, it shall be expressed by the persons designated by the court under a designated for the compulsory placement and treatment (article 87, para 7 HA).⁶⁰

d. donations and wills;

Regarding validity of donations, pls. see **para a** above.

The mental capacity at the moment of making the will matters for its validity. Capability of making a will depends on 3 cumulative factors: the person should not be deprived of legal capacity, should have reached the age of majority and should be able to act reasonably (article 13 of Succession Act). The ability to act reasonably is a factual ability that must exist at the moment of making the will. The lack of mental capacity makes the testamentary disposition voidable (article 43, para 1/a of Succession Act). The incapacitated adults can accept the inheritance only by inventory (article 61, para 2 Succession Act) but they cannot reject the inheritance (article 130, para 4 FC).

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

The mental capacity of the person should not affect their capacity to participate in civil proceedings. The participation of such persons in civil proceedings and administrative matters is not facilitated by accommodated materials or guidance.

The Persons with Disabilities Act, 2019 (PDA) introduced supported decision making with regard to access to justice of persons with intellectual or psychosocial problems, which capacity has not been limited. According to the new provisions, any person with disabilities who experiences difficulties in making legally binding decisions, including in court proceedings or in any legal proceedings, is entitled to support measures. The measures involve intervention of social services

⁶⁰ The general health system is not prepared to deal with persons with physical illness who also have a psychosocial disability. Even in the cases where the person is not in a severe psychotic or other mental health crisis, the general health system is heavily affected by prejudice and refuses to provide proper health care. See: NGO information to the UN CRPD Committee to the initial report of the Republic of Bulgaria, 2017.

where, according to the Act, the professional offering the intervention must have a relationship of trust with the person in need and shall include: 1. counselling by a trained professional; 2. provision of specialised supported decision-making services; 3. provision of a decision support mentor; 4. preparation of a crisis plan; 5. supported decision-making through support networks; 6. implementation of protective measures. The support measures consist of: 1. explaining the meaning of the legal action and its consequences; 2. assisting the supported person to understand the other actors involved in the legal action or affected by it; 3. helping the supported person to express his/her wishes and preferences in a way that others can understand; 4. providing other assistance related to the performance of the legal act (articles 65 – 66 PDA). The problem with this new regulation is that the support decision making should be implemented in accordance with a law but this law is still not adopted.

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

The Bulgarian system on legal capacity has been evaluated so far only by the human right NGOs. As already mentioned the Constitutional Court decision conveyed the message that there is a need of legislative reform. The violations of the ECHR regarding treatment of incapacitated adults found by the ECtHR also confirmed that there are profound issues that deserve immediate reaction by the state authorities.

The major issues could be summarised as follows: 1/ the legislation is still far away from the philosophy of the CRPD as it mainly considers persons with mental disabilities as not-able, lacking capacity to act and primarily as objects of social assistance. Far more radical and holistic approach needs to be applied in the field of personal and social assistance, independent living, support in decision making, education and employment of persons with disabilities; 2/ the medical model in assessment of disabilities is leading and is a basis for all rights and benefits in practice; 3/ social assessment of the needs and capacities of the persons with disabilities is done in a formalistic/bureaucratic way; 4/ individually tailored services, assistance and allowances do not exist; 5/ the public spaces are largely inaccessible for persons with different kinds of disabilities. Universal design is not adopted as a notion/definition and measures for its potential implementation are taken on EU funded projects basis sporadically; 6/ for persons with disabilities in Bulgaria, the right to independent living is not respected. The majority of them live with their families and cannot choose where and with whom to live. Access to

community-based services is not guaranteed to all potential users and the quality of care provided in them is generally low, with a few exceptions. Users' opinions are not being sought and taken into account while the services are being developed, while they are functioning and when their quality is being evaluated.⁶¹

SECTION III – STATE-ORDERED MEASURES

Overview

16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.⁶² Pay attention to:

- a) can different types of state-ordered measures be applied simultaneously to the same adult?**
- b) is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;**
- c) does your system provide for interim or ad-hoc state-ordered measures?**

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

No, different types of state-ordered measures cannot be applied simultaneously to the same adult.

The deprivation or limitation of legal capacity (zapreshtenie) is the only measure that is applied and it is considered as a protection measure. Since the incapacitation affects the capacity of the adult to act, a representative is appointed to that adult – guardian (nastoinik). A partial guardian (popechitel) is appointed to the adult whose legal capacity has been limited.

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

61 Bulgarian Helsinki Committee, Alternative Report on the Implementation of the UNCRPD in Bulgaria, June, 2017, available in English in: <<http://www.bghelsinki.org/en/news/press/single/delayed-reform-and-implementation-rights-persons-disabilities-bulgaria/>> last visited in August 2023.

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

There is no preferential order in the application of the state-ordered measures. The appointment of a guardian (nastoinik) or of a partial-guardian (popечitel) depends on the scope of interference in the legal capacity.

In a recent Ruling No. 424 of 26.05.2021 in Case No. 2989/2020/IV, the Supreme Court of Cassation stated that the support measures as stipulated in the Social Services Act and in Persons with Disabilities Act are not an alternative of the incapacitation, 'insofar as these social services and support measures do not replace/abrogate the institution of the guardianship, but exist alongside it'. This should mean that in proceedings for limitation of the legal capacity the court can order support measures instead of capacity limitation. This could satisfy the test of article 8 para 2 ECHR in particular proportionality and subsidiarity of the restriction of the rights. It should be noted that much earlier, in 2013, the Sofia District Court rejected the claim of parents for deprivation of legal capacity of their son and ordered several support measures instead.⁶³ The judge in fact applied directly article 12 CRPD that is allowed by the Constitution, however the community of judges did not praise such an approach and the decision remained isolated.

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

There are two examples of interim state-ordered measures. Both of them aim to protect the vulnerable adult and their property during the final decision regarding incapacitation or appointment of a guardian or a partial guardian. Within the incapacitation proceedings the court shall appoint a temporary guardian to look after personal and property interests of the defendant if, after the examination, considers it necessary (article 337, para 2 CPC). Within the administrative procedure pending the appointment of a guardian or a partial guardian, the guardianship authority shall take protective measures for the person and property of the person to be placed under guardianship/partial guardianship. The guardianship authority shall, in person or through a person appointed by it, take an inventory of the property. Where necessary, it may assign a person to temporarily perform the functions of a guardian or a partial guardian (article 159, para 1 FC).

The support decision measures under the Persons with Disabilities Act should be considered as a type of *ad hoc* state ordered measures (see answer to the question 14 'e' above). Measures should be implemented tailored to the concrete needs of the person and according to the concrete legally binding decisions, including in court proceedings or in any administrative proceedings. There is not known examples of practical implementation of this regulation. It was far from clear how these

63 Sofia District Court Decision of 04.11.2013 on the case No 16532 of 2012.

new provisions would be put into practice. The justice system, including the courts, seemed not to have had any training or be otherwise prepared for how to apply these regulations on supported decision making.⁶⁴ In 2021 the Act was amended to say that the supported decision-making measures should be determined by (other) law. This law has not yet been adopted. Therefore these measures will not be considered in the following sections.

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.

The legal grounds to order the measure is the court decision that deprives of or limits the legal capacity of the adult. The state measure is the appointment of a guardian (nastoinik) and guardianship council. As article 156 FC reads, the GA of the person's domicile shall appoint a guardian, a deputy guardian and two advisers from among the relatives and close relatives of the incapacitated person who will best look after his or her interests and have given their written consent thereto. They shall form a guardianship council. A partial guardian (popechitel) and a deputy is appointed from among the relatives and close relatives of the incapacitated person who will best look after his or her interests and have given their written consent thereto to the adult whose legal capacity is limited (article 157 FC)

18. Which authority is competent to order the measure?

The guardianship authority (GA) is competent to appoint a guardian or partial guardian for the adult. The mayor of the municipality or an official designated by the mayor shall be the guardianship authority (article 154 FC). It will be the GA of the municipality where the permanent address of the incapacitated person is to appoint the guardian (article 156, para 1 FC). The GA is responsible for overseeing and monitoring all guardianship arrangements within the municipality and assisting guardians in carrying out their duties (article 162 FC).

64 Voices for Justice. Victims of crime with disabilities in Bulgaria. Information and Communication: Cornerstones of justice for victims of crime with disability (878604 — InfoComPWDs) JUST-AG-2019 / JUST-JACC-AG-2019-878604; validity.ngo/projects-2/voices-for-justice/, 2022, p. 33.

19. Who is entitled to apply for the measure?

The appointment of guardian or partial guardian is done *ex officio* upon the notification by the court about the decision that deprives or limits the legal capacity (article 338, para 3 CPC). The guardianship authority shall appoint a guardian and a deputy guardian (guardianship council) or a partial guardian within 30 days commencing upon receipt of a copy of the court decision (article 155, para 1 FC). In case the adult has a parent or a spouse these will become *ex lege* guardian/partial guardian (article 173 FC).

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?

No, the consent is not required neither from the fully nor from the partially incapacitated adult.

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.**

- a. a requirement of legal representation of the adult;**

There is no requirement of legal representation of the adult in this proceeding. The legal representation is required in the incapacitation proceedings.

- b. availability of legal aid;**

N/A

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

Since the guardian (nastoinik) or partial-guardian (popechitel) should be selected among the family members of the adult, their participation is necessary to the extent that they need to agree to become guardians. The agreement should be in writing (article 156, para 1 FC).

d. requirement of a specific medical expertise / statement;

There is no requirement of a specific medical expertise in this proceeding. The specific medical expertise / statement is required in the incapacitation court proceedings.

e. hearing of the adult by the competent authority;

The partially incapacitated adult should be heard in the procedure of appointment of partial guardian (popechitel), but not adult deprived of legal capacity (article 155, para 3 FC).

f. the possibility for the adult to appeal the order.

No, there is no possibility for the adult to appeal the order. However, the actions of the GA, as well as the refusal to establish guardianship or partial guardianship or to take interim protection measures, may be appealed by the persons concerned or by the public prosecutor before the district court. The meaning of 'concerned persons' should be interpreted on a case basis. Usually these could be the family members or relatives of the vulnerable adult that has requested their incapacitation.

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

Yes, the GA keeps a Register of guardians, deputy guardians and partial-guardians (article 174 FC). The deprivation or limitation of the legal capacity should be entered in the Population register under the person's file (article 25 of the Civil Registration Act). Third parties can request information about the status of the vulnerable adult under the conditions stipulated in Civil Registration Act. On the basis of this information the GA should provide information about their

guardian/partial guardian.

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

Only natural person can be appointed as representative/support person (in Bulgaria these will be guardian / partial guardian). These are to be appointed among the circle of family members of the vulnerable adult who will best look after their best interests and have given their written consent thereto (articles 156-157 FC).

a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?

The Family Code sets up the requirements in a negative way - incapacitated persons, persons deprived of parental rights and persons convicted of intentional crimes may not become guardian or partial guardian (article 158, para 1 FC).

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

The law is explicit with regard to the preferences of the family members and close persons concerning the decision of appointment of guardian/partial-guardian. The preferences of these persons should be taken seriously into consideration because the guardian/partial guardian should agree to be appointed and the job is voluntary. The preferences only of the partially incapacitated person should be taken into consideration in the process of consulting him/her (articles 155, para 3 and 156, para 1 FC).

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?

The spouse or the parent are *ex lege* representatives, so they come first, if do exist (article 173 FC). The representative should typically be appointed among the close family members or relatives or close persons. In case they refuse, social worker, an official from the municipal authority or from the social care residential care facility could be appointed as guardian/partial guardian. The same procedure

applies in case the guardian/ partial-guardian should be replaced (article 160, para 3 FC).

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

No specific safeguards exist at the moment of appointment. The presumption is that the family members are best placed to take care of the best interests of the person. In case of conflict of interests between the incapacitated adult and the guardian, partial guardian the Family Code stipulates for replacement of the guardian by the deputy guardian (article 160, para 3 FC). In case of conflict of interests the GA may appoint a special representative of the vulnerable adult (article 169, para 1 FC).

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

As explained above, within the framework of a single measure only one person can act as a representative/ support person. But the Family Code requires several persons to be appointed simultaneously to support/consult the representative (guardian) and the support person. In case of guardianship, the GA shall appoint a guardian, a deputy guardian and two advisers among the relatives and close relatives of the person placed under full guardianship who will best look after his or her interests and have given their written consent thereto. These form a guardianship council that may include other suitable persons (article 156, para 1 FC). In case of partial incapacitation, a partial-guardian (support person) and a deputy shall be appointed (article 157 FC). Under certain circumstances, e.g. conflict of interests, withdrawal of the guardian or decision of the GA, the deputy guardian or deputy support person should be authorised to act.

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

No, the person should agree (in writing) to be appointed as representative/support person, but is not obliged to do so.

During the measure

Legal effects of the measure

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

The effect of the limitation of legal capacity of the adult (which is the measure of protection) is explained in para 9 above.

Powers and duties of the representatives/support person

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

- a. **can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
 - b. **property and financial matters;**
 - 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)?**
-
- 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;**

There is no list of rights or decision-making areas that are expressly reserved for the adult under guardianship, so the legislation could be interpreted as authorising the guardian to make **all** legal and medical decisions – to act as representative in all property and financial matters. There is a general obligation of the guardian to take care of the incapacitated adult, manage his/her property and represent him/her before third parties (article 164, para 3 FC).

Adults that have their legal capacity partially limited, carry out legal actions with the consent of their partial guardians. The partial guardians have the same obligations as guardians.

It is a duty of the guardian to administer the property of the person under guardianship with the care of a good owner and in his/her best interests (article 165, para. 1 FC). According to the courts, ‘the institution of guardianship is intended to secure the rights and interests of the adult, to ensure him/her a peaceful and normal life, in accordance with his needs (Judgment of Sofia District Court of 4.07.2013, case № 24999/2012). However, although guardians are required to make decisions that promote the adult’s interests, they are not obliged to determine what the adult’s wishes are.’⁶⁵

The guardian shall, within one month, notify the guardianship authority of the property of considerable value acquired after the guardianship has been established, which shall be entered in the inventory under article 159, para 1 of the Family Code. The guardian shall deposit the funds of the person under guardianship in his name in a bank within 7 days of receipt thereof. He shall be liable to pay the statutory interest for late deposit. For the disposal of immovable property, movable property by formal transaction as well as deposits and securities property of a person under guardianship, a permission of the district court is required and should be granted if the disposal is not contrary to the best interests of the adult. A gift, waiver, loan and securing of another's obligations by a property of the adult shall be null and void (article 165 FC).

With regard to property and financial matters the representative (guardian) acts in the place of the adult (substitute decision making). The support person (partial guardian) shall act together with the partially incapacitated adult (support decision making).

c. personal and family matters;

The guardian does not have the power to represent the fully incapacitated person regarding decisions related to personal and family matters. And since the incapacitated adult can not take such decisions by themselves he/she cannot enter a marriage, exercise parental responsibilities, decide on medical treatment. The support person (partial guardian) cannot assist the adult in

⁶⁵ See more in: Mental Disability Advocacy Center, Guardianship and Human Rights in Bulgaria. Analysis of Act, Policy and Practice. 2007, available in English at: <https://mdac.org/sites/mdac.info/files/English_Guardianship_and_Human_Rights_in_Bulgaria.pdf> last visited in September 2022.

deciding on personal and family matters. The adult is legally able to take these decisions without support.

d. care and medical matters;

The guardian has the authority to take major decisions regarding the medical treatment of the incapacitated adult. The placement in residential care of the incapacitated adult is now decided by a court and the will and preferences of the fully incapacitated adult should be respected. The consent of the partially incapacitated adult is required in these decisions together with the consent of the support person.

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

The decision-making criteria are the best interests of the fully incapacitated adult (articles 156 and 160 FC). In case of partial incapacitation, the will and preferences do matter since the adult can act alone but the consent of the partial guardian is also necessary.

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?

In majority of cases the incapacitated adult has *ex lege* representative person (guardian) who is the spouse or the parent or the representative person (guardian) is a family member in case of a lack of a spouse / parent. Therefore there are no explicitly formulated duties of the representative person (guardian) to inform, consult, account and report to the adult and his family.

The duty of the support person (partial guardian) to inform, consult and account to the adult is implied since they act together.

The law elaborates on the duties of representative/support person (guardian/ partial guardian) to the GA in a general framework of mutual obligations for assistance and accountability. The GA shall assist the guardian and partial guardian in the performance of their duties (article 162 FC) as well as shall supervise the activities of the guardian and partial guardian and may suspend the

actions of the guardian and prescribe actions to be carried out after taking the opinion of the guardianship council (article 170 FC).

The representative person shall be held accountable about the property and finances of the incapacitated adult. The guardian is obliged to enter in an inventory each asset of considerable value acquired after the guardianship has been established; shall deposit the funds of the person under guardianship in his name in a bank (article 165, paras 2 and 3 FC).

The guardian can only dispose of the property and bank accounts of the incapacitated adult after court permission (articles 165, para 4 and 130, para 3 FC). In case the disposal of property is done without court permission the transaction is voidable (article 27, para 1 Obligations and Contracts Act). The deal could be voided by interested persons (article 32, para 1 Obligations and Contracts Act) and since the incapacitated adult can not act by themselves these could be either the GA or family members other than the ones involved in the guardianship council.

While the guardian shall report to the GA every year by the end of February on his/her activities and on his dismissal and whenever the GA so requests, the support person should provide an explanation of his/ her activities when requested to do so by the GA (article 171, paras 1-2 FC). The deputy guardian shall replace the guardian when he/she is prevented from performing their duties or when a conflict arises between their interests and the interests of the ward. In such cases, the GA may appoint a special representative. The deputy guardian may propose to the guardianship and custody authority the release of the guardian (article 169 FC).

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

The guardian shall provide care and live together with the fully incapacitated person (article 164, para 3 and article 167 FC). The general overview of the case law suggests the the judges are reluctant to approve disposal of the assets and bank accounts of the incapacitated adults justified with the need to cover their substance costs. The concept behind is that the care of the incapacitated family members is a familial duty. Therefore judges require strong evidence that the wards do not have their own income to cover their substance such as pensions or rents. In some cases this could go too far. For example, the court did not approve using the money from a bank account of a deceived mother to cover the substance cost of her only incapacitated daughter. The considered that the duty to care means

that the guardian should cover the expenses for everyday needs of the incapacitated adult and only in case of proven financial difficulty the funds of the adult should be accessed (Ruling of the Sofia District Court on case No 4651/15.04.2011/II). At the same time although children have a moral and legal obligation to care for their elderly parents, the contracts for the transfer of ownership of immovable property in return for the assumption of a duty of care and maintenance of adult parents are not considered morally reprehensible (Decision of the Supreme Court of Cassation No. 122/22.10.2018 on case № 4190/2017/ I).

On the other hand, discussing the duties to support; the voluntary nature of the guardianship as well as the general prohibition for the representative to enter contract with him/herself, the Supreme Court of Cassation holds that ‘the obligation of the guardian under article 164, para 3 FC concerns the performance of legal actions for property management of the incapacitated adult, representation before third parties and provision of care, but not the obligation to provide funds for his/her maintenance from the property of the guardian. The maintenance of the adult should be provided, if possible, from his/her own property (pension, social benefits, income from property, etc. (Supreme Court of Cassation Ruling No. 355/03.05.2019 on case № 4055/2018/ III).’ In the same Ruling the Supreme Court of Cassation considers that the duty of personal care (bathing, dressing, preparing food, cleaning the home) is also not included in the actions which the guardian should perform personally because the incapacitated adult holds the physical capacity to perform such acts him/herself.

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

No, there is no right to receive remuneration. The activity of the guardian and of the partial guardian is honorary and voluntary (articles 164, para 1 and 168, para 1 FC).

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 stated above, the measure under the Bulgarian legislation is one, several measures cannot be simultaneously applied to the same adult, but the representative/support person have their deputies and the Family code regulates their interactions. The deputy guardian replaces the guardian when he/she is prevented from performing his duties or when a conflict arises between his interests and those of the ward. The deputy guardian may propose to the GA the release of the guardian. The same rules apply to the deputy support person (article 169 FC). The counselors in the guardianship council shall assist the guardian and the deputy guardian in the performance of their duties and shall notify the GA of any gaps in the protection of the rights and interests of the adult. They shall hear the guardian's report and participate in its adoption by the GA as well as may propose the dismissal of the guardian and give their opinion in the cases provided for by law (article 166 FC).

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

The authority to represent or to support the vulnerable adult is attributed only to the guardian or to the support person.

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?**

Decisions by the GA, and any refusal by the mayor to appoint a guardian or to take other steps provided for in the Family Code are, for their part, amenable to judicial review. They may be challenged by interested parties or the public prosecutor before the district court, which gives a final decision on the merits (article 161 FC). This procedure allows the close relatives to request a change of guardian in the event of a conflict of interests (Decision of the Supreme Court No 1249/23.XII.1993 on case No 897/93), however the fully incapacitated persons are not among the “interested parties” entitled to initiate such proceedings (Ruling No 5771/11.06.2003 of the Supreme Administrative Court on case No 9248/2002). There is no case-law suggesting that a partially incapacitated person is authorised to do so.

The GA has the obligation to supervise the actions of all guardians living in the territory of their municipality (article 170 FC). In reality, however, their control tends to be rather formalistic. They often choose to distance themselves from the relationship between the guardian and the ward, and have no actual training on how to intervene. Sometimes there is a conflict of interest which compromises their oversight role. This happens, for example, when the municipality is a provider of residential care where the vulnerable adult is placed, and the director of the home is appointed as guardian of that person. And it is the mayor of that municipality which runs the home, who is also expected to regulate the guardian.⁶⁶

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

The duties of the supervisory authority is to take measures in order to protect the rights of the incapacitated adult.

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

The GA shall supervise the activities of the guardian/partial guardian. In the case of malfunctioning of the representative/support person the GA can take various measures. If any irregularities are observed after considering the guardian's report, the authority may request that they be rectified or may order the suspension of the measures in question; may request further actions to remedy inactions or wrong actions (article 171 paras 2 and 3 FC); suspend their actions and prescribe the performance of actions after taking the opinion of the guardianship council (article 170 FC); may replace the guardian; may always make changes in the guardianship council or in support person and the deputy, when the interests of the adult so require. Before ruling on the changes the GA shall also consult the relatives of the vulnerable adults (article 160 FC). The GA may impose fines on the guardian where the guardian fails to appear or submit the report without valid reasons (article 171 para 6 FC).

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

⁶⁶ See: Voices for Justice. Victims of crime with disabilities in Bulgaria, p. 29.

The guardian is liable for the damage caused by the ward who lives with him/her. They shall not be liable if they were unable to prevent the damage (article 48 of the Obligations and Contracts Act).

- 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.**

There is no special regulation. The Obligations and Contracts Act regarding default and liability for contractual damages should apply (articles 79 – 94).

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 only decisions of the representative/guardian, which need sanction of the state authority are the dispositions of property and bank accounts belonging to the incapacitated adult. A permission of the court is necessary for any disposal of immovable property, movable property by means of a formal transaction and deposits, as well as securities belonging to the incapacitated adult, which should be in the best interests of the adult (article 130, para 3 FC).

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

In case of the unauthorised disposal of property the transaction is voidable (article 27, para 1 Obligations and Contracts Act). The deal could be voided by interested persons (article 32, para 1 Obligations and Contracts Act) and since the incapacitated adult can not act by themselves these could be either the GA or family members other than the ones involved in the guardianship council.

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

Ill-conceived acts of the guardian or partially incapacitated adult with their support person could be voidable in case of error or fraud. An error in the subject matter is a ground for voiding the contract when it relates to essential qualities of the same. A mistake as to the person is a ground for voidance where the contract was made with reference to the person (article 28 Obligations and Contracts Act).

Fraud is a ground for voiding a contract when one party has been induced by the other to enter into it by intentional misrepresentation. Where the fraud emanates from a third party, the defrauded party may claim the avoidance of the contract only if, at the time of its conclusion, the other party knew or could not have been unaware of it (article 29 Obligations and Contracts Act).

d. conflicts of interests

The common rule regarding prohibition for the representative person to negotiate on behalf of the represented person either with themselves or with another person whom they also represent, shall apply (article 38 of the Contracts and Obligations Act).

The common safeguards provided for within the private law regulation are not adapted enough to the situations of incapacitation of adults. For example, as article 40 of the Contracts and Obligations Act sets out, in case the representative person (guardian) and the third party reach an agreement to the detriment of the incapacitated adult, the contract shall have no effect for the adult. This means that such a contract has a valid effect to the other contractual party. In order to benefit from such a rule the incapacitated adult should seize the court to announce the deal as null and void. However it should be done by the guardian who has acted in conflict of interests. The GA could act in such a case but it has not a clear legal standing.

In addition to these general safeguards, the GA can replace the guardian if a conflict of interests has been established with the adult. Prevention of actions of the guardian in conflict of interests to the detriment of the incapacitated adult could be ensured on the basis of property inventory that should be created prior to the appointment of a guardian and that should be maintained by the guardian. Since the GA should authorise any disposal of property belonging to the incapacitated adult, the GA could refuse authorisation for transactions where a potential conflict of interests exists.

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 dissolution of the guardianship could be a consequence of a restoration of the legal capacity or a change in the scope of the limitation – from deprivation to partial limitation (see reply to the question 8, d).

Reflection

30. Provide statistical data if available.

N/A

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?

See the discussions about limitation of legal capacity (reply to the question 6).

SECTION IV – VOLUNTARY MEASURES

There are no voluntary measures available in Bulgarian law, such as powers-of-attorney or advance directives, that could make it possible to avoid the need to appoint a guardian for individuals who become incapacitated.

Under the Obligations and Contracts Act, an adult deprived of legal capacity cannot establish a power of attorney. Pursuant to article 41 of the same act, in case the granter has been deprived of legal capacity the power of attorney shall be terminated. The termination of a power of attorney may not be opposed by third parties who have negotiated in good faith with the attorney, unless the termination has been subject to registration and has been effected.

Overview

32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.⁶⁷

The only possibility at the moment in Bulgaria, to give advance directives is provided to oncology patients at the terminal stage of their sickness. A form of ‘Advance directives’ is included in the Clinical Pathway N 297 on Palliative Care

⁶⁷ Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship – [opeka]).

for Oncology Patients issued by the Ministry of Health.⁶⁸ The form combines two types of advance directives of the patients: a power of attorney to take effect in event of principle loss of competence and instructions to refuse medical treatment (living will). The form is titled: Durable power of attorney for medical treatment and a living will.⁶⁹ The format comprises introductory part where the patient is informed about the nature of the power of attorney for medical treatment and the need of it as well as how to fill in the form. The form provides the patient with a free space to express wishes not initially envisaged. The patient is advised to carefully choose the person to represent him/her in the future treatment.

The power of attorney & living will should be done in writing and has to be signed by the patient and two witnesses in several copies: for the patient, for the medical doctor or the nurse responsible for the care, for the attorney, family and any other person chosen by the patient. The witnesses must not be relatives to the person. Authorisation by a notary is not necessary. The document has to be duly dated. No registration is required.

The form contains also a glossary with the most relevant terms. The glossary interprets the concept of the durable power of attorney as a decision to be taken by the authorised person to follow the expressed wishes of the patient in case he/she has lost the necessary capacity. If no specific relevant wishes are expressed in the power of attorney the authorised person has to follow the *assumed wishes* of the adult issued the power of attorney. The person to be authorised may be a family member or other close to the patient adult (above the age of 18). He/she shall be identified by the names, address, telephone and other means. A second person could be authorised too.

The second part of the form provides the patient with the opportunity to express his/her living will in cases of: (i) non changeable vegetative condition – wishes may be expressed about the use or foregoing of food and water, if supplied via tubes or other medical devices, (ii) under life sustaining treatment and unable to communicate, (iii) in severely dependent condition with prospective for life in-

68 The clinical pathways are issued under the Regulation 40 of the Ministry of Health (2004) on the main package of health care activities, secured by the budget of the National Health Insurance Body. The Regulation is passed in accordance with article 45 (2) of the Health Insurance Act of 1998, revised in 2010.

69 In Bulgarian in: <<http://www.doctorbg.com/page.php?id=2530>> , last visited 26 July 2023.

stitutionalisation. The patient has the options either to express instructions for future treatment or to refuse the life sustaining treatment, which in fact means that the passive euthanasia is allowed for oncology patients.

It should be noted though, that the described above opportunity is clearly restricted only to oncology patients at the terminal stage of their sickness. The physical access to this option is almost impossible to other people. The document is not public but is rather available only to the medical personnel dealing with cancer patients. It is placed as an Annex to the agreement between the National Health Insurance Fund and the hospitals and is a condition for covering their expenses for palliative care. Since there is no information, there is no demand coming from other people with similar needs.

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

N/A

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

N/A

- 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)?**

N/A

Start of the measure

Legal grounds and procedure

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

N/A

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

N/A

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

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

N/A

Appointment of representatives/support persons

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

- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?**
- b. what are the safeguards as to conflicts of interests?**
- c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?**

N/A

During the measure

Legal effects of the measure

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

N/A

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

N/A

Powers and duties of the representative/support person

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

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

N/A

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

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

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

N/A

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

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

N/A

Safeguards and supervision

45. Describe the safeguards against:

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

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

N/A

|

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

- a. is supervision conducted:
- by competent authorities;
 - by person(s) appointed by the voluntary measure.

- b. in each case, what is the nature of the supervision and how is it carried out?
- c. the existence of measures that fall outside the scope of official supervision.

N/A

End of the measure

47. Provide a general description of the termination of each measure. Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.

N/A

Reflection

48. Provide statistical data if available.

N/A

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

N/A

SECTION V – EX LEGE REPRESENTATION

Overview

50. Does your system have specific provisions for *ex lege* representation of vulnerable adults? *If so, please answer questions 51 – 64. and, if not, proceed with question 65.*

Bulgarian Family Code allows for *ex lege* representation of an adult in case of deprivation of their legal capacity by the court. This measure is different than the definition adopted under this questionnaire because it is applicable only following the incapacitation of the adult by the court.

In case the incapacitated person is married the competent spouse becomes *ex lege* guardian and a representative of the vulnerable adult. In case the vulnerable adult is not married, his/ her parents should become *ex lege* representatives unless they are unknown, deceased or deprived of parental rights and duties (article. 173, para 2 FC). The spouse or the parents of an adult whose legal capacity is limited becomes a partial guardian (support person) of an adult that is married or not married but has parents.

In case *ex lege* guardianship is not in the best interests of the incapacitated adult the GA a guardian or a partial guardian should be appointed following the common procedure (article 173, para 4 FC).

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?

The legal grounds, which give rise to the *ex lege* representation are: 1) court decision for deprivation or limitation of legal capacity and 2) availability of a competent spouse / the legally incapacitated person should be in a marriage or 3) in case the vulnerable adult is not married, his or her parents will continue to exercise the parental rights and duties unless the parents are unknown, deceased or deprived of them. In such cases no guardianship council or guardian and deputy guardian shall be appointed and no guardianship proceedings shall be instituted (article 173, paras 2 and 3 FC).

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

N/A

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

The Guardianship authority creates and maintains a Guardianship Registry where the appointed guardians and parial guardians are entered *ex officio* (article 174 FC). In the case of *ex lege* representation, the registration shall not be carried out *ex officio* but upon the request of the *ex lege* representative (guardian) of the incapacitated adult. A Certificate of the applicant's capacity as guardian shall be issued following the registration (article 174 para 2 FC).

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 competent spouse or if the person is not married – the parent/s unless they are unknown, deceased or deprived of parental rights can act as *ex lege* representative.

During the ex-lege representation

Powers and duties of the representatives/support person

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

Since the *ex lege* representation follows the full legal incapacitation of the adult, all actions with legal implications should be exercised by the *ex lege* representative. There is no difference in the mandate of the ordinary representative / guardian of the incapacitated person and of the *ex lege* representative.

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

The legal effects of the representative's acts are same as of the guardian'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?

No, there are no such options.

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

There is no such interaction because this is the only option under the law unless the competent spouse or the parent refuses to become a guardian or it is not in the best interests of the ward to be represented by their competent spouse or parent.

Safeguards and supervision

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

The only specific supervision measure is the power of the GA to discharge the *ex lege* guardian/partial guardian where the interests of the adult so require. In such cases a guardianship council or a guardian and a deputy guardian shall be appointed in the general manner (article 173, para 4 FC).

End of the ex-lege representation

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

The end of *ex lege* representation comes with the restoration of the legal capacity of the ward or with the appointment of a regular guardian after the *ex lege* guardianship has been challenged in the court.

Reflection

60. Provide statistical data if available.

N/A

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

Specific cases of ex lege representation

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

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?

Family Code allows each spouse irrespective of the other spouse's capacity, to enter into transactions relating to household expenses, which then also legally bind the other spouse (article 32 FC).

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

The rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration of that property and regardless of the mental capacity of that spouse (article 24, para 2 FC). There are different views, however, regarding the representative power of spouses in transactions of disposal of assets that are part of the community of property regime. Some researchers accept the existence of a 'presumed mutual representation' of the spouses but the other – considers that the law does not give such a power to the

spouse.⁷⁰ The mental impairment of the spouse will be irrelevant under the matrimonial community of property regime.

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

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

Yes, the private law instrument *negotiorum gestio* exists in Bulgaria (Articles 60-62 Obligations and Contracts Act). This instrument, to my knowledge, does not have any practical significance in cases involving vulnerable adults.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

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

No, there are no such instruments.

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

No, there are no such provisions.

⁷⁰ For the analyses of both views see: Topusov, D. Spousal Mutual Representation in the Light of the Principles of European Family Act, *Studia Juris*, 2017, 1, p.65 at: *STUDIA IURIS – Брой 1 за 2017 – STUDIA IURIS*

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.

The transition from substituted to supported decision-making in Bulgaria has not started yet although a draft Act has been submitted to the Parliament in 2016. The effective Bulgarian legislation and the case law of the Supreme Court of Cassation⁷¹ does not aim at *empowerment* of vulnerable adults but rather treats them within the paradigm of protection and medical approach proved by:

- the fundamental value of the limitation of the legal capacity as a protection measure;
- which is imposed for an indefinite period of time;
- covers all legal areas of an individual's activity;
- is effective in the future, and, in practice, it is difficult to revoke it in the context of the established case where the precondition therefore is that the person under guardianship prove their recovery with a medical document or protocol issued by a medical consultative committee;
- does not take into consideration the dynamics of the individual's state, and does not recognize that their inability or difficulties in terms of taking care of their affairs change over time and vary in respect of the legal spheres;
- shall not be subject to periodic review;

71 Judgment No 596 of 28.08.2006 in civil case No 1342/2005, 2nd C.D.

- the individuals under guardianship are deprived of any access to the court and redress for their fundamental rights and interests, the legal consequences from partial guardianship in the Bulgarian context being the same as the ones from full guardianship⁷²;
- is entirely a form of substitute decision-making: the person under guardianship is assigned a substitute in all civil matters who makes decisions based on their “best interest”, as the latter is understood by third parties. An attempt to replace the best interests approach by will and preferences was made in two cases – placement in residential care of incapacitated adults and participation in judicial proceedings. In both cases will and preferences should guide the decision;
- the person under guardianship is fully subordinated to their guardian, and does not have any mechanism available to ensure respect for his/her wishes and preferences.

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;**

⁷² Findings of ECtHR judgment in the case *Stanev v. Bulgaria*. While in accordance with Decree No 5/79 of 13.02.1980 of the Plenary of the Supreme Court, the person under partial guardianship can, on their own or with the consent of their custodian, including the one under Art. 108 of PFA, request the revocation of their guardianship, Mr. Stanev who had been placed under partial guardianship had not been able to access the court. After ECtHR judgments in the cases *Stanev v. Bulgaria* and *Stankov v. Bulgaria* were delivered, the Civil Code of Procedure was amended accordingly (Art.340 (2) of CCP, amended – SG No 86 of 2017), which allowed a person under partial guardianship to request independently the revocation of guardianship.

- **protection of the privacy of the vulnerable adult.**

Even the protection aspect of the Bulgarian system, based on the Constitution, reveals many gaps. The proceedings for legal incapacitation do not contain sufficient safeguards that the personal circumstances of the individual and his/her protection needs will be taken into account both in the judicial procedure and in the administrative one for the appointment of a guardian/ partial-guardian.⁷³ The mere idea of ‘protection’ remains unclear: what is at stake and in need of protection – the rights of the vulnerable adults or the interest of the family/relatives on the property and capitals of the vulnerable adult. Regretably, the Constitutional Court could not go beyond the concept of protection. The Court stated that: *‘with regard to persons with mental disabilities the special **protection includes also preventing** these persons from performing legal action whereby they may damage their own interests. An important element of this protection is the regime of guardianship...insofar as due to the nature of their state there is no other more efficient means to protect their interests.’* Being consistent in its understanding in terms of the narrow interpretation of legal incapacity, the Constitutional Court proposes that *‘it should be understood as a status, whose sole purpose is to prevent any legal actions that might damage the interests of the person under guardianship or third persons or the public.’*

73 Guardianship and Human Rights in Bulgaria, 2005, Mental Disability Advocacy Centre, available in Bulgarian and English: <<http://www.mdac.info/en/resources/guardianship-and-human-rights-bulgaria>> last visited in August 2023.