



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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**Comparative study on
the legal systems of the
protection of adults
lacking legal capacity**

study



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

LEGAL AFFAIRS

Comparative Study on the legal systems of the protection of adults lacking legal capacity

**National Rules of Private Law, of Private International Law
and a Possible Legislative Initiative of the European Union**

**United Kingdom, France, Germany, Sweden, Czech
Republic, Romania**

STUDY

Abstract

This study provides an in-depth and objective comparative analysis of the legal systems of protection of adults lacking legal capacity within selected EU Member States. The first two parts of the study contain for each Member State concerned a detailed description and assessment of the national provisions of private law and of international private law on the protection of adults lacking legal capacity. The final part of the study indicates and evaluates the advantages and the possible content of a legislative initiative of the UE in the field of the protection in cross-border situations of adults lacking legal capacity.

This document was requested by the European Parliament's Committee on Legal Affairs

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LINGUISTIC VERSIONS

Original: EN, FR

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Manuscript completed in November 2008
Brussels, © European Parliament, 2008.

This document is available on the Internet at:
<http://www.europarl.europa.eu/studies>

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EXECUTIVE SUMMARY

I. OBJECTIVE OF THE STUDY

This study constitutes an in-depth and objective comparative analysis of the national norms of substantive private law and private international law in the field of legal protection of incapacitated adults.

It also considers the recommendations of international organisations (*Declaration on the Rights of Mentally Retarded Persons* of the United Nations of 20 December 1971 and *Council of Europe Recommendation n° (99) 4* on the principles concerning the protection of incapacitated adults adopted 13 February 1999) as well as international norms in private international law (*Hague Convention on the International Protection of Adults* concluded 13 January 2000).

This analysis should serve as a basis for an evaluation of the necessity and desirability of a potential legislative initiative on the part of the European Union in this field.

II. SCOPE OF THE STUDY

A Geographic Scope

As per the European Parliament's request, this study covers the national laws of six Member States of the European Union, including

- A Member State whose legal system is based on the *Common Law* system,
- Two Member States representative of the Romano-Germanic system,
- A Scandinavian Member State, and
- Two new Member States.

In response to this request, the SICL has selected the following States:

- The United Kingdom;
- France ;
- Germany;
- Sweden;
- The Czech Republic;
- Romania.

The choice of countries was essentially based on how current was the pertinent legislation, on the national legislator's approach, notably with respect to the will of the incapacitated person, and on the accessibility of the relevant legislation, jurisprudence and doctrine. In addition, we deemed it equally important to draw a parallel between the substantive rules of these countries and the guiding principles flowing from the international texts concerning the protection of adults.

The *United Kingdom* was selected because British legislation in the field of protection of adults is relatively recent, as opposed to the Republic of Ireland whose rules are less modern and connected

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to the particular constitutional framework of that country. For Cyprus and Malta, the difficulties in obtaining legal documentation in an accessible language presented a serious obstacle to the inclusion of these countries in this study.

The recently amended *Mental Health Act 1983* covers the detention and medical treatment of incapacitated adults, even against their will. The *Mental Capacity Act 2005* imposes procedures and criteria according to which the capacity of an individual can be determined and decisions made for him or her. This legislation is accompanied by a Code of Conduct addressed to all those who work with individuals of limited capacity.

As this legislation gave rise to a large number of reactions in the doctrine and in practice, the legislator introduced legislative specifications and corrections in the *Mental Health Act 2007*. The extensive case law concerning the application of the legislative framework is easily accessible. The doctrine addresses not only the core of the subject but also certain related problems, such as the care of elderly and fragile persons, or the right of a person who appears to have full mental capacity to refuse ordinary medical treatment.

French law concerning the protection of incapacitated adults lent itself particularly well to a detailed examination because it was the subject of significant reforms in March 2007 (law n° 2007-308), demonstrating the current interest of the legislator in the protection of such persons as well as a desire to provide for measures adapted to such persons. French law offers three forms of protection which can be declared by the judge of tutorships on the basis of a medical opinion which is now a prerequisite for each of the protective measures available (legal safeguards, tutorship and curatorship). These legal protective measures apply depending on the seriousness of the mental state of the person concerned, are of limited duration and allow for the respect of the principles of necessity, subsidiarity and proportionality that inspired the French legislator.

Through the *Zweites Gesetz zur Änderung des Betreuungsrechts (2. BtÄndG)* of 21 April 2005 (BGBl. I 1073) in effect since 1 July 2005, *German* law concerning adults with limited mental capacity has adopted recent reforms. Germany is among the countries that are the precursors in the field of the law of protection of adults. Following an approach which tends to respect, to the greatest extent possible, the will of the protected adults, German law respects the principles of subsidiarity and proportionality by providing strict criteria for the institution of a tutorship and various degrees of tutorship, limiting the powers of the tutor in the management of the affairs of the life of the adult for whom assistance is absolutely required. The role of the free will of the protected adult is clearly manifested in the law, at all stages of the procedure for institution of a tutorship and during the exercise thereof. Germany was also one of the first States to sign the Hague Convention on the International Protection of Adults (signed in 2003, ratified in 2007).

Sweden also has very interesting legislation in this field whose purpose is to preserve to the greatest extent possible the rights of incapacitated persons while offering them protection, either in their homes or within the context of specialized establishments, as well as financial support. The rules that distinguish tutorship – *förvaltare*skap – from curatorship – *godmanskap* are based on the intent of the legislator not to submit an adult to protection in an automatic and permanent manner, and therefore to limit the decisions of incapacity and the areas concerned by the mandate as well as its duration. The prudent approach of the Swedish legislator with regard to the incapacity of adults is clearly shown by the fact that, since 1989, it is no longer possible to be designated as “incapacitated” under Swedish law. Moreover, several instruments regulate aspects of international tutorship in an exhaustive manner. The extensive and important case law on the subject and the high degree of

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computerisation of the Swedish authorities and public services represented an additional argument for the inclusion of Swedish law in this study.

We have chosen the *Czech Republic*, among the new Member States, because it represents a society of dynamic development and a stable legal system, supported by a strong economic development. Our research concerning the Czech system of protection of adults has allowed us to determine a form of prototype for such protection in the new Member States of the European Union that share a similar historical experience. On the grounds of a mental disturbance, courts can deprive adults of their legal capacity or, on the grounds of a temporary mental difficulty, limit their legal capacity and determine the scope of application of this limitation in their decision. In the case of deprivation or limitation of an individual's legal capacity, a curator ("*opatrovník*") becomes such individual's legal representative. The Czech courts are competent with respect to the deprivation and limitation of legal capacity of Czech citizens even when they live abroad. Nonetheless, Czech courts can abstain from exercising their jurisdiction to the extent that the measures taken abroad are sufficient to protect the rights and interests of their citizen so concerned. With respect to foreigners, the Czech courts limit themselves to those measures necessary for the protection of the rights of such persons and notify their decisions to the competent foreign authorities.

Romania is on the verge of presenting a new Civil Code which will include new rules concerning legal protection of incapacitated adults. Currently, Romania is still marked by a confrontation between socialist inspired regulations and the modern approach to this problem. Thus, legal prohibition and curatorship of the adult are regulated by the Family Code as well as Decree 31/1954 concerning individuals and legal entities and, with respect to their application, Decree 32/1954, respectively. Nevertheless, a fairly rich case law from ordinary courts and the Constitutional Court reveals the insufficiencies of the traditional system and points out the necessity for change.

B Cross-Border Aspects

For several of the countries studied, with respect to *private international law*, national rules will be replaced by the Hague Convention of 13 January 2000 on the International Protection of Adults. Ratified by Germany, the United Kingdom and France, and signed by Finland, Greece, Ireland, Luxemburg and Poland and most recently by Italy, the Convention will enter into force the first of January 2009 for the following countries: Germany (ratification: 3 April 2007), France (ratification: 18 September 2008) and the United Kingdom (ratification: 5 November 2003).

The purpose of this Convention is to determine the State whose authorities have jurisdiction to take measures for the protection of the person or the assets of an adult, to determine the law applicable by these authorities in the exercise of their jurisdiction, to determine the law applicable to the representation of the adult, to assure the recognition and execution of the protective measures in all the Contracting States and to establish among the authorities of the Contracting States the cooperation necessary for the realisation of the objectives of the Convention.

With respect to legal acts entered into by a protected person, Article 1 par. 2 subpar. a of the Regulation 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (*Rome I*) excludes, in principle, the mental state and the capacity of individuals from its scope of application but makes an exception, in its Article 13, that provides for a rule that tends to equalise the respective interests of the protection of an incapacitated person and the co-contracting party.

C Substantive Scope

1. National Private Law Norms

The first part of the study will provide for each EU Member State concerned detailed replies to the following questions

- a. What are the causes determining the legal incapacity of adults that are foreseen in the national legal provisions (mental disturbance, physical impairment or other kinds of insufficiency of personal faculties)?
- b. Which degrees of incapacity are recognised by national law (total deprivation of capacity to perform legal acts, limitation of legal capacity in relation to certain legal actions)?
- c. What are the systems of protection of adults lacking capacity that are established by national law (guardianship, curatorship and/or analogous institutions)? What are the fundamental features of each legal protective regime?
- d. What conditions must be met for placing adults lacking capacity under the protective systems established by national law?
- e. What are the minimum and maximum time-limits of measures placing adults lacking capacity under a protective system?
- f. Who may request the placing of an adult lacking capacity under a protective regime (relatives of the adult concerned, social groups or associations, administrative authorities, etc.)?
- g. What are the national authorities having jurisdiction to declare the legal incapacity of an adult, to take measures directed to the protection of the person or property of the adult and to ensure and monitor the implementation and the follow-up of such measures? Are the national competent authorities judicial or administrative bodies?
- h. Which persons or bodies can be appointed to implement the measures placing an adult under a system of protection? What powers can the person or body having charge of the adult exercise in relation to both the adult's person and property?
- i. Which authority carries out the preliminary inquiries before the adoption of the measure placing the adult under a system of protection (judicial, administrative authority, public or private associations)?
- j. Who is responsible for paying the expenses related to the implementation of the measure of protection? Does the national legal system provide for a total or limited public funding?
- k. Does national law establish and regulate a system of publicity of measures related to the legal incapacity of adults?
- l. Under what conditions do measures related to the legal incapacity of adults stop producing legal effects and how is this submitted to publicity?

2. Private International Law Rules

Furthermore, the study must provide for each EU Member State concerned detailed replies to the following questions:

- a. Does the national legal order contain rules of private international law on the legal capacity of adults?
- b. Does the national legal order establish which law is applicable in cross-border cases of adults lacking capacity?
- c. Does the national legal order determine the State whose authorities have jurisdiction to take measures directed to the protection of the person and property of an adult in cross-border situations?
- d. Does national law recognise and enforce judicial and extrajudicial measures of protection of adults adopted in other EU Member States? Under which conditions are those measures recognised and enforced? Is the recognition of those measures submitted to a procedure of exequatur or similar procedure?

D Possible EU Legislative Initiative

Taking into consideration the results and conclusions of the comparative analysis conducted within the first and the second part, the study must provide detailed replies to the following questions:

- a. The study must consider if a legislative initiative of the EU in the field of the protection of adults in cross-border cases is worthwhile. If the conclusion is positive, what measures should the EU take?
- b. Should such legislative intervention of the EU be limited to simply imposing on the Member States the obligation to apply the principle of mutual recognition of measures directed to the protection of adults or should it instead harmonise national rules of private international law in this field? In this latter case, which degree of harmonisation should the EU impose?
- c. Which legal basis of the treaties should be used by the EU Institutions for legitimating a possible legislative action in the field of protection of adults lacking capacity in cross-border situations?

III. MAIN RESULTS OF THE ANALYSIS

A Analysis of National Substantive Law

1. Preliminary Remarks

1.1. Systems

The civil law of each of the States studied herein provides for protection regimes for adults no longer able to care for their personal interests or their property and affairs. National approaches to this area of law differ in terms of their basic systems and content.

The systems studied follow either:

- An approach based on “incapacity”, applying the same or similar national rules used to protect minors. This approach was previously adopted in Sweden¹ and Germany,² and is characteristic of Eastern European States (e.g. Romania³).
- An approach based on a variety of models of protection (e.g. France⁴ and the United Kingdom⁵) used to minimise the impact of limitations on capacity.
- An approach based on the complete abolition of the concept of “incapacity” (e.g. in Germany⁶ and Sweden⁷) and providing for a single, yet flexible protective system which can be adapted to individual cases and may relate to one or several personal welfare/patrimonial interests (see, in particular, the German national report).⁸

Within the different systems, the following measures can be distinguished:

- Measures imposed by a court or another competent authority (proceedings for declarations of incapacity and/or the appointment of guardians, etc.)
- Anticipated measures set up by the affected individual (e.g. *lasting/enduring powers of attorney/Vorsorgevollmachten/Betreuungsverfügungen/ Patientenverfügungen*):⁹ national laws do not always provide for such modern forms of anticipatory protection (e.g. in France, the current law does not contain such provisions, but proposed legislation provides for such measures (*mandat de protection future*)¹⁰, see the discussion on the law of 2007, which is not yet in force); in Germany,¹¹ such anticipated measures are not

¹ See Comparative Study, Part I, National Report of Romania, Point 2.1.

² See Comparative Study, Part I, National Report of Sweden, Introduction.

³ See Comparative Study, Part I, National Report of Germany, Introduction.

⁴ See Comparative Study, Part I, National Report of France, Point 3.1.

⁵ See Comparative Study, Part I, National Report of the United Kingdom, Point 3.1.

⁶ See Comparative Study, Part I, National Report of Germany, Introduction.

⁷ See Comparative Study, Part I, National Report of Sweden, Introduction.

⁸ See Comparative Study, Part I, National Report of Germany, Points 2.3 and 3.1.

⁹ See in this regard Guttenberger, *Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen*, 2004, S. 7 et seq., 16 s. who mentions a third category: measures *ex lege*, which are unknown to the States examined in this study.

¹⁰ See Comparative Study, Part I, National Report of France, Points 3.1.3. and 3.1.4.

¹¹ See Comparative Study, Part I, National Report of Germany, Point 2.3.

specifically provided for by law but are allowed and either provide for anticipated decisions regarding future medical treatment (*Patientenverfügung*), the choice of a guardian (*Betreuungsverfügung*), or the nomination in advance a person to manage the interests of the affected adult while precisely defining the scope of that person's powers (*Vorsorgevollmacht*, which must be registered). In the United Kingdom,¹² lasting powers of attorney (conferring authority to make decisions about personal welfare and/or property and affairs) or enduring powers of attorney (concerning matters of property and affairs) are subject to stricter formal requirements.

1.2. Terminology

Through the comparative analysis of State laws regarding the protection of adults, differences in terminology arise. The terms used in national reports to describe measures of protection vary (curatory or curatorship, tutorship, guardianship, and receivership in English, *tutelle* and *curatelle* in French). Differences between the original terms used in State legislation and official translations provide an explanation for such variance, as the latter are often less precise than the literal translations to English or French used in this study. It must be noted, however, that the English or French terms chosen to describe national protective measures should not be the only decisive criteria for the proper understanding of the legal system described. For instance, the term "curatory" in one State may be the functional equivalent of a specific form of "guardianship" in another. The terms "tutorship" and "guardianship" are used interchangeably throughout the study; however, "guardianship" refers to a system of protection that is more flexible and attempts to respect to a maximum the dignity of the adult.

The Czech Republic:

The Czech Civil Code is based on the uniform notion *opatrovnik* (curator), employing the same term for different levels of protection without making conceptual distinctions between curatory and "tutorship/guardianship". The official English translation only refers to "curatory".

Germany:

The German Civil Code uses the term *Betreuung*, translated as "guardianship" in English and "tutelle" in French. More extensive protection is achieved via *Betreuung mit Einwilligungsvorbehalt* ("guardianship with authorisation requirement" in English and "tutelle par le biais d'autorisations" in French). Thus, only one concept of protection exists, the range of which can be adapted to individual cases.

France:

French law clearly distinguishes between *curatelle* ("curatory") and *tutelle* ("tutorship") as protective measures taken according to the severity of the case.

Romania:

Romanian law clearly distinguishes between "curatelle" ("curatory") and "tutelle" ("tutorship"). Curatory is available to adults who do not lack capacity, but require assistance due to age or illness.

¹² See Comparative Study, Part I, National Report of the United Kingdom, Points 3.1.3. et 3.1.4.

Curatory is also available as a temporary measure or complementary measure in addition to other protective measures for adults lacking capacity.

Sweden:

In Sweden, a distinction is made between *God man* (“curator”) and *Förvaltare* (“tutor”). Curatory under Swedish law is for adults who do not lack capacity but require assistance. The curator must act with the consent of the protected individual.

The United Kingdom:

United Kingdom legislation distinguishes between “guardianship” (official terminology) and “receivership”. The first is a comprehensive protective system for personal and other interests. The latter is limited to pecuniary interests.

In addition, several forms of **representation** exist: through lasting or enduring powers of attorney, created before the onset of mental difficulties, the need to appoint a guardian is avoided; through “curatory”, a person may be represented in court proceedings. **United Kingdom**¹³ legislation includes the appointment of deputies – appointed by the court of protection as agents of persons lacking capacity, and mental capacity advocates – representatives instructed by National Health Service bodies to support vulnerable persons in their decisions relating to medical treatment.

2. Notion and Causes of Incapacity

The notion of incapacity is defined differently in the six States examined herein, and in some of these States, the term “incapacity” is obsolete, as is the case in **Sweden**¹⁴ and in **Germany**.¹⁵ Their recent codifications with respect to a maximum dignity for the protected adult speak only of causes for guardianship. The presence of certain criteria (*e.g.* mental illness, as well as physical, mental or emotional disability, and temporary illness, such as acute psychosis or reactive depression) forms the basis for the conclusion that assistance is required. Physical disability is, however, a special case, as protection is only available upon request by the physically disabled adult.

The **French**¹⁶ legislation does not specifically define the notion of incapacity but identifies, through various provisions, the characteristics of capacity and incapacity. It enumerates, as causes, the alteration of the mental or physical faculties, and proposed legislation no longer refers to specific cases such as prodigality, intemperance or idleness.

Similarly, in the **United Kingdom**,¹⁷ capacity is considered to be a functional concept. There is no exhaustive list of factors causing incapacity. Capacity must be assessed in respect of every decision that a person is required to make and several factors are to be taken into account, such as the effects of pain, shock or exhaustion, psychiatric illness, learning disabilities, dementia, and brain damage among others.

¹³ See Comparative Study, Part I, National Report of the United Kingdom, Point 3.1.

¹⁴ See Comparative Study, Part I, National Report of Sweden, Point 1.1.

¹⁵ See Comparative Study, Part I, National Report of Germany, Point 1.1.

¹⁶ See Comparative Study, Part I, National Report of France, Points 1.1 and 1.2.

¹⁷ See Comparative Study, Part I, National Report of the United Kingdom, Point 1.1.

Other States, such as the **Czech Republic**¹⁸ and **Romania**¹⁹ still use the term “incapacitated adult” and take protective measures upon a declaration or finding of “incapacity”. Consequently, there are two separate proceedings: one for the declaration or finding of “incapacity” and another for the setting up of protective measures or imposition of restrictions. According to Czech law, a finding of incapacity is based on a loss of capacity due to permanent mental illness. Depending on whether the illness entails the inability to undertake certain or all legal acts, the Czech Civil Code recognises two categories of incapacity: full and partial deprivation of legal capacity. In Romania, incapacity is related to the absence of lucidity as a result of a psychological event, insanity or mental disability due to old age or physical illness.

3. Legal Consequences of Incapacity

3.1. Protective Regimes

Consequences of incapacity vary from State to State. As mentioned in the preliminary remarks, most States distinguish between two co-existing forms of protection based on an assessment of a case’s severity: curatory and tutorship/guardianship. Each of these measures follows its own legal framework. Where a distinction is drawn between tutorship/guardianship and curatory, the latter is understood as being the less protective/restrictive measure (see examples in the national reports relating to **France, Romania and Sweden**).

In **France**,²⁰ an adult’s need for care may entail legal safeguards, curatory and different levels of tutorship. Similarly, in **Romania**²¹, the choice of protective measure (curatory or tutorship) depends on the extent of the person’s capacity of discernment. In Romania, curatory is available for those who do not lack capacity but are unable to manage their patrimony and affairs due to age or illness, or as a temporary measure for adults declared incapable. Also in **Sweden**,²² these two types of measures may be taken in cases where the affected adult is no longer able to exercise his rights, administer his property or care for himself. Each of these measures has different implications on the freedom of action of the affected adult.

These distinctions are less apparent in the **United Kingdom**, the **Czech Republic** and **Germany**.

British²³ legislation provides for varying degrees of incapacity, assessed in relation to the ability to make certain decisions. Based on the individual case, either deputies or independent mental capacity advocates may be appointed, or guardianship and receivership measures taken, in order to protect the affected adult.

By contrast, in the Czech Republic²⁴ and Germany,²⁵ a single protective measure is provided for by law and is imposed in varying degrees based on the severity of an individual’s case.

¹⁸ See Comparative Study, Part I, National Report of Czech Republic, Point 2.1.1.

¹⁹ See Comparative Study, Part I, National Report of Romania, Point 3.1.1.

²⁰ See Comparative Study, Part I, National Report of France, Point 3.1.

²¹ See Comparative Study, Part I, National Report of Romania, Point 3.1.1.

²² See Comparative Study, Part I, National Report of Sweden, Point 2.3.1.

²³ See Comparative Study, Part I, National Report of the United Kingdom, Point 2.1.

²⁴ See Comparative Study, Part I, National Report of Czech Republic, Point 2.1.

²⁵ See Comparative Study, Part I, National Report of Germany, Point 2.3.

In the Czech Republic, full loss of capacity entails the placement under full or all-encompassing curatory. Partial deprivation of legal capacity only leads to partial curatory.

The **German** approach may be described as the least formalistic regime of those studied: legislation does not distinguish between different types of protection, but provides for different degrees of protection. The extent to which care is needed must be precisely ascertained in each individual case. Guardianship will only be available for those who are in real need of care and for those areas in which assistance is absolutely necessary. It is not considered necessary where the concerns of the incapable adult can be managed by a representative or resolved with other assistance.

3.2. Publication of the Status of Incapacity and its Termination

National systems follow different approaches with regard to publication. Publication is rarely understood as a condition for the validity of a protective measure.

The act of publication still appears to be a very important prerequisite for the taking of protective measures in **France**.²⁶ The *Code Civil* provides for the publication of the imposition, modification or cancellation of protective measures which must be indicated as a note on the original birth certificate of the adult lacking capacity. These measures become enforceable as against third parties two months after the notation. The law of 2007, which is not yet in force, places less emphasis on publication requirements.

With regard to the publication of guardianship orders, as well as the modification to and termination of protective measures, national rules generally require registration in the competent court's register. Such is the case in **Romania**,²⁷ **Germany**,²⁸ and **Sweden**.²⁹

In **Sweden**, appointment orders or the termination of protective measures must also be published in the *Post- och Inrikes Tidningar*, the Swedish Government gazette, which is the State's official notification medium for announcements. This, however, is not necessary for curatory measures.

In **Germany**, notice of the appointment order must be given to the affected adult and to the guardian himself, as well as to the competent authority. To avoid the violation of the affected adult's personal rights, publication, unlike in France, is not a prerequisite.

In the **Czech Republic**³⁰ no specific rules provide for the publication of guardianship orders.

In the **United Kingdom**³¹ and **Germany**,³² specific requirements have, however, been put into place to ensure the publication of lasting or enduring powers of attorney and orders appointing deputies in national registers.

²⁶ See Comparative Study, Part I, National Report of France, Point 2.2.

²⁷ See Comparative Study, Part I, National Report of Romania, Point 2.2.

²⁸ See Comparative Study, Part I, National Report of Germany, Point 2.2.

²⁹ See Comparative Study, Part I, National Report of Sweden, Point 2.2.

³⁰ See Comparative Study, Part I, National Report of Czech Republic, Point 2.2.

³¹ See Comparative Study, Part I, National Report of the United Kingdom, Point 2.2.

³² See Comparative Study, Part I, National Report of Germany, Point 2.2.

4. Specifics of the National Systems of Protection

4.1. Basic Principles

4.1.1. *Role of Free Will for the Affected Adult*

Usually the affected adult's free will is reduced according to the severity of his/her condition and the protective measure likely to be taken. In **Sweden**,³³ for instance, the affected adult must consent to the appointment of a curator, but his lack of consent will not affect the appointment of a tutor / guardian.

Recent laws increasingly take the will of the affected person into account. This is clear in **French**³⁴ law, and particularly in **German** law³⁵. The importance placed on the affected adult's free will is apparent at different levels: when a person may choose, in advance, who will be responsible for his or her protection in the event that he or she loses capacity (see discussion on enduring and lasting powers of attorney, *Vorsorgevollmachten, Betreuungs-/ Patientenverfügungen*); when a person is free to recommend a guardian for appointment; where an appeal against the appointment of a guardian is possible; when it is possible to limit the scope of a guardian's functions in order to allow the affected person to remain as autonomous as possible, especially with respect to the right to vote, to make a will, to consent to health matters or to make decisions regarding private matters.

This approach corresponds to international law principles (see Principle 9, 10, 22/23 of the Recommendation of the Council of Europe N°(99) 4).³⁶

4.1.2. *Subsidiarity and Proportionality*

The principles of subsidiarity and proportionality are of importance in **Swedish law**³⁷ and have been reaffirmed in the **French**³⁸ reform process. They are also the guiding principles of **German** law.³⁹ In Germany, the decision to appoint a guardian must indicate precisely to what extent the need for care can be ascertained. The scope of the guardian's functions is very strictly limited to concerns for which the adult absolutely requires assistance. In principle, and as a result, other States follow a similar logic, but their laws place less importance on the principles of subsidiarity and proportionality.

This corresponds to Principles 2, 5 and 6 of the Recommendation N° (99) 4.⁴⁰

4.2. Right to Request Protective Measures

In the **Czech Republic**,⁴¹ a petition for commencement of proceedings of deprivation or restriction of capacity may be filed by a person, authority or by a sanitary institution.

³³ See Comparative Study, Part I, National Report of Sweden, Points 2.3.2 and 2.3.3.

³⁴ See Comparative Study, Part I, National Report of France, Introduction.

³⁵ See Comparative Study, Part I, National Report of Germany, Points 1.1., 2.3., 3.1.1., 4.1. and 4.5.

³⁶ Recommendation N°(99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (23 February 1999), see Comparative Study, Part I, Chapter II, Section 2.

³⁷ See Comparative Study, Part I, National Report of Sweden, Points 1.1. and 2.1.

³⁸ See Comparative Study, Part I, National Report of France, Introduction.

³⁹ See Comparative Study, Part I, National Report of Germany, Point 3.1.

⁴⁰ See Comparative Study, Part I, Chapter II, Section 2.

⁴¹ See Comparative Study, Part I, National Report of Czech Republic, Point 4.1.

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Under proposed legislation in **France**⁴², requests can be filed by the person to be protected, his or her spouse or partner under a PACS, the “concubine”, a relative, any person having close and stable ties with the person, the person who exercises a legal protective measure and the head of the Prosecution Department.

According to **Romanian**⁴³ law, the imposition of restrictions can be requested by a very large circle of persons; they must simply justify their interest (as a person with close ties, a civil servant, a judge or prosecutor, a competent authority, etc.).

In **Germany**,⁴⁴ protective measures may only be granted in answer to a request made by the affected adult or *ex officio*. Third parties have no right to insist that a guardianship order be made; they may only propose the appointment of a guardian, except where guardianship is a pre-condition to the enforcement of third party rights.

In **Sweden**,⁴⁵ the affected adult, his relatives or the *överförmyndare* (a curator in the case of a request of tutorship/guardianship) may ask for protective measures to be taken or the court may examine this option *ex officio*.

In the **United Kingdom**,⁴⁶ a **guardianship** application may be made either by the nearest relative of the patient or by an approved social worker; a receivership application may be made by anyone who considers that the affairs and property of a person may require the protection of the Court or by an officer of the court.

4.3. Declaration of Incapacity

In the **Czech Republic**⁴⁷ and **Romania**,⁴⁸ a court must first make a declaration of incapacity in order for protective measures to be imposed.

In other States, such as **Germany**⁴⁹ and **Sweden**,⁵⁰ there is no preliminary declaration of incapacity; the appointment of a guardian may be direct. The question of the mental status of the concerned adult need only be assessed during proceedings on the appointment of a guardian, on the basis of a medical opinion, as a precondition for the appointment order.

As a result, the approach and tenor of decisions made in different States will not be identical. As a general rule, however, each decision regarding capacity/protective measures must be made by a court (competent court of protection).

⁴² See Comparative Study, Part I, National Report of France, Point 4.1.

⁴³ See Comparative Study, Part I, National Report of Romania, Point 4.1.

⁴⁴ See Comparative Study, Part I, National Report of Germany, Point 4.1.

⁴⁵ See Comparative Study, Part I, National Report of Sweden, Point 4.1.

⁴⁶ See Comparative Study, Part I, National Report of the United Kingdom, Point 4.1.

⁴⁷ See Comparative Study, Part I, National Report of Czech Republic, Point 2.1.1.

⁴⁸ See Comparative Study, Part I, National Report of Romania, Point 3.1.1.

⁴⁹ See Comparative Study, Part I, National Report of Germany, Point 4.3.

⁵⁰ See Comparative Study, Part I, National Report of Sweden, Point 4.3.

4.4. Quality of a Guardian/Curator/Tutor

Protective measures may be exercised either by individuals or by representatives of local authorities. In **Germany**, guardians may also be members of specific associations set up to protect adults lacking capacity.

Assistants are chosen by the court, but it is becoming increasingly important to take into account, as far as the circumstances of the case permit, the choice of the affected adult regarding his or her guardian. In some States, the appointed guardian cannot decline to act as guardian except under specific personal circumstances – as is the case in **Romania**.⁵¹

The States examined also provide for the exclusion of certain persons from exercising protective measures in order to avoid dangers for the affected adult or conflicts of interest.

4.5. Period of Protection

The court may change or cancel protective measures at any time when assistance is no longer required. In addition, national laws provide for a re-examination of each individual case within a certain period.

In **France**,⁵² legislation in force does not foresee a minimum or maximum period of protection. According to the 2007 legislation (in force as of the beginning of 2009) the maximum term for tutorships and for curatory will be 10 years (renewable once after 5 years have elapsed). Legal safeguards (*sauvegarde de justice*) cannot be in force for more than a total of 2 years (and are renewable once after one year). Only in cases of irreversible physical or mental disability may the judge make a specifically motivated decision in accordance with a concurring medical opinion, to impose protective measures for a longer period of time.

In **Germany**,⁵³ there is no minimum or maximum protection period for normal guardianship. Placement under guardianship can end at any time when the court finds that the conditions for guardianship no longer exist. In addition to this general rule, the situation must be re-examined every seven years.

In **Sweden**,⁵⁴ apart from temporary curatory or tutorship, which can be imposed for a determined period in order to ensure immediate protection, no specific protection period is provided for by law. The court is, however, obliged to regularly re-evaluate, and if necessary, terminate any protective measure.

Under **British**⁵⁵ law, with the exception of guardianship, which requires periodic renewal (*e.g.* a patient placed under guardianship may only be detained in a hospital or kept under guardianship for a maximum period of six months), protection generally lasts until the protected person regains capacity.

⁵¹ See Comparative Study, Part I, National Report of Romania, Point 4.4.1.1.

⁵² See Comparative Study, Part I, National Report of France, Point 3.2.

⁵³ See Comparative Study, Part I, National Report of Germany, Point 3.2.

⁵⁴ See Comparative Study, Part I, National Report of Sweden, Point 4.3.

⁵⁵ See Comparative Study, Part I, National Report of the United Kingdom, Point 3.2.

In the **Czech Republic**,⁵⁶ a re-examination of a decision to place a person in an institution is provided for after one year.

In **Romania**,⁵⁷ no specific time-limit for tutorship is imposed by law. The situation is different for a curatorship set up as a temporary protective measure for adults lacking capacity.

4.6. Financing of Protective Measures

In **France**,⁵⁸ those who are responsible for the protection of adults generally provide protective measures at no cost. However, depending on the value of the managed assets or the extent to which the measures taken are time consuming, the court may fix an indemnity to be paid by the protected person. The cost of measures exercised by judicial appointees for the protection of adults and ordered by the relevant judicial authority – be it within the context of legal safeguards, curatory or tutorship – are to be paid in whole or in part, by the person protected, depending on his or her resources and, failing that, out of public funds.

Similarly, in the **Czech Republic**,⁵⁹ the cost of curatory is paid by the person who accepted or is obligated to accept the duty, except where an official curator (*e.g.* of a public authority) has been appointed. The costs of all court proceedings are paid by the State, but may, under certain circumstances be reimbursed by the protected adult.

In **Romania**,⁶⁰ guardianship is theoretically based on the principle of gratuity. Nevertheless, remuneration – limited to 10% of the incapable person's income and calculated according to the guardian's tasks – is provided for by law.

The situation is different in **Germany** and in **Sweden**:

German⁶¹ law distinguishes first between protected adults with and without financial means, and second between the nature of their accommodation and placement. Protective measures are financed by the protected adult if he or she disposes of sufficient financial resources. The State must otherwise cover the cost of guardianship.

In **Sweden**,⁶² the curator or tutor can claim a reasonable compensation of the costs engaged due to his or her activity. They are paid by the concerned adult except where his or her financial means are not sufficient. In the latter case the costs are incumbent upon the municipality.

British⁶³ legislation provides for the financing or reimbursement of reasonable out-of-pocket expenses relating to protective measures, and contain specific provisions in this regard that relate to deputies, professional receivers and persons attending proceedings.

⁵⁶ See Comparative Study, Part I, National Report of Czech Republic, Point 3.2.

⁵⁷ See Comparative Study, Part I, National Report of Romania, Point 4.4.1.1.

⁵⁸ See Comparative Study, Part I, National Report of France, Point 3.3.

⁵⁹ See Comparative Study, Part I, National Report of Czech Republic, Point 3.3.

⁶⁰ See Comparative Study, Part I, National Report of Romania, Point 4.4.1.1.

⁶¹ See Comparative Study, Part I, National Report of Germany, Point 3.3.

⁶² See Comparative Study, Part I, National Report of Sweden, Point 3.3.

⁶³ See Comparative Study, Part I, National Report of the United Kingdom, Point 3.3.

4.7. Competences of the Appointed Assistant

The framework of competences taken over by the appointed assistant is limited by law and/or in the appointment order. Generally, assistance ranges from the personal protection of the adult and amelioration of his living conditions, alimony and health to the administration of his or her patrimony and affairs, etc. The scope of competences of the person granting assistance differs, however, according to the protective regime in place and the affected adult's need for assistance. The principle of necessity seems to be a key principle in each of the legal orders studied, but some countries (in particular **Germany**)⁶⁴ provide for stricter rules than others.

In regimes which distinguish between different regimes of protection, the scope of action is usually very restricted in the case of curatory and relatively extensive in the case of tutorship/guardianship. For example, measures taken with respect to adults not lacking capacity but placed under curatory, are based on the consent of the adult, as is the case in **Sweden**.⁶⁵

If a person lacks capacity and is placed under tutorship or guardianship, the assistant takes over the duties and responsibilities that the protected adult can no longer exercise himself or herself. Guardians may act freely within the scope of their duties except where the law requires court approval. Most States list, in their respective legislations, a number of situations where a guardian might require prior court approval before acting. Such is the case with respect to decisions relating to property interests beyond the usual affairs (acquisition and sale), certain banking transactions, or where there is a conflict of interest between the guardian/his or her relatives and the protected adult. In terms of certain types of medical treatment, the influence of the assistant is a controversial subject, and it seems that **Germany** follows the strictest approach in this regard.⁶⁶

German law appears to contain the most precise and strict rules limiting the scope of the guardian's duties. The scope of his or her duties must be defined with exactitude and many specific provisions set limits to his powers.⁶⁷

4.8. Rights of Appeal

In principle, an appeal against the imposition of restrictions or the nomination of a certain guardian etc. is possible in all States. It can first of all be filed by the affected adult as, in most of the States, proceedings concerning protective measures are considered to be normal court proceedings. Appeals follow the general rules of civil procedure.

The situation is different in Germany,⁶⁸ as guardianship matters are not subject to the normal rules on civil procedure but to the rules on *Freiwillige Gerichtsbarkeit*. German law enumerates a list of persons entitled to appeal against the appointment of a guardian or a guardianship order with authorisation requirement: the affected adult; his or her spouse, partner or relatives; the competent authority; the representative of the treasury (for decisions concerning certain problems relating to accounts/remuneration of the guardian); and, the guardian (concerning decisions referring to the scope of his or her duties).

⁶⁴ See Comparative Study, Part I, National Report of Germany, Introduction and Point 3.1.

⁶⁵ See Comparative Study, Part I, National Report of Sweden, Point 2.3.2.

⁶⁶ See Comparative Study, Part I, National Report of Germany, Point 3.1.1.

⁶⁷ See Comparative Study, Part I, National Report of Germany, Point 3.1.1.

⁶⁸ See Comparative Study, Part I, National Report of Germany, Point 4.5.

5. Statistical Data

The national reports include a collection of statistical data regarding the States examined in this study. The national reports and a comprehensive chapter entitled, “Annexes” contain the various statistics that have been placed at the disposal of the Swiss Institute of Comparative Law. They reflect the latest available data, although they do not always cover the same enquiry period.

Statistics concerning the number of adults **circulating in the EU** do not exist. This can be explained by the fact that national authorities who compile statistics would be required to distinguish between nationals and non-nationals in a complex research study that might appear discriminatory. This is particularly true for Sweden, where the registration of a person’s age, sex, death, race and foreign citizenship is not allowed unless expressly permitted by law.

RECENT STATISTICAL DATA COMPARED

State	Year	Origin of Data	Number of Adults Protected per Year	Increase of the number of protected adults in relation to previous years	Number of Adults Protected Circulating in the EU
Germany	2007	Statistisches Bundesamt/ Bundesministerium der Justiz	Guardianships 1,242,180 (1, 27% more than in 2006) Guardianships with authorisation requirement 12,050 Enduring Power of Attorney Applications registered 642,532 (35, 85 % more than in 2006)	Yes	No information available
France	2004	Rapport n°3557 du député Emile Blessig, enregistré à la Présidence de l’Assemblée nationale le 10 janvier 2007 (dans le cadre du projet de loi portant réforme de la protection juridique des majeurs)	Number of Protected Adults 636,877 Number of Placements under tutorship/ curatory 65, 418	Yes	No information available
United Kingdom	2007- 2008	Judicial and Court Statistics 2007	Orders made under the <i>Mental Health Act</i> <i>1983</i> 2007-2008: 201 Orders made on applications relating to the Enduring Powers of Attorney 2007-2008: 257 Transition Orders Made to allow Existing Receivers to Continue as Deputies under the <i>Mental Capacity Act</i> without repeated referrals to Court 2007-2008: 9,136 Enduring Power of Attorney Applications registered 2007-2008: 15,969	Yes	No information available

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Sweden	2006	Reports <i>Överförmyndare</i> 2006	Tutorship: 7,192 Curatory: 62,795	Yes	No information available
Czech Republic	2006	Ministry of Justice/ District courts	Judgments where full incapacity was found: 1,459 Other decision in full incapacity proceedings: 580 Judgments where partial incapacity was found: 357 Other decision in partial incapacity proceedings: 62 Judgments where legal capacity was restored: 52 Other decision to restore legal capacity: 139 Judgments enforcing agreements or other legal acts on behalf of persons under full or partial incapacity: 1,283 Refusals to enforce agreements or other legal acts on behalf of persons under full or partial incapacity: 35. Other decisions about agreements or legal acts on behalf of persons under full or partial incapacity: 168. Judgments appointing curators according to §29 of Civil Code: 434 Other decisions where curators were appointed: 93	Yes, but stagnation in 2006	No information available
Romania		No systematic collection of data on the national level	No data available	No data available	No data available

B Analysis of National Rules of Private International Law

1. European Sources, Bilateral and International Treaties in Matters of Private International Law

Private international law in the sphere of protection of adults remains essentially national, in terms of its sources.⁶⁹ The European instruments, namely the “Brussels I Regulation”⁷⁰ and the Rome Convention (Rome I)⁷¹ have only a marginal role to play in the sphere relating to international protection of incapacitated adults.

The scope of the **Rome Convention (Rome I Regulation)** expressly excludes questions involving the status or legal capacity of natural persons. Article 13 of Rome I Regulation (relating to incapacity)⁷² establishes the unique exception to this rule. In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his or her incapacity resulting from another law only if the other party to the contract was aware, or should have been aware, of this incapacity at the time of the conclusion of the contract. The **Brussels I Regulation** is not applicable to questions directly related either to the status or to the legal capacity of natural persons.

Very few **Bilateral Conventions**, and namely treaties concerning international recognition of decisions, exist and thus have little impact in the matter⁷³.

The **Hague Convention of 13 January on the International Protection of Adults** will enter into force only in the beginning of 2009 and, for the time being, it will only be applicable in a restricted number of States: Germany (ratification on 3 April 2007), France (ratification on 18 September 2008) and the United Kingdom (ratification on 5 November 2003).⁷⁴

Each country here analysed possesses **its own rules** relating, on the one hand, to **applicable law**, and on the other, to **conflicts of jurisdictions** and **recognition and enforcement of foreign measures**. It should however be mentioned that England has provided its legal system, in *Schedule 3 of Mental Capacity Act 2005*, with **mechanisms** that are identical to those of the Hague Convention of 13 January 2000, save some **minor** modifications⁷⁵.

⁶⁹ The Convention, signed on 17 July 1905, relating to the deprivation of civil rights and similar measures of protection, is no longer in force in any of the States concerned by the present study, except for Romania (see P. Lagarde, « *Explanatory Report* », n° 3 and the site of the Hague Conference www.hcch.net).

⁷⁰ Council Regulation (EC) n° 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, JO L 12 of 16.1.2001, p. 1 *et seq.*

⁷¹ Regulation (EC) n° 593/2008 of 17 June 2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), JO L 177 of 4.7.2008, p. 6 *et seq.*

⁷² Art. 11 of the Rome Convention.

⁷³ Germany, for example, is bound only by the Treaty of Establishment concluded with Persia In 1929: see T. Guttenberger, *op. cit.*, p. 25.

⁷⁴ Other countries will follow: Finland, Greece, Ireland, Luxembourg and Poland. Most recently, Italy has signed the Convention.

⁷⁵ Comparative study, Part II, National Report of the United Kingdom.

2. National Sources in Matters of Private International Law

2.1. Conflict of Laws

2.1.1. Capacity

National systems of private international law **distinguish** between the law applicable to the capacity of natural persons **outside any procedure** aiming to obtain or granting a protection measure and the law applicable precisely **to the conditions and effects of the requested protection measure**.

In conflict of law matters relating to **legal or contractual capacity**, with the exception of third party protection, national rules are principally based on the **law of origin of the concerned person** (this is the case, for instance, in **France**⁷⁶, **Romania**⁷⁷ and **Germany**⁷⁸). In addition, specific norms exist in the field of the law applicable to **contractual obligations**. These rules aim at the protection of the public interest and third party rights where incapable adults engage in legal relations (for instance, in **Germany**⁷⁹, or in the **Czech Republic**⁸⁰).

2.1.2. Protective Measures

2.1.2.1. Measures Provided for by Law

Some of the above-mentioned States favour the **law of origin**, law that may thus be foreign, namely when the adult's place of residence is situated abroad and when the case is submitted to the authorities of the State of habitual residence. Some of the States systematically apply the law of origin in matters of conflict of laws concerning the **appointment of a guardian and the scope and content of the protective measures**. This approach guarantees the recognition of measures undertaken by foreign States in the country of origin of the adult concerned but implies a more complicated and consequently less rapid realisation of the protective measures. In **Romania**, for instance, establishment, modification, effects and termination of curatorship, as well as relations between the curator and the protected person, are governed by **the law** of origin of the protected person⁸¹. However, by virtue of a specific provision, the exact signification of which could not be established, the law of the State whose authorities **manage and supervise the protection** (*lex fori*) govern the "measures".

Other States apply the *lex fori* to the **conditions** and the **effects of the envisaged measure**, thus avoiding the above-mentioned difficulties. This approach is usually followed by those States linking competence to the habitual residence in order to obtain a parallelism between competence and the applicable law. This permits a rapid decision making process due to a better understanding of the applicable law. (This is namely the case in **Sweden**⁸², and, substantially, in **Czech Republic**⁸³ as well as in the **United Kingdom**⁸⁴).

⁷⁶ Comparative study, Part II, National Report of France, point B 1.
⁷⁷ Comparative study, Part II, National Report of Romania, point B 1.
⁷⁸ Comparative study, Part II, National Report of Germany, point B 1.
⁷⁹ Comparative study, Part II, National Report of Germany, point B 2.
⁸⁰ Comparative study, Part II, National Report of the Czech Republic, point B 2.
⁸¹ Comparative study, Part II, National Report of Romania, Point B.2.
⁸² Comparative study, Part II, National Report of Sweden, point B 1.
⁸³ Comparative study, Part II, National Report of the Czech Republic, point B 1.
⁸⁴ Comparative study, Part II, National Report of the United Kingdom, point C 1.

Germany⁸⁵ follows a **mixed system**: the constitution of protective measures and any changes of the established guardianship structure and its termination are subject to the **law of origin** of the person concerned, but allows the option of the *lex fori* in case of foreign nationals having their habitual residence in Germany. Temporary measures and the content of protective measures are subject to the law of the State that takes the respective measure, in other words, if the measure is requested in Germany, German law will apply. The dividing line between the constitution and the content of protective measures can, however, be difficult to draw. In **France**, the French law governs, or is supposed to govern, the *conditions* (causes of incapacity) and seemingly also the effects thereof, or at least some of them, for example, by determining the transactions that the incapable person can conclude by himself and the sanctions of failure to respect, even if this system reveals itself to be sometimes impracticable⁸⁶.

The practice shows that law of the forum is **practically always applicable** in France and in Germany⁸⁷, and it seems to be the case in Romania as well, despite the complexity of legal provisions adopted in this matter.

Among the States subject to analysis, only **the United Kingdom** opts for jurisdiction of the **State of residence of the carer of the incapable person** (in line with the solution proposed by the Hague Convention of 13 January 2000).⁸⁸

2.1.2.2. Measures Provided for the Adult Concerned (Lasting Powers of Attorney/ Vorsorgevollmachten, Betreuungs- Patientenverfügungen)

National laws do not provide for specific private international law rules relating to lasting or enduring powers of attorney. In **Germany**⁸⁹ for example, the private international law rules for measures of protection (conditions and content of guardianship orders) do not apply to measures taken by private persons and German law contains no specific provision dealing with conflict of laws in cases of powers of attorney. There is a tendency to apply either the law of the State in which the power of attorney produces effects (*Wirkungsland*) or the law of the State in which use is made of it (*Gebrauchsort*) but the question remains controversial.

2.2. Conflicts of jurisdictions

In matters of conflicts of jurisdictions relating to issues of incapacity and to the instalment of protective measures, the authorities of the forum are competent to impose a protective measure on the basis of **multiple connecting factors**. These are the **nationality** of the protected adult, his/her habitual residence, an **emergency** or the competence resulting from physical **presence of property in the country**⁹⁰.

International jurisdiction for **nationals**, for foreigners with **habitual residence** in the country of the forum, and in cases of an **apparent need for protection** is used in **Germany, Romania**, and, in a substantially similar manner, in **Sweden**⁹¹.

⁸⁵ Comparative study, Part II, National Report of Germany, point B 1.

⁸⁶ Comparative study, Part II, National Report of France, Point B.1

⁸⁷ T. Guttenberger, cit., p. 25.

⁸⁸ Comparative study, Part II, National Report of the United Kingdom, point B 1.

⁸⁹ Comparative study, Part II, National Report of Germany, point B 1.

⁹⁰ For example, in the United Kingdom. This competence related to local property may, however, lead to quite an undesirable scission.

⁹¹ Comparative study, Part II, National Report of Sweden, point B. 1.1.1.

In the **Czech Republic**, the principle competence is based on **nationality**. Competence concerning foreigners residing in the Czech Republic is seemingly restricted to the **interests of the foreigner located in the Czech territory**⁹², and consequently to measures necessary for their protection, mostly of a temporary nature. However, the legal provision relating to this competence lacks clarity.

Other countries link the court's competence to the notion of **residence or domicile only** (e.g. **France**)⁹³.

Concerning the question of coordination of competences, the need for such coordination becomes quite apparent in the **Swedish, German and Czech rules**.

German judges have a power of discretion to decline to exercise their jurisdiction in cases where a decision has been or will be pronounced abroad and if declining jurisdiction is in the best interest of the adult⁹⁴. This rule also applies to German nationals residing abroad and to foreigners residing in Germany (as well as in cases where the competence is based on the physical location of property in Germany).

In **Sweden**, the judge may decline jurisdiction upon request concerning Swedish nationals residing abroad, if the authorities of the State of residence are already treating the case. Concerning foreigners residing in Sweden, the Swedish judge is obliged to research, via the Ministry of Justice, whether any measures have been taken or requested in the country of residence. The judge may continue proceedings only in case of absence of reply in the six months following the request, except for cases of emergency⁹⁵.

In the **Czech Republic**, when the measures concerning a Czech citizen installed abroad suffice to protect him/her, Czech tribunals abstain from accepting to hear the case. In the same manner, tribunals accept subsidiary competence in respect of measures concerning a foreign national residing in the Czech Republic, if the authority of the State of origin does not proceed to it within a reasonable time⁹⁶.

In **France**, it seems that the problem must be solved according to the principles that are generally in effect in the sphere of international *lis pendens*. According to the jurisprudence, the French judge may (but is not obliged to) take into consideration *lis pendens* abroad, provided that the decision is likely to be recognized in France.

In **Romania**, on the other hand, the competence of Romanian jurisdictions is not dismissed due to the fact that a similar procedure is engaged abroad⁹⁷.

It is interesting to evoke another mechanism of coordination, sometime provided for in national legislations, - **the transfer of jurisdiction**. In Germany, the German court, having ordered a protective measure, may give up the competence to a foreign judge, if this corresponds to the interests of the person in need of protection, provided that the curator assigned in Germany gives his/her assent to it

⁹² Comparative study, Part II, National Report of the Czech Republic, point C.1.

⁹³ Comparative study, Part II, National Report of France, point C 1.

⁹⁴ Comparative study, Part II, National Report of Germany, point C.1 ; see also T. Guttenberger, *op. cit.*, p. 46.

⁹⁵ Comparative study, Part II, National Report of Sweden, point B. 1.1.1.

⁹⁶ Comparative study, Part II, National Report of the Czech Republic, Point C. 1.

⁹⁷ Comparative study, Part II, National Report of Romania, Point C.1.

and that the foreign authorities are ready to assume the responsibility⁹⁸. If the above conditions are satisfied, the measure installed in Germany is no longer in effect.

In a comparable manner, in **Sweden**, if a Swedish national is put under curatorship in a foreign State, the curatorship installed in Sweden may be terminated. If the curatorship is imposed in Sweden with respect to a foreign national, whereas s/he already was under curatorship abroad, the carer assigned in Sweden is dismissed⁹⁹.

3. Recognition and Enforcement

In general, in terms of recognition, no particular written rules exist that expressly relate to problems of incapacity or protective measures in favour of adults (this is the case, for instance, in **Sweden**¹⁰⁰, **Germany**¹⁰¹, the **Czech Republic**¹⁰², and **France**¹⁰³). Common legal rules are thus to be applied. The German system reveals itself to be **quite open** to recognition of foreign protective measures. The type of recognition in question is recognition *ipso iure*, and the effects of the measure are generally the **same** as those that the measure would produce in the *legal order of its origin*.

As for the **reasons** for refusal of recognition, one may cite failure to respect the applicable jurisdiction rules, no chance to be heard during the proceedings, **inconsistency with the previously ordered measure** or incompatibility of the outcome of the recognition with the *public order* (for ex. the PIL rules in **Germany**¹⁰⁴ and in **the United Kingdom**¹⁰⁵).

The interpretation of some reasons for refusal of recognition nonetheless remains quite uncertain. This is the case for public order (refusal of recognition if no medical expert analysis has been realised; recognition of the deprivation of civil rights (*mise sous interdiction*) is discussed in the light of public order).¹⁰⁶

In **Germany**, the rule of priority given to the jurisdiction to which the case has first been submitted (no recognition if a decision is incompatible with a prior decision taken or recognised in Germany or if proceedings are incompatible with a pending proceeding) may reveal itself to be problematic in the light of international protection of adults, as it leads to frequent overruling of decisions due to sudden changes in circumstances (*e.g.* concerning the health of the adult, etc.)

In **Sweden**, whereas protective measures are ordered abroad with respect to a Swedish national or to a foreign national living in Sweden, Swedish measures may be terminated. In such a situation, the rules discussed above imply the **general principle of recognition** of foreign measures, but *ad hoc* rules are lacking.

In **France**, foreign decisions relating to status are automatically recognised. In order to obtain enforcement of the measure, however, it is necessary to request an exequatur. Among the traditional conditions that may impede recognition, **control of the applied law** has been cancelled by

⁹⁸ See T. Guttenberger, *op. cit.*, p. 24.

⁹⁹ Comparative study, Part II, National Report of Sweden, Point 1.1.1.

¹⁰⁰ Comparative study, Part II, National Report of Sweden, Point C 2.

¹⁰¹ Comparative study, Part II, National Report of Germany, point C 2.

¹⁰² Comparative study, Part II, National Report of the Czech Republic, point C 2.

¹⁰³ Comparative study, Part II, National Report of France, point C 2.

¹⁰⁴ Comparative study, Part II, National Report of Germany, point C 2.

¹⁰⁵ Comparative study, Part II, National Report of the United Kingdom, point C 2.

¹⁰⁶ See T. Guttenberger, *op. cit.*, p. 31.

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a recent decision. A general recrudescence of public order application is however envisaged¹⁰⁷. Practice shows an effort of collaboration of local authorities in functioning of protective measures ordered abroad¹⁰⁸.

The Czech and Romanian private international law regimes are the most particular ones. The law of the **Czech Republic** still stipulates **reciprocity** as a precondition of recognition.¹⁰⁹ **Romania** claims **exclusive jurisdiction** in respect to “all curatorships and guardianships installed in respect to persons having their domicile in Romania, Romanian citizens or apatrides” and to deprivation of civil rights (*mise sous interdiction*) of a person having his/her domicile in Romania”. Romania prohibits the recognition of a great number of measures ordered abroad, as they are deemed to violate the exclusive jurisdiction of Romanian tribunals.

¹⁰⁷ Comparative study, Part II, National Report of France, point A 2.

¹⁰⁸ Comparative study, Part II, National Report of France, point B.1.

¹⁰⁹ Comparative study, Part II, National Report of the Czech Republic, point B.2.

IV. SUMMARY OF THE REFLECTIONS ON A POSSIBLE EU LEGISLATIVE INITIATIVE

1. Legal Basis

The national **systems of protection** of the States studied **differ significantly**. In some respects, these **differences** are today perhaps even **more extensive** than before. It is therefore unrealistic to envision, in the short or medium-term, a **uniform substantive Community law initiative** in the field of protection of adults. Moreover, and more importantly, it is highly **doubtful** that a legal basis in Community law for such an undertaking exists. It would appear then that an international – notably *Community*-level – regime of protection of adults cannot be substituted for the national substantive legislations. In addition, this European legal patchwork must be “**managed**” in such a manner as to **avoid posing obstacles to “the proper operation of the internal market”** as per Art. 65 EC. The proper operation of the internal market must rely on the adoption of measures in the **field of private international law** (in the broad sense of that term) *i.e.* under Art. 61 subparagraph c), in the field of “**judicial cooperation in civil matters**”.

The domain of protection of adults, or at least the questions we have been asked to address in the national reports, falls within the category of “**civil matters**”. The Community’s adoption of rules relating to “**judicial cooperation**” finds in Articles 61, (particularly subparagraph c), and 65 EC a **sufficient legal basis**. However, resort to this legal basis may be had provided that one can demonstrate that these measures are, as Art. 65 EC requires, “necessary for the proper operation of the internal market”, *i.e.* in substance, necessary for the creation of “an area of freedom, security and justice” and, of course, that one can also demonstrate the **proportionality** of the measures desired to be taken with respect to such an objective. It would appear, then, in substance, that Community intervention is justified if the international regime of protection of the adult that is the result of the application of national systems, of substantive law and of private international law, would lead to **the creation of an obstacle to the legal consequences of life on an international – and notably, Community – scale, for these individuals, their freedom of movement and that of their assets**.

2. Insufficiencies of the Current Private International Law Systems

Although the frequency of situations that are effectively problematic is, at the present time, difficult to measure precisely, we believe that the solutions that issue from the **national systems of private international law** of the Member States are not sufficient to assure a regime of protection of the adult that is, on all points and always, **satisfactory**. Some national rules, systems and mechanisms (refusal to consider a procedure abroad, including by transfer of competences; refusal of recognition of the measure of protection, etc.) that clearly raise obstacles to the coordination and the recognition of measures of protection, and that open the way to a **conflict of protective regimes** that generates obstacles to the international (and particularly intra-Community) legal activities of the adult and those who are responsible for the adult. It seems to us that this calls into question the “proper functioning of the internal market”; the risk here is that, in order to avoid these costs and other disadvantages, the persons concerned will be encouraged to attempt, here again, to **reduce, wherever possible, or even eliminate, the international - more precisely, the Community – element; in other words, to give up the opportunity to exercise the freedoms guaranteed by the Community**. If one takes a higher vantage point and look at the situation from the *more global* point of view of the *Community legislator*, one cannot help but admit that the duplication of judicial and administrative activities that this situation implies does not comply with the notion of **reasonable**

administration of justice in what wants to view itself as an “integrated” judicial space. Certain national systems contain other rules, systems and mechanisms that are more **modern, and more open to coordination** as well as being **more concerned** with protecting the various persons concerned with the protection of the adult from the difficulties that such conflicts engender. But these rules are either often still formulated in too timid a fashion or not sufficiently specific or clear, or, in any event, do not lead to a satisfactory level of effectiveness because of their **unilateral nature** in the absence of a **supranational framework and wide-ranging acceptance**.

3. Solutions Offered by the Hague Convention of 13 January 2000

The work undertaken over the past fifteen years at the Hague Conference confirms that the organisation of an international regime for the protection of the adult is opportune. The Hague Convention of 13 January 2000 on the International Protection of Adults which was the result of this work contains a group of **rules that are clear, coherent, modern and well thought out**, in which the cooperation among authorities appropriately **plays a dominant role**. It is perfectly reasonable to affirm that this system represents, as a whole, at the current stage of development and reflection concerning the law and the practical application of the law, the best and most finely tuned instrument from a private international law standpoint – or, in other words, of “judicial cooperation in civil matters” as that expression is used in Art. 65 EC – in the field of the protection of the adult.

One can imagine that the adoption by the Member States of the solutions provided for by the Hague Convention would represent **great progress** both for their respective legal orders and that of the Community. Hailed in a practically unanimous manner by specialists in private international law since its adoption, the entry into force of the Convention in three large European countries (Germany, France and the United Kingdom), on 1st January 2009, is evidence of the political favour that these solutions enjoy as well. In addition, the convention has already been signed by Finland, Greece, Ireland, Luxemburg and, most recently, Italy. One may well conclude that **the integration of these solutions into the legal systems of the largest possible number of Member States would present only advantages**. It appears to us that Articles 61 and 65 EC offer the European Union sufficient legal bases to intervene. It remains to be determined how best to use them, considering that the Hague Convention will soon become effective in three of the Member States and that other States, including third party States, might well follow in their footsteps.

4. European Community Accession to the Hague Convention

The Community has **no exclusive external competence**: no **explicit** competence is foreseen in the treaty relating to the protection of incapacitated adults, the Community has **not yet taken internal measures** in this area and, in light of the ECJ jurisprudence, the internal competence of the Community does not appear to be “inextricably linked” to the external sphere. As a result, the Community authorities having not yet “occupied” the territory concerned, the Member States can conclude agreements with third party States in the domain concerned, since they have the benefit of **concurrent competence**; consequently, the European Community **can act, as is clear from point 3 of the declaration of competence within the framework of the HCCH** annexed to Council Decision of 5 October 2006 (2006/719/EC). *Nonetheless*, in accordance with the **principle of subsidiarity**, the European Community shall act only if and insofar as the objectives of the proposed action **cannot be sufficiently achieved by Member States** and can therefore, by reason of the scale or effects of the proposed action, **be better achieved by at the European Community level**.

It can be argued that these conditions are fulfilled, in light of the preceding analysis which showed a certain **absence of coordination** between the national private international law regimes, absence

which **potentially creates obstacles to the functioning of the internal market**, even in light of the fact that cross border situations in this area **implicating Third Party States as well as EU member States** can for analogous reasons **endanger the functioning of the internal market** and, finally, in light of the **difficulty in drawing a dividing line** between purely internal situations and those implicating Third Party States. The Hague Convention of 13 January 2000 on the International Protection of Adults, however, **does not include a specific clause relating to the accession of the European Community**. Consequently, an **adaptation of its text would be required to allow for the accession of a regional organisation of economic integration**. On the occasion of the accession of the Community to the HCCH, such modalities were discussed in this regard in order to overcome the difficulties resulting from the absence of a clause allowing the accession of a Regional Organisation of Economic Integration. The accession of the Community to the Convention of 13 January 2000, desirable with respect to the solutions it proposes, therefore appears to be **technically possible**.

5. A European Legislative Instrument

An alternative means of achieving the simultaneous effectiveness of the solutions adopted by the Hague Convention of 13 January 2000 on the International Protection of Adults in **all** of the Member States would be to integrate such solutions in a **new Community instrument** to be adopted on the basis of **Articles 61 and 65 EC**. Technically, the adoption of a regulation would allow for **only the partial**, and therefore **selective, acceptance** of the solutions offered by the Convention. Thus the Community's intervention could notably be limited to the imposition of the **principle of mutual recognition** of the decisions and measures in the field. We believe, nonetheless, that such a partial acceptance would in any case be **inopportune** because, among other reasons, of the interconnections amongst the various sections of the Convention.

We conclude that the adoption of a European Regulations is **less desirable a solution than the accession of the Community to the Hague Convention**. We take this position not only because a european regulation could create conflicts with the Hague Convention which might be **difficult to manage**, unless disconnection clauses were to be included which might, themselves, **diminish the formal effectiveness** of the regulation, but also because the accession to the Hague Convention pay the 27 Member States together with the **ratchet effect** that this might have with respect to Third Party States, might permit the satisfactory resolution of cross-border situations implicating Member States, on the one hand, and Third Party States who are parties to the Convention, on the other hand, which situations might compromise the proper operation of the internal market.

COMPARATIVE STUDY

PART ONE

SUBSTANTIVE LAW

CHAPTER I
NATIONAL REPORTS

Section I United Kingdom

Summary

The tradition in English law has been that capacity is a functional concept to be assessed according to the specific decision to be taken. Under the Mental Capacity Act 2005, which came into force on 1 October 2007, there is no exhaustive list of factors causing incapacity. A new assessment of capacity must be made in respect of every decision that a person said to be incapable is required to make. Under the Mental Health Act 2007, which received Royal Assent on 19 July 2007, several factors may cause incapacity.

The legislation in this area of law provides for varying degrees of incapacity. In terms of publication of the status of incapacity and its termination, under the Mental Capacity Act 2005, the Public Guardian is required to maintain a register of orders in relation to lasting powers of attorney, orders appointing deputies and enduring powers of attorney.

Besides the appointment of donees of lasting or enduring powers of attorney, made pursuant to applications by the donor or donee, national systems of protection include the appointment of deputies (individuals or trust corporations appointed by the Court of Protection as agents of a person lacking capacity) and independent mental capacity advocates (representatives, instructed by National Health Service bodies, who support vulnerable persons in decisions relating to the provision of serious medical treatment or the provision of accommodation). Additionally, guardianship and receivership are available systems of protection under the Mental Health Acts 1983 and 2007.

While a guardianship application is usually made by the nearest relative of the patient or an approved social worker, a receivership application may be made by anyone who considers that the affairs and property of a person may require the protection of the Court. Applications for the registration of an instrument intended to create a lasting or enduring power of attorney must be made to the Public Guardian. Guardianship applications, on the other hand, must be made to the local social services authority based on written medical recommendations. Receivership applications are made to the Court of Protection using forms provided by the Court.

With the exception of guardianship, which requires periodic renewal, periods of protection generally last until the protected person regains capacity, if at all. Both the Mental Capacity Act 2005 and the Mental Health Acts provide for the financing or reimbursement of reasonable out-of-pocket expenses relating to protective measures, and contain specific provisions in this regard that relate to deputies, professional receivers and persons attending proceedings.

The Court of Protection has the power to make declarations as to whether or not a person lacks capacity to make a decision. It has the same powers as the High Court, which has declaratory jurisdiction and must take into account the best interests of the person lacking capacity. The Court of Protection also has the power to do or secure the doing of all such things as appear necessary or expedient for the administration of an incapable person's affairs. While an appeal lies to the Court of Appeal from any decision of the Court of Protection, an appeal lies to the Mental Health Review Tribunal in respect of decisions relating to guardianship.

A Introduction

The year 2007 saw the coming into force of two major pieces of legislation affecting incapable adults: the *Mental Capacity Act 2005*, which came into force on 1 October 2007 and the *Mental Health Act 2007*, which received Royal Assent on 19 July 2007. The *Mental Capacity Act 2005* brings together best practices and common law principles concerning people who lack mental capacity and those who take decisions on their behalf while the *Mental Health Act* governs the treatment of people affected by mental disorder.

The *Mental Capacity Act 2005* deals with the assessment of incapacity, as well as acts by carers of those who lack capacity. In terms of careers, the *Mental Capacity Act 2005* provides for two types: a donee of a lasting power of attorney, who is appointed by the donor to act on his behalf if he should lose capacity in the future, and a deputy, who is appointed by the court as a receiver capable of taking decisions on welfare, healthcare and financial matters as authorised by the court. The *Mental Capacity Act 2005* also creates two new public bodies to support its framework: a new Court of Protection, which is the final arbiter for capacity matters and a new Public Guardian, who registers instruments relating to lasting powers of attorney and supervises court-appointed deputies. Other provisions in the *Mental Capacity Act 2005* that are aimed at protecting vulnerable people relate to (i) independent mental capacity advocates, who are appointed to persons in their decision-making; (ii) advance decisions for the refusal of treatment; and, (iii) criminal offences relating to the ill-treatment of persons lacking capacity. Finally, the *Mental Capacity Act 2005* sets out parameters for research relating to persons lacking capacity: carers must be consulted, the research must be of minimal risk, the benefit of the research must outweigh the risk and there must be minimal intrusion or interference with the rights of the person involved.

The *Mental Health Act 1983*, which governs the compulsory treatment of certain people with mental disorders, was recently amended by the *Mental Health Act 2007*. The purpose of the amendments was to introduce “deprivation of liberty safeguards” through an amendment to the *Mental Capacity Act 2005*. The amendment is largely a response to the “Bournewood judgment”, which involved the detention of an autistic man at Bournewood Hospital by doctors against the wishes of his carers and resulted in a finding by the European Court of Human Rights that the admission to and retention in hospital of *HL* amounted to a breach of Articles 5(1) (deprivation of liberty) and 5(4) (right to have lawfulness of detention reviewed by a court) of the European Convention on Human Rights. (See *R v Bournewood Community and Mental Health NHS Trust ex p L* [1999] 1 AC 458, *HL v United Kingdom* (2004) 40 EHRR 761 and *JE v DE (by his litigation friend the Official Solicitor, Surrey County Council and EW* [2006] EWHC 3459 (Fam), 2007 2 FLR 1150).

Major changes to the 1983 *Mental Health Act* include a re-definition of mental disorder abolishing all references to categories of disorder (mental illness, mental impairment, psychopathic disorder and severe mental impairment) and complementing changes to the criteria for detention, which have also changed. Moreover, the amendments broaden the group of practitioners who can take on the functions previously performed by approved social workers and responsible medical officers. The amendments also give patients the right to make applications to the county court to displace their nearest relative, who would otherwise be able to make a guardianship application or other applications by virtue of his or her status as nearest relative. Like the *Mental Capacity Act 2005*, the *Mental Health Act 2007* provides for assistance by independent mental health advocates.

United Kingdom (UK)

Statistical data

State	Source of Data	Number of Adults Protected per Year	Number of Measures per Year	Number of Protected Adults Circulating in the EU
United Kingdom	Judicial and Court Statistics 2007 ¹¹⁰		1	--
	Orders made under the <i>Mental Health Act 1983</i>	2007-2008: 201		
	Orders made on applications relating to the Enduring Powers of Attorney	2007-2008: 257		
	Transition Orders Made to allow Existing Receivers to Continue as Deputies under the <i>Mental Capacity Act</i> without repeated referrals to Court	2007-2008: 9,136		
	Amount in pounds (£) that Public Guardian held as agent for incapable persons	2007-2008: 2.5 billion		
	Enduring Power of Attorney Applications Received by Public Guardian	2007-2008: 20,030		
	Enduring Power of Attorney Applications registered	2007-2008: 15,969		

According to the Office of the Public Guardian, there are at present 26,994 deputyships in place in the United Kingdom. This number does not reflect the number of deputies acting, which is less, as many deputies have multiple deputyships.¹¹¹

¹¹⁰ Ministry of Justice, *Judicial and Court Statistics 2007* (September 2008) [on line], <http://www.official-documents.gov.uk/document/cm74/7467/7467.pdf>.

¹¹¹ Information obtained by e-mail from Stacey John of the United Kingdom government, dated 3 November 2008.

United Kingdom (UK)

Since an Enduring Power of Attorney or a Lasting Power of Attorney may be registered when a person still has capacity and may remain on the register even after a person's death, there are no statistics indicating how many registered Enduring Powers of Attorney and Lasting Powers of Attorney actually relate to people currently lacking capacity.

B Listing

1. Legislation enacted

- a. Enduring Powers of Attorney Act 1985
- b. Mental Capacity Act 2005
- c. Mental Capacity Act Code of Practice
- d. Mental Health Act 1983
- e. Mental Health Act 2007

2. Draft legislation

3. Jurisprudence

Court Decision	Relevant passages
Functional Approach to Capacity <i>Masterman-Lister v. Brutton & Co</i> [2002] EWCA Civ. 1889; [2003] 3 All E.R. 163, per Chadwick L.J.	"English law requires that a person must have the necessary mental capacity if he is to do a legally effective act or to make a legally effective decision for himself. The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second that what is required is the capacity to understand the nature of that transaction when it is explained."
Case-by-case Approach to Determination of Capacity Per Kennedy L.J.	"[The] conclusion that in law capacity depends on time and context means that inevitably a decision as to capacity in one context does not bind a court which has to consider the same issue in a different context."

United Kingdom (UK)

<p>Medical Treatment</p> <p><i>Re MB (Medical Treatment)</i> [1997] 2 F.L.R. 426, per Butler-Sloss L.J.</p>	<p>“A person lacks capacity is some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or refuse treatment. That inability to make a decision will occur when:</p> <ol style="list-style-type: none"> a. the patient is unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having or not having the treatment in question; b. the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision.”
<p>Adult: Refusal of Treatment</p> <p><i>Re T (Adult: Refusal of Treatment)</i> [1992] 4 All E.R. 649, per Lord Donaldson.</p>	<p>The more serious the decision, the greater the level of capacity required.</p>
<p>Adult: Refusal of Treatment</p> <p><i>Re W (Adult: Refusal of Medical Treatment)</i> [2002] EWHC Fam 901.</p>	<p>A judge is not required to accept the evidence of medical practitioners as to a person’s mental capacity.</p>
<p>Adult Patient Medical Treatment: Consent</p> <p><i>Re AK (Adult Patient) (Medical Treatment: Consent)</i> [2001] 1 F.L.R. 129.</p>	<p>A patient who could only communicate by blinking was held to be mentally capable (see section 3(1)(d) of the <i>Mental Capacity Act 2005</i>, which clearly excludes such patients from the definition of persons unable to make decisions).</p>
<p>Diagnosis of Patient with Mental Health Problems</p> <p><i>Re H (Mental Patient: Diagnosis)</i>(1993) 1 F.L.R. 28.</p>	<p>A court may refuse to make a declaration as to whether an act or proposed act in relation to an individual lacking capacity is or would be lawful. (The court refused to make a declaration and thereby delay the procedure for which the declaration was being sought – to determine whether a C.T. scan for a schizophrenic patient with a suspected brain tumour would be lawful.)</p>
<p>Patient in Hospital: Court’s Jurisdiction</p> <p><i>Re S (Hospital Patient: Court’s Jurisdiction) (No. 1)</i> [1996] Fam. 1 at 18.</p>	<p>“[I]n cases of controversy and cases involving momentous and irrevocable decisions, the courts have treated as justiciable any genuine question as to what the best interests of a patient require or justify. In making these decisions the courts have recognised the desirability of informing those involved whether a proposed course of conduct will render them criminally or civilly liable; they have acknowledged their duty to act as a safeguard against malpractice, abuse and unjustified action; and they have recognised the desirability, in the last resort, of decisions being made by an impartial independent tribunal.”</p>

United Kingdom (UK)

<p>Tutorship with Respect to Social Benefits Cass. 1e civ., 18 April 1989 (n°87-14.563) : Bull. civ. I n° 156 p. 103.- Cass. 1e civ., 18 April 1989 (n°87-18.475), unpublished.</p>	<p>« As established by article L. 167-2 of the Social Security Code that allows the judge, when imposing a tutorship in civil law to maintain tutorship with respect to social benefits and to grant to a single person the guardianship of both civil interests and social benefits, the judge of tutorships has the ability to create co-existing regimes of tutorship of social benefits, specifically imposed with a view towards the re-adaptation of the person in question to a normal life and the civil regime incompetence, whose purpose is, as a general matter, to insure the protection of the person and the assets of the incapacitated person;</p> <p>The institution of a tutorship in civil law or of a curatorship article 512 of the Civil Code implies that the protected adult is not capable of using his or her revenues in accordance with his or her own best interests; it follows that the first of the alternative conditions imposed by article L. 167-1 of the Social Security Code on the initiation of a tutorship for social benefits is necessarily ».</p>
<p>Conditions for the Imposition of a “Curatorship” Cass. 1e civ., 25 October 1989 (n° 88-11.816), unpublished.</p>	<p>« The judges deciding on the substantive issues have determined that the alteration of Ms. X’s mental faculties was observed by the medical specialist that they appointed, however, they did not refer to such specialists’ conclusions in deciding that the safeguarding of the assets and the interests of Ms. X, required that she be Councilled and assisted by means of a curatorship ».</p>
<p>Factual Determination (of the Judge of the First Instance) of the Necessity of Being Represented in Actions of Day to Day Life Cass. 1e civ., 4 April 1991 (n° 89-15.902) : Bull. civ. I n° 116 p. 78.</p>	<p>« The judgment provides that the evidence in the file, in particular the expert’s report, whose justifications and conclusions he appropriated, that Mr. X presents a pre-existing psychotic state to which is added serious disturbances of thought and the perception of reality; that it is an appreciation of the facts, which is sovereign, that he deems that, as a result of these disturbances, Mr. X needs to be represented in a continuous manner in the acts of daily life ».</p>
<p>Reproduction of an Image of a Protected Adult Cass. 1e civ., 24 February 1993 (n° 91-13.587) : Bull. civ. I n° 87 p. 57.</p>	<p>« The reproduction of images representing mentally handicapped persons in the privacy of their daily existence inside the establishments where they live without the authorization of their legal representatives constitutes, in and of itself, an illegal violation of their privacy. The case correctly holds that the manager of the tutorship cannot, alone, complete acts relating to the protected adult, such as consenting to the reproduction of images of such adult, and that the manager must, pursuant to article 500, par. 2 of the Civil Code, petition the judge responsible for tutorships who can either authorize these acts or, subject to any conditions that he may deem necessary, decide to constitute a complete tutorship ».</p>
<p>Receiver and Solicitor of Patient Re EG [1914] 1 Ch. 927.</p>	<p>The receiver [or deputy] acts as the patient’s agent. The solicitor instructed by the receiver in connection with the patient’s affairs is the solicitor of the patient.</p>

United Kingdom (UK)

<p>Existence of Patient’s Legal Liabilities</p> <p><i>Bell v. Todd</i> [2002] Lloyd’s L.R. 12 at para. 22.</p>	<p>A receiver’s [or deputy’s] duty to satisfy a patient’s legal liabilities is entirely dependent on there being such liabilities in existence.</p>
<p>Incapacity resulting from Tortfeasor</p> <p><i>Cassel v. Riverside HA</i> [1992] P.I.Q.R. Q. 168.</p>	<p>A person rendered a patient as a result of the actions of a tortfeasor is entitled to require the tortfeasor to pay the costs of a receiver as part of the damages.</p>
<p>Housing for Incapable Person</p> <p><i>R (on the application of Batantu) v. Islington LBC</i> (2001) 4 C.C.L. Rep. 445.</p>	<p>The meaning of accommodation under the 1948 Act is wide and flexible and embraces care homes, ordinary and sheltered housing, housing association and other registered social housing, and private sector housing which may have been purchased by the local authority.</p>
<p>Decisions taken for Incapable Person</p> <p><i>F. v. West Berkshire HA</i> [1989] 2 All E.R. 545, HL, per Lord Brandon at 554.</p>	<p>Property and affairs means “business matters, legal transactions and other dealing of a similar kind”.</p> <p>Where a patient lacks mental capacity to consent to treatment, the treating doctor can provide the treatment if it is in the patient’s best interests and in case of doubt, the doctor can apply to the court for guidance.</p>

C NATIONAL REPORT

1. Notion and causes of incapacity

1.1. Notion of incapacity

The tradition in English law has been that capacity is a functional concept to be assessed according to the specific decision to be taken.¹¹² Consistent with this view, **the *Mental Capacity Act 2005* defines “people who lack capacity” in relation to specific matters: “a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”** (Section 2(1)). The impairment or disturbance may be permanent or temporary (Section 2(2)) and the issue of whether a person lacks capacity must be decided on the balance of probabilities (Section 2(4)). A person is otherwise presumed to have capacity.¹¹³ In addition to defining “people who lack capacity”, the *Mental Capacity Act 2005* defines the “inability to make decisions”. A person is said to be unable to make decisions if he is unable to (i) understand the information relevant to the decision, (ii) retain

¹¹² P. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (Oxford : Oxford University Press, 2005) at 11.

¹¹³ P. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (Oxford : Oxford University Press, 2005) at 11.

that information, (iii) use or weigh that information as part of the process of making the decision, or (iv) communicate his decision.

In the ***Mental Health Act 2007***, which amends the *Mental Health Act 1983*, a mental disorder shall be defined as a disorder or disability of the mind. References in the *Mental Health Act 1983* to categories of disorder, such as “severe mental impairment”, “mental impairment” and “psychopathic disorder” shall be abolished. The relevant section (Section 1(2)) of the new legislation is, however, prospective and has not yet entered into force.

1.2. Causes of incapacity

There is no exhaustive list of factors causing “impairment of, or a disturbance in the functioning of, the brain or mind,” as provided for in the *Mental Capacity Act 2005* (Section 2(1)). The Explanatory Report to the *Mental Capacity Act 2005* lists several different causes of such impairment or disturbance:

- the effects of pain, shock or exhaustion;
- a psychiatric illness;
- a learning disability;
- dementia;
- brain damage;
- a toxic confusional state; or
- a grave physical illness resulting in biochemical disturbances, confusion or impairment of consciousness.¹¹⁴

Courts have held a woman to lack capacity where she refused a blood transfusion on religious grounds in the last stages of pregnancy. Courts have also held a woman to lack capacity to decide whether she should receive an injection where the woman expressed a needle phobia while in labour.¹¹⁵ Causes of incapacity may be temporary and may be caused by several factors, including excessive alcohol consumption, misuse of drugs, mental disorder, emotional crisis, or prescribed medication.¹¹⁶

The *Mental Health Act 1983*, as amended provides a list of factors causing incapacity. The *Mental Health Act 1983* states that nothing in the law is to be construed as implying that a person may be dealt with as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs (Section 1(3)). The *Mental Health Act 2007* shall replace this subsection, limiting its scope to dependence on alcohol or drugs. Thus, dependence on drugs will not be considered to be a disability of the mind as of the entry into force of Section 1(3) of the *Mental Health Act 2007*. The *Mental Health Act 2007* shall also state that a person with a learning disability shall not be considered by reason of that disability to be suffering from mental disorder unless that disability is associated with abnormally aggressive or seriously irresponsible behaviour (Section 1(2A)).

¹¹⁴ R.M. Jones, *Mental Capacity Act Manual* (London : Sweet & Maxwell, 2005) at 14.

¹¹⁵ Case cited in P. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (Oxford : Oxford University Press, 2005).

¹¹⁶ R.M. Jones, *Mental Capacity Act Manual* (London : Sweet & Maxwell, 2005) at 14.

1.3. Termination of the status of incapacity

The definition of an “inability to make decisions” in the *Mental Capacity Act 2005* relates to the ability of the person to make a particular decision at a particular moment in time; it does not relate to the person’s ability to make decisions generally. As such, **a new assessment of capacity must be made in respect of every decision that the person is required to make.** For instance, where a **lasting power of attorney** (as described in Part 2.3 of this Report) or an **enduring power of attorney** (as described in Part 2.3 of this Report) has been registered under the *Mental Capacity Act 2005* or the *Enduring Powers of Attorney Act 1985*, it may be revoked at any time when the person, who was previously unable to make decisions, regains his capacity to do so (See Section 13(2) and Schedule 4). Similarly, where a court-appointed **deputy** (as described in Part 2.3 of this Report) has reason to believe that a person has regained his or her capacity to make decisions, the deputy loses the power to decide for that person (Section 20(1)).

2. Legal consequences of incapacity

2.1. Degrees of incapacity and the legal consequences thereof

Based on the principles set out in the *Mental Capacity Act 2005* to guide the interpretation of the legislation, the individual retains legal authority to make decisions for which he or she continues to have capacity.¹¹⁷ **The legislation, therefore, provides for varying degrees of incapacity, assessed in relation to the ability to make certain decisions.** The incapable person must be unable to understand the reasonably foreseeable consequences of a decision and all possible choices stemming from that decision or a failure to decide.¹¹⁸ In any event, the *Mental Capacity Act 2005* is generally sufficiently satisfied if it is reasonably believed that a person indeed lacks capacity. The *Mental Capacity Act 2005* requires that there be “impairment to the mind or brain” (Section 2(1)), and although this definition is very broad, it is not so broad as to encompass purely physical impairment resulting in incapacity, unconsciousness following an accident, immobilisation resulting from severe muscular disorders, or significant distraction resulting from physical pain.¹¹⁹

In his commentary on the *Mental Health Act 1983*, Jones cites the National Audit Office Report, *Looking After the Financial Affairs of People with Mental Incapacity*: “[t]he nature of patients’ incapacity and circumstances can vary. Patients may be elderly people with mental infirmity; or people with mental illness or mental handicap; or people with brain damage as a result of accident or illness”.¹²⁰ The *Mental Health Act 2007* abolishes references in the *Mental Health Act 1983* to categories and degrees of disorder, such as “severe mental impairment”, “mental impairment” and “psychopathic disorder” (Section 1(2) *Mental Health Act 2007*). Mental disorder under the *Mental Health Act 2007* is simply defined as any disorder or disability of the mind (Section 1(2) *Mental Health Act 2007*). The effect of this change is to widen the application of the provisions of the *Mental Health Act* to all mental disorders, including personality disorders and dysfunction arising from brain injury, which previously may not have fallen squarely within one of the categories of the *Mental Health Act*.

¹¹⁷ P. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (Oxford : Oxford University Press, 2005) at 25.

¹¹⁸ P. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (Oxford : Oxford University Press, 2005) at 28.

¹¹⁹ P. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (Oxford : Oxford University Press, 2005) at 27.

¹²⁰ R.M. Jones, *Mental Health Act Manual*, 10th ed. (London : Sweet & Maxwell, 2006) at 15-21.

The *Mental Health Act 1983* stated that the definition of mental disorder was not to be construed as implying that a person may be dealt with as suffering from mental disorder "by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs." The *Mental Health Act 2007* substitutes the relevant section with a single exclusion stating that dependence on alcohol or drugs is not considered a disorder or disability of the mind for the purposes of the definition of mental disorder. Since promiscuity and immoral conduct are not by themselves regarded as mental disorders, the deletion of references to such conduct is inconsequential. Disorders of sexual preference, such as paedophilia, however, might still be considered "sexual deviance" and may consequently be within the scope of the legislation as a result of the amendments.

2.2. Publication of the status of incapacity and of its termination

Under the *Mental Capacity Act 2005*, the Public Guardian is required to maintain a register of "lasting powers of attorney" and orders appointing deputies (Section 58), as well as a register of enduring powers of attorney under the *Enduring Powers of Attorney Act 1985* – repealed by the *Mental Capacity Act 2005* (Section 66).

2.3. National system of protection

Under the *Mental Capacity Act 2005*, courts may appoint deputies and independent mental capacity advocates, and donees may be granted a lasting power of attorney. Previously, under the *Enduring Powers of Attorney Act 1985*, repealed by the *Mental Capacity Act 2005*, donees could be granted an enduring power of attorney. Under the *Mental Health Act 1983*, as amended, guardianship and receivership are two institutions of protection available in England and Wales.

3. Analysis of the national system of protection

3.1. Types of protective measures

3.1.1. Deputies

The *Mental Capacity Act 2005* provides for the "appointment of deputies". A deputy must be an individual, who is 18 or over and may be a trust corporation if authority relates to the donor's property and affairs. **A deputy may not be appointed without consent and is to be treated as the agent of the person who lacks capacity ("P")** (Section 19). A deputy may not restrain P unless certain conditions are satisfied (Section 20(7)) or refuse consent to the carrying out or continuation of life sustaining treatment for P (Section 20(5)). A deputy may not be given powers with respect to the settlement of P's property, the execution of P's will or the exercise of any power vested in P (Section 20(3)). Moreover, a deputy may not be given power to make a decision that runs counter to a decision made by the donee of a lasting power of attorney, and a deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds to believe that P has capacity in relation to the matter (Section 20(1)).

A deputy may be appointed by the Court of Protection to assist a person who lacks capacity ("P") in relation to a matter or matters concerning P's personal welfare or P's property (Section 16). In terms of the Court's powers concerning P's personal welfare, these extend to deciding where P is to live, what contact P is to have with specified persons, whether to give or refuse consent to the carrying out or continuation of a treatment by a healthcare professional, and whether to allow a person responsible for P's health care to assign responsibility to another (Section 17). In terms of the Court's powers concerning P's property and affairs, these extend to the control and management of P's

property; the sale, exchange, charging, gift or other disposition of P's property; the acquisition of property in P's name or on P's behalf; the carrying on, on P's behalf, of any profession, trade or business; the taking of a decision which will have the effect of dissolving a partnership of which P is a member; the carrying out of any contract entered into by P; the discharge of P's debts and of any of P's obligations, whether legally enforceable or not; the settlement of any of P's property, whether for P's benefit or for the benefit of others; the execution for P of a will; the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise; the conduct of legal proceedings in P's name or on P's behalf.

3.1.2. Independent Mental Capacity Advocates

The *Mental Capacity Act 2005* provides for the appointment of "independent mental capacity advocates". **An independent mental capacity advocate represents and supports persons in decisions relating to the provision of serious medical treatment by a National Health Service Body, the provision of accommodation by a NHS Body and / or the provision of accommodation by a local authority** (Sections 35-39). The independent mental capacity advocate, therefore, acts as a representative and supporter of the particularly vulnerable, including "people with dementia who have lost contact with all friends and family, or people with severe learning disabilities or long term mental health problems who have been in residential institutions for long periods and lack outside contacts".¹²¹ The independent mental capacity advocate will become involved where there is no family member or unremunerated carer who can be consulted about a person's best interest and where that person lacks capacity to make decisions on his or her own. In England, the Secretary of State may make regulations as to the functions of mental capacity advocates. In Wales, the National Assembly may make such regulations (Section 36). Regulations expanding the role of independent mental capacity advocates in relation to persons who lack capacity may prescribe circumstances in which independent mental capacity advocates may or must be instructed to represent a person who lacks capacity (Section 41).

3.1.3. Donees of a Lasting Power of Attorney

The *Mental Capacity Act 2005* provides for a "lasting power of attorney". **A lasting power of attorney confers authority on a donee or donees to make decisions about the personal welfare and / or the property and affairs of the donor** (Section 9(1)). The authority is created by virtue of an instrument made and registered with the Public Guardian in compliance with sections 9 or 10 or Schedule 1 of the *Mental Capacity Act 2005* (Section 9(2)-(3)). The authority is subject to the principles set out at section 1; the best interests of the donee (as assessed in light of section 4); and, any other conditions specified in the instrument (Section 9(4)). At the time of execution of the instrument, the donor must be a mentally capable adult (Section 9(2)). A donee must be 18 or older; may be a trust corporation (as defined at section 68(1) of the *Trustee Act 1925*) if authority relates to the donor's property and affairs; and, may not be bankrupt (Section 10). Unless certain conditions are satisfied, the donee may not, restrain the donor (Section 11(1)), give or refuse consent to the carrying out or continuation of life sustaining treatment (Section 11(7)), or dispose of the donor's property by making gifts (Section 12(1)). A lasting power of attorney is revocable by the donor (Section 13(2)) and may be disclaimed by the donee (Section 13(6)). As a general rule, the appointment of the donee is terminated upon the loss of capacity, death or bankruptcy of the donee or its winding-up or dissolution where the donee is a trust corporation. Unless otherwise specified in the instrument, the appointment may also be terminated upon dissolution or annulment of a marriage or civil partnership between the donor and donee (Section 13).

¹²¹ R.M. Jones, *Mental Capacity Act Manual* (London: Sweet & Maxwell, 2005) at 85, citing Explanatory notes to the *Mental Capacity Act 2005*.

3.1.4. Donees of an Enduring Power of Attorney

The *Enduring Powers of Attorney Act 1985* provides for “enduring powers of attorney”, but is repealed pursuant to the *Mental Capacity Act 2005* (Section 66(1)(b)). Thus, all new powers of attorney must be executed pursuant to the *Mental Capacity Act 2005* if they are supposed to survive the incapacity of the donor; however, the provisions of the *Enduring Powers of Attorney Act 1985* regarding registration and effect of already existing enduring powers of attorney are contained at Schedule 4 of the *Mental Capacity Act 2005*.¹²² As such, persons with valid powers as attorneys under the *Enduring Powers of Attorney Act 1985* or as receivers under the *Mental Health Act 1983* do not lose their powers on the implementation of the repeals, but it is no longer possible to create an enduring power of attorney once the repeal takes effect.¹²³ **An enduring power of attorney is different from a lasting power of attorney in that it cannot extend to decisions regarding social care and medical treatment. Rather, it is limited to matters of property and affairs.**¹²⁴

3.1.5. Guardians

The *Mental Health Act 1983*, as amended, provides that a patient who has attained 16 years of age may be received into guardianship where he or she is suffering from a mental disorder, which is of a nature or degree which warrants his reception into guardianship and guardianship is in his or her best interests (Section 7). A guardian has the authority to require the patient to reside at a place specified; to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training; and, to require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner or clinician, approved social worker or other person so specified (Section 8). Finally, the Secretary of State may make regulations for regulating the exercise by the guardians of their powers and for imposing on guardians such duties as he considers necessary or expedient in the interests of the patient (Section 9).

3.1.6. Receivers (with additional note on Curators)

Under the *Mental Health Act*, as amended, judges of the **Court of Protection may, by order, appoint a receiver for a patient, to do all such things in relation to the property and affairs of the patient as the judge, in the exercise of the powers conferred on him, orders or directs.** The receiver may also do any such thing in relation to the property and affairs of the patient as the judge, in the exercise of those powers, authorises (Section 99). A receiver is generally responsible for collecting the patient’s income, paying the bills and administering the affairs in the patient’s best interests. Authority will usually be given to the receiver to spend as much as is necessary of the patient’s income in order to ensure the proper maintenance, support and comfort of the patient.¹²⁵

The *Mental Health Act* recognises curatory, an institution of Scots Law.¹²⁶ **The *Mental Health Act* simply provides for the vesting of stock in a curator appointed outside England and Wales where a judge is satisfied that under the law prevailing in a place outside England and Wales, a person has been appointed to exercise powers with respect to the property or affairs of any other person on the ground that the other person is incapable, by reason of mental disorder, of managing and administering his property and affairs, and that it is expedient that the judge should exercise his powers as such** (Section 100). This section allows courts to take judicial notice, without questioning

¹²² P. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (Oxford : Oxford University Press, 2005) at 43-44.

¹²³ R.M. Jones, *Mental Capacity Act Manual* (London : Sweet & Maxwell, 2005) at 35.

¹²⁴ P. Bartlett, *Blackstone’s Guide to the Mental Capacity Act 2005* (Oxford : Oxford University Press, 2005) at 43.

¹²⁵ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 554-564.

¹²⁶ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 589.

the appropriateness, of the operation of foreign law under which some form of curatorship has been constituted for a patient.¹²⁷ Although the *Mental Health Act* does not clarify the distinction between a curator *ad litem* and a curator *bonis*, the former is appointed by the court in proceedings already before the court to conduct the litigation in question only, while the latter to take over the entire management of a person's estate on a long-term basis.¹²⁸

3.2. Period of protection

Appointment of deputy: Under the *Mental Capacity Act 2005*, where a court-appointed deputy has reason to believe that a person has regained his or her capacity to make decisions, the deputy loses the power to decide for that person (Section 20(1)).

Appointment of independent mental capacity advocate: Under the *Mental Capacity Act 2005*, the appointment of an independent mental capacity advocate lasts as long as the independent mental capacity advocate is needed to represent and support the person without capacity, who is subject to decisions relating to the provision of serious medical treatment by a National Health Service Body, the provision of accommodation by a NHS Body and / or the provision of accommodation by a local authority (Sections 35-39).

Lasting power of attorney: Under the *Mental Capacity Act 2005*, a lasting power of attorney may be revoked at any time when the person, who was previously unable to make decisions, regains his capacity to do so (See Section 13(2) and Schedule 4).

Enduring power of attorney: Under the *Enduring Powers of Attorney Act 1985* (revoked), an enduring power of attorney, may be revoked at any time when the person, who was previously unable to make decisions, regains his capacity to do so (See Section 13(2) and Schedule 4 of the *Mental Capacity Act 2005*).

Guardianship: Under the *Mental Health Act 1983*, as amended, a patient placed under guardianship in pursuance of a guardianship application, may be detained in a hospital or kept under guardianship for a period not exceeding six months beginning with the day on which he was so admitted, or the day on which the guardianship application was accepted, as the case may be, but shall not be so detained or kept for any longer period unless the authority for his detention or guardianship is renewed (Section 20(1)). Guardianship, thus, lasts for six months, but may be renewed for another six months and thereafter annually.¹²⁹

Receivership: Under the *Mental Health Act 1983*, as amended, a receiver appointed for any person shall be discharged by order of a judge of the Court of Protection where the judge is satisfied that that person has become capable of managing and administering his property and affairs. A receiver may be discharged by order of the judge at any time if the judge considers it expedient to do so, and will be discharged (without any order) on the death of the patient (Section 99).

3.3. Financing of protective measures

The *Mental Capacity Act 2005* provides for the financing of protective measures. Where necessary goods or services are supplied to a person who lacks capacity, he must pay a reasonable price for them (Section 7). Moreover, where a person ("D") performs acts in connection with the care or

¹²⁷ R.M. Jones, *Mental Health Act Manual*, 10th ed. (London : Sweet & Maxwell, 2006) at 429.

¹²⁸ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 589 and 23-24.

¹²⁹ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 197.

treatment of a person who lacks capacity (“P”) it is lawful to pledge P’s credit for the purpose of the expenditure and to apply money in P’s possession toward meeting the expenditure. Furthermore, if the expenditure is borne for P by D, D may reimburse himself out of money in P’s possession or demand indemnification by P (Section 8). A deputy appointed by the Court of Protection under the *Mental Capacity Act 2005* (in the manner described at Part 2.3 of this Report) may, if the Court so directs, be remunerated and is, in any event, entitled to be reimbursed, out of P’s property, for his reasonable expenses in discharging his functions (Section 19(7)). Moreover, the Lord Chancellor may, with the consent of the Treasury, by order, prescribe fees payable in respect of anything dealt with by the Court of Protection (Section 54). Subject to the Court of Protection Rules, the costs incidental to all proceedings in the court are in its discretion and the court has full power to determine by whom, to what extent and from which funds fees and costs are to be paid (Section 55 and 56).

Under the *Mental Health Act 1983*, as amended, rules under Part VII concerning the management of property and affairs of patients may (i) authorise the making of orders for the payment of costs to or by persons attending, as well as persons taking part in, proceedings (Section 106(7)); or (ii) make provision as to the giving of security by a receiver and as to the enforcement and discharge of the security (Section 107(1)). However, a receiver is generally not entitled to any remuneration for his duties unless he is a solicitor, in which case he may be paid costs at the discretion of the Court. Professional receivers, such as accountants and the local authority, may be remunerated for their professional advice, though arrangements in this respect must be negotiated when the first order for receivership is made with respect to the patient. Reasonable out-of-pocket expenses are reimbursed.¹³⁰

4. Persons/authorities establishing the system of protection

4.1. Request for protective measures

The *Mental Capacity Act 2005* does not specify who may request protective measures, though it provides that permission for applying to the Court of Protection is not required of the following persons

- a person lacking capacity;
- a person with parental responsibility for a person lacking capacity;
- a donor or donee of a lasting power of attorney to which the application relates;
- a deputy appointed by the court for a person to whom the application relates; or
- a person named in an existing order of the court if the application relates to the order (Section 50(1)).

The Court of Protection’s power to make declarations regarding a person’s capacity (as described at Part 4.3 of this Report) is most likely to be exercised where medical professionals cannot resolve a dispute as to a person’s capacity to decide on medical treatment or where there is a dispute as to whether a person was capable when a lasting power of attorney was made or a decision was taken in advance.¹³¹

¹³⁰ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 561-564.
¹³¹ R.M. Jones, *Mental Capacity Act Manual* (London : Sweet & Maxwell, 2005) at 62-74.

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- The need for a **deputy** to be appointed by the Court of Protection to manage a person's property and affairs is most likely to arise in the same circumstances governing the appointment of receivers under the *Mental Health Act*, i.e. when property must be sold or the person has financial resources requiring management by a deputy.
- A National Health Service body must, before providing serious medical treatment or making arrangements for the provision of accommodation, instruct an **independent mental capacity advocate** to represent a person unable to make decisions (Section 37(3) and Section 38(3)). The same is true for a local authority wishing to make arrangements for the provision of accommodation for a person unable to make decisions for him or herself (Section 39(4)).
- An application for the registration of an instrument intended to create a **lasting power of attorney**, may be made by the donor or the donee(s) (Schedule 1).

Under the *Mental Health Act 1983*, as amended, the following persons may make requests for protective measures:

- a **guardianship** application may be made either by the nearest relative of the patient or by an approved social worker; and every such application shall specify the qualification of the applicant to make the application (Section 11(1)). A person named as guardian in a guardianship application may be either a local social services authority or any other person (including the applicant himself); but a guardianship application in which a person other than a local social services authority is named as guardian shall be of no effect unless it is accepted on behalf of that person by the local social services authority for the area in which he resides, and shall be accompanied by a statement in writing by that person that he is willing to act as guardian (Section 7(5)).
- a **receivership** application may be made by anyone who considers that the affairs and property of a person may require the protection of the Court or by an officer of the court where the Court is aware that the affairs and property of a person may require the protection of the Court.¹³²

4.2. Preparation of the file

An application, under the *Mental Capacity Act 2005*, for the registration of an instrument intended to create a lasting power of attorney (Schedule 1) or an enduring power of attorney (Schedule 4), must be made to the Public Guardian, who is a public officer appointed by the Lord Chancellor and paid out of money provided by Parliament. The Public Guardian has a distinct legal personality and an important administrative role.¹³³ The Public Guardian must apply to the Court of Protection for it to determine any question as to the meaning or effect of a lasting power of attorney or instrument purporting to create one. The Public Guardian must not register the instrument until the Court of Protection has made a determination (Schedule 1). Once a determination is made, the Public Guardian may register the lasting power of attorney and his functions include establishing and maintaining a register thereof, as well as a register of orders appointing deputies (Section 58).

Under the *Mental Health Act 1983*, as amended, a guardianship application is made to the local social services authority, and once accepted by that authority, confers authority on the person named in the application as guardian, to the exclusion of any other person (Section 8(1)). The application must be founded on the written recommendations in the prescribed form of two

¹³² G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 548.

¹³³ G. Ashton et al., *Mental Capacity : The New Law* (Bristol : Jordans, 2006) at 279-280.

registered medical practitioners or clinicians (Section 7(3)). There is no requirement for the patient to consent to the guardianship application.¹³⁴

Under the *Mental Health Act 1983*, as amended, and the Court of Protection Rules, a receivership application is made in writing using forms provided by the Court. The Court will require references as to the applicant's fitness to act as a receiver, security in order to safeguard the patient's assets and medical evidence as to the mental disorder of the patient.¹³⁵ Moreover, before a receiver is appointed, notice to the parents and relatives of the patient will be provided by the Court.¹³⁶

4.3. Declaration of incapacity

The *Mental Capacity Act 2005* gives the Court of Protection the power to make declarations as of the lawfulness of any act done or to be done in relation to a person and whether or not a person lacks capacity to make a decision specified or described in the declaration (Section 15). The Court of Protection has the same powers as the High Court (Section 47), which has declaratory jurisdiction.¹³⁷ The Court of Protection may make an order in relation to the decision or may appoint a deputy to make decisions on behalf of the person deemed incapable of making the decision for him or herself (Section 16). In so doing, the Court of Protection must follow the principles set out in the *Mental Capacity Act 2005* and must take into account the best interests of the person lacking capacity (Section 16(3)). The Court of Protection may vary or discharge its orders by a subsequent order (Section 16(7)) and may revoke or vary the power conferred on a deputy (Section 16(8)). It should be noted that a decision of the Court of Protection is to be preferred to the appointment of a deputy whose powers are to be as limited in scope and duration as is reasonably practicable (Section 16(4)). Where matters are likely to be repeatedly referred back to the Court of Protection, a deputy will likely be appointed; however, where only a one-off decision is needed, it is more likely that a decision of the Court of Protection will be preferred.¹³⁸

The *Mental Health Act 1983*, as amended, gives the Court of Protection power with respect to the property and affairs of a patient, to do or secure the doing of all such things as appear necessary or expedient for the maintenance or other benefit of the patient and his family and for the making of provisions for other persons or purposes for whom or which the patient might be expected to provide were he not mentally disordered. The Court of Protection also has the power to do or secure the doing of all such things as appear necessary or expedient for the administration of the patient's affairs (Section 95). The functions of a judge of the Court of Protection in relation to the management of property and affairs of the patient are exercisable where, after considering medical evidence, the judge is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs (Section 94(2)).

4.4. Exercise of the protective measure

Deputy: Under the *Mental Capacity Act 2005*, a deputy is appointed *ex officio* by the Court of Protection (Section 19). A deputy must be an individual who has reached 18, or if appointed in relation to property and affairs, an individual who has reached 18 or a trust corporation.

Independent mental capacity advocate: Under the *Mental Capacity Act 2005* and the *Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006*, an

¹³⁴ R.M. Jones, *Mental Health Act Manual*, 10th ed. (London : Sweet & Maxwell, 2006) at 65.

¹³⁵ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 548.

¹³⁶ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 549.

¹³⁷ R.M. Jones, *Mental Capacity Act Manual* (London : Sweet & Maxwell, 2005) at 96.

¹³⁸ G. Ashton et al., *Mental Capacity : The New Law* (Bristol : Jordans, 2006) at 167.

independent mental capacity advocate is appointed *ex officio*. However, no person may be appointed to act as an independent mental capacity advocate unless he is for the time being approved by a local authority on the grounds that he satisfies the appointment requirements, or he belongs to a class of persons which is for the time being approved by a local authority on the grounds that all persons in that class satisfy the appointment requirements (Section 5(1) of the Regulations). Furthermore, under the *Mental Health Act 2007*, any help available to a patient under the arrangements regarding independent mental capacity advocates should, so far as practicable, be provided by a person who is independent of any person who is professionally concerned with the patient's medical treatment.

Donee of a lasting power of attorney: Under the *Mental Capacity Act 2005*, there are no restrictions as to who may be a donee, though the donee must be an individual who has reached 18, or if the power relates to property and affairs, either such an individual or a trust corporation.

Guardian: Under the *Mental Health Act 1983*, as amended, the person named as guardian in a guardianship application may be either a local social services authority or any other person, including a parent or member of the family;¹³⁹ but a guardianship application in which a person other than a local social services authority is named as guardian shall be of no effect unless it is accepted on behalf of that person by the local social services authority for the area in which he resides, and shall be accompanied by a statement in writing by that person that he is willing to act as guardian (Section 7(5)).

Receiver: Under the *Mental Health Act 1983*, as amended, the Court of Protection decides who should be appointed as a receiver (Section 99 (1)); however, applicants include relatives, friends, medical authorities and solicitors. The Public Trustee may be appointed as a last resort if there is nobody suitable.¹⁴⁰

4.5. Rights of appeal

In general under the *Mental Capacity Act 2005*, an appeal lies to the Court of Appeal from any decision of the Court of Protection (Section 53(1)). The Court of Protection may make provision as to any of the following matters:

- whether permission is required to make an appeal
- the person(s) entitled to grant permission to appeal; and,
- any requirements to be satisfied before permission is granted (Section 53(4)).

Under the *Mental Health Act 1983*, as amended, an appeal lies to the Mental Health Review Tribunal in respect of a patient placed under guardianship by a guardianship order (Section 69(1)(b)). The Mental Health Review Tribunal is an independent tribunal comprised of three members appointed by the Lord Chancellor: a president (lawyer), a psychiatrist and a law member. A patient must apply to the Tribunal within six months of the date of admission into or the application for, guardianship.¹⁴¹ The fact that the initial determination of a guardianship application is made by an administrative body (the local authority) does not contravene the European Convention on Human Rights because there is a right of appeal to the Mental Health Review Tribunal, which provides the guaranteed of Article 6 of the Convention. Moreover, in accordance with the rules under Part VII relating to the management of the property and affairs of a patient, an appeal also lies

¹³⁹ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 197.

¹⁴⁰ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 549.

¹⁴¹ G. Ashton & A. Ward, *Mental Handicap and the Law* (London : Sweet & Maxwell, 1992) at 96.

to a nominated judge from any decision of the Court of Protection, and the Court of Appeal has jurisdiction as to appeals from any decision of a nominated judge (Section 105).

D Bibliography

ASHTON (ED.), G.R., *Mental Capacity: The New Law* (Bristol: Jordans, 2006).

ASHTON, G. & WARD, A., *Mental Handicap and the Law* (London: Sweet & Maxwell, 1992).

BARTLETT, P., *Blackstone's Guide to the Mental Capacity Act 2005* (Oxford: Oxford University Press, 2005).

CLASHFERN, LORD MACKAY OF.(ed.), *Halsbury's Laws of England* (London, 4th), Vol. 30(2) (2005).

DEPARTMENT OF HEALTH AND WELSH OFFICE, *Code of Practice Mental Health Act 1983* (London: HMSO, 1993).

JONES, M.A. & MORRIS, A.E., *Blackstone's Statutes on Medical Law* (London: Blackstone Press Limited, 1992).

JONES, R.M., *Mental Capacity Act Manual* (London: Sweet & Maxwell, 2005); *Mental Health Act Manual*, 10th ed. (London: Sweet & Maxwell, 2006).

LIDDELL ET AL., "Medical Research Involving Incapacitated Adults: Implications of the EU Clinical Trials Directive 2001 / 20 / EC" (2006) 14:3 *Medical Law Review* 367.

ROYAL COLLEGE OF PSYCHIATRISTS, *Consent and the Incompetent Patient: Ethics, Law, and Medicine*, Hirsch, S.R. & Harris, J., eds. (London: Gaskell, 1988).

Section II

France

Summary

The provisions of the law of 3 January 1968 adopted to reform the legal treatment of adults without legal capacity had become outdated, necessitating the reforms imposed by the law n°2007-308 of 5 March 2007 on the protection of incapacitated adults.

The 2007 law retained the original protections schemes although they were remodeled. As a result, legal safeguards, and curatorship and tutorship - two forms of guardianship - continue to exist but the framework for each of these notions has been redefined. First, the principles of necessity and proportionality have been reaffirmed in the context of the decision to impose protective measures and, second, a clear distinction is made between legal protection and social protection of such persons.

The main focus of the reform is to put into place the protection that is best adapted to the situation and the needs of these persons. This is why the reforms modify the bases for the imposition of the protection regimes by eliminating prodigality, intemperance and idleness as bases for the imposition of legal protective measures. The reform also takes into account to a greater extent the wishes of the protected person, notably, by allowing such person to choose in advance who will be responsible for his or her protection in the event that such person finds himself or herself in one of the situations for which the law provides for the imposition of protective measures.

In addition, the reform modifies the role of the judge in guardianship proceedings, such that the judge can no longer impose protective measure on his or her own initiative, imposes a clearer framework for protective measures by establishing a maximum duration and takes into account certain new social realities such as the Civil Pact of Solidarity (PACS) or the recognition of unmarried couples by allowing such partners to be persons selected to insure the protection of incapacitated adults.

A Introduction

The intention to adopt a new law thirty years after the adoption of the law n° 68-5 of 3 January 1968 modifying the rights of incapacitated adults appearing in the Civil Code (Title 11, Arts. 488 to 515), officially appeared for the first time in 1998.¹⁴²

In France, there were more than 630 000 people placed under legal protection in 2004¹⁴³ and 1 126 000 people will be placed under such protection in 2010 according to Report n° 3557 of Mister Émile Blessig published on the site of the National Assembly on 10 January 2007¹⁴⁴. Moreover, the number of people subject to a protection regime has increased by 8% and 65'416 judgments were rendered on the subject in 2004¹⁴⁵.

The reform made significant advances based on Recommendation n° R (99) 4 adopted by the Committee of Ministers of the Council of Europe on 23 February 1999, which set forth the major principles relating to legal protection of incapacitated adults. The Law n°2007-308 of 5 March 2007¹⁴⁶ amending the legal protection of adults was finally adopted by the National Assembly on 17 January 2007 and by the Senate on 15 February 2007.

This law will become effective on 1 January 2009, with the exception of the provisions concerning the mandate for future protection and the oversight measures concerning judicial appointees for the protection of adults, which are immediately applicable. Nonetheless, the mandate cannot take effect before the date of effectiveness of the law. In addition, the law applies to regimes in existence prior to its effectiveness under three conditions. Under the first condition, articles 441 and 442 (new Civil Code) relating to the term of the protective measures are applicable to measures imposed prior to the date of entry in force of the new law, but the time period established in the law does not begin to run until the effective date of the law.

Under the second condition, the guardianship provisions relating to social programs expire by law only three years after the law becomes effective.

This reform reaffirms the principles of necessity, subsidiarity and proportionality of the legal protection provided as well as the principle of the protection of the person and no longer only his assets.

¹⁴² The analysis by the general inspectorate of finance, judicial services and social services was quite critical of the excesses and dysfunctions of the existing legal provisions concerning incapacitated adults and the report of the inter-ministerial working group presided over by Mr. Favard (Honorary Council of the *Cour de cassation*) of 18 April 2000 following an in-depth analysis of the 1968 legal provisions came to the conclusion that they had deviated from their initial goals, had become rigid and inefficient and included serious insufficiencies in terms of regulation and oversight. Some commentators have gone even further: for example, M. Laurent Wauquiez, in his Opinion of the 2007 Commission on Cultural, Family and Social Affairs, stated that the 1968 laws were "at once inhuman, ineffective and dangerous". (with respect to this report, c.f. the Introduction, page 4 in Opinion n° 3556 of M. Laurent Wauquiez, made in the name of the Commission on Cultural, Family and Social Affairs, on 18 January 2007).

¹⁴³ Detailed statistics can be found in Exhibit 1.

¹⁴⁴ <http://www.assemblee-nationale.fr/12/rapports/r3557.asp> ((last visited 23 July 2008).

¹⁴⁵ Report present by Rose Boutaric to the Economic and Social Council <http://www.conseil-economique-et-social.fr/rapport/doclon/06100516.pdf> (last visited 23 July 2008).

¹⁴⁶ JORF n°56 of 7 March 2007 page 4325 text n° 12.

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This law retains the three prior protection regimes (tutorship, curatorship and legal safeguards) but adds a framework of general principles. One of the essential points of the reform is the clear distinction between social protections of the vulnerable adult and the legal protection of an adult whose intellectual faculties are impaired. Another important point is the importance of the individual's wishes. From now on, the mandate of future protection allows an individual to anticipate and organize his or her protection in advance.

Moreover, the principles of priority of the family and the independence of medical treatment or hospitalization have been reaffirmed.

Following the amendment of the law in 2007, the provisions concerning the protection of incapacitated adults were modified in the Civil Code (from new article 414 to article 514) and in the Code of social action and families concerning the accompaniment of an adult in social and budgetary matters (new articles L. 271-1 to L. 217-8), the judicial appointees for the protection of adults (new articles L. 471-1 to L. 471-9), judicial appointee services for the protection of adults (articles L. 312-1, L. 312-5, L. 314-1, L. 314 -4 and L. 314-5), the financing of the legal protection of adults (new articles L. 361-1 to L. 361-3), individual judicial appointees for the protection of adults (new article L. 472-1 to article L. 473.4 and article L. 474-1 to article L. 474-8), oversight of social and medico-social establishments and services (articles L. 313-13, L. 313-18, L. 331-1, L. 331-3, L. 331-4, L. 331-5 and L. 331-6).

This reform also includes the Code of Public Health new article L. 6111-4, the Code of Organization of the Judiciary article L. 221-9, the Insurance Code articles L.132-3-1 and L. 132-9, the Code of Mutuality articles L. 223-5-1 and L. 223-11 and, finally, the Social Security Code articles L. 613-1 and L. 622-5.

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Statistical Data

State	Source of Data	Number of Adults Protected per Year	Number of Measures per Year	Number of Protected Adults Circulating in the EU
France	Report n°3557 of Deputy Emile Blessig, delivered 10 January 2007 (in the context of the draft law amending the legal protection of adults)	1990 : 348 271 1991 : 368 952 1992 : 389 593 1993 : 410 090 1994 : 427 483 1995 : 445 378 1996 : 465 002 1997 : 487 630 1998 : 512 814 1999 : 539 053 2000 : 561 631 2001 : 582 907 2002 : 601 481 2003 : 619 413 2004 : 636 877	Number of placements under tutorship and under curatorship: 1990 : 41 714 1991 : 42 914 1992 : 44 114 1993 : 42 244 1994 : 43 826 1995 : 46 511 1996 : 49 941 1997 : 53 729 1998 : 57 615 1999 : 57 177 2000 : 57 094 2001 : 54 578 2002 : 59 099 2003 : 61 541 2004 : 65 418	

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*Only the statistics which appear to be the most pertinent for the present study are indicated. The whole report, with more detailed statistics, may be found in the Annexes.

Other statistics are also available in very detailed reports regularly elaborated by the National Observatory of protected adults (*Observatoire national des populations « majeurs protégés »*) (www.unaf.fr). However, the data given only deal with adults whose legal protection is ensured by a specific authority, belonging to the Departmental Union of Family Associations (U.D.A.F.) This Union groups together guardianship associations supporting in most of the cases adults whose situation is very precarious, socially and financially, and who are affected by mental disorders, etc.

B Listing

1. Legislation Enacted

- Law n°2007-308 of 5 March 2007 amending the legal protection of adults;
- Decree n° 2007-1658 of 23 November 2007 amending the Code of Criminal Procedure (third Part Decrees) relating to prosecution, investigation and judgment of offenses committed by protected adults ;
- Decree n° 2007-1702 of 30 November 2007 relating to the model advance appointment for protection under private seal .

2. Draft Legislation

- Report of Mr. Henri de Richemont, in the name of the Commission of Laws, n° 212 (2006-2007) ;
- Opinion of the Economic and Social Council on the report presented by Ms. Rose Boutaric in the name of the Section of Social Affairs and the Report of Ms. Rose Boutaric to the Economic and Social Council of 27 September 2006 ;
- Report made in the name of the Commission of Constitution Laws, Legislation and General Administration of the Republic on the draft law (No. 3462) concerning legal protection of adults by Mr. Emile Blessig – Deputy;
- <http://www.assemblee-nationale.fr/12/rapports/r3557.asp>;
- Opinion n°3556 of Mr. Laurent Wauquiez, Deputy, made in the name of the Commission of Cultural, Family and Social Affairs, delivered 18 January 2007 ;
- <http://www.assemblee-nationale.fr/12/rapports/r3556.asp>.

3. Jurisprudence

All of these cases may be found on the following site : <http://www.legifrance.gouv.fr>

Decisions	Relevant Passages
<p>Substantial Character of an Examination by a Medical Specialist Cass. 1^e civ., 18 January 1972 (n° 70-10.321) : Bull. civ. n° 21 p. 20.</p>	<p>« Since the observation, by a medical specialist, of the alteration of mental or physical faculties of the patient constitute a substantive formality that is a prerequisite to the imposition of a tutorship or of a curatorship, the person who is the subject of such a measure shall not be heard to base his or her objection to the measure on the fact that such formality was not complied with given that it is his or her own acts that result in the medical examination not having taken place ».</p>
<p><i>Sua sponte</i>¹⁴⁷ Action of the Judge Cass. 1^e civ., 25 January 1983 (n° 82-80.013) : Bull. civ. n° 33.</p>	<p>« It appears from the confirmed order that the judge responsible for tutorships acted <i>sua sponte</i> on the advice of a doctor, as the text cited allows ».</p>
<p>Tutorship with Respect to Social Benefits Cass. 1e civ., 18 April 1989 (n°87-14.563) : Bull. civ. I n° 156 p. 103.- Cass. 1e civ., 18 April 1989 (n°87-18.475), unpublished.</p>	<p>« As established by article L. 167-2 of the Social Security Code that allows the judge, when imposing a tutorship in civil law to maintain tutorship with respect to social benefits and to grant to a single person the guardianship of both civil interests and social benefits, the judge of tutorships has the ability to create co-existing regimes of tutorship of social benefits, specifically imposed with a view towards the re-adaptation of the person in question to a normal life and the civil regime incompetence, whose purpose is, as a general matter, to insure the protection of the person and the assets of the incapacitated person;</p> <p>The institution of a tutorship in civil law or of a curatorship article 512 of the Civil Code implies that the protected adult is not capable of using his or her revenues in accordance with his or her own best interests; it follows that the first of the alternative conditions imposed by article L. 167-1 of the Social Security Code on the initiation of a tutorship for social benefits is necessarily ».</p>
<p>Conditions for the Imposition of a “Curatorship” Cass. 1e civ., 25 October 1989 (n° 88-11.816), unpublished.</p>	<p>« The judges deciding on the substantive issues have determined that the alteration of Ms. X’s mental faculties was observed by the medical specialist that they appointed, however, they did not refer to such specialists’ conclusions in deciding that the safeguarding of the assets and the interests of Ms. X, required that she be counseled and assisted by means of a curatorship ».</p>

¹⁴⁷

A *sua sponte* action of the Judge is one in which the judge acts on his or her own initiative, without being requested to do so by another person or entity.

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<p>Factual Determination (of the Judge of the First Instance) of the Necessity of Being Represented in Actions of Day to Day Life Cass. 1^e civ., 4 April 1991 (n° 89-15.902) : Bull. civ. I n° 116 p. 78.</p>	<p>« The judgment provides that the evidence in the file, in particular the expert's report, whose justifications and conclusions he appropriated, that Mr. X presents a pre-existing psychotic state to which is added serious disturbances of thought and the perception of reality; that it is an appreciation of the facts, which is sovereign, that he deems that, as a result of these disturbances, Mr. X needs to be represented in a continuous manner in the acts of daily life ».</p>
<p>Reproduction of an Image of a Protected Adult Cass. 1^e civ., 24 February 1993 (n° 91-13.587) : Bull. civ. I n° 87 p. 57.</p>	<p>« The reproduction of images representing mentally handicapped persons in the privacy of their daily existence inside the establishments where they live without the authorization of their legal representatives constitutes, in and of itself, an illegal violation of their privacy. The case correctly holds that the manager of the tutorship cannot, alone, complete acts relating to the protected adult, such as consenting to the reproduction of images of such adult, and that the manager must, pursuant to article 500, par. 2 of the Civil Code, petition the judge responsible for tutorships who can either authorize these acts or, subject to any conditions that he may deem necessary, decide to constitute a complete tutorship ».</p>
<p>Coexistence of the civil law "tutorship"/ curatorship and the tutorship concerning social benefits Cass. 1^e civ., 6 April 1994 (n° 92-10.629) : Bull. Civ. I n° 138 p. 100.</p>	<p>« The institution of a civil law tutorship or curatorship under article 512 of the Civil Code that can co-exist with a tutorship concerning social benefits implies that the protected adult is incapable of using his or her revenues in his or her best interests and that such adult is in the situation provided for by the first of the alternative conditions to the imposition of a tutorship for social benefits pursuant to article L. 167-1 of the Social Security Code; that, in the present case, the decision states that Ms. X... was placed under a curatorship regime under Civil Code article 512; that, on this ground alone, the appeals court legally justified its holding ».</p>
<p>Lack of Effect of the Failure to Mention the Treating Physicians Opinion Cass. 1^e civ., 3 January 2006 (n° 03-16.783), unpublished.</p>	<p>« The fact that the judge of tutorships omitted to mention the opinion of the physician in his opinion does not render the procedure defective where it is clear from the findings of the trial court (<i>tribunal de grande instance</i>) that the opinion of the doctor who gave the medical certificate dated 27 December 2002 which appears in the file, was given prior to the decision of the judge responsible for tutorships ».</p>
<p>Criteria Justifying the Imposition of a "Curatorship" Cass. 1^e civ., 27 March 2007 (n° 05-12.633), unpublished.</p>	<p>« Ms X..., who has considerable real estate holdings, present here, according to the expert who examined her, has some slight disturbances in her reasoning, her judgment and of certain cognitive functions that alter only partially her mental faculties, and who has shown such extravagance that, notwithstanding her significant resources, might put her in a situation of dependence and difficulty »</p>

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<p>Presentation of a Petition for Adoption by a Protected Adult. Cass. 1^e civ., 4 June 2007 (n° 05-20.243) : Bull. civ. I, n°218 ; D. 2007.</p>	<p>« The presentation of a petition for adoption is an act whose nature implies strictly personal consent and cannot give rise to the representation of the adopter who is under a « tutorship »; nonetheless, the judge responsible for tutorships, upon advice of the treating physician, can authorize the protected adult to present, alone or with the assistance of a guardian or the person who serves that function, a petition for adoption ».</p>
<p>Criteria Justifying the Imposition of a “Curatorship Judgment of the <i>Tribunal de grande instance</i> of Soissons, 5 July 2007 (n° 07/00359)</p>	<p>« All of the elements together with the fact that Mr. Christophe CC... is still not abstinent, establish that he presents an alteration of his personal faculties which render him unable to protect his own interests, it is therefore appropriate to confirm the decision to place him under curatorship as he needs to be assisted, counseled and supervised in all of the acts of civil life, including in the receipt and use of his revenues, in order to insure the continuation of the business, and the organization of his daily life during and after the divorce procedure »</p>

C NATIONAL REPORT

1. Notion and Causes of Incapacity

1.1. Notion of Incapacity

The **Laws of 3 January 1968 and 5 March 2007** do not specifically define the notion of incapacity. Nonetheless, both laws identify, **through their various provisions the characteristics of capacity and incapacity.**

Under the Law of 3 January 1968, these provisions were found in articles 488 to 514 of the Civil Code, whereas under the system imposed by the Law of 5 March 2007 these provisions were those of 414 to 514 of the Civil Code.

The various regimes of incapacity are discussed below.¹⁴⁸

1.2. Causes of Incapacity

Pursuant to the Law of 3 January 1968, the causes of incapacity were discussed in **articles 488¹⁴⁹ and 490 of the Civil Code.** These articles identified several causes which could justify the imposition of

¹⁴⁸ See, in particular, question 3, p. 34.

¹⁴⁹ These provisions can be found in their entirety in Annex II with respect to articles of the [prior]Civil Code and Annex III for the new articles of the Civil Code.

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legal protective measures including the alteration of the mental or physical faculties of an individual as well as his or her prodigality¹⁵⁰, his or her intemperance¹⁵¹ or his or her idleness¹⁵².

The Law of 5 March 2007 eliminates prodigality, intemperance and idleness as causes of incapacity and **retains only the alteration of the mental or physical faculties as a justification of the imposition of a protection procedure**. It is **article 425** of the new Civil Code that regulates the causes of incapacity. This evolution is explained by the intention of the legislator to re-center the role of the judge responsible for tutorships around the legal protection of individuals and their assets¹⁵³, leaving social protections to the medico-social services. Moreover, it has been observed that individuals, in particular those evidencing prodigality, needed to be assisted and accompanied rather than having their legal capacity reduced and suffering an often disproportionate reduction of their rights.

1.3. Termination of the State of Incapacity

1.3.1. Pursuant to the Law of 3 January 1968

Legal safeguards could be terminated in three different ways under article 491-6 of the Civil Code: by a **declaration** indicating that the situation that had justified the imposition of legal safeguards no longer existed, by the **expiration of the legal duration of the measure imposed** or, finally, by striking the measure based on a **decision of the head of the Prosecution Department**.

A **tutorship** terminated when the protected person **recovered his or her personal faculties**. The release of the tutorship was ordered only upon presentation of a medical opinion attesting to the amelioration of the situation of the person in question (*Civil Code art. 507*).

A **curatorship** terminated in the same manner as a tutorship pursuant to article 509 of the Civil Code.

Publication of the termination of protection measures was regulated by articles 493-2 and 509 par. 2 of the Civil Code (cf. question 2.2 *infra* p. 34).

1.3.2. Pursuant to the Law of 5 March 2007

Judicial safeguards terminate either upon the expiration of the **term specified in** new article 439 par. 1 of the Civil Code, by the **decision of a judge** determining that the situation that give rise to the imposition of the measure no longer exists (*Civil Code, new art. 439 par. 2*), by a **declaration** made to the head of the Prosecution Department (District Attorney), or by striking the **medical declaration** that had originally justified the imposition of the measures by the head of the Prosecution Department (District Attorney). (*Civil Code, new art. 439 par. 3*).

A **tutorship** and a **curatorship** can be terminated in four different ways: by the **expiration of the term of the measure imposed**, by a **judgment of release of the imposition of the measure**, by the **death**

¹⁵⁰ Prodigality is defined as the dilapidation by an individual of his or her assets and revenues, thereby running the risk of finding him or herself in need or unable to fulfill his or her family obligations. See, e.g. Cass. 1^e civ., 27 March 2007 (n°05-12.633), unpublished.

¹⁵¹ Intemperance is the leading of a dissolute life, lacking in moderation. *Tribunal de grande instance de Soissons*, 5 July 2007 (n° 07/00359). An alcoholic can be placed under an aggravated curatorship.

¹⁵² Idleness means living without working, being inactive.

¹⁵³ Frédéric Arbellot, *Droit des tutelles ; Protection judiciaire et juridique des mineurs et des majeurs*, Dalloz, Paris, 2007.

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of the person concerned or, when such person **does not reside on French territory** thereby rendering the supervision and verification of the measure imposed more difficult (*Civil Code, new art. 443*).

With respect to publication, the rules are the same as those discussed in connection with question 2.2; new article 444 of the Civil Code governs the publication of the termination of the measure.

2. Legal Consequences of the Incapacity

2.1. Degrees of Incapacity and the Implications Thereof

2.1.1. *The Types of Incapacity*

In France, one generally distinguishes two types of incapacity: incapacity to benefit from certain rights and incapacity to exercise rights. **Incapacity to benefit** is defined as **the legal inability to benefit from a right**, to be distinguished from civil death by virtue of the fact that the inability is limited to certain rights, but which can exist either with respect to any other person (absolute incapacity to receive a gift which is imposed on certain convicted criminals) or only with respect to a relationship between two specific persons (relative incapacity, e.g. “a doctor cannot receive a gift from a patient that such doctor treated during his or her final illness.”¹⁵⁴

An incapacity to exercise is “**the legal inability of a person either to exercise his or her rights on his or her own behalf** (unless represented by another person, e.g. the minor who is represented by a tutor) or **to exercise such rights by him or herself** (i.e. without the assistance or the authorization of another person, e.g. the spendthrift assisted by a curator), that **can include all of the acts of daily life** (general incapacity) or **can affect only certain specific acts.**”¹⁵⁵ Any attempt to exercise such rights in the face of such incapacity is void.

The various **protection regimes of incapacitated persons fall under the category of incapacity to exercise**. There are three: legal safeguards, curatorship and tutorship. These regimes existed under the Law of 3 January 1968 and were continued under the Law of 5 March 2007.

2.1.2. *The Law of 3 January 1968*

An individual placed under a system of **legal safeguards** exercised his or her rights as if such individual were not entitled to protection however, any **legal acts concluded could be rescinded in the event that the protected person did not receive appropriate value, or the price reduced in the event it is excessive**, according to **article 491-2** of the Civil Code.

Under a **curatorship**, the protected person **could not enter into certain transactions alone, i.e. those transactions which required the authorization of the family council** under a tutorship, pursuant to **article 510** of the Civil Code. Moreover, **article 511** of the Civil Code provided that the judge responsible for tutorships could allow a protected person to conclude certain legal acts by his or herself or, *a contrario* specify other legal acts to be added to the list of transactions that the protected adult could not accomplish alone.

¹⁵⁴ Gérard CORNU, *Vocabulaire juridique*, Presses universitaires de France, Paris, 6^e édition, 2004.

¹⁵⁵ Op. cit., note n°45, p. 32.

Finally, pursuant to **article 501** of the Civil Code, a person placed under **tutorship** could **conclude the legal acts that the judge had enumerated, based on the advice of the individual's physician, either alone or with the assistance of his or her tutor** or other person filling that role.

2.1.3. The Law of 5 March 2007

The Law of 5 March 2007 carries over the provisions of the Law of 1968 concerning the actions that persons placed under **legal safeguards** (*Civil Code, new art. 435*) and under **curatorship** (*Civil Code, new arts. 467 and 471*) can undertake. With respect to **tutorship**, however, the reform brought with it a new element since, although the protected person continues to be represented by his or her tutor in all acts of daily life, such person nonetheless remains **free to take the actions that the law or custom allows** (*Civil Code, new art. 473*).

Moreover, the Law of 2007 provides, in its new **article 458** of the Civil Code, that the protected adult **can accomplish alone only those actions which imply consent which is strictly personal**, such as the recognition or adoption of a child¹⁵⁶. Finally, new **article 459** of the Civil Code, incorporates the jurisprudence of the *Cour de cassation* pursuant to which the protected person **can make all personal decisions concerning such person that his or her condition allows**¹⁵⁷.

2.2. Publication of the Status of Incapacity and of its Termination

Under the regime of the **Law of 3 January 1968**, articles 493-2 and 509 par 2 of the Civil Code provided for the publication of tutorship and curatorship measures whose imposition, modification or suppression was to be indicated **as a notation on the original birth certificate of the incapacitated adult**. These measures became effective with respect to third parties two months after this notation was made.

Under the regime of the **Law of 5 March 2007**, only one article regulating the publication of judicial protection measures exists: **new article 444 of the Civil Code that incorporates the prior provisions of that article**.

2.3 National System of Protection

The various methods of protection existing under the regime of the **Law of 3 January 1968** can be divided into three categories¹⁵⁸ :

- **Provisional measures**, *i.e.* legal safeguards.
- **Measures of assistance and Council**, including the simple curatorship, the curatorship of extended or restricted capacity and the aggravated curatorship.
- **Representation measures**, which included complete tutorship, legal administration under judicial supervisions, management under tutorship and mitigated tutorship.

¹⁵⁶ The *Cour de cassation* seems to have anticipated this provision in its jurisprudence. Accord, Cass. 1^e civ., 4 June 2007 (n° 05-20.243) : Bull. civ. I, n°218 ; D. 2007, regarding a request for adoption filed by an adult under tutorship.

¹⁵⁷ Accord Cass. 1^e civ., 24 February 1993 (n° 91-13.587) : Bull. civ. I n° 87 p. 57, concerning the approval given by a manager of tutorship for the dissemination of a film showing mentally handicapped persons without the authorization of the judge responsible for tutorships.

¹⁵⁸ Classification based on that made by Jacqueline Jean and Agnès Jean, *Mieux comprendre la tutelle et la curatelle*, Vuibert, Paris, 2^e édition, 2008, p. 13-14.

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In addition to these methods of protection, there was also the **social benefits tutorship**, which was also linked to a legal protection regime.

The **Law of 5 March 2007** significantly modified these categories, establishing two systems¹⁵⁹:

- A **contractual system** which includes the mandate for future protection and the personalized social accompaniment measures (MASP) ;
- A **judicial system** which includes **provisional measures**, *i.e.* legal safeguards, **measures of assistance and Council**, *i.e.* curatorship, reinforced curatorship, **representation measures**, *i.e.* two variations of tutorship: complete tutorship with family council and mitigated tutorship, and, finally, **judicial accompaniment measures** (MAJ).

3. Analysis of the National System of Protection

3.1. Legal Representation/Curatorship

3.1.1. *The Fundamental Characteristics of the Protection Regimes of the Law of 5 March 2007*

3.1.1.1. **The Mandate for Future Protection (Civil Code, new art. 477)**

This is the mandate pursuant to which **an individual can provide in advance for his or her protection** in the event that a decline in his or her personal faculties necessitates protection. The mandate can be written by parents for their minor child or their child who has reached the age of legal majority but for whom they assume material and emotional responsibility.

3.1.1.2. **Personalized Social Accompaniment Measures (MASP)**

This is a contract between the department, on the one hand, and on the other hand, a **person who has difficulty in managing, in his or her own interest, the social benefits that he or she receives** (*Code of Social and Family Actions, hereafter "CASF", new art. L. 271-1*).

There are two forms of personalized social accompaniment measures (« MASP ») : on the one hand, a **contract entered into between the department and the individual** (*CASF, new art. L. 271-2*) and, on the other, pursuant to a **decision of a judge upon request of the president of the general council**, in the event that the individual in question refuses to enter into the contract or does not respect its provisions (*CASF, new art. L. 271-5*).

3.1.1.3. **Legal Safeguards (Civil Code, new arts. 433 - 439)**

The first form of legal protection of an adult, this is the least constraining measure and that which deprives the person in question of the least amount of legal capacity. The person in question is simply the object of a protection. Such person, then, can **conclude by him or herself, the acts of daily life**, even if it would be possible **to bring diverse actions against such acts when not in the interest of the person protected**. These legal actions which could be brought are the action to nullify the act¹⁶⁰, the action for rescission for harm¹⁶¹ and the action for reduction in case of excess¹⁶².

¹⁵⁹ Op. cit., note n°45, p.32.

¹⁶⁰ The action to nullify aims to retroactively make any legal act that does not fulfill the conditions required for its formation disappear.

¹⁶¹ The action in rescission for harm aims to annul a legal act that harms the interests of the protected person.

3.1.1.4. Curatorship (Civil Code, new art. 440 *et seq.*)

The second form of legal protection of an incapacitated adult can be filed on behalf of individuals who, without having the need to be represented in all acts of daily life, need to be assisted or supervised. Thus, **the adult under curatorship can accomplish by him or herself the acts of daily life other than those acts that require the authorization of the family council or the judge of tutorships** under a tutorship regime, in other words, the most serious acts that can affect the assets of the protected person. This is a precautionary measure because the **curator intervenes only to consent to acts that result in the diminution of the protected person's assets.**

3.1.1.5. Reinforced Curatorship (Civil Code, new art. 472)

The reform of 2007 brought with it four major modifications¹⁶³ to the reinforced curatorship under the law of 1968:

- The imposition of a reinforced curatorship is possible at any time ;
- The curator is required to open an account in the name of the protected adult ;
- The curator's powers of representation have been extended and,
- The modalities of the supervision of management have been specified and more closely resemble those for a tutor.

This is a serious measure as it implies that the **person protected no longer has access to his or her revenues.** Nonetheless, the person subject to the curatorship remains the ultimate decision maker: he or she must be informed of and participate in all decisions that concern such person. This is insured by the requirement of a co-signature.

3.1.1.6. Tutorship

The third form of legal protection measures, this is the most serious and most restricted form since **the protected adult will be represented by a tutor in all acts of daily life, with the exception of those that law and custom authorize the protected person to make alone.** This is the normal regime.

In addition to this normal regime, there are **two other forms of tutorship.** On the one hand, a **complete tutorship with a family council** (*Civil Code, new art. 456*) is proclaimed if the assets of the protected adult so require and if there are enough people in the family to constitute such a council. On the other hand, a **modified tutorship** (*Civil Code, new art. 473*) applies to the situation in which the judge authorizes the adult under tutorship to execute certain specified acts on his or her own.

3.1.1.7. Judicial Accompaniment Measures (MAJ)

The Law of 5 March 2007 eliminated tutorship for social benefits, and replaced it with judicial accompaniment measures. This is in contradiction with the traditional jurisprudence of the *Cour de cassation* concerning the coexistence of social protection measures and legal protection measures¹⁶⁴. Moreover, in several decisions, the first Civil Chamber opined that a tutorship or a curatorship could coexist with a social benefits tutorship. Nonetheless, today, article 495-1 clearly establishes that

¹⁶² The action for reduction in case of excess aims to bring the excessive legal act back to an obligation which is proportional to the actual means of the protected person.

¹⁶³ Report n°212 made to the Senate in the 2006-2007 ordinary session by Henri de RICHEMONT p. 179.

¹⁶⁴ Cass., 1^e civ., 18 April 1989 (n°87-14.563) : Bull. civ. I n° 156 p. 103. - Cass., 1^e civ., 18 April 1989 (n°87-18.475) unpublished. - Cass., 1^e civ., 6 April 1994, (n° 92-10.629) : Bull. civ. I n° 138 p. 100.

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judicial accompaniment measures **cannot be declared if legal protection has already been provided for** and if legal protection measures have been declared, judicial accompaniment measures are automatically terminated.

This measure is defined in new article 495 of the Civil Code and will be pronounced with respect to a **person who endangers his or her interests without necessarily suffering an alteration of his or her personality and for whom personalized social accompaniment measures have failed**. Its aim is to help the individual concerned to regain his or her autonomy in the management of his or her resources. It is an action which is both protective, in that it covers the management of social benefits of the person concerned, and educational, since its purpose is to help the person concerned to become autonomous or to regain his or her autonomy.

3.1.2. Conditions Necessary for the Submission of Individuals to this Protection Regime

Under the regime imposed by the **Law of 3 January 1968**, it was necessary to obtain a **medical certificate** in order to initiate a legal protection measure (*Civil Code, art. 490*). Nonetheless, the *Cour de cassation* has specified that the evaluation of medical opinions fall within the exclusive competence of the judge of the first instance¹⁶⁵. Moreover, there is no procedural error where the judge's opinion does not refer to the opinion of the doctor in charge, provided that such opinion appears in the file¹⁶⁶. That said, **the medical opinion allowed the judge to rule on the limits of the legal protection to be extended to the person in question**¹⁶⁷.

The **Law of 5 March 2007** adopts the same principle, *i.e.* that the judge must have a **medical certificate** attesting to the alteration of the personal faculties of the person in question in order to impose a legal protection measure (*Civil Code, new art. 431*). Moreover, the judge must determine the protection regime applicable to the incapacitated adult in accordance with such alteration of personal faculties. In so doing, the judge respects the principle of necessity in deciding whether to impose a protection regime as well as the principle of proportionality in the choice of the legal regime to be imposed (*Civil Code, new art. 428*).

3.2. Period of Protection

3.2.1. Under the System of the Law of 3 January 1968

This law included no provisions defining either a **minimum or a maximum term** for a **curatorship** or a **tutorship**. Nonetheless, **article 490-3 of the Civil Code aimed at preventing the measures from being uselessly prolonged** by allowing the head of the Prosecution Department and the judge responsible for tutorships to visit, or have someone visit, the protected person at any time¹⁶⁸.

With respect to **legal safeguards**, they were to be declared for a period of two months, renewable for successive six month periods (*Code of Civil Procedure, art. 1237*¹⁶⁹).

¹⁶⁵ Cass., 1^e civ., 4 April 1991 (n° 89-15.902) : Bull. civ. I n° 116 p. 78.

¹⁶⁶ Cass. 1^e civ., 3 January 2006 (n° 03-16.783) unpublished.

¹⁶⁷ Cass. 1^e civ., 25 October 1989 (n° 88-11.816) unpublished.

¹⁶⁸ Pierre Voirin, Gilles Goubeaux, *Droit civil; Personnes, famille, personnes protégées, biens, obligations, sûretés*, Tome 1, LGDJ, Paris, 2007, p. 233 § 518.

¹⁶⁹ Art. 1237 of the Civil Procedure Code: « La mesure de sauvegarde de justice se pèrime par deux mois à compter de la déclaration ; les mesures de renouvellement par six mois à compter des déclarations à cette fin. »

3.2.2. Under the System of the Law of 5 March 2007

No minimum term is provided, however, there is a **maximum term**.

Legal safeguards cannot exceed a maximum of **2 years** (one year, renewable once), pursuant to new article 439 par. 1 of the Civil Code.

The maximum term for **tutorships** and for **curatorships** is **10 years** (5 years, renewable once) pursuant to new articles 441 and 442 of the Civil Code. New article 442 par. 2 of the Civil Code, however, provides for the **case where the protected person suffers from irreversible physical or intellectual** based on current scientific knowledge. In this case, **the judge may, via a specifically motivated decision in accordance with a concurring medical opinion, pronounce protective measures for a longer period of time.**

3.3. Financing of Protection Measures

3.3.1. Under the System of the Law of 3 January 1968

The Law of 3 January 1968 reforming the law on incapacitated adults and the decree n°74-930 of 6 November 1974 concerning the organization of **State tutorship** and **State curatorship** provided that the costs related thereto could be covered in three different ways. First, they could be paid exclusively out of **payments made from the protected adult's resources**, **second**, they could be covered exclusively by **public funds** or, finally, by funds resulting from a combination of these two sources of financing.

In the case of **tutorships**, the **costs were financed by the protected adult**, in a variable percentage.

With respect to **tutorship for social benefits** (TPSA), remuneration was **entirely the responsibility of public entities** (State, department, family allocations, social security...).

The financing of State tutorships and curatorships was assured by protected adults in proportion to their capacity to contribute, the State paying the difference between this amount and a price ceiling set at a national level.

3.3.2. Under the System of the Law of 5 March 2007

State tutorships and tutorships for social benefits (TPSA) were replaced by **legal appointees for the protection of adults**.

Provisions concerning the remuneration of persons responsible for protection are found:

- In new articles 419 and 420 of the Civil Code;
- In new articles L. 471-5, L. 361-1, L. 472-3 and L472-9 of the Code of Social Actions and Families and
- By a decree of the Council of State concerning the modalities of application of the financial provisions of the Code of Social Actions and Families.¹⁷⁰

In principal, those who are responsible for the protection of adults **provide services under the legal protection measures without charge** (*Civil Code, new art. 419 par. 1*)

¹⁷⁰

As of the date of this report no such decree had as yet been issued.

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The foregoing notwithstanding, depending on the value of the assets managed or the difficulties in exercising the protection measures, the judge responsible for tutorships or the family council can authorize and set the value of **an indemnity to be paid to** the person responsible for the protection, which indemnity shall be **paid by the person protected** (*Civil Code, new article 419 par. 1*)

The **costs of measures exercised** by judicial appointees for the protection of adults and ordered by the relevant judicial authority, be it within the context of legal safeguards, curatorship, tutorship or measures of legal accompaniment, is **to be paid in whole or in part, by the person protected depending on his or her resources** (*Code of Social Action and Families, new art. L. 471-5*).

If the person protected cannot insure the financing of the protection measures, **the costs relating to the exercise of these measures are paid out of public funds** in accordance with the methods of calculation common to all judicial appointees for the protection of adults, taking into account the conditions of execution of the measures, regardless of the source of financing. These methods will be established by a Decree of the Council of State.

Exceptionally, a **supplementary indemnity** may be granted to a judicial appointee for the protection of adults **by a judge or by the family council**, on the advice of the head of the Prosecution Department, if particularly long and complex proceedings are necessary and if the remuneration is insufficient. This indemnity is to be paid by the person protected (*Civil Code, new art. 419 par. 4*).

The **mandate for future protection is exercised without charge**, unless otherwise stipulated.

4. Persons/Authorities Establishing the System of Protection

4.1. Request for Protective Measures

Under the system of the **Law of 3 January 1968**, the persons who could request the imposition of legal protective measures were the following (*Civil Code, art. 493*) :

- The adult concerned
- The physician
- The spouse
- The curator to request tutorship
- A member of the adult's family
- The head of the Prosecution Department
- The judge responsible for tutorships who may act *sua sponte*¹⁷¹

Since the entry in force of the **Law of 5 March 2007**, such persons are (*Civil Code, new art. 430*):

- the person to be protected
- the spouse
- the partner under a Civil Pact of Solidarity (this possibility is new)
- the « concubine »¹⁷² (this possibility is new)

¹⁷¹ Cass., 1^e civ., 25 January 1983, n° 82-80.013, Bulletin des arrêts Cour de Cassation Chambre civile 1 N. 33

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- a relative
- any person who has close and stable ties with the person (this possibility is new and doubtless includes the protected person's doctor)
- the person who exercises a legal protective measure
- the head of the Prosecution Department

Thus, since the entry into force of the law of 2007, **the judge of tutorships can no longer act *sua sponte***. Indeed, as the Minister of Justice has indicated: « *sua sponte* initiation of proceedings, which currently represents more than one-half of cases initiated, is at the source of numerous abuses »¹⁷³ which is why the reform has eliminated this possibility.

4.2. Preparation of the File

Under the system of the Law of 3 January 1968 as well as that of the Law of 5 March 2007, when the judge of tutorships has been requested to impose a legal protective measure several steps will be followed. Article 1251 par. 3¹⁷⁴ of the Code of Civil Procedure provides that **the case will be investigated and decided in chambers upon advice of the Department of the Public Prosecutor**.

4.2.1. Examination of the Person to be Protected

Under the regime of the Law of 3 January 1968 (Civil Code, art. 493-1) and under the regime of the Law of 5 March 2007 (Civil Code, new art. 431) the examination of the person to be protected is performed by a medical specialist selected from a list established by the head of the Prosecution Department.

In a decision dated 18 January 1972,¹⁷⁵ the *Cour de cassation* held that, **if the incapacitated adult refused to undergo this examination, he or she was barred from raising the omission of this substantive formality in an appeal against the imposition of a measure**. The law of 2007 being silent on this subject, one can legitimately deduce that this jurisprudential solution will continue to apply.

4.2.2. Hearing of the Person to be Protected

Under the regime of the Law of 3 January 1968, article 1246¹⁷⁶ of the New Code of Civil Procedure provided for an obligatory hearing of the person to be protected, unless his or her health was such that such a hearing might cause harm to such person (Code of Civil Procedure, art. 1247¹⁷⁷).

¹⁷² As defined under art. 515-8 of the Civil Code, *i.e.* an unmarried partner with whom the protected person has cohabitated in a stable and continuous relationship.

¹⁷³ Josette Pons, *Réforme de la protection juridique des majeurs*, http://www.josettepons.fr/article.php?id_article=237

¹⁷⁴ Art. 1251 par.3 of the Civil Procedure Code: « L'affaire est instruite et jugée en chambre du conseil, après avis du ministère public. »

¹⁷⁵ Cass., 1^e civ., 18 January 1972, n° 70-10.321, Bulletin des arrêts Cour de Cassation Chambre civile 1 N. 21 P. 20.

¹⁷⁶ Art. 1246 of the Civil Procedure Code: « Le juge des tutelles entend la personne à protéger et lui donne connaissance de la procédure engagée. L'audition peut avoir lieu au siège du tribunal, au lieu de l'habitation, dans l'établissement de traitement ou en tout autre lieu approprié.

Le juge peut, s'il l'estime opportun, procéder à cette audition en présence du médecin traitant et, éventuellement, d'autres personnes.

Le procureur de la République et le conseil de la personne à protéger sont informés de la date et du lieu de l'audition ; ils peuvent y assister.

Il est dressé procès-verbal de l'audition. »

The law of 2007 contains the same provisions but includes them directly in the Civil Code (*Code Civil*, new art. 432).

4.2.3. **Communication of the File to the Department of the Public Prosecutor**

Under the systems of both the laws of 1968 and of 2007, article 1250¹⁷⁸ of the Code of Civil Procedure provides that the file must be transferred to the head of the Prosecution Department at least **one month prior to the date of the hearing** in order that the Prosecutor can deliver his opinion no later than two weeks prior to the beginning of the hearing.

4.2.4. **Requests for Additional Information**

Under both laws, it is within the discretion of the judge of tutorships to request additional information on his own initiative or upon demand of the parties or the Public Prosecutor (*Code of Civil Procedure*, art. 1248¹⁷⁹).

4.2.5. **Meeting of the Family Council**

Under both laws, the judge will decide whether it is useful to hold a family council in order to obtain its advice concerning the state of mental health of the person to be protected (*Code of Civil Procedure*, art. 1249¹⁸⁰).

« The judge of tutorships shall hear the person to be protected and shall advise him or her of the procedure initiated. The hearing can take place at the courthouse, in the treating institution or in any other appropriate place.

The judge can, if he or she deems desirable, proceed with this hearing in the presence of the treating physician and, possibly, other persons as well.

The Head of the Prosecution Department and the Council of the person to be protected shall be informed of the date and place of the hearing; they are entitled to be present at the hearing.

Minutes of the hearing shall be kept.”

¹⁷⁷ Art. 1247 of the Civil Procedure Code: « Si l'audition de la personne à protéger est de nature à porter préjudice à sa santé, le juge peut, par disposition motivée, sur l'avis du médecin, décider qu'il n'y a pas lieu d'y procéder. Il en avise le procureur de la République.

Par la même décision, il ordonne que connaissance de la procédure engagée sera donnée à la personne à protéger dans une forme appropriée à son état.

Il est fait mention au dossier de la tutelle de l'exécution de cette décision. »

¹⁷⁸ Art. 1250 of the Code of Civil Procedure: « Le dossier est transmis au procureur de la République un mois avant la date fixée pour l'audience. Quinze jours avant cette date, le procureur de la République le renvoie au greffe avec son avis écrit. Ces délais peuvent être réduits par le juge en cas d'urgence.

Le juge fait connaître au requérant et à la personne à protéger, si elle lui paraît en état de recevoir utilement cette notification, ou à leurs conseils, qu'ils pourront consulter le dossier au greffe jusqu'à la veille de l'audience. »

¹⁷⁹ Art. 1248 of the Code of Civil Procedure: « Le juge peut, soit d'office, soit à la requête des parties ou du ministère public, ordonner toute mesure d'information. Il peut notamment faire procéder à une enquête sociale ou à des constatations par telle personne de son choix.

Il entend lui-même, autant qu'il est possible, les parents, alliés et amis de la personne à protéger. »

¹⁸⁰ Art. 1249 of the Code of Civil Procedure: « Le juge des tutelles peut, avant de statuer, réunir un conseil de famille formé selon le mode que détermine le code civil pour la tutelle des mineurs.

Le conseil de famille est appelé à donner son avis sur l'état de la personne pour laquelle est demandée l'ouverture d'une tutelle, ainsi que sur l'opportunité d'un régime de protection.

L'avis du conseil de famille ne lie pas le juge ; il n'est susceptible d'aucun recours. »

4.3. Declaration of Incapacity

4.3.1. Generalities

Under the laws of both 1968 and 2007, the **judge of tutorships** is competent, after having examined the medical certificates, to declare the protected person to be incapacitated, with respect to both a **tutorship** and a **curatorship**. With respect to **legal safeguards**, both the **judge of tutorships** and the **head of the Prosecution Department** are competent. Similarly, it is up to the judge of tutorships to choose the appropriate protection regime.

Pursuant to the reform of 2007, the role of the **Public Prosecutor** has been extended since it is now his or her mission to **oversee the protective measures for minors and adults** in addition to the oversight exercised by the judge of tutorships (*Civil Code, new art. 416*).

4.3.2. Pursuant to the Law of 3 January 1968

Legal safeguards were the result either of a **declaration made to the head of the Prosecution Department** or the placing by the **judge of tutorships** of the person to be protected under such a regime for the duration of the proceedings to impose a curatorship or a tutorship, pursuant to article 491-1 of the Civil Code.

Under article 493 of the Civil Code, the **judge of tutorships** declared the imposition of a **tutorship**. The imposition of a **curatorship** was also declared by the judge of tutorships (*Civil Code, art. 509* referring to the applicable provisions relating to tutorship).

4.3.3. Under the System of the Law of 5 March 2007

Legal safeguards can be the result of a decision of the **judge** (*Civil Code, new art. 433*) or of a **declaration made to the Head of the Prosecution Department** (*Civil Code, new art. 434*).

The imposition of a **tutorship** and of a **curatorship** is decided by the **judge of tutorships**, as one may deduce from new article 444 of the Civil Code relating to the publication of the declaration of imposition of such measures.

4.4. Exercise of the Protective Measure

4.4.1. Persons Designated to Exercise Protective Measures.

4.4.1.1. Under the Law of 3 January 1968

The person placed under **legal safeguards** was not represented. Nonetheless, pursuant to article 491-3 of the Civil Code, if the protected person had appointed someone to administer his or her assets either before or after being placed under legal safeguards, such appointment the **appointee's mandate** would have necessarily been performed **In the absence of such a mandate, the rules of Benevolent Intervention in Another's Affairs** applied (*Civil Code., art. 491-4*).

Under the **curatorship** regime, according to article 509-1 of the Civil Code, the curator was, in principle, **the spouse of the protected person provided that they still co-habited and that there was no reason to oppose this principle**. In the absence of these conditions, the curator was appointed by the judge.

The **tutorship** regime was similar to that of the curatorship since the **spouse of the person to be protected was the tutor**, provided that the person and the spouse still co-habited and that there was no reason that this not be the case. (*Civil Code, art. 496*). **If this was not the case, the tutor was a**

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relative of the person to be protected (*Civil Code, art. 497*). Moreover, in the case of the **management of the tutorship**, the manager of the tutorship could be **either a person belonging to the administrative personnel of the treating institution of the protected person or a special administrator** (*Civil Code, art. 499*).

4.4.1.2. Under the Law of 5 March 2007

The person placed under **legal safeguards** can be represented by a **special appointee for the accomplishment of certain legal acts defined by the judge** (*Civil Code, new art. 437*). Otherwise, the rules are quite similar to those under the law of 1968 concerning the existence of an appointee and the application of the rules of Benevolent Intervention in Another's Affairs (*Civil Code, new art. 436*).

With respect to **curatorship** and **tutorship**, the rules are the same and the selection of the person to be responsible for the protection of the adult is made on the basis of a **hierarchy of criteria**. The first preference is that the person appointed to manage the measure imposed be **the person chosen by the adult in a mandate for future protection**. (*Civil Code, new art. 448*). In the absence of a choice indicated by the person to be protected, the **judge will choose the spouse, the registered partner or the, the partner under a Civil Pact of Solidarity or the concubine** to be the tutor or curator (*Civil Code, new art. 449*). If no such person exists, the judge will choose a **relative or a person having close and stable ties with the adult in question** (*Civil Code, new art. 449*). If no such person is available, the judge will designate a **person appearing on the list of legal appointees for the protection of adults** (*Civil Code, new art. 450*).

Finally, pursuant to new article 451 of the Civil Code, **if the protected person is institutionalized and it is in his or her interest**, the judge can name as curator or tutor a **person or a service of the medical establishment in question who appears on the list of legal appointees for the protection of adults**.

4.4.2. The Powers of Persons Executing Protection Measures.

4.4.2.1. Legal Safeguards

As we have seen¹⁸¹, the person placed under legal safeguards **retains the ability to exercise his or her rights and is not represented by another person in the exercise of such rights** (*Civil Code, new art. 435 par. 1*). Only a protected person has standing to bring an action to unwind a contractual act taken by such protected person ; his or her heirs have standing only upon the death of the protected person (*Civil Code, new art. 435 par. 3*).

Nonetheless, **those persons who can request the imposition of a tutorship or of a curatorship must take actions to protect the patrimony of the person placed under legal safeguards** (*Civil Code, new art. 436*).

In addition, the judge can designate a **special appointee to take the actions necessary to protect the patrimony** of the protected person (*Civil Code, new art. 437*). This appointee may even be requested to protect the person in question within the framework of the rules applicable to tutorships and curatorships. (*Civil Code, new art. 438*).

4.4.2.2. The Curatorship

The curatorship regime is not a regime of representation but a **regime of assistance**. The curator accompanies the ward in the accomplishment of those **acts that would require the authorization of the family council or the judge of tutorships** under a tutorship, in other words, the alienation of an asset in the majority of cases (*Civil Code, new art. 467*).

Moreover, the ward requires the curator's assistance **in order to use the capital that he or she has received and to go to law/** (*Civil Code, new art. 468*).

¹⁸¹ See section 3.1.1.3, *supra* p. 35 of the document.

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The curator cannot represent the protected person in the event such person refuses to take an action that is necessary to preserve such person's interests (*Civil Code, new art. 469*). In this case, the curator must request authorization from the judge to accomplish the action.

4.4.2.3. The Tutorship

Title XII of Book 1 of the Civil Code is dedicated entirely to the management of the patrimony of an adult placed under tutorship. A tutorship being a **regime of representation**, the tutor represents the protected person in the management of his or her patrimony. According to the plan contained in the Civil Code, there are:

- acts that the tutor can complete alone
- acts that the tutor can complete with the authorization of the family council or the judge of tutorships, and
- acts that the tutor cannot complete

4.4.2.3.1. Category 1 : the **acts that the tutor can complete alone** (*Civil Code, new arts. 503 and 504*)

The tutor can complete **act to preserve and administer** the patrimony of the protected person, can **go to law** to defend the patrimonial rights of the incapacitated adult and can **enter into a lease**.

4.4.2.3.2. Category 2 :the **acts that the tutor can complete with authorization** (*Civil Code, new arts. 505 to 508*)

After having received the authorization from the family council or the judge of tutorships, the tutor can complete the alienation of an asset of the protected person, compound or compromise a debt or come to terms with creditors on the protected person's behalf, undertake a partition, accept an inheritance and purchase the assets of the protected person or rent or lease them if it is in the person's interest to do so

4.4.2.3.3. Category 3 : **acts not permitted to the tutor** (*Civil Code, new art. 509*)

The tutor cannot **alienate the rights or assets of the protected without remuneration, acquire a debt or a right that a third party has over the incapacitated adult, run a business or practice a liberal profession in the name of the protected person or purchase the assets of such person**, except where specifically provided under new article 508 of the Civil Code.

Nota bene : the tutor must prepare an inventory of the assets of the protected person within three months of the imposition of the tutorship (*Civil Code, new art. 503*) and must prepare management accounts every year (*Civil Code, new art. 510*) which will then be verified by the chief clerk of the relevant trial court (*Civil Code, new art. 511*).

4.5. Rights of Appeal

With respect to appeals against the decisions of the judge of tutorships, distinctions must be made depending on the subject matter of the decision

4.5.1. Appeal Against a Decision to Impose a Tutorship or Curatorship

Under the regime of the Law of 3 January 1968, only those person who are entitled to act according to article 493 of the Civil Code may bring an appeal against a decision to impose a tutorship or a curatorship.¹⁸²

According to the Law of 5 March 2007, although article 1256 of the Civil Procedure Code relating to appeals against a decision of the judge of tutorships is still applicable, it does not specify which persons are authorized to. Indeed, **new article 430 of the Civil Code** which is based on article 493 of the former Civil Code **enumerates the persons who are authorized to request the imposition of protective measures but does not indicate whether they are authorized to appeal such a decision.**

4.5.2. Appeal Against Decisions Refusing to Impose a Tutorship or a Curatorship

Under both the laws of 1968 and 2007, only the protected person can appeal a decision of the judge of tutorships that refuses to impose protective measures.¹⁸³

4.5.3. Appeal Against Decisions Relating to the Organization of the Operation of the Protection Regime

Under both the laws of 1968 and 2007, appeals against decisions relating to the organization or operation of the protection regime are regulated by articles 1214 and 1215 of the Code of Civil Procedure. As such, **any person who is affected by the decision** may appeal.¹⁸⁴

4.5.4. Form of the Appeal

Article 1256 of the Code of Civil Procedure provides that the appeal against a decision imposing or refusing to impose a protective measure can take **two forms**. Either it takes the form of a **demand signed by a lawyer** in compliance with the provisions of article 1216 of the New Code of Civil Procedure¹⁸⁵, or it takes the form of a **letter with summary arguments supporting the request and signed by one of the persons authorized to act.**

¹⁸² Art. 1256 C. Proc. Civ. : « Le recours contre la décision qui ouvre la tutelle ou refuse d'en donner mainlevée est formé, soit conformément aux dispositions de l'article 1216, soit par lettre sommairement motivée et signée par l'une des personnes ayant qualité pour agir en vertu de l'article 493 du code civil ; cette lettre est remise, ou adressée sous pli recommandé avec demande d'avis de réception, au greffe du tribunal d'instance.

Quelle que soit la forme du recours, le ministère d'avocat n'est pas obligatoire pour la poursuite de l'instance. »

¹⁸³ Art. 1255 C. Proc. Civ. : « Le recours contre la décision qui refuse d'ouvrir la tutelle n'est ouvert qu'au requérant. »

¹⁸⁴ Art. 1214 C. Proc. Civ. : « La décision du juge est notifiée, à la diligence de celui-ci, dans les trois jours, au requérant, au tuteur, à l'administrateur légal et à tous ceux dont elle modifie les droits ou les charges s'ils ne sont pas présents.

En outre, dans le cas de l'article 389-5 du code civil, elle est notifiée au conjoint qui n'a pas consenti à l'acte et, dans le cas de l'article 468 du même code, au subrogé-tuteur. »

Art. 1215 C. Proc. Civ. : « Dans tous les cas, la décision du juge peut être frappée de recours dans les quinze jours devant le tribunal de grande instance. Le recours est ouvert aux personnes mentionnées à l'article précédent à compter de la notification ou, si elles étaient présentes, du prononcé de la décision.

A moins que l'exécution provisoire n'ait été ordonnée, le délai de recours et le recours lui-même exercé dans le délai suspendent l'exécution de la décision. »

¹⁸⁵ Art. 1216 C. Proc. Civ. : « Le recours est formé par une requête signée par un avocat et remise, ou adressée par lettre recommandée, au greffe du tribunal d'instance.

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With respect to **appeals against decisions relating to the organization** or operation of the protective measure, they must take the form of a **demand signed by a lawyer**.

4.5.5. Time to File and Jurisdiction

The appeal must be made within **two weeks of the handing down of the decision, the notification or service of the decision**. This is an ordinary time period

Under the Law of 3 January 1968, the appeal is brought before the *tribunal de grande instance (trial court)*.

Under the Law of 5 March 2007, executory regulations (décret d'application) should be enacted indicating whether the matter should be brought before the trial court (*tribunal de grande instance*) or the court of appeals.

D Bibliography

Books

ARBELLOT FREDERIC, *Droit des tutelles ; Protection judiciaire et juridique des mineurs et des majeurs*, Dalloz, Paris, 2^e édition, 2007.

ARBELLOT FREDERIC, *Droit des tutelles ; Protection judiciaire et juridique des mineurs et des majeurs*, Dalloz, Paris, 1^e édition, 2003.

CAPITANT HENRI, TERRE FRANÇOIS, LEQUETTE YVES, *Les grands arrêts de la jurisprudence civile*, Dalloz, Paris, 11^e édition, 2000.

CORNU GERARD, Association Henri Capitant, *Vocabulaire juridique*, PUF, Paris, 6^e édition, 2004.

JEAN JACQUELINE ET JEAN AGNES, *Mieux comprendre la tutelle et la curatelle*, Vuibert, Paris, 2^e édition, 2008.

MALAURIE PHILIPPE, *Les personnes, les incapacités*, Droit civil, Defrénois, Paris, 3^e édition, 2007.

VOIRIN PIERRE ET GOUBEAUX GILLES, *Droit civil ; Personnes, famille, personnes protégées, biens, obligations, sûretés*, Tome 1, L.G.D.J, Paris, 31^e édition, 2007.

Articles

FOSSIER THIERRY ET PECAUT-RIVOLIER LAURENCE, « Réforme des tutelles : la protection des intérêts patrimoniaux », *Revue Droit de la Famille*, 2007, p. 167.

FOSSIER THIERRY ET VERHEYDE THIERRY, « Réforme des tutelles : la protection de la personne », *Revue Droit de la Famille*, 2007, p. 160.

FOSSIER THIERRY, VERHEYDE THIERRY ET PECAUT-RIVOLIER LAURENCE, « Réforme des tutelles : la mesure d'accompagnement judiciaire et les mesures administratives d'accompagnement social personnalisé », *Revue Droit de la Famille*, 2007, p. 175.

Dans les huit jours de la remise de la requête ou de sa réception, le secrétaire de la juridiction transmet le dossier au président du tribunal de grande instance. »

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HAUSER JEAN, « Réforme des tutelles. Les acteurs de la protection : la famille et l'incapable majeur », *Revue Droit de la Famille*, 2007, p. 198.

PELLIER JEAN-DENIS, « Le mandat de protection future issu de la loi du 5 mars 2007 portant réforme de la protection juridique des majeurs », *Les Petites Affiches*, 25 avril 2007, n°83, p. 4.

PONS JOSETTE, « Réforme de la protection juridique des majeurs », http://www.josettepons.fr/article.php?id_article=237.

Section III

Germany

Summary

The German rules on adults with limited mental capacity have undergone several changes and were modified in 2005.

The German system follows an approach which tends to respect, to a maximum the will of the protected adult. Individuals lacking mental or gravely lacking physical capacities can be assisted by guardians (*Betreuer*). The decision to appoint a guardian must be based on an expert opinion regarding the capacity of the concerned adult and indicating precisely to what extent a need for care can be ascertained. The scope of functions of the guardian is limited to concern regarding the life of the adult, for which the adult absolutely requires assistance.

The law provides for different degrees of guardianship (guardianship and guardianship with authorization requirement, the latter being limited to specific concerns/ *Betreuung und Betreuung mit Einwilligungsvorbehalt*) which shall permit an adequate intervention of a carer to protect the personal rights of the individual and guarantee subsidiarity and proportionality.

The free will of the protected adult is illustrated at different levels. Firstly, adults can take preventive measures during states of lucidity, preparing durable powers of attorney which must be respected in case of loss of capacity. Those DPAs equally bind the guardian. Secondly, concerned adults have great freedom to recommend a guardian for appointment.

Guardianship is primarily envisaged by the competent court on request of the concerned adult. Third parties can only suggest guardianship: without the request of the concerned adult, the appointment of a guardian is subject to an *ex officio* court decision. The law provides for a right of the concerned adult to appeal against the guardian's appointment. The appointment order has to clearly enumerate the scope of functions of the guardian, which cannot be enlarged without a new formal court decision. During the period of protection, which has to be re-appraised at least once after seven years at the latest, the protected adult remains as autonomous as possible.

Specific legislation provides for rules on particular topics, such as the remuneration of guardians or the procedural questions concerning their appointment as well as other proceedings related to guardianship.

German law contains provisions on the conflict of laws in the field of legal / contractual capacity and guardianship as well as specific norms protecting the public interest and third parties where incapable adults engage in legal relations. In the field of protective measures, Germany follows a mixed system: reference is made to the law of the place at which the relevant guardianship structure was constituted or terminated, but optionally to the *lex fori* in case of foreign nationals having their habitual residence in Germany. Temporary measures and the content of protective measures are subject to German law. The international competence of German courts is based principally on the adult's habitual residence. German judges nevertheless have the power to decide not to exercise their jurisdiction, if that would advance the interests of international coordination of jurisdiction. Recognition of foreign decisions in the domain of guardianship is subject to general rules of recognition. The interpretation of some of them has however, been the subject of controversy in the field of protection of adults. As Germany was one of the first States Party to the Hague Convention on the International Protection of Adults (signed in 2003, ratified in 2007), the system described here will undergo several changes in the near future.

A Introduction

The German rules on adults with limited mental capacity have undergone **several changes**.

The law in force **until 31 December 1991** provided for a very **extensive system** of protection for adults comparable to the protection of minors. The established system constituted an extreme intervention into the personal rights of the concerned adult, as he was incapacitated and put under complete tutorship (*Vormundschaft*). Furthermore the persons taking decisions on behalf of incapable adults were appointed *ex officio*, and each of them was in charge of some 200 cases. A personal care system could, thus, not be established.

The *Betreuungsgesetz (BtG)* of 12 September 1990 (BGBl. I 2002) redressed that situation, changing the structure of the German concept of protection of adults. The changes were introduced in the fourth book of the BGB in a separate chapter (**sec. 1896 ss BGB**). With effect from **1 January 1992**, the ‘extensive incapacitation’ (*Entmündigung*) has been substituted by the **less intrusive concept of guardianship (*Betreuung*)**. In this system, the accent is less on the incapacity of the adults and more on the need for and purposes for which care must necessarily be provided.

Improvements to this legal situation were achieved by adopting the first *Betreuungsrechtsänderungsgesetz (BtÄndG)*,¹⁸⁶ aimed at **correcting deficiencies of the 1990 reform** and targeted at cost reduction, promotion of durable powers of attorney (DPA) for healthcare (*Vorsorgevollmacht*) and the delimitation of the guardian’s (*Betreuer*) scope of action. It introduced the concept of so-called “**legal guardianship**” (*rechtliche Betreuung*), which exempts the concerned adult from psychosocial assistance and focuses on purely legal aspects of guardianship. This was largely intended to preserve the independence of concerned adults.

As the problem of high costs for protective measures persisted, the **recent second *Betreuungsrechtsänderungsgesetz of 2005***¹⁸⁷ introduced new rules on the remuneration of guardians (*Betreuer*) in the so-called Act on the remuneration of tutors and guardians (*Vormünder- und Betreuervergütungsgesetz (VBVG)*).¹⁸⁸ It equally **strengthened the role of the adult’s free will**, which is one of the basic elements of the whole guardianship system. The amendment also modified the rules on groups of practitioners and associations who can take functions of guardians.

Statistical data

The annexes contain several statistics providing very detailed information about the number of adults under protection (*Betreuungen*), annual appointment orders, appointed guardians according to status (family members, guardians from associations or authorities, etc.), guardian associations on the German territory, changes to guardianship (including extensions or limitations on powers), protective measures terminated, guardianships with authorisation requirement (*Betreuung mit Einwilligungsvorbehalt*), judicial requests for authorisation of medical treatment, authorised treatments, authorised sterilisations, authorised placements in specialised institutions and similar measures, registered lasting powers of attorney (*Vorsorgevollmachten*), and judicial requests concerning registered powers of attorney. Additionally, statistics on the financing of protective measures and the number and financing of custodianships for proceedings are compiled.

¹⁸⁶ Erstes Gesetz zur Änderung des Betreuungsrechts (1. Betreuungsrechtsänderungsgesetz, 1. BtRÄndG) vom 25.6.1998 (BGBl. I 1580).

¹⁸⁷ Zweites Gesetz zur Änderung des Betreuungsrechts (2. *Betreuungsrechtsänderungsgesetz*, 2. BtRÄndG) vom 21. April 2005 (BGBl. I 1073).

¹⁸⁸ Vormünder- und Betreuervergütungsgesetz vom 21. April 2005 (BGBl. I S. 1073, 1076).

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Unfortunately, the statistics do not specify how many cases with cross-border implications have been treated. The number of nationals from other EU States under guardianship in Germany is unknown, as well as the number of Germans under protection in other EU-States.

On the basis of statistics compiled at the end of each of the last five years, the report demonstrates a steady and stable increase of adults under protection on the German territory (82.217.837 inhabitants):

2003 (31.12.)	2004 (31.12.)	2005 (31.12.)	2006 (31.12.)	2007 (31.12.)
<i>Number of Guardianships</i>	<i>Number of Guardianships</i>	<i>Number of Guardianships</i>	<i>Number of Guardianships</i>	<i>Number of Guardianships</i>
1.100.626	1.157.819	1.198.373	1.226.638	1.242.180
<i>Protected adults per 1000 inhabitants</i>	<i>Protected adults per 1000 inhabitants</i>	<i>Protected adults per 1000 inhabitants</i>	<i>Protected adults per 1000 inhabitants</i>	<i>Protected adults per 1000 inhabitants</i>
13,34	14,03	14,54	14,90	15,11
<i>Increase in % compared to last year per 1000 inhabitants</i>	<i>Increase in % compared to last year per 1000 inhabitants</i>	<i>Increase in % compared to last year per 1000 inhabitants</i>	<i>Increase in % compared to last year per 1000 inhabitants</i>	<i>Increase in % compared to last year per 1000 inhabitants</i>
5, 08%	5, 20 %	3, 50%	2, 36%	1, 27%
<i>Guardianships with authorisation requirement (Einwilligungsvorbehalt)</i>	<i>Guardianships with authorisation requirement (Einwilligungsvorbehalt)</i>	<i>Guardianships with authorisation requirement (Einwilligungsvorbehalt)</i>	<i>Guardianships with authorisation requirement (Einwilligungsvorbehalt)</i>	<i>Guardianships with authorisation requirement (Einwilligungsvorbehalt)</i>
9.810	10.843	11.652	11.371	12.050
<i>Registered enduring powers of attorney</i>	<i>Registered enduring powers of attorney</i>	<i>Registered enduring powers of attorney</i>	<i>Registered enduring powers of attorney</i>	<i>Registered enduring powers of attorney</i>
<i>No information</i>	<i>No information</i>	325.637	472.965	642.532

For more detailed information see “Annexes Germany”.

B Listing

1. Legislation enacted

- Bürgerliches Gesetzbuch (BGB) in der Fassung der Bekanntmachung vom 2. Januar 2002, (BGBl. I S. 42, ber. S. 2909 und BGBl. 2003 I S. 738, zuletzt geändert durch Art. 1 Kindeswohl-MaßnahmenG vom 4. 7. 2008 (BGBl. I S. 1188) - Abschnitt 3 Vormundschaft, Rechtliche Betreuung, Pflegschaft (sec. 1773ff, 1896 ff, 1909 ff BGB)
- Erstes Gesetz zur Änderung des Betreuungsrechts (1. Betreuungsrechtsänderungsgesetz, 1. BtRÄndG) vom 25.6.1998 (BGBl. I 1580).
- Zweites Gesetz zur Änderung des Betreuungsrechts (2. Betreuungsrechtsänderungsgesetz, 2. BtRÄndG) vom 21. April 2005, BGBl. I 1073
- Gesetz über die Vergütung von Berufsvormündern (Berufsvormündervergütungsgesetz – BVormVG, BGBl. I S. 1580, 1586) vom 25. Juni 1998, zuletzt geändert durch Art. 12 Zweites Betreuungsrechts-ÄndG vom 21. 4. 2005 (BGBl. I S. 1073)
- Gesetz zur Änderung der Vorschriften über die Anfechtung der Vaterschaft und das Umgangsrecht von Bezugspersonen des Kindes, zur Registrierung von Vorsorgeverfügungen und zur Einführung von Vordrucken für die Vergütung von Berufsbetreuern (VatAnfVuaÄndG)) vom 24.4. 2004 (BGBl I 2004, 598)
- Vormünder- und Betreuervergütungsgesetz vom 21. April 2005 (BGBl. I S. 1073, 1076).
- Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit (RGBl. S. 771), 20.5.1898, zuletzt geändert am 4. 7. 2008 (BGBl. I S. 1188)

2. Draft legislation

Concerning the reform of 2005:

- Beschlussempfehlung und Bericht des Rechtsausschusses (6. Ausschuss) zu dem Gesetzentwurf des Bundesrates – Drucksache 15/2494 – (Drucksache 15/4874, 16. 02. 2005)
- Stellungnahme der Bundesregierung zu dem Gesetzentwurf des Bundesrates eines Gesetzes zur Änderung des Betreuungsrechts - BR-Drs. 865/03 (Beschluss)
- Gesetzentwurf des Bundesrates Entwurf eines...Gesetzes zur Änderung des Betreuungsrechts (Betreuungsrechtsänderungsgesetz –...BtÄndG) Drucksache 15/2494, 12. 02. 2004

3. Jurisprudence

Court Decision	Relevant Passages
<p>Suggestion of the concerned adult Sec. 1897 IV 1 BGB BayObLG, 14. 6. 1996 - 3Z BR 125/96, Rpfleger 1997, 19</p>	<p>The court has to give priority to the proposal of the concerned adult to appoint a specific individual as guardian, irrespective of whether he or she has legal / contractual capacity. In principle, the court has to conform to the will of the protected adult.</p> <p>The question of whether the appointment of the suggested guardian runs counter to the interests of the adult has to be considered in view of all the circumstances of the case. Only if the result of the consideration clearly disfavours the appointment can another guardian be nominated.</p>
<p>Appeal of relatives against the order of guardianship; suggestion of the concerned adult Sec. 20 I, 69g I 57 I Nr. 9 FGG; Sec.1896 I 2, 1897 IV and V BGB OLG Düsseldorf, 7. 10. 1997 - 25 Wx 55/97, FGPrax 1998, 53</p>	<p>The right to appeal against an order of guardianship on request of the concerned adult is to be considered pursuant to sec. 20 FGG, not sec. 69g para. 1 FGG (which extends the scope of persons having a right to appeal, but only applies to <i>ex officio</i> appointments).</p> <p>During the selection process of a guardian, the will of the concerned adult has to be taken into account even in case of legal / contractual incapacity.</p>
<p>Suggestion of the concerned adult and availability of more suitable guardians BayObLG , 26.3.1998 - 4Z BR 33/98 -</p>	<p>If the adult, who shall be protected suggests a suitable person as guardian, the fact that other persons might be even more suitable does not justify the conclusion that the appointment of the suggested guardian runs counter to the interests of the concerned adult.</p>
<p>Choice and control of a parental guardian (sec. 1908i para. 2 BGB) BayObLG, 3.12.1997 - 3Z BR 364/97-</p>	<p>If the court wishes to appoint as guardian of the adult's relatives mentioned in sec. 1908i II S. 2 BGB, it also has to examine, whether eventual dangers for the welfare of the adult can be prevented by means of supervision or directives.</p>
<p>DPA for patrimony matters and guardianship Sec.1896 II BGB OLG Düsseldorf, 6. 12. 1996 - 25 Wx 60/96, Rpfleger 1997, 379</p>	<p>A power of attorney, covering all personal and patrimonial concerns, is to be considered a general mandate, anticipating the protection of the principal. The holder of the power of attorney may not take decisions beyond legally relevant matters such as those relating to interventions into the physical integrity or the personal liberty of the principal.</p>

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<p>Exercise of the guardianship by a representative Sec. 1902, 1908e, 1835, 1836 BGB LG Frankenthal, Beschluß vom 21. 1. 1997 - 1 T 569/96, Rpfleger 1997, 380</p>	<p>The court of protection has to make a formal decision with respect to the appointment and dismissal of a guardian. Internal discussions and agreements with the court and implicit approval of activity of a guardian, who has not been formally appointed, cannot replace the order of appointment. Only the formally appointed guardian can be the representative of the protected individual.</p>
<p>Conditions for an order of exhaustive guardianship (Totalbetreuung) BGB §§ 1908d III, 1896 II; BWahIG 3 13 Nr. 2 BayObLG, Beschluß vom 12. 3. 1997 - 3 Z BR 47/97</p>	<p>The scope of functions of the guardian cannot be extended if the adult concerned is capable of managing a part of his affairs on his own.</p> <p>If an adult is “assisted” by the employees of an asylum, this assistance does not replace guardianship.</p> <p>An order of exhaustive guardianship cannot be based on the fact that the adult concerned would be incapable of exercising voting rights; the danger of manipulation in the voting process must be prevented otherwise, if exhaustive guardianship is not generally justified for other reasons.</p>
<p>Appointment of a guardian to prevent further indebtedness BGB §§ 1896, 1903 BayObLG, 4. 2. 1997 - 3 Z BR 8/97, FamRZ 1997, 902</p>	<p>The appointment of a guardian for concerns relating to patrimony may be necessary in order to prevent further indebtedness of the adult concerned, even if the latter has no financial means.</p> <p>In such cases, a guardianship order with an authorisation requirement is generally justified.</p>
<p>Medication with a neuroleptikum against the will of the protected adult Sec.1906 IV, 1904 BGB OLG Hamm, 8. 1. 1996 - 15 W 389/96</p>	<p>Medication is only to be considered a measure covered by sec. 1906 IV BGB (measures similar to placement measures) if it is specifically used to prevent an adult from leaving his domicile.</p> <p>The application of sec. 1904 BGB does not require that the adult give his consent to the administration of the medication. The only requirement is that the adult must be capable of understanding the significance of the measure. He need not have legal / contractual capacity.</p> <p>If the individual cannot consent and there is a danger that the medication might produce severe side effects described in sec. 1904 BGB, the court of protection, based on considerations relating to the adult’s welfare and the principle of proportionality, must decide whether or not to grant permission for the administration of the medication.</p>

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<p>Medication with a neuroleptikum against the will of the protected adult Sec. 1906 I n°. 2, II, IV BGB BGH, 11. 10. 2000 - XII ZB 69/00</p>	<p>Regular forced medication with a neuroleptikum against the will of the protected adult is not to be equated to placement measures and therefore cannot be authorised according to sec. 1906 II and I n° 2 or according to sec. 1906 IV BGB.</p>
<p>Conditions of forced sterilisation Sec. 1905 I 1 Nr. 3 BGB BayObLG, 15. 1. 1997 - 3Z BR 281/96</p>	<p>Sterilisation is not justified where there is only a theoretical danger of pregnancy. Without concrete indications that without preventive measures, a pregnancy cannot be avoided, this measure must not be taken.</p>
<p>Forced administration of medication OLG Celle, 17 W 37/05, 10.8.2005</p>	<p>Forced administration of medication cannot be authorised if its administration runs counter to the clear will of the adult concerned (which can, for example be expressed in a DPA for healthcare).</p>
<p>Protection of the rights of the adult concerned Sec. 1896 I S. 1 BGB; Sec. 12, 68b FGG BayObLG –24. 8. 2001 - 3Z BR 246/01</p>	<p>To prevent disproportional interventions concerning the rights of an adult, the diagnosis of a mental illness or handicap requires a concrete opinion of a psychiatrist and explanations regarding the consequences of the illness in terms of the adult’s cognitive capacity and free will.</p>
<p>Consent of the guardian against the will of the protected person, who is unable to give legally binding consent Sec. 1906 Abs. 1 Nr. 2 BGB BGH, 1. 2. 2006 - XII ZB 236/05</p>	<p>As the adult’s representative, the guardian can principally consent to medical treatment – even against the natural will of an adult who is legally incapable. In cases of authorised placement under sec. 1906 para. 1 nr. 2 BGB, the tasks of the guardian exceptionally include the right to take decisions against the will of the protected adult (see also BGHZ 145, 297ss.).</p>
<p>Refusal of lifesaving measures Sec. 1896, 1901, 1904 BGB BGH, 17. 3. 2003 - XII ZB 2/03</p>	<p>Lifesaving measures for an adult incapable of expressing his or her natural will must not be taken if refusal has been previously expressed, for example in a DPA for healthcare (<i>Patientenverfügung</i>). In moments when an individual is no longer capable of taking decisions, human dignity requires the respect for decisions taken by the person during periods of lucidity. Where the declared will of the patient cannot be determined, the assumed will, established on the basis of the patient’s lifetime decisions, convictions and values, is determinative. A guardian has to act within the parameters of sec. 1901 BGB in order to meet the needs and desires of the protected adult. Refusal of consent to lifesaving measures will depend, however, on prior court decisions. The competence of the court of protection does not stem from sec. 1904 BGB, (relating to medical measures with perilous side-effects), but from the fundamental principles of the law on guardianship.</p>

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<p>Limitations on the right to determine the residence of the protected adult Sec. 1901 I 2 BGB OLG Köln, 26. 2. 1996 - 16 Wx 47/96, NJW-RR 1997, 451</p>	<p>A guardian, appointed for the “determination of the residence of the concerned adult” does not have complete freedom to choose the residence of the protected adult (for example, in a special asylum). He must ensure that the wishes of the adult do not conflict with his interests.</p>
<p>Gratis transfer of land property by the guardian Sec. 1804, 1908 i II 1 BGB BayObLG, 24. 5. 1996 - 3Z BR 104/96, NJW-RR 1997, 452</p>	<p>If a guardian transfers property to future heirs of the protected adult, this transfer is invalid and cannot be authorised unless it fulfils a moral duty. A moral duty to transfer property in the lifetime of the protected adult cannot, however, be based on a tax-savings argument.</p>
<p>Importance of the wishes of the protected adult with respect to the sale of real property Sec. 1821 I Nr. 1; 1908i I BGB BayObLG, 13. 8. 1997 - 3Z BR 234/97 BtPrax 1998, 30 FamRZ 1998, 455</p>	<p>In contracting for the sale of land owned by the protected adult, the guardian must respect the wishes of the protected adult provided that they are reasonable and do not run counter to the welfare of the adult.</p>
<p>Conditions of mail control Sec. 1896 IV BGB BayObLG, 9. 10. 1996 - 3Z BR 249/96, FGPrax 1997, 26 FamRZ 1997, 244</p>	<p>The ability of the guardian to open and / or stop correspondence by mail addressed to the protected adult is only acceptable if the guardian would otherwise be prevented from fulfilling his functions for the benefit of the protected adult.</p>
<p>Remuneration of a professional guardian in case of a protected adult without financial means Sec. 1836 II 2, 1836a BGB; sec. 1 I BVormVG BGH, 31. 8. 2000 - XII ZB 217/99</p>	<p>The amount of remuneration for a professional guardian must only correspond to the requirements set out at sec. 1 BVormVG if the protected adult has no financial means, and the remuneration has, therefore, to be paid by the treasury. Amounts indicated by law reveal criteria and constitute minimum amounts. They are, as a rule, reasonable and must only be exceeded if the difficulties of the particular circumstance of guardianship so justify.</p>
<p>Remuneration of non-professional guardians BGB § 1836 I BayObLG, Beschluß v. 16. 3. 1998 - 3Z BR 373/97 BayObLGZ 1998, 65</p>	<p>The criteria developed for the remuneration of professional guardians cannot be applied for non-professional guardians. The remuneration is primarily calculated on the basis of the guardian’s performances and not on the basis of the value of the supervised patrimony. Time spent is an important factor and must, therefore, be taken into account. The remuneration cannot be based primarily on hourly rates. The reasonable remuneration for a professional guardian can be a standard of comparison, but will be granted to non-professional guardians in exceptional cases only.</p>

<p>Qualification of the guardian BayObLG, Beschluss vom 8.11.2000 - 3 ZBR 22/00</p>	<p>Guardians of adults disposing of financial means can claim remuneration in excess of the hourly rates indicated in sec. 1 para. 1 BVormVG, provided that the particularities of the specific guardianship (in terms of agreement as to time spent and specific qualifications of the guardian) clearly exceed the average complexity of a guardianship based on the same functions and that the remuneration according to hourly rates would clearly be insufficient.</p>
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C NATIONAL REPORT

1. Notion and causes of incapacity

1.1. Notion of incapacity

The rules on mentally disordered adults **place less of an accent on the notion of “mental incapacity”** and its definition and more of an accent on **factors causing mental incapacity and the different domains for which protection becomes necessary.**¹⁸⁹

Need of guardianship is expressed through an enumeration of certain causes which lead to the conclusion that assistance is required, it is further **expressed in relation to specific matters**. For instance, if an adult, due to mental illness or a physical, mental or emotional disability, is either temporarily or permanently unable to take care of his affairs on his own, the guardianship court can, upon his request or *ex officio* appoint a guardian for him (sec. 1896 para. 1 subpara. 1 BGB).¹⁹⁰ The appointment of a guardian does not automatically imply a loss of legal capacity. That a person can be in need of care does not necessarily mean that he or she is incapable of dealing with any matter relating to legal actions. **Free will** of the adult is very important: if it is proven that he is in a state that allows him to exercise his free will and he rejects any measure of care, this must be accepted. Only where free will is not present can guardianship be envisaged despite refusal.¹⁹¹

The rules in the sec. 1896 ss BGB distinguish between the **need** for the care of persons with limited capacity and the **purposes** for which this care must necessarily be provided. A need for total care in every aspect of life is the exception and is limited to cases of important mental handicap or a very advanced state of dementia due to age.

1.2. Causes of incapacity

The diagnosis of mental incapacity is the first step towards initiating protective measures. The principal condition for the institution of any protective measure is either **mental illness** of the adult (*psychische Krankheit*) or **physical, mental or emotional disability** (*körperliche, geistige oder*

¹⁸⁹ BT-Drs. 11/4528, p. 57.

¹⁹⁰ Sec. 1896 para. 1 subpara.1 BGB: „Kann ein Volljähriger auf Grund einer psychischen Krankheit oder einer körperlichen, geistigen oder seelischen Behinderung seine Angelegenheiten ganz oder teilweise nicht besorgen, so bestellt das Vormundschaftsgericht auf seinen Antrag oder von Amts wegen für ihn einen Betreuer.“

¹⁹¹ Palandt/Diederichsen, Bürgerliches Gesetzbuch, 67. Aufl. 2008, § 1896,, n. 4

seelische Behinderung), see sec. 1896 para. 1 BGB. **Temporary illness**, for example, acute psychosis or reactive depression, **is sufficient**.

Three major causes of incapacity can be distinguished as either permanent or temporary:

- mental illness,
- mental or emotional handicap or
- physical disability.

Mental illnesses must be confirmed by a psychiatrist.¹⁹² They must be particularly severe: autism, stubbornness due to age, and organic psychosis corresponding to the age of the adult are not sufficient.¹⁹³ The following, however, are confirmed mental illnesses: Down's syndrome, endogenous psychosis, troubles resulting from cerebral injuries or other diseases, psychosis in relation to drug or alcohol addiction, psychopathic troubles and paranoia.¹⁹⁴ Alcohol and drug addictions alone are not considered to be disabilities of the mind.

Examples of **mental or emotional disabilities** include defects of intelligence¹⁹⁵ and dementia.¹⁹⁶ Social handicaps such as unsocial behaviour and criminality are outside the scope of mental and emotional disabilities. Moreover, the mental illness or disability must have caused the adult's inability to manage his own affairs.¹⁹⁷

In cases of **physical disability**, the defect must be **important** and must hinder the adult's ability to manage his own affairs. In these cases, guardianship is rare. Blindness and deafness do not fall within the scope of physical disabilities, as adults affected by these conditions may be assisted by health services or other social services. The **free will** of the adult is of particular importance and guardianship cannot be established without **request** by the disabled adult (sec. 1896 para. 1 subpara. 3 BGB).

1.3. Termination of the status of incapacity

It is not possible to appoint a permanent guardian. In any case of guardianship, the law provides for **regular control and new assessments of capacity**. Every **seven years** the appointment of a guardian must be re-examined according to sec. 69 para. 1 nr. 5 and 69 i para. 6 subpara.1 FGG. If the requirements of the first appointment are still being met, the guardianship will continue; it will otherwise end. If this control is circumvented, the guardianship is not automatically cancelled but persists illegally.¹⁹⁸

A special control mechanism is also foreseen for **guardianship with authorisation requirement** (see under point 3.2.): the authorisation requirement is subject to control within a certain timeframe (sec. 69 para. 1 Nr. 5 FGG) and must be nullified or limited *ex officio* if conditions for the guardianship no longer exist.

¹⁹² BayObLG NJW 92, 2100

¹⁹³ BayObLG FamRZ 95, 1082 ; BayObLG FamRZ 02, 494.

¹⁹⁴ See Palandt/Diederichsen, cit., § 1896 n. 5 quoting pertinent jurisprudence.

¹⁹⁵ BayObLG FamRZ 94, 318.

¹⁹⁶ BT-Drs. 11/4528, p. 116.

¹⁹⁷ BaObLG NJWE-FER 01, 151.

¹⁹⁸ Palandt/Diederichsen, Bürgerliches Gesetzbuch, 67. Aufl. 2008, § 1896 n. 24, LG Ffm FamRZ 03, 185.

Apart from this formal, regular control, guardianship must be cancelled according to sec. 1908 d para. 1 BGB, if the **conditions for its imposition cease to exist in whole or for certain tasks** that the carer undertakes for the incapable adult. To the extent that the adult regains his capacity to make decisions, the guardian loses his power to act on his behalf. If the carer has been appointed by request on the part of the protected person, guardianship will be terminated on the latter's request except where conditions for an *ex officio* imposition of guardianship are met (see sec. 1908d para. 2 BGB). However, legal consequences relating to changes in conditions for guardianship are subject to a judicial scrutiny.¹⁹⁹

Guardianship ends automatically **with the death** of the incapable adult. Only some tasks, such as drafting of final reports, etc. must still be fulfilled.

2. Legal consequences of incapacity

2.1. Degrees of incapacity and the legal consequences thereof

Since guardianship, according to German law is, as a whole, a limited concept of care for a person's concerns, the distinction between different formal **degrees of incapacity** become **less pertinent** and have been abolished from the law.²⁰⁰ The **aim has been to preserve the adult's autonomy** as far as possible, as well as the **public interest**. Not everybody shall, upon his request, be assisted by a carer: only those who are in real need of care. As mentioned above, the need for care is not considered as imperative in cases of physical handicap, and guardianship is then only available on request from the concerned adult and granted only where no other assistance will suffice.

Furthermore, in any case of incapacity, a person must only be received into guardianship for **those areas in which guardianship is absolutely necessary**. Guardianship is not considered necessary where the concerns of the incapable adult can be managed by a representative or be resolved with other assistance.

Where a **danger for the concerns of the incapable adult** exists as a result of his inability to understand the nature and consequences of legally binding decisions, only then can the court provide for a **stricter regime** of guardianship, combined with an obligation on the adult to request **authorisation of his carer for every action** falling within the scope of the carer's tasks (§ 1903 BGB – *Einwilligungsvorbehalt*).

2.2. Publication of the status of incapacity and of its termination

The notification, to the guardian, of the **appointment order** and of the order constituting guardianship with authorisation requirement ensures the entry into force of the guardianship. The following must also be notified:

- **The adult concerned**

According to sec. 69a para. 1 FGG the adult must be given notice of the decisions taken on his behalf, except if this would entail considerable negative consequences for his health as proven by a medical certificate;

¹⁹⁹ BT-Drs. 11/4528, p. 155.

²⁰⁰ BT-Drs. 11/4528, p. 57.

The competent authority

The competent authority must be notified of the decision to appoint a guardian and the order constituting a guardianship with authorisation requirement (sec. 69a para. 2 FGG).

Vorsorgevollmachten, which have been established by the adult during periods of lucidity, are registered in a **central register of the federal chamber of public notaries** (*Zentrales Vorsorgeregister der Bundesnotarkammer*).

2.3. National system of protection

For incapable adults, the German system only provides for **one system** of protection – guardianship (*Betreuung*) – distinguished from those systems destined to minors (tutorship – *Vormundschaft*, curatorship - *Pflegschaft*). Guardianship can achieve **different degrees of intensity** of protection depending on the mental status of the concerned adult and the dangers that his independent actions would constitute.

Apart from these measures, which have to be imposed by the court, German law allows private measures to be taken in respect of future needs of protection by means of powers of attorney (*Vorsorgevollmachten*, *Betreuungsverfügungen* or *Patientenverfügungen*).²⁰¹ These options permit either the nomination of a representative whom the concerned adult has himself chosen and who is appointed with responsibility for the personal and/or patrimonial concerns of the relevant adult (*Vorsorgevollmacht*) or are either limited to the anticipated nomination of a future guardian (*Betreuungsverfügung*) or to decisions previously taken in respect of medical treatment (*Patientenverfügung*).

3. Analysis of the national system of protection

3.1. Types of protective measures

3.1.1. Guardianship (*Betreuung*)

Guardianship encompasses every action **necessary** to care for the affairs of the protected adult. It can be **exhaustive** (*Totalbetreuung*) or **limited** (*Teilbetreuung*).

The guardian is in principles limited to **legally relevant concerns**. Any personal problem can be addressed and discussions or psychosocial contacts can be maintained; however, this will remain within the discretion of the guardian, as such care is no longer remunerated under the law in force.

The **will** of the protected adult is very important. It is in principle **on the incapable adult's own request** that a guardian is appointed except where this must be decided *ex officio* due to the circumstances of the situation. The will of the incapable adult is also decisive for the question of **who should be nominated** as a guardian: the incapable adult can formulate his wishes in a prior writing, and his will to nominate a certain person as his carer must be respected during the appointment procedure unless this would be contrary to his interests.

²⁰¹

See in this regard Rudolf/Bitter, *Vorsorgevollmacht*, p. 58 ss; Palandt/Diederichsen vor § 1896 Rn. 8 ss and Guttenberger, Till, *Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen*, 2004, p. 16s.

According to sec. 1896 BGB, the tasks of the guardian are subject to many limitations. Consequently, once it has been established that an adult is in need of care,²⁰² the **extent** to which the guardian must care for the concerns of the adult must also be determined. This procedure is subject to a strict requirement of **subsidiarity**.²⁰³ The court determines, for each individual case, the tasks for which the guardian is responsible. There is no rule in law pertaining to the scope of these tasks.

First, it must be determined for which tasks assistance is really required, which calls for a verification of every single concern.²⁰⁴ A complete guardianship cannot be envisaged if assistance is only needed for certain affairs. A **preventive guardianship** is only possible where the need for such a measure can be foreseen and immediate action is required once the predicted dangers are about to arise.²⁰⁵

Second, guardianship is not possible where **other assistance** can be provided; where the adult can care for himself; or as far as he has regulated his situation by a power of attorney.

When the guardian cares for the concerns of the adult, he must always take into consideration the **welfare of the protected adult**. This includes respecting him and giving him the possibility to live his life according to his own desires and ideals.²⁰⁶ Major concerns which can be entrusted to the guardian are as follows:

- care for **health matters** including medical treatment, hospitalisation, the realisation of DPAs for healthcare, etc. (with restrictions, as sometimes court approval is requested, see sec. 1904 BGB). Case-law indicates, however, that the free will of the adult concerned is very important in these matters. § 1906 BGB indicates that any measure, depriving the adult from his personal liberty is subject to very strict conditions (see below);
- care for **personal matters** including determination of the place of residence (*Aufenthaltsbestimmung*), etc.; control of mail and phone contact (though this requires a special court order (sec. 1896, para. 4 BGB));
- care for the **patrimony** of the adult, which includes the administration of bank accounts, bill payments and insurance contracts and requests for public assistance (social security etc.);
- care for **living conditions** of the adult, which includes the conclusion of tenancy agreements (with restrictions, see § 1907 BGB described below);
- **representation** within the entrusted scope of duties (sec. 1902 BGB), which includes representation before judicial and administrative bodies, mandates to lawyers, etc.

The individual retains authority to make decisions for which he continues to have capacity.

Within the scope of his duties, the guardian must facilitate the **improvement of the protected adult's condition** and the prevention of health deterioration (sec. 1901 para. 4 BGB).

If the guardian realises that certain circumstances entail a **limitation of the competences** attributed to him, he must report this to the competent court. He is also responsible for the respect of the

²⁰² See above point 1.1. and 1.2.

²⁰³ BT-Drs. 11/4528, p. 52.

²⁰⁴ BayObLG FamRZ 98, 921; 99, 1612.

²⁰⁵ BayObLG FamRZ 94, 1059, 1060.

²⁰⁶ Sec. 1901 para. 2, subpara. 2 BGB.

subsidiarity principle. When he realises that guardianship is no longer necessary or can be further limited, he must act (sec. 1901 para. 5 BGB).

Certain concerns cannot be dealt with by the carer alone:

- Several actions relating to the **administration of the adult's patrimony** (sec. 1803, 1804, 1811, 1816ff, 1820ff BGB (e.g. transactions concerning real property, certain financial assets, successions, businesses etc.);
- **Examinations or operations constituting a danger to life** for the protected adult (require be subject to approval by a competent court (sec. 1904 BGB));
- **Sterilisation** (is subject to strict conditions and the consent of the competent court (sec. 1904 BGB));
- **Placement in an institution depriving the protected adult from his liberty** (only possible under very strict conditions and in case of grave danger for the concerned adult, requires authorisation from the competent court (sec. 1906 BGB)); and
- **Termination of tenancy agreements** (requires the competent court's approval).

3.1.2. Guardianship with authorisation requirement (*Betreuung mit Einwilligungsvorbehalt*)

A system which acknowledges the remaining capacities of an incapable adult and limits his rights only in case of utmost necessity must nevertheless provide for protection of the adult when he can endanger himself. He must be prevented from taking actions with legally binding force if he is incapable of understanding the nature of these actions. Moreover, contradictory legal acts undertaken by the guardian and the incapable adult in parallel must be avoided.²⁰⁷ The status of the adult is then comparable to that of an adolescent with limited legal capacity.

Consequently, in cases presenting an **important danger for the incapable adult or for his patrimony**, the law provides for a **guardianship system with authorisation requirement**. This means, that the incapable adult needs the authorisation of his guardian for every legally binding act falling within the guardian's scope of responsibilities (sec. 1903 para. 1 BGB).

A prerequisite for the imposition of guardianship with authorisation requirement is that there be an **important danger for the person or his patrimony**. A danger is not only present, where the adult completely lacks legal capacity, but also where he is tempted to harm himself while acting. The law deliberately does not associate the authorisation requirement with the notion of "legal capacity"²⁰⁸. Rather, it focuses on the presence of a concrete danger, which is assessed on a case by case basis. Accordingly, the authorisation requirement does not lead to an automatic loss of legal capacity.²⁰⁹ The danger is important if the damage which could be caused by an action of the protected adult is not merely minimal (e.g. major debts, or the danger that every legal decision taken by the guardian or the concerned adult will be revoked, causing patrimonial damage).²¹⁰

The authorisation requirement has to be decided upon by the **court**. As this form of guardianship sensibly affects the rights of the individual, the **concerned adult and the competent authority have**

²⁰⁷ BT-Drs. 11/4528, p. 58 ss and 136.

²⁰⁸ Legal capacity finds a regulation in sec. 104 ss and 106 ss BGB.

²⁰⁹ Palandt/Diederichsen, cit. § 1903 n. 6.

²¹⁰ BayObLG FamRZ 97, 902.

to be heard and an **opinion** has to be prepared (sec. 68, 68a, 68b FGG). This form of guardianship can be limited in time and restricted to specific actions (e.g. “renovation of a house” or “court proceedings”).²¹¹

According to sec.1903 para. 2 BGB, the authorisation requirement must not include decisions **in the personal sphere (family matters and succession)**: legally binding decisions concerning marriage, partnerships or wills and decisions which can, pursuant to the BGB, also be undertaken by persons having limited legal capacity do not depend on the carer’s authorisation. Para. 3 of this section is based on the same reasoning: any legally binding decision, which can only be advantageous to the concerned adult, can be taken without prior consent of the guardian.

In practice, the guardian must **approve all decisions falling within the scope of decisions requiring authorisation**.

3.1.3. Content of the appointment order

The decision to appoint a guardian and the order of guardianship with authorisation requirement (sec. 69 FGG) must be motivated and must contain the following:

1. the identity of the protected adult,
2. in case of appointment of a guardian, the identity of
 - a) the guardian and
 - b) his specific tasks,
3. in case of appointment of a guardian from a guardianship association or a competent authority
 - a) the identification of the association’s or the authority’s guardian,
 - b) the name of the association and the authority,
4. in case of an order of a guardianship with authorisation requirement, the specific tasks for which guardian approval is necessary,
5. the latest date on which the court must decide as to the extension or cancellation of protective measures (not later than seven years from the date of the pronouncement of the order),
6. instructions on the right to appeal.

3.2. Period of protection

There is **no minimum or maximum protection period for normal guardianship**. As has been said above, the placement under guardianship must be re-examined every seven years. Apart from that, it can end at any time when the court finds that the conditions for guardianship no longer exist.

It has equally been noted that a special control mechanism is foreseen for guardianship with authorisation requirement which is subject to control within a certain timeframe (sec. 69 para. 1 Nr.

²¹¹ Palandt, cit., § 1903, n. 9 ; BayObLG FamRZ 95, 1517.

5 FGG) and has to be annulled or limited *ex officio*, if its conditions no longer persist. This form of guardianship will regularly be limited in time (see above point 3.2.).

Guardians are subject to several control mechanism; the competent court has to control the activity of the guardian regularly. The guardian must fulfill information duties, and at least once a year must submit a report on his activity and the financially relevant actions he has undertaken.

3.3. Financing of protective measures

The law distinguishes firstly between protected adults with and without financial means, and secondly between the nature of their accommodation and placement.²¹²

If the adult lives, for example, in a special home for persons with disabilities, the costs for protective measures are slightly less expensive than the costs if the adult lives in his own home.

Protective measures are financed by the protected adult if he disposes of sufficient financial resources. Where the adult does not dispose of such funds, the State has to cover the cost of the guardianship. It is important to note that with the 2. BtRÄG, the budgets have again been reduced in order to manage the cost explosion in the field of guardianship. The quality of guardianship services is likely to decrease in terms time spent and care exercised by guardians, given that the financial means are not available to remunerate the guardian's work.

4. Persons/authorities establishing the system of protection

4.1. Request for protective measures

Generally, requests for protective measures can only be made by:

- the **concerned adult**,
- or the court *ex officio*.

Third parties have no right to insist on guardianship orders for an adult. Their demands will normally only be considered as a proposal or recommendations for the *ex officio* appointment of a guardian. If, however, guardianship is a pre-condition to the valorisation of third party rights, the third party can demand the appointment and has the right to complain if the adult is not placed under guardianship (sec. 20 FGG). For example, in a case of termination of a tenancy agreement by the landlord, guardianship may be a pre-condition in order to allow for a procedure to be initiated against an incapable debtor.²¹³

4.2. Preparation of the file

In proceedings concerning guardianship, the adult concerned is considered to have the **capacity to act in the proceeding** without regard to his legal / contractual capacity.

However, if the adult concerned is not represented by a lawyer or an authorised representative (e.g. relatives), the law provides for **custodianship for the appointment proceedings** (*Verfahrenspflegschaft*). According to sec. § 67 FGG, a person can be appointed if necessary to realise the

²¹² See the Vormünder- und Betreuervergütungsgesetz, cit.

²¹³ BayObLG FamRZ 96, 1369. BayObLG FamRZ 98, 922.

interests of the adult concerned during the procedure appointing a guardian. This is especially true where adult concerned will exceptionally not be heard prior to the appointment of a guardian (sec. 68 para. 2 FGG) or if the guardianship shall cover every aspect of his life; it is indispensable for proceedings concerning the sterilisation of the adult. Exceptions are only possible if the adult is represented by a lawyer or another suitable and authorised representative. The appointment also covers appeal procedures.

4.3. Declaration of incapacity

Guardianship orders have to be taken by the competent court of protection (*Vormundschaftsgericht*). The order must be based on examinations and **opinions** regarding the state of health of the person deemed to be incapable and based on a hearing of the adult concerned.

A precondition for any protective measure is the proof that the concerned adult is **in need of protection**. This proof is delivered pursuant to sec. 68 b FGG by means of an **expert opinion**,²¹⁴ established subsequent to a recent examination and contact between the expert and the incapable adult. The appointment of an expert and the preparation of the opinion is one of the most important pre-conditions for any proceeding relating to the appointment of a guardian. If the expert comes to the conclusion that a guardian has to be appointed, the opinion has to indicate the scope of the guardian's functions and the estimated period of guardianship. For temporary measures, it is sufficient that a competent doctor confirms the necessity for protection. The opinion has to be sent to the adult before his hearing.

Pursuant to sec. 68 FGG, the hearing of the adult concerned (prior to an appointment order or an order of guardianship with authorisation requirement) shall enable the court to form an opinion rather instead of basing decisions solely on the expert's opinion. If he or she so requests, or if clarification of facts requires, the hearing can occur in the habitual surroundings of the adult.

The court must instruct the adult on the possible outcome of the proceedings and explain the possibility and content of DPAs. In case of adults residing in another State, these procedural steps are undertaken via international judicial assistance. The hearing can only be avoided if it is likely to have negative effects on the person's health or if the individual is manifestly unable to proclaim his will.

The adult concerned is allowed to be accompanied by a person of his choice. The court can also tolerate the presence of more people. If the individual refuses to take part in the proceedings, he can be summoned with the assistance of the competent authority.

The outcome of the proceedings of appointment of a guardian must be discussed with the adult concerned.

4.4. Exercise of the protective measure

A guardian may be

- **any person suitable** to care for the incapable adult's concerns (sec. 1897 para. 1 BGB).

Restrictions (in terms of authorisation requirements from employers) apply to

- Employees of a recognised **association in charge of guardianship** (*Betreuungsverein*, sec. 1908f BGB),

²¹⁴

BayObLG FamRZ 01, 1403.

- Employees of an **authority in charge of guardianship** matters (*Behördenbetreuer*, sec. 1908g BGB).

The following people are excluded from guardianship:

- **employees of the institution** in which the adult lives or with whom he is in a relationship of dependence (sec. 1897 para. 3 BGB). This rule is important to prevent any abuse of power by third parties, which is common in special homes for persons with disabilities.

If the incapable adult **recommends** a person as his guardian (either in a prior declaration or in the procedure for appointment), then his will must be respected unless it runs counter to his own interests. If he refuses a certain carer, his will shall also be taken into account (sec. 1897 para. 4 BGB). If no recommendation has been made, the personal and parental relationships of the adult, notably his relations with his parents, children, husband or wife or partner shall be considered. However, conflicts of interests must be taken into account. The law attempts here to prevent any controversy between family members as to the administration of the family patrimony.

Professional guardians shall only be appointed where no other suitable person can be nominated (sec. 1897 para. 6 BGB). Guardianship associations shall be a last resort, though they can prove to be very useful where, for example, representation is desired and no other qualified person is available.

The person appointed as a guardian must accept the appointment if the criterion of suitability is met and if the fulfilment of this task can reasonably be requested of him. The carer has to declare that he accepts his nomination. If he does not declare his acceptance of the nomination, this breach of duty remains, however, without sanctions.

If one guardian is not sufficient for the protection of an adult, the competent court of protection may nominate **several guardians**, to guarantee better care for the adult (sec. 1899 BGB). If one or several persons cannot take sufficient care of the adult, the court can also appoint a recognised association entrusted with guardianship as long as the association accepts this appointment. The association then nominates several of its employees as guardians for the adult and the adult can suggest nominations. Again, his will has to be accepted unless there are important obstacles in the way of accepting the expression of his will.

The court may entrust the task of an adult's care to the **competent authority**, but only if the adult cannot be sufficiently protected by one or several persons or by an association.

The guardian must be **dismissed** if his ability to care for the protected adult is no longer guaranteed or for other important reasons, including incorrect accounting by the guardian (sec. 1908b para. 1 BGB). On the other hand, the guardian may ask to be relieved from his appointment if he can no longer reasonably be requested to fulfil his task (sec. 1908b para. 2 BGB).

4.5. Rights of appeal

According to sec. 20 FGG, everybody, whose rights are impaired by a court order has the right to appeal.

In case of orders which have been taken upon request, the appeal is in principle open to only those who requested the decision (sec. 20 para. 2 FGG).

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However, in guardianship matters, the circle of persons having a right to appeal is broad: Sec. 69g FGG provides for a right of appeal against the appointment of a guardian or the order of guardianship with authorisation requirement by the following persons in relation to the adult concerned:

- the husband or spouse,
- the partner,
- the relatives,
- the competent authority,
- the representative of the treasury (for decisions concerning certain problems relating to the accounts / remuneration of the guardian),
- the guardian (concerning decisions referring to the scope of his duties).

The adult concerned may appeal to the court of protection that issued the contested order or to the court of appeal (competent district court), and in case of placement, to the court of the district where the establishment is located.

According to sec. 69c FGG, the adult concerned can also appeal (only) against the appointment of a guardian chosen and nominated by a guardianship association or an authority. The court can instruct the institutions to nominate another guardian if this is in conformity with the wishes of the adult concerned and does not run counter to his interest.

D Bibliography

BIENWALD, *Betreuungsrecht: Gesetz zur Reform des Rechts der Vormundschaft und Pflegschaft für Volljährige (Betreuungsgesetz - BtG): Kommentar*, Bielefeld, 1992.

BRILL/MARSCHNER, *Psychisch Kranke im Recht*, 4th ed. 2005.

DAMRAU/ZIMMERMANN, *Betreuungsrecht: Kommentar zum materiellen und formellen Recht*, Stuttgart, 3rd ed. 2001.

DODEGGE/ ROTH, *Systematischer Praxiskommentar*, Köln, 2003.

GUTTENBERGER, *Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen*, Bielefeld, 2004.

HALLER, *Das psychiatrische Gutachten*, 2nd ed. 2008.

JURGELEIT / BUCIC (Hrsg.), *Handkommentar*, Baden-Baden, 2006.

JÜRGENS [et al.], *Kommentar zum materiellen Betreuungsrecht, zum Verfahrensrecht und zum Vormünder- und Betreuervergütungsgesetz*, München, 3rd ed. 2005.

MÜNCHENER KOMMENTAR ZUM BGB, 5th ed. 2008, §§ 1896 ss.

NITZINGER, *Das Betreuungsrecht im internationalen Privatrecht*, 1998.

OELKERS, *Internationales Betreuungsrecht*, Frankfurt a.M., 1996.

PALANDT, *Bürgerliches Gesetzbuch*, 68th ed., München, 2008, §§ 1806 ss.

RUDOLF/BITTER, *Vorsorgevollmacht*, Bonn, 2000.

SCHMIDT GERD/ BÖCKER FELIX, *Betreuungsrecht: eine systematische Einführung aus juristischer und psychiatrischer Sicht*, München, 1993.

STAUDINGER, *BGB - Neubearbeitung 2006*, §§ 1896 ss.

Articles

ABRAM, *Zwangswiseiter Zutritt des Betreuers zur Wohnung des Betroffenen und Befugnis zur Entrümpelung*, *FamRZ* 2004, 11;

ADOLPH/FOERSTER, *Prozessfähigkeit und unerwünschte Prozesse*, *BtPrax* 2005, 126;

BAUER, *Zwangsbefugnisse des Betreuers im Aufgabenkreis „Wohnungsangelegenheiten“*, *FamRZ* 1994, 1562;

BIENWALD, *Der Betreuer mit dem Aufgabenkreis nach § 1896 Abs. 3*, *Rpfleger* 1998, 231;

BOBENHAUSEN, *Konkurrenzen zwischen dem Willen des Betreuten und des Betreuers*, *BtPrax* 1994, 158;

BRUCKER, *Aufgaben der örtlichen Betreuungsbehörde und deren Organisation*, *NDV* 1996, 330;

DIEDERICHSEN, *Zivilrechtliche Haftungsverhältnisse im Betreuungsrecht*, *FS Erwin Deutsch*, 1999, 131;

DODEGGE, *Zwangsbehandlung und Betreuungsrecht*, *NJW* 2006, 1627;

DODEGGE, *Die Entwicklung des Betreuungsrechts* *NJW* 2003, 2645; 2005, 2660; 2006, 2670;

DRÖGE, *Die Betreuungsanordnung gegen den Willen des Betroffenen*, *FamRZ* 1998, 1209;

FENGE, *Selbstbestimmung im Alter*, 2002;

HARM, *Die Personensorge im Betreuungsrecht*, *BtPrax* 2005, 98;

JÜRGENS, *Der Betreuer zwischen rechtlicher Vertretung und persönlicher Betreuung*, *BtPrax* 1998, 129;

LUDYGA, *Rechtmäßigkeit von medizinischen Zwangsmaßnahmen bei einer Unterbringung gemäß § 1906 BGB*, *FPR* 2007, 104;

LIPP, *Betreuung und Zwangsbehandlung*, *JZ* 2006, 661;

LIPP, *Die Betreuungsverfügung als Instrument privater Vorsorge*, *FS Bienwald*, 2006, S. 177;

MEIER, *Demenz und rechtliche Betreuung*, *BtPrax* 2006, 159;

PAWLOWSKI, *Betreuung wider Willen?*, *FS Fenge*, 1996, S. 479;

ROTH, *Erbrecht und Betreuungsfall*, 2005;

SEITZ, *Wohl und Wille als Handlungsnormen im Betreuungsrecht*, *BtPrax* 2005, 170;

SONNENFELD, *Bericht über die Rechtsprechung zum Betreuungsrecht*, *FamRZ* 2005, 762; 2006, 653; 2007, 783.

Section IV

Sweden

Summary

Since 1989, it is no longer possible, under Swedish law, to designate a person as “incapable” on the basis that he or she has limited legal capacity or has been deprived of legal capacity. A person may nonetheless require assistance in taking care of himself and/or his property. In that case, tutorship – *förvaltarskap* – or curatory – *godmanskap* – may be ordered.

Godmanskap is the form of assistance which least constrains the individual, who retains his legal capacity to act and enjoys – in principle – the right to give or withhold consent. It must be limited to what is needed by the person concerned in the particular case. The person under *godmanskap* can always consent to acts being done. *Godmanskap* is also the form of assistance which must be considered in the first instance for a person who needs help. If *godmanskap* does not provide sufficient protection for the individual concerned, then *förvaltarskap* may be imposed.

Förvaltarskap does not require the consent of the individual concerned. The intervention concerns very precise tasks and can therefore be limited to certain items of property or certain types of acts. Within the limits of this mandate, the person under administration has no capacity to act; she retains, on the other hand, the right to make decisions about her other financial affairs. Above all, she does not lose the right to vote at elections – which was the case under the former legal institution entitled “declaration of minority”.

The appointment of a *förvaltare* or *god man* of a person is a reaction to the specific needs of the person. Depending on those needs, both *förvaltarskap* and *godmanskap* are limited in respect of both the matters concerned and the duration of the mandate.

A Introduction

With effect from 1 January 1989, the institution of *omyndigförklaring* (“declaration of minority”) was abolished under Swedish law. In its place, an extended form of *godmanskap* was introduced and called *förvaltarskap*. He who has need of assistance in the management of his affairs benefits in the first instance from the appointment of a *god man*. Where however, the person in need of help is incapable of taking care of himself or of looking after his property, the appointment of a curator will not suffice. In such a case, a *förvaltare* is appointed.

The appointment and control of curators and tutors are decentralised administrative powers. Decisions are made by first instance courts and oversight is maintained by local government *överförmyndaren* (authorities for the control of curators and tutors).

The rules governing both forms of assistance are principally to be found in the Family Code (*föräldrabalk* SFS 1949:381), especially chapters 11 and 16.

Draft legislation, prop. 2007/08:150, introduced on 15 May 2008, aims in particular to improve the protection of the property of persons under *godmanskap* or *förvaltarskap*, by intensifying the participation of *överförmyndaren* (authorities for the control of curators and tutors), extending the rights of the *överförmyndare* to have access to documents and reinforcing the supervision effected by regional councils (*länsstyrelserna*) over *överförmyndare*. If this bill is adopted, the new provisions will enter into force on 1 January 2009.

Statistical Data

The number of representatives (which is to say *god man/ förvaltare*) increased during the period 2000-2004. At the end of the year 2004, about 88100 decisions to impose representation were in force in Sweden, of which the most part (about 56100 decisions) concerned *godmanskap* for health reasons.²¹⁵ The number of administrations was about 6200. The number of *godmanskap* for health reasons increased by about 9% during the period 2000-2004, while the number of *förvaltarskap* increased even more strongly, by over 30%. The *Riksrevisionen* (« Auditing Authority of the Kingdom ») explains these increases principally by reference to demographic aging and the expansion of the total population of old people.²¹⁶ Another explanation is provided by the reduction of the number of persons placed in institutions following upon reforms in this field (“*ädelreformen*” as well as “*psykiatrireformen*”).

²¹⁵ RIKSREVISIONEN, *Riksrevisionens styrelses framställning angående länsstyrelsernas tillsyn av överförmyndare*, no 2005/06:RRS26, Stockholm, 2006, p. 7.

²¹⁶ RIKSREVISIONEN, *Riksrevisionens styrelses framställning angående länsstyrelsernas tillsyn av överförmyndare*, no 2005/06:RRS26, Stockholm, 2006, p. 7-8.

Sweden (S)

State	Source of data	Annual number of protected adults	Annual number of measures	Number of protected adults moving within the EU
Sweden	Compilation of the annual reports of <i>överförmyndare</i> in Sweden on 12 December 2006.	2006: 7'192 persons under <i>förvaltarskap</i> 2006: 62'795 persons under <i>godmanskap</i>		

B Listing

1. Legislation enacted

National Law

- SFS 1942:740 Rättegångsbalken (*Code of Judicial Procedure*)
- SFS 1949:381 Föräldrabalken (*Family Code*)
- SFS 1988:1366 Förordning (1988:1366) om utredningen i ärenden om förordnande av god man och förvaltare (*Regulations concerning enquiries into cases of appointment of god man and of förvaltare*)

Pre-legislative Materials

SOU 1954:6
SOU 1987:73
SOU 1999:40
SOU 2003:51
SOU 2004:112
SOU 2007:65

Ju 2002:04

Prop. 1980/81:48
Prop 1987/88:124
Prop. 1996/97:113
Prop. 1997/98:14
Prop. 2007/08:150

2. Draft Legislation

Pre-legislative materials: Prop. 2007/2008:150 of 20 May 2008.

3. Jurisprudence

Decisions	Relevant extracts
<p>Högsta domstolen (Supreme Court)</p> <p>Administration - Guardianship</p> <p>1. NJA 1981 p. 291</p> <p>Qualifications of the administrator</p> <p>2. NJA 1980 p. 271</p> <p>Declaration of incapacity where sufficient help available</p> <p>3. NJA 1978 p. 350</p>	<p>Högsta domstolen (Supreme Court)</p> <ol style="list-style-type: none"> 1. On an application for the annulment of a declaration of incapacity, the person concerned having been found to be incapable of taking care of himself and of looking after his property due to limited mental development and a psychological abnormality. <i>Quaere</i> whether the appointment of a <i>god man</i> would suffice. 2. A brother who had badly managed the property of his sister was not qualified for appointment as her <i>god man</i>. 3. <i>Quaere</i> whether an application for a declaration of incapacity is admissible when the person concerned already receives sufficient help to enable her to look after her property and herself.
<p>Regeringsrätten (Supreme Administrative Court)</p> <p>Rights of a guardian</p> <p>1. RÅ 1999 ref 38</p>	<p>Regeringsrätten (Supreme Administrative Court)</p> <ol style="list-style-type: none"> 1. A <i>god man</i>, appointed under Article 11:4 of the Family Code to determine the rights of the ward to certain property, was authorised by the Court to obtain copies of declarations made by the ward, the latter having been found incapable of requesting them or of authorising their disclosure to the <i>god man</i>.
<p>Protection of guardians</p> <p>2. RÅ 1993 not 710 et RÅ 1992 not 331</p> <p>Rights of appeal</p> <p>3. RÅ 83 2:19</p>	<ol style="list-style-type: none"> 2. <i>Quaere</i> whether data about curators is to be classified as <i>allmän handling</i> (public information) 3. Right of appeal of a <i>god man</i> (under Art. 18:2 of the Family Code)

<p>Hovrätt (Court of Appeal)</p> <p>Successions</p> <p>1. RH 2005:41</p> <p>Duration of guardianship</p> <p>2. RH 1990:67</p> <p>Consent of the person concerned</p> <p>3. RH 5:82</p> <p>Consent of the person concerned</p> <p>4. RH 20:80</p>	<p>Hovrätt (Court of Appeal)</p> <ol style="list-style-type: none"> 1. The <i>god man</i> could not validly approve a will on behalf of his ward. See also: NJA 1999 p. 159 concerning the revocation of a will. 2. The mandate of a <i>god man</i> under Art. 11:4 of the Family Code cannot continue if the person for whose <i>godmanskap</i> he was appointed applies for the termination of the mandate. 3. The Court of Appeal found that, in the circumstances of this case, there were insufficient reasons for appointing a <i>god man</i> under Art. 18:3 of the Family Code without the consent of the adult to be placed under <i>godmanskap</i>. 4. The Court of Appeal found that, in the circumstances of this case, there were sufficient reasons for appointing a <i>god man</i> under Art. 18:3 of the Family Code without the consent of the adult to be placed under <i>godmanskap</i>.
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C NATIONAL REPORT

1. Notion and causes of incapacity

1.1. Notion

In Sweden, a person who has been deprived of legal capacity or has limited legal capacity cannot be characterised as incapable. Since 1 January 1989, an adult person cannot be declared *omyndig* (to completely lack legal capacity).

A person can however, **decide that he is in need of assistance in exercising his rights, administering his property or taking care of himself**. In that case, the court²¹⁷ can – with the consent of that person – appoint a *god man* if that is indeed necessary.²¹⁸ The applicant then becomes a *huvudman* (principal).

When a person is **unable to appreciate his own needs**, the court can appoint – if a *god man* would not suffice – a *förvaltare*.²¹⁹

The source of Swedish legislation on this point is to be found in Chapter 2 of the Instrument of Government (*Regeringsformen*)²²⁰ of 1974, hereinafter “RF”, (one of the four Swedish laws having

²¹⁷ The court of first instance (*tingsrätt*) at the place of domicile of the person concerned; refer to Chap. 11, Art. 25 of the *föräldrabalken* (Family Code, hereinafter “FB”).

²¹⁸ Chap. 11, art. 4, FB.

²¹⁹ Chap. 11, art. 7, FB.

constitutional status), which states that the **fundamental rights and freedoms of the person** are guaranteed. This guarantee concerns relations between the individual and the public, meaning the courts, public authorities and other official organs. Laws relating to individuals and authorities must not impose restrictions on these rights and liberties, other than in exceptional cases. Art. 9 of Chapter 1 RF foresees that:

“Courts, public authorities and others performing functions within the public *förvaltarskap* shall observe in their work the equality of all persons before the law and shall maintain objectivity and impartiality”.

Even where persons are affected by illness or mental disorder, the principal remains that of full self-determination and legal capacity, within the limits of the law (1991:1128) concerning involuntary psychiatric care (*lagen om psykiatrisk tvångsvård*, « LPT ») and of the law (1988:870) on the care of drug addicts (*lagen om vård av missbrukare i vissa fall*).

1.2. Causes of incapacity

Refer to point 1.1, above.

A person requires the assistance of a *god man* or of a *förvaltare* if, due to:

- an illness;
- a psychological disorder;
- a weak state of health; or
- a similar state,

she is unable to look after herself or her property.²²¹

1.3. Termination of the status of incapacity

Refer to point 1.1, above.

If the assistance of a *god man* or *förvaltare* is no longer needed, the measure must cease.²²² The relevant question is therefore that of the continuing existence of the need for *godmanskap* or *förvaltarskap*.²²³ The decision is made by the court of first instance, **if necessary *ex officio***.²²⁴ The *överförmyndaren* (authority for the control of curators and tutors) is equally required to make a decision, if necessary *ex officio*, as to the termination of a *godmanskap* or *förvaltarskap*.²²⁵

²²⁰ SFS 1974:152, which defines the bases of the Swedish constitutional order, the manner in which the Government works, the fundamental rights and freedoms of Swedes and rules for elections to the *Riksdag* (parliament). The English language title and the extract set out below are taken from Nergelius, J, “Sweden” (Booklet 2, updated June 1996), p. 2, in Flanz, G.H. (ed), *Constitutions of the Countries of the World* (Dobbs Ferry, NY), Vol. XVIII. According to Booklet 1, these were originally “official English translations” and have not been affected by amendments which were subsequently introduced and not “officially” translated.

²²¹ Chap. 11, art. 4 and 7 FB.

²²² Chap. 11, art. 19 FB.

²²³ Refer to the pre-legislative materials, prop 1987/88:124 p. 140.

²²⁴ *Ibid* and chap. 11, art. 15 FB.

²²⁵ Chap. 11, art. 15 FB.

When the *god man* or *förvaltare* has completed his tasks, he must immediately notify the *överförmyndaren*.²²⁶

2. Legal Consequences of Incapacity

2.1. Degrees of incapacity and the legal consequences thereof

A person may be assisted by a *god man* or by an *förvaltare*. The missions of the latter determine the extent of the person's legal capacity to act.

2.1.1. Person under curatory

A person assisted by a *god man* retains her legal capacity to act.²²⁷ For the extent of the powers of a *god man*, refer to section 4.4, below.

A legal act performed by a curator outside the scope of his mandate does not bind the person under *godmanskap*.²²⁸ Similarly, a legal act done within the scope of the mandate, but without the consent of the person under *godmanskap*, does not bind the latter, unless she was incapable of expressing her opinion by reason of her state or if there was another reason for which her opinion could not have been obtained.²²⁹

If, within the scope of his mandate, the *god man* does a legal act which is normally effected in the course of the conduct of one's daily affairs, the consent of the person und *godmanskap* is presumed, unless she had expressed a different intention to the third party concerned by the legal act, before it was done.²³⁰

If the legal act done by the *god man* is annulled for any of the reasons mentioned above,²³¹ then the *god man* must compensate the third party if the latter acted in good faith and suffered any damage as a result.²³² That does not apply however, if the legal act is annulled by reason of particular circumstances of which the *god man* was not aware and of which the third party could not reasonably have expected that the *god man* was aware.²³³

In 1981, in a case²³⁴, before the Supreme Court, of annulment of a declaration of incapacity (note that it was decided before the reform of the law concerning incapacitated persons), the person concerned had been adjudged to lack the capacity to take care of himself any to administer his property by reason of limited mental development and psychological abnormality. The court considered that it sufficed to appoint a *god man* (and not a *förvaltare*), despite the possibility that the person concerned might make decisions contradictory to those of the *god man*. In this particular case, the person was conscious of his need of assistance, so that the risk of contradictory decisions

²²⁶

Ibid.

²²⁷

Refer to chap. 11, art. 4-5 FB and also in particular AGELL, A., et MALMSTRÖM, Å, *Civilrätt*, Malmö, 2007, pp. 65 and 67.

²²⁸

Chap. 11, art. 5, al. 1 FB.

²²⁹

Chap. 11, art. 5, al. 1 FB.

²³⁰

Chap. 11, art. 5, al. 2 FB.

²³¹

Chap. 11, art. 5, al. 2 FB.

²³²

Chap. 11, art. 6 FB.

²³³

Ibid.

²³⁴

NJA 1981 p. 291.

was considered to be relatively small. The appointment of a *god man* was therefore considered sufficient.

2.1.2. Person under tutorship

Unlike a person under curatory, a person under *förvaltarskap* (tutorship) has limited legal capacity to act. Administration, as the legal institution which replaced the previously applicable declaration of the minority (*omyndig*) of an adult, still deprives an adult person of his legal capacity to act, but to a lesser degree. Within the scope of the tutor's mandate, the person under tutorship loses his capacity to act and is represented by the tutor in all questions relevant to the mandate.

Despite the *förvaltarförordnande* (order of tutorship), the person concerned can²³⁵:

- enter into a contract of service or employment;
- enjoy the fruits of his own employment after the appointment of the *förvaltare*, as well as the benefits of any assets obtained out of those fruits or which replaced those fruits; and
- freely dispose of anything which he received – after the appointment of the *förvaltare* - by gift, will or appointment as the beneficiary of an insurance policy or retirement savings plan under the law (1993:91) on individual retirement contributions²³⁶, but only on condition that the asset is not included within the scope of the competences of the *förvaltare*.

Where special reasons exist, it remains possible for the court to decide that the tasks of the *förvaltare* should extend even to the acts set out above.²³⁷

Furthermore, the person under *förvaltarskap* does not have the right to carry out legal acts in the name of anyone else or to represent another person.²³⁸

A *förvaltare* has, within the scope of his mandate, exclusive competence to dispose of the assets of the person concerned and to represent her in all matters foreseen by the mandate.²³⁹

The person under tutorship can, nevertheless and with the consent of the administrator, perform legal acts within the scope of the administration order.²⁴⁰ If the person concerned contracted without the consent of the *förvaltare*, the other party to the contract can elect – if the contract was neither approved, nor duly performed – to repudiate it.²⁴¹ On the other hand, if that party knew that she was entering into a contract with a person under *förvaltarskap* – without having reason to believe that that person had the consent of the *förvaltare* to act – then that party cannot repudiate during the performance of the contract.²⁴² Where the person under *förvaltarskap* is performing employment duties or other services, the other party cannot repudiate the contract while the work is in the course of being performed.²⁴³

²³⁵ Chap. 11, art. 8 FB.

²³⁶ *Lagen (1993:931) om individuellt pensionssparande.*

²³⁷ Chap. 11, art. 8 FB.

²³⁸ Chap. 11, art. 9, al. 2 FB.

²³⁹ Chap. 11, art. 9, al. 1 FB.

²⁴⁰ Chap. 11, art. 10 FB.

²⁴¹ Refer to chap. 11, art. 10 FB and to chap. 9, art. 6-7 FB.

²⁴² Chap. 9, art. 6 FB.

²⁴³ *Ibid.*

If the contract, which the person under *förvaltarskap* had concluded without the necessary consent, is annulled, each of the parties must make restitution of that which he obtained or transferred and if that is impossible, indemnify the other party to the extent of the value of the asset which the latter transferred.²⁴⁴

If at the moment of the conclusion of the contract, a person under *förvaltarskap*, providing falsified information, led the other party into error, then she must nevertheless – if the contract is annulled – compensate the other party to a reasonable extent for the damage or loss caused by the annulment of the contract.²⁴⁵

A person under tutorship is not bound by legal acts which the tutor performs outside the scope of his mandate.²⁴⁶ The *förvaltare* is, in such a case, required to compensate any *bona fide* third party for damage suffered by the latter.²⁴⁷ If the conduct can be qualified as a criminal offence, the amount of compensation will be determined according to the rules concerning compensation for criminal injuries.²⁴⁸

2.2. Publication of the status of incapacity and of its termination

The courts must immediately publish decisions concerning the appointment or the termination of an administration in the *Post- och Inrikes Tidningar* (the official gazette).²⁴⁹ Publication in this manner of decisions modifying the extent of the mandate of a *förvaltare* is also foreseen.²⁵⁰

Such publication is not, on the contrary, necessary in respect of *godmanskap*.

2.3. National System of Protection

2.3.1. Two forms of protection

There exist two forms of assistance to adults:

- a) **the god man (curator); and**
- b) **the förvaltare (tutor).**

Godmanskap (*godmanskap*) is a less burdensome system of protection of the person than is *förvaltarskap* (*förvaltarskap*).

A *godmanskap* or *förvaltarskap* may be composed of one or more of the following duties:

- manage the rights of the person concerned by the measure (legal tasks),
- administer the property of the person concerned by the measure (economic tasks),
- take care of the person concerned by the measure (personal tasks).

²⁴⁴ Chap. 9, art. 7, FB.

²⁴⁵ Chap. 9, art. 7, al. 2, FB.

²⁴⁶ Chap. 11, art. 11 FB.

²⁴⁷ Chap. 11, art. 11 FB.

²⁴⁸ *Ibid.*

²⁴⁹ Chap. 11, art. 27 FB.

²⁵⁰ *Ibid.* Cf. chap. 11, art. 23 FB.

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The duties to be performed within the scope of the mission of the *god man* or *förvaltare* always depend upon the particular case. They must however, in all cases fulfill their obligations with diligence and always act in the best interests of the person in need of protection.²⁵¹

²⁵¹

Chap. 12, art. 2

2.3.1.1. Manage the rights of the person concerned by the measure

These tasks can be divided into two parts:

1. *In the context of individual legal acts, safeguard the interests of the person under protection;*

In particular: advance a claim to succession; contract in the name of the person under protection; represent the person under protection for the sale of goods or in negotiations with creditors.

2. *Manage the rights of the person as against the authorities or society as a whole in fields where the interests of the person require protection.*

In particular: prepare and lodge applications to benefit authorities, or to social services; lodge an appeal against a decision which appears to be flawed.

2.3.1.2. Administer the property of the person concerned by the measure

This duty requires the *förvaltarskap* of all of the assets of the person under protection. Concretely, this involves management of the financial resources of the person, including retirement benefits and public support payments due to him, payment of bills, allocation of pocket money, management of capital, shareholdings and real estate, as well as contracting appropriate insurance for the person.

The most important task of the *god man* or *förvaltare* is to ensure that the person under protection receives the benefit of his revenues and that he enjoys the quality of life which his means and his situation permit.

2.3.1.3. Take care of the person concerned by the measure

This means that the *god man* or *förvaltare* must protect the personal interests of the person under protection. The *god man* or *förvaltare* has in particular to ensure that the person under protection does not lose touch with his social environment, to visit the person, to ensure that he has suitable accommodation and/or to assist the person in taking decisions about his accommodation, education and recreation.

It must be noted that a *god man* or *förvaltare* can never take a decision concerning accommodation or medical care against the will of the person under protection.

2.3.2. Godmanskap (curatory)

Curatory aims at assisting the person concerned in performing very well defined acts.²⁵² The curator's mandate must be limited to what is necessary in the particular case²⁵³ - which is to say that it must not be drawn too widely and must always be motivated by a need. The mandate is thus concretely limited.

²⁵²

Chap. 11, art. 4 FB, as well as the pre-legislative materials Prop 1987/88:124 p. 140.

²⁵³

Pre-legislative materials Prop 1987/88:124 p. 140.

The assistance of a *god man* is voluntary, chosen and **cannot be imposed on anyone.**²⁵⁴ **He can nevertheless be appointed without the consent of the individual concerned, but only if that individual is incapable of giving his opinion.**²⁵⁵

Similarly, the individual must in principal consent to the *godmanskap* and can, at any moment, demand the termination of the *godmanskap*.²⁵⁶

In a decision of the Court of Appeal²⁵⁷, the judges ordered the termination of a *godmanskap* mandate at the demand of the person under *godmanskap* (in conformity with Chap. 11, Art. 4 of the Family Code). The latter had herself requested the assistance of a *god man* and the Court held that she was therefore entitled to demand the termination of the *godmanskap*, to which she no longer consented. In this particular case, mental health problems or a need for the imposition of an *förvaltarskap* were not referred to.

The person under *godmanskap* is not deprived of her right to decide for herself. A person under *godmanskap* therefore retains, as mentioned above, the legal capacity to act. *Godmanskap* being voluntary, assistance is provided in the form of a dialogue, or a cooperation, with the consent of the individual, under the condition that he understands what is involved.

With respect to everyday matters, the *god man* does not need to obtain the actual consent of the person under *godmanskap*. Consent in such matters results from consent to the *godmanskap* as a whole. With respect to other matters, the consent of the person under *godmanskap* is necessary unless he cannot give it because of his mental state or the state of his health.²⁵⁸

In another decision of the Court of Appeal²⁵⁹, the judges however, considered that a *god man* could not approve a will concerning the person under *godmanskap*. In effect, a *god man* must protect the property and the interests of the persons under *godmanskap* and approval of a will could produce negative consequences for that person, especially the loss of the right to express opposition.

2.3.3. Förvaltarskap (tutorship)

Tutorship is to be chosen only if curatory would not meet the needs of the person.²⁶⁰ It must also be **adapted to the needs of the person** and can, as a result, be **limited to certain precise tasks** (refer nevertheless to section 2.1, above).²⁶¹

Förvaltarskap can be imposed upon a person.²⁶² He or she nevertheless always has the right to apply for the termination of the *förvaltarskap*.²⁶³

²⁵⁴ Chap. 11, art. 4, FB.

²⁵⁵ Chap. 11, art. 4 FB. The Court of Appeal held in case RH 5:82 that the reasons for not obtaining consent must be sufficient in the particular case to warrant a derogation from the principal of consent to the adoption of a curatory measure for the person. In that particular case, the reasons advanced were insufficient (*e contrario* case RH 20:80).

²⁵⁶ Chap. 11, art. 21 FB.

²⁵⁷ RH 1990:67.

²⁵⁸ Chap. 11, art. 5 FB.

²⁵⁹ RH 2005:41 and see also the decision of the Supreme Court reported in NJA 1999 p. 159.

²⁶⁰ Chap. 11, art. 7 FB.

²⁶¹ Chap. 11, art. 7, al. 2 FB.

²⁶² Chap. 11, art. 7 FB.

²⁶³ Chap. 11, art. 21 FB.

A person under *förvaltarskap* does not have full legal capacity to act and thus depends upon the *förvaltare*. To the extent that a decision of the *förvaltare* would lead to a violation of the integrity of the person, it must be preceded by a detailed evaluation of the need therefore.²⁶⁴

The consent of the person under *förvaltarskap*, whose legal capacity to act is very limited, is not required for measures taken by the *förvaltare* in his name (refer to section 2.1, above). The *förvaltare* alone decides questions following within the scope of his mandate. The person under *förvaltarskap* simultaneously loses his right to decide them, but always retains the right to vote and to marry.

3. Analysis of the National Protection System

3.1. Types of protective measures

3.1.1. *Förvaltarskap*

Förvaltarskap is the system of protection have the most consequences for the person concerned by the measure; it is adopted only if *godmanskap* would not meet the needs of the person.²⁶⁵

If someone, as a result of illness, a psychological disorder, a weakened state of health or a similar condition, **needs assistance to manage his rights, administer his property or take care of himself, and is not capable of looking after his property or of himself, the court can place the person under administration if guardianship would not suffice.**²⁶⁶

3.1.2. *Godmanskap*

If someone, as a result of illness, a psychological disorder, a weakened state of health or a similar condition, **needs assistance to manage his rights, administer his property or take care of himself, the court can – with his consent (to the extent that this is possible) – appoint a *god man* for him.**²⁶⁷

Two conditions must be added:

1. **a link must exist between the state of health and the need for assistance;** and
2. **lesser assistance would not be feasible.**²⁶⁸

Sometimes, a mandate given to a friend or relative may constitute sufficient assistance. Similarly, social services may assist person using their own means. In both of those cases, a *god man* is normally not needed.

²⁶⁴ Chap. 11, art. 16-17 FB.

²⁶⁵ Chap. 11, art. 7 FB.

²⁶⁶ Chap. 11, art. 7 FB.

²⁶⁷ Chap. 11, art. 4 FB.

²⁶⁸ ÖVERFÖRMYNDARNA I SAMVERKAN, *God man och förvaltare*, Göteborg, 2007, p. 2.

3.2. Period of protection

3.2.1. Temporary administration and guardianship

In the first instance, it is possible to **provisionally appoint a tutor or curator**, in advance of a final decision as to the need for *godmanskap* or *förvaltarskap*, if the situation of the person demands immediate attention or if it appears that delay could endanger the person herself or her property.²⁶⁹ It is the local government authorities for the control of tutors and curators – *överförmyndaren* – which appoint tutors and curators to act during that period.²⁷⁰ The person concerned may – at that moment – express her opinion, unless the case does not admit of delay or if the appointment of the person proposed would disadvantage her.²⁷¹ The courts, as well as the *överförmyndaren* themselves, may always revise a provisional decision concerning *förvaltarskap* or *godmanskap*.²⁷²

3.2.2. Indeterminate *förvaltarskap* and *godmanskap*

A *god man* is appointed in order to carry out very specific legal acts for the person under *godmanskap*.²⁷³ His actions **are limited to what is necessary in order to guarantee sufficient protection**. The same principle applies in the case of *förvaltarskap*.²⁷⁴

If assistance is no longer needed and the presence of a carer is thus no longer necessary, the jurisdictionally competent court should order the termination of the tutorship or curatory.²⁷⁵ In other cases, it is the *överförmyndaren* which take the decision, particularly in order to permit the retirement of the *förvaltare* or *god man*.²⁷⁶

The court is similarly obliged to determine **the extent of the mandate** (of either *godmanskap* or *förvaltarskap*) upon the application of the person concerned, his relatives or friends, or of the *förvaltare* or *god man*.²⁷⁷ The court can also act *ex officio*.²⁷⁸ *Godmanskap* and *förvaltarskap* are based upon the needs of the individual and should accordingly be regularly re-evaluated in order to ensure the operation of that intervention in the life of the individual which is most suitable at each moment in time.²⁷⁹

When a *god man* or *förvaltare* has completed his mandate, he must immediately notify the *överförmyndaren*.

²⁶⁹ Chap. 11, art. 18 FB.

²⁷⁰ Chap. 11, art. 18, al. 2 FB.

²⁷¹ Chap. 11, art. 18, al. 3 FB.

²⁷² Chap. 11, art. 18, al. 4 FB.

²⁷³ Chap. 11, art. 4, FB.

²⁷⁴ Chap. 11, art. 7 FB.

²⁷⁵ Chap. 11, art. 19 FB.

²⁷⁶ *Ibid.* This applies equally in the cases cited in chap. 11, art. 3, al. 1-5 FB, being cases in which a guardian is temporarily appointed for matters concerning succession.

²⁷⁷ Chap. 11, art. 23 FB.

²⁷⁸ *Ibid.*

²⁷⁹ Refer to the pre-legislative materials, prop. 1987/88:124, p. 181 and prop. 1993/94:251 p. 206.

3.3. Financing of protective measures

Tutors and curators are entitled to charge reasonable fees and to indemnification for expenses necessarily incurred in the accomplishment of their mandates.²⁸⁰ The extent of the fees depends upon the extent and the nature of each mandate. It is the *överförmyndaren* that fix the actual amounts of both fees and indemnification.²⁸¹

In principle, it is the person under tutorship or curatory who pays – normally annually – the fees and indemnifications.²⁸² If the revenues of the person under *förvaltarskap* or *godmanskap* are less than 2.65 times the basic amount (« basbelopp »)²⁸³, or if her financial means are less than two basic amounts, it is the local government authority which pays the fees and indemnities of the *förvaltare* or *god man*.²⁸⁴ The *överförmyndaren* again decide whether fees and indemnities are actually to be paid out of the revenues or assets of persons placed under *godmanskap* or *förvaltarskap*.²⁸⁵

4. Persons/authorities establishing the system of protection

4.1. Request for protective measures

He who requires the assistance of a *förvaltare* or *god man*, his friends and relatives²⁸⁶ and the *överförmyndare* all have standing to apply for the establishment of a guardianship or administration.²⁸⁷ A guardian can also apply for the establishment of an *förvaltarskap*.²⁸⁸

In appropriate cases, the court must consider on its own initiative the question of whether or not to put a guardianship or administration in place.²⁸⁹ The same applies to the *överförmyndaren*, concerning the appointment of a *god man* or *förvaltare*.²⁹⁰

If the social authorities realise that a person requires *godmanskap* or *förvaltarskap*, they are also obliged to make a notification.²⁹¹

²⁸⁰ Chap. 12, art. 16, al. 1 FB.

²⁸¹ Chap. 12, art. 16, al. 2, FB.

²⁸² Chap. 12, art. 16, al. 3, FB.

²⁸³ For the year 2008, a “basic amount” equals, according to the law (1962:381) on general providence (*lagen om allmän försäkring*) 41 000 SEK, which corresponds to about 4’200 EUR.

²⁸⁴ Chap. 12, art. 16, al. 3, FB.

²⁸⁵ Chap. 12, art. 16, al. 2, FB.

²⁸⁶ According to the pre-legislative materials (prop. 1993/94:251, p. 203), the spouse or partner (*sambo*), as well as the children of the person should be envisaged as probably nearest to him, but nothing prevents close friends from belonging to the individual’s closest circle.

²⁸⁷ Chap. 11, art. 15, al. 1 FB. The same persons can apply for the appointment of another curator or *förvaltare* if that should be necessary, in particular in case of the death of the carer.

²⁸⁸ Chap. 11, art. 15, al. 2 FB.

²⁸⁹ Chap. 11, art. 15, al. 3 FB; refer also to the pre-legislative materials prop. 1987/88:124 p. 175.

²⁹⁰ *Ibid.*

²⁹¹ Chap. 3, art. 5, chap. 10, art. 5 and chap. 11, art. 1 of the law (2001:453) on the social service (*socialtjänstlag*).

4.2. Preparation of the file

4.2.1. *Godmanskap*

The *överförmyndaren* undertake studies of needs and can themselves take decisions concerning certain types of *godmanskap*, in particular in cases of succession or of change of *god man*.²⁹²

An application or a notification of a need for *godmanskap* measures should be addressed to the *överförmyndaren*²⁹³ and must contain the following documents²⁹⁴:

1. a medical declaration, made on the form foreseen for this purpose²⁹⁵;
2. a social study containing information about illnesses, handicaps, social circumstances, friends and relatives, the person's economic resources (revenues, debts, etc), accommodation, employment status and any contacts with the authorities or hospitals. From this study, the need for *godmanskap* and the origins of that need must be clearly apparent;
3. contact details;
4. the person's identity document (*personbevis*);
5. if the application is for *godmanskap*, an expression of the consent of the person must also be annexed, on condition that the its effect is understood by the person, which must be certified by the medical declaration.

He who lodges the application can propose that a particular person be appointed *god man*. In such a case, the *överförmyndaren* must decide whether or not that person is apt to carry out the mandate. As a general rule, the court of first instance appoints a *god man* when it determines the need for a person to be placed under *godmanskap*.²⁹⁶ The *överförmyndaren* must however, name the *god man* in certain cases.²⁹⁷ The court of first instance decides whether one or several curators are necessary.²⁹⁸ On the other hand, the *överförmyndaren* make decisions about whether to replace curators or to designate one or more additional curators.²⁹⁹

If the person concerned has not consented to the curatory, the court must, before ordering measures, obtain a medical certificate or other comparable report concerning the individual's state of health.³⁰⁰

4.2.2. *Förvaltarskap*

An application for *förvaltarskap* can be lodged by the person concerned by the measures, by his friends or relatives or by his *god man* (in a relevant case).³⁰¹ The *överförmyndaren* can also make applications on their own initiative.³⁰²

²⁹² Chap. 11, art. 3 FB.

²⁹³ Chap. 11, art. 15 FB, as well as the pre-legislative materials prop. 1993/94:251, p. 201.

²⁹⁴ According to the regulations (1988:1366) on the examination of cases concerning the appointment of curators and tutors (*förordning om utredning i ärenden om förordnande av god man och förvaltare*) (in particular chap. 10) ; refer to chap. 11, art. 17, al. 2 FB.

²⁹⁵ Refer to the relevant form: SoSB 76322 (*Läkarintyg för utredning i ärende om anordnande av godmanskap*).

²⁹⁶ Chap. 11, art. 4, al. 2 FB.

²⁹⁷ *Ibid.*

²⁹⁸ Chap. 11, art. 4, al. 2, and art. 13 FB.

²⁹⁹ Refer to the pre-legislative materials, prop. 1993/94:251, p. 199 and Chap. 11, art. 4, al. 2 FB.

³⁰⁰ Chap. 11, art. 7 FB.

³⁰¹ Chap. 11, art. 15 FB.

³⁰² *Ibid.*

If the social authorities realise that a person requires *förvaltarskap*, they are obliged to make a notification to that effect, but they cannot lodge formal applications.

It is up to the court of first instance (*tingsrätt*) to decide whether *förvaltarskap* measures are necessary.³⁰³ The *överförmyndaren* can suggest – as it does in respect of curators – an *förvaltare*.³⁰⁴

An application or a notification of a need for *förvaltarskap* measures should be addressed to the *överförmyndaren*³⁰⁵ and must contain the following documents³⁰⁶:

1. a medical declaration, made on the form foreseen for this purpose³⁰⁷;
2. a social study containing information about illnesses, handicaps, social circumstances, friends and relatives, the person's economic resources (revenues, debts, etc), accommodation, employment status and any contacts with the authorities or hospitals. From this study, the need for *förvaltarskap* and the origins of that need must be clearly apparent;
3. contact details;
4. the person's identity document (*personbevis*).

The presentation of a medical certificate or other comparable report concerning the individual's state of health is a prerequisite to any decision of the court in respect of *förvaltarskap*.³⁰⁸

4.3. Declaration of incapacity

It must be repeated here that a court never **declares a person to be incapacitated**.

The court of first instance decides whether to appoint a *god man* for a person according to chap. 11, art. 4 of the Family Code³⁰⁹. The same applies to the decision to submit a person to *förvaltarskap*.³¹⁰

After the decision to appoint a *god man* or *förvaltare* has been made by the court, it is up to the *överförmyndaren* to make decisions concerning changes of curator(s), his or their appointment and issues which may arise out of a decision to give a single mandate to several curators.³¹¹

It is also up to these two authorities to decide whether to terminate any assistance measures.³¹²

³⁰³ Chap. 11, art. 7 FB.

³⁰⁴ Chap. 11, art. 7 and art. 15 FB.

³⁰⁵ Chap. 11, art. 15 FB, as well as the pre-legislative materials prop. 1993/94:251, p. 201.

³⁰⁶ According to the regulations (1988:1366) on the examination of cases concerning the appointment of curators and tutors (*förordning om utredning i ärenden om förordnande av god man och förvaltare*) (in particular chap. 10); refer to chap. 11, art. 17, al. 2 FB.

³⁰⁷ Refer to the relevant form: SoSB 76332 (*Läkarintyg för utredning i ärende om anordnande av förvaltarskap*).

³⁰⁸ Chap. 11, art. 7 FB.

³⁰⁹ Chap. 11, art. 4 FB.

³¹⁰ Chap. 11, art. 7 FB.

³¹¹ Chap. 11, art. 4, al. 2 and art. 7 FB, as well as the pre-legislative materials prop. 1993/94:251, p. 199.

³¹² Chap. 11, art. 4 and 7 FB.

4.4. Exercise of the protective measure

The *god man* is the minister of the person concerned, a legal representative and an organiser of necessary assistance, rather than a practical assistant. The assistance given is founded upon a public mandate. Curators are not employed by the public sector (local government authorities or the State) and are not governed by the legislation on data protection, but must nonetheless carry out their mandates with the utmost integrity. A *god man* – like a *förvaltare* – must be an **honest, experienced and suitable person**.³¹³

No person can be appointed curator or tutor if she is a minor or herself under tutorship.³¹⁴

In order to determine whether a person is suitable, the court may refer to general information about that person. Thus, in a 1980 decision of the Supreme Court³¹⁵, a brother who had mismanaged the property of his sister was considered unsuitable to become her *god man*.

An *förvaltare* provides the same assistance as a *god man* and holds a public mandate, but is nevertheless not an employee of the public sector and is not required to respect the rules of confidentiality imposed on public officials.

Överförmyndaren (authorities for the control of curators and tutors) are designated by the elected council³¹⁶ of each local government area³¹⁷ to conduct verifications and checks of the activities of curators and tutors.³¹⁸ Instead of a single person, the council may decide to appoint a board of *överförmyndare*; the *överförmyndarnämnd*.³¹⁹ The *överförmyndaren* inspect, on the one hand, the reports concerning the revenues and debts of the persons under protection which must be prepared by each curator or tutor at the beginning of his mandate, and on the other hand, the annual reports and the *förvaltarskap* declarations which must be lodged by the *överförmyndaren* before the first day of March of each year. The *överförmyndaren* can also demand explanations concerning activities that have been carried out.

The consent of the *överförmyndaren* is necessary for certain administrative measures which a *guardian* or an *administrator* carries out on behalf of his ward.³²⁰ The most important of these measures are the following³²¹:

1. withdrawal of funds frozen by the *överförmyndaren*;
2. investments of the ward's funds in shares or other instruments, capital or retirement insurance funds or other forms of investment;
3. loans of the ward's funds;
4. purchase, exchange, sale, deposit or mortgage of real estate titles or long-term leases;
5. purchase, exchange, sale, deposit or mortgage of a residential lease (*bostadsrätt*)

³¹³ Chap. 11, art. 12 FB.

³¹⁴ Chap. 11, art. 12, al. 2 FB.

³¹⁵ NJA 1980 p. 271.

³¹⁶ Chap. 19, art. 5 FB.

³¹⁷ Chap. 19, art. 1 FB.

³¹⁸ Chap. 12, art. 9 FB.

³¹⁹ Chap. 19, art. 2 FB. The *överförmyndaren* are in turn subjected to the supervisory control of the regional councils (*länsstyrelsen*) (chap. 19, art. 17).

³²⁰ Chap. 12, art. 7 and chap. 16, art. 9 FB.

³²¹ Refer to the pre-legislative materials, Prop. 1993/94:251 p. 283.

6. succession, division of joint property (*bodelning*) in succession and conclusion of contracts concerning cohabitation in an undivided succession (*dödsbo*);
7. borrowing on behalf of the ward, using the property of the ward as security for borrowing, etc.

It is also important to underline that a **curator (but not a tutor) is obliged to obtain the consent of his ward to steps which he takes on behalf of the latter**. The consent of the ward is nevertheless not required when it cannot be obtained because of the condition of the ward or in respect of “acts which are normally done in the daily course of life³²²” (such as the payment of rent or telephone bills). In order to determine whether the state of the ward prevents him from giving consent, a medical certificate may be needed. If the *god man* fails to obtain one, the legal act in question may be annulled. He can also be held liable for any damage resulting.

In a decision of the Supreme Administrative Court³²³, the *god man* who had been appointed to take care of the property of the ward – who, incidentally, was unable to give consent – was held to be entitled to obtain copies of the ward’s declarations, despite the confidentiality of these documents. The court considered that access to these documents was necessary in order for the *god man* to be able to carry out his mandate. He was therefore empowered to obtain access, given that the ward was not in a condition to be able to request the documents or to authorise their production to the *god man*, even though access to the documents had not been expressly foreseen in the mandate.

According to Chap. 16, Art. 9 of the Family Code, a *god man* or *förvaltare* must, **when considering important questions, consult the person concerned by the measure, as well as his spouse or partner (*sambo*)³²⁴ and other close friends or relatives**.

A *god man* or *förvaltare* who does not carry out his mandate in a satisfactory manner is no longer suitable for exercising the function and may be relieved of his duties.

When an *överförmyndare* is considering whether to authorise an important administrative measure (« *en förvaltningsåtgärd av större vikt* »), he must follow certain procedures and give particular persons – which is to say the spouse or partner (*sambo*) and close relatives or friends – the possibility of commenting upon the proposal, before giving his consent to the administrative measure.³²⁵ This obligation to ask for and consider opinions applies even if the persons entitled to comment are already informed of the intended administrative measure.³²⁶ The *överförmyndaren* can subsequently withdraw consent, if the preconditions to consent no longer exist.³²⁷

If a *god man* or *förvaltare* is found liable for maladministration or negligence in carrying out his mandate, if he is bankrupted or if there are other reasons which render him unsuitable to hold the mandate, he must be dismissed by virtue of a decision made by the relevant *överförmyndare*.³²⁸ In this respect, *överförmyndaren* can also make provisional decisions if a final decision cannot be taken immediately.³²⁹

³²² Chap. 11, art. 5 FB.

³²³ RÅ 1999 ref 38.

³²⁴ For the definition of « *sambo* », refer to chap. 10, art. 18 FB.

³²⁵ Chap. 16, art. 9 FB.

³²⁶ Refer to the reports of the *justitieombudsmannen* (*Justitiombudsmännens ämbetsberättelser*): particularly no 1997/98:J01, Dnr 3488-1995 and no 2000/01:J01, Dnr 3488-1995.

³²⁷ Chap. 16, art. 9, al. 2 FB.

³²⁸ Chap. 11, art. 20 FB.

³²⁹ Chap. 11, art. 20, al. 2 FB.

4.5. Rights of appeal

In the first instance and as mentioned above, a *god man* cannot be appointed without the consent of the person concerned (unless she is not in a position to give it). For the appointment of a *förvaltare*, the consent of the individual is not necessary.

Once a *god man* or *förvaltare* has been appointed, several decisions can be made concerning **changes to the mandates of the representatives or the termination of the measure. Such decisions of the court or of the överförmyndaren can form the subject of an appeal.**

The need for a *förvaltare* or *god man* can change in the course of time. If the person concerned by such measures, his spouse, partner or close relatives or friends³³⁰ or even the existing *god man* or *förvaltare* request it, the court must accordingly consider whether the extent of the *förvaltarskap* or *godmanskap* should be adjusted.³³¹ The court can also decide to consider the question *ex officio*. Before making any decision, the court must give to the *god man* or *förvaltare*, as well as to the relevant *överförmyndaren* and the person concerned, the possibility of expressing a point of view.³³²

An application to dismiss a *god man* or *förvaltare*, as well as an application for the termination of a *godmanskap* or *förvaltarskap*, can be submitted by the person concerned by such measures, his spouse, partner or close relatives or friends³³³ or even by the existing *god man* or *förvaltare*.³³⁴ A court or *överförmyndare* can also proceed *ex officio* to consider these questions in so far as they fall within the scope of its competence.³³⁵ As part of the procedure on an application for the dismissal of a *förvaltare* or *god man* or for the termination of all measures, the court or *överförmyndare* must give the person concerned an opportunity to express his opinion on the question, in so far as this is possible.³³⁶

The relevant decisions of courts, like those of överförmyndaren, are subject to the ordinary principles of civil procedure set out in the Judicial Procedure Code (*rättegångsbalken*)³³⁷:

- Upon any decision (even provisional in advance of a court order) of an *överförmyndare*, an appeal can be brought to the court of first instance (*tingsrätt*)³³⁸;
- Upon any decision of a court of first instance (*tingsrätt*), an appeal to the second administrative instance (*hovrätt*) can be lodged within the three weeks following receipt of the decision and must be addressed to the court of first instance.³³⁹

D Bibliography

General works

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- ³³⁰ Chap. 11, art. 15 FB.
³³¹ Chap. 11, art. 23 FB.
³³² Chap. 11, art. 23, al. 2 FB.
³³³ Chap. 11, art. 15 FB.
³³⁴ Chap. 11, art. 21 FB.
³³⁵ Chap. 11, art. 21, al. 2 FB.
³³⁶ Chap. 11, art. 21, al. 3 FB.
³³⁷ Chap. 11, art. 25 FB, as well as chap. 20, art. 6 FB.
³³⁸ Chap. 20, art. 6 FB.
³³⁹ Chap. 50, art. 1 of the Judicial Procedure Code, SFS 1942:740 (*rättegångsbalken*).

AGELL, A., et MALMSTRÖM, Å., *Civilrätt*, Malmö, 2007.

BRINCK, B., FALK, P. *et al.*, *Civilrätt : grundläggande lärobok*, Umeå, 1995.

FAGERBERG, A., *Civilrätt*, Lund, 1985.

DAHLSTEDT, A.-C., et BJÖRNEFELDT-REX, G., *God man – förvaltare*, Lund, 2007.

FÄLLDIN, K., *God man eller förvaltare : en praktisk handbok*, Stockholm, 2007.

SEHLIN, E., *Förmyndare, god man och förvaltare : en information jämte föräldrabalken 9-16 kap m m*, Stockholm, 1998.

WALIN, G., *Förmyndare, förvaltare och gode män*, Stockholm, 1996.

Reports of the justitieombudsmannen

JO 2006/07 p. 437 – *Critiques envers l’överförmyndaren concernant l’administration d’une demande de changer curateur*

JO 2005/06 p. 422 – *Critiques envers l’överförmyndaren concernant l’administration d’une demande de curateur*

JO 1993/94 p. 240 – *Décision d’allocation sans le consentement du curateur*

JO 1989/90 p. 37 – *Question d’aptitude de la nomination d’un curateur*

JO 1988/89 p. 34 – *Critiques contre le conseil de surveillance de la tutelle (överförmyndarnämnd) pour manquement de surveillance du curateur*

JO 1987/88 p. 38 – *Question de l’étendue de l’obligation de la surveillance de l’överförmyndaren, quand le curateur vise – contre la volonté du mandant – vendre les immobiliers de celui-ci sur un terrain loué*

JO 1980/81 p. 274 – *Question de récusation d’un curateur pour un mineur*

Private international law

BERGQVIST, U., *Internationell arvs- och bodelningsrätt. En kommentar*, Stockholm, 2003.

BOGDAN, M., *Advokaten*, 1994, pp. 355-356.

BOGDAN, M., *Svensk internationell privat- och processrätt*, Stockholm, 2004 (en particulier, chap. 9.6-9.9)

BOGDAN, M., et MOBERG, Balans, no. 3, 1984.

EEK, H., *Lagkonflikter i tvistemål II*, Stockholm, 1978 (en particulier pp. 23 et ss.)

HOBÉR, K., "Tillämplig lag på utländska företags emissionsprospekt i

Sverige, jämte något om amerikanska bestämmelser om emissionsprospekt", *Svensk Juristtidning*, 1987, p. 586-599.

KARLGREN, H., *Kortfattad lärobok i internationell privat- och processrätt*, Lund, 1974 (en particulier pp. 82 et 92)

LANDO, O., *Kontraktstatuttet*, Copenhague, 1981 (en particulier pp. 233 et ss.)

MICHAELI, W., *Internationales Privatrecht gemäss schwedischem Recht und Schwedischer Rechtsprechung*, Stockholm, 1948 (en particulier, pp. 109 et ss.)

Sweden (S)

MICHAELI, W., SvJT 1946 p. 457.

NIAL, H., *Internationell förmögenhetsrätt*, Stockholm, 1953 (en particulier p. 78 et ss.)

PHILIP, A., *Dansk international privat- og procesret*, Copenhagen, 1976 (en particulier pp. 358 et ss.)

PHILIP, A, Recueil des cours, 1959 I (vol. 96) (en particulier pp. 303-304)

WALIN, G., *Kommentar till ärvdabalken II*, Stockholm, 2001 (en particulier p. 285 et ss.)

Section V

Czech Republic

Summary

The capacity of an individual to acquire rights and assume duties on the basis of his own legal acts is regulated in the Czech legal order by three documents: the Czech Civil Code, the Civil Procedure Code, and the Act on Private and Procedural International Law.

The Czech Civil Code contains substantive provisions on incapacity and curatorship, which are very concise. On the contrary, the Code of Civil Procedure devotes specific chapters both, to incapacitation under the heading “Proceedings related to capacity to undertake acts in law” and curatorship procedure under the heading “Proceedings on guardianship”.

The Civil Code recognises two categories of incapacity: (1) full deprivation of legal capacity (when the adult is placed under full or all-encompassing curatorship); and (2) partial deprivation of legal capacity (when the adult is placed under partial curatorship).

The court will generally appoint a legal representative or curator to assist a person deemed incapable or whose capacity to act is restricted. If, due to a permanent mental illness, an individual is able to undertake certain legal acts, the court may restrict his or her capacity to act and specify the extent of such a restriction. Nobody can be represented by an incapable person or by a person whose interests are at odds with the interests of the represented person. Unless a relative of the individual or other person meeting the requirements therefore can be appointed as curator for the individual, the court may appoint a local administrative authority as curator entitled to act in its own name.

Decisions taken by a representative or curator in relation to property of the represented person require court approval unless these are part of the usual affairs. If, at any time, the interests of the legal representative, or other persons represented by him, change such that they are at odds with the interests of the represented person, the court will appoint a special representative.

Legal capacity is, according to Czech legislation, governed by the law of the State of the person’s nationality. However, if a foreign national accomplishes a legal act in the territory of the Czech Republic, it is sufficient, in order for the act to be valid, that the person had capacity under Czech law.

A Introduction

The capacity of an individual to acquire rights and assume duties on the basis of his own legal acts is regulated in the Czech legal order by three documents: the Czech Civil Code(1964),³⁴⁰ the Civil Procedure Code (1963),³⁴¹ and the Act on Private and Procedural International Law (1963).³⁴²

There is **no special Act or regulation concerning the protection of adults lacking legal capacity.**

Statistical data

There is a lack of official data on the number of people with psycho-social disabilities (mental health problems) and intellectual disabilities in the Czech Republic. Neither the 2001 census nor the relevant ministries have relevant data. The **Government Council for Human Rights** acknowledged this problem in the late 1990s, but in 2002 still observed that “[t]he protection of the rights of persons whose freedom has been restricted de facto – as a result of being placed in various types of institutional care – remains a matter of peripheral interest for the public, legislators, lawyers and, with exceptions, also for the protectors of human rights.”³⁴³ The Council went to on state that a **“particularly urgent problem is represented by the protection of persons deprived of legal capacity and the procedural status of persons in proceedings on legal capacity.”**³⁴⁴ The Government Council for Human Rights therefore urged that “given the specific nature of these proceedings and their consequences for mentally ill persons, it is highly desirable for these proceedings to be monitored statistically and for their course to be tracked.”³⁴⁵ In 2007, the Ministry of Justice provided, on

³⁴⁰ The Czech Civil Code No. 40/1964 Coll. of Laws of 26 February 1964 (Občanský zákoník ze dne 26. února 1964) with following changes of No. 58/1969, 146/1971, 131/1982, 94/1988, 188/1988, 87/1990, 105/1990, 116/1990, 87/1991, 509/1991, 264/1992, 267/1994, 104/1995, 118/1995, 94/1996, 89/1996, 227/1997, 91/1998, 165/1998, 363/1999, 27/2000, 103/2000, 159/1999, 227/2000, 367/2000, 229/2001, 501/2001, 317/2001, 135/2002, 125/2002, 136/2002, 320/2002, 476/2002, 88/2003, 135/2002, 47/2004, 480/2004, 37/2004, 278/2004, 554/2004, 359/2005, 56/2006, 107/2006, 57/2006, 160/2006, 115/2006, 315/2006, 443/2006, 264/2006, 296/2007, 230/2008 Coll. of Laws.

³⁴¹ The Czech Civil Procedure Code No 99/1963 Coll. of Laws of 4 December 1963 (Občanský soudní řád ze dne 4. prosince 1963) with following changes of No. 36/1967, 158/1969, 49/1973, 20/1975, 133/1982, 180/1990, 328/1991, 519/1991, 263/1992, 24/1993, 171/1993, 283/1993, 117/1994, 152/1994, 216/1994, 84/1995, 118/1995, 238/1995, 118/1995, 160/1995, 238/1995, 247/1995, 31/1996, 142/1996, 269/1996, 202/1997, 227/1997, 15/1998, 91/1998, 165/1998, 326/1999, 2/2000, 46/2000, 360/1999, 27/2000, 105/2000, 130/2000, 204/2000, 227/2000, 370/2000, 30/2000, 155/2000, 220/2000, 367/2000, 120/2001, 137/2001, 231/2001, 271/2001, 451/2001, 491/2001, 501/2001, 317/2001, 202/2002, 226/2002, 276/2001, 151/2002, 320/2002, 476/2002, 88/2003, 120/2004, 153/2004, 237/2004, 257/2004, 340/2004, 436/2004, 555/2004, 628/2004, 554/2004, 59/2005, 170/2005, 216/2005, 205/2005, 342/2005, 377/2005, 383/2005, 501/2004, 413/2005, 56/2006, 79/2006, 57/2006, 79/2006, 113/2006, 133/2006, 216/2006, 233/2006, 134/2006, 115/2006, 308/2006, 315/2006, 112/2006, 135/2006, 264/2006, 308/2006, 296/2007, 104/2008, 123/2008, 126/2008, 129/2008 Coll. of Laws.

³⁴² The Czech Act on international private and procedural law No. 97/1963 Coll. of Laws of 4 December 1963 (Zákon ze dne 4.prosince 1963 o mezinárodním právu soukromém a procesním) with following changes of No. 158/1969, 234/1992, 264/1992, 125/2002, 37/2004, 257/2004, 361/2004, 377/2005, 57/2006, 70/2006, 233/2006, 296/2007, 123/2008 Coll. of Laws.

³⁴³ Government Council for Human Rights, Report on the State of Human Rights in the Czech Republic in 2002, §4.7.2, p. 43.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

Czech Republic (CZ)

request of the Mental Disability Advocacy Center,³⁴⁶ more detailed figures on incapacitation and curatorship proceedings. These figures have only been available since 2002, and **it is therefore impossible to estimate the total number of people under curatorship**. Furthermore, the table lacks further categorisation, for example by gender, age and diagnosis of people under curatorship, as well as in response to such questions as how many people have an institutional curator or what is the average number of people under curatorship for whom each professional curator is responsible.

Judicial decisions in incapacitation and curatorship proceedings
District courts (*okresní soudy*)

Type of Decision	2002	2003	2004	2005	2006
Judgments where full incapacity was found	1,314	1,312	1,508	1,594	1,459
Other decision in full incapacity proceedings	426	461	521	473	580
Judgments where partial incapacity was found	254	281	314	312	357
Other decision in partial incapacity proceedings	67	68	90	91	62
Judgments where legal capacity was restored	48	45	33	49	52
Other decision to restore legal capacity	108	95	115	113	139
Judgments enforcing agreements or other legal acts on behalf of persons under full or partial incapacity	1,039	1,086	1,193	1,332	1,283
Refusals to enforce agreements or other legal acts on behalf of persons under full or partial incapacity	37	38	34	35	35
Other decisions about agreements or legal acts on behalf of person under plenary or partial incapacity	113	118	157	180	168
Judgments appointing curators according to §29 of Civil Code	462	378	543	529	434
Other decisions where curators were appointed					93

According to recent information, released in November 2008 by the Czech Ministry of Justice, 2'139 decisions on full incapacitation, 472 decisions on limited capacity and 68 decisions returning capacity were in force in the Czech Republic in 2007. In the first half of 2008 (until 30.6.2008), the authorities made 1'155 decisions of full incapacitation, 314 decisions on limited capacity and 28 decisions

³⁴⁶

See Mental Disability Advocacy Center, Guardianship and Human Rights in the Czech Republic, Analysis of Guardianship Law and Policy, 2007 http://www.mdac.info/documents/Czech_report_English.pdf (15.09.2008), p. 19.

returning capacity. No data is available about the number of foreign citizens or about the residence of incapacitated persons.

B Listing

1. Legislation enacted

- Czech Civil Code (1964)
- Civil Procedure Code (1963)
- Act on private and procedural international law (1963)

2. Draft legislation

Issues related to disability and guardianship are currently not a priority area for Czech policy makers. Non-governmental organisations such as the **Mental Disability Advocacy Centre³⁴⁷ urge the Czech government to reform its protection of adults lacking legal capacity and guardianship laws.** According to these proposals it must be done in a way that actively involves and respects people with mental health problems and with intellectual disabilities, as well as their local and national organisations. For the time being **there is no comprehensive draft legislation proposed by responsible Czech legislature concerning the protection of adults lacking legal capacity.**

3. Jurisprudence

Court Decision	Relevant passages
Approval of the person appointed Decision of District court of Ústí nad Labem [(RC) 7 Co 206/66]	The approval of the person appointed as a curator is necessary.
Approval of the person appointed Decision of the Constitutional Court [III. US 154/06]	The approval of the person appointed as a curator is necessary; however, if the local administration is appointed as curator, approval is accorded by virtue of the law.
Obligation to hear an expert Decision of the Supreme Court [(RC) 5 Cz 67/63]	In order to impose restrictions on a person's legal capacity, the opinion of an attending doctor is required (the court must always hear an expert).

³⁴⁷

The Mental Disability Advocacy Center (MDAC) advances the human rights of children and adults with actual or perceived intellectual or psycho-social disabilities. It has participatory status with the Council of Europe. (see <http://www.mdac.info/> 15.09.2008).

Czech Republic (CZ)

<p>General overview of the procedure Statement of the Supreme Court [(RC) Cpj 160/1979]</p>	<p>This statement provides a general overview of the procedure involved in depriving or restricting legal capacity and certifying renewed capacity.</p>
<p>General overview of the procedure Statement of the Supreme Court [(RC) Cpj 228/81]</p>	<p>This statement provides a general overview of the procedure involved in depriving or restricting legal capacity and certifying renewed capacity.</p>
<p>Overview of private law issues Statement of the Supreme Court [(RC) Cpfj 27/86]</p>	<p>This statement provides an overview of private law issues relating to decisions restricting legal capacity.</p>
<p>Establishment of curator's duties Decision District Court of Prague [(RC) 20 Co 243/94]</p>	<p>In Prague municipalities, the definition of a curator's duties is established according to the domicile of the person concerned.</p>
<p>Competence of the local Government Decision of the Upper Court [(RC) 9 Cmo 269/97]</p>	<p>The competence of the local Government for curatorship is established according to the last domicile of the person concerned.</p>
<p>Approval of the person appointed Decision of District Court of Hradec Kralove [(Rc) 25 Co 531/97]</p>	<p>The appointment of the local administration as curator is not invalid in the absence of its approval.</p>
<p>Appointment of a procedural curator Decision of the Upper Court of Prague [(Rc) 9 Cmo 240/99]</p>	<p>The appointment of a curator for certain procedures ends with the end of this procedure.</p>
<p>Approval of the person appointed Decision of the Constitutional Court [II US 27/2000]</p>	<p>If the local administration is appointed as curator, it must approve its appointment; otherwise, the appointment is not valid.</p>
<p>Capability for curatorship Decision of the Supreme Court [(Rc) 20 Cdo 2850/99]</p>	<p>Nobody can be represented by a person who is not capable of acting in that capacity or whose interests are at odds with the interests of the represented person.</p>
<p>Approval of the person appointed Upper Court of Prague [(Rc) 9 Cmo 431/2001]</p>	<p>Curators can be not appointed without their approval.</p>

C NATIONAL REPORT

1. Notion and causes of incapacity

1.1. Notion

The capacity of an individual in terms of rights and duties arises, pursuant to § 7 of the Czech Civil Code, **at the moment of the individual's birth.**³⁴⁸ The full capacity of an individual to acquire rights and assume duties on the basis of his or her own legal acts arises at when he or she attains the age of majority, which is eighteen years under Czech law unless an individual marries before attaining the age of eighteen years and is deemed to have reached the age of majority upon entering the marriage (§ 8 of the CC).³⁴⁹ Minors shall be deemed capable only with respect to such legal acts that are appropriate in light of their age and maturity.

If, due to a **permanent mental illness**, an individual is unable to act in a legal capacity, the **court will restrict that person's ability to undertake such legal acts.** The Civil Code recognises two categories of incapacity: (1) full deprivation of legal capacity (when the adult is placed under full or all-encompassing curatorship); and (2) partial deprivation of legal capacity (when the adult is placed under partial curatorship).

1.2. Causes of incapacity

According to the Czech Civil Code, if an individual is capable of only **certain legal acts due to a permanent mental illness** or to an over-consumption of alcohol, the court may **restrict his or her ability to undertake such legal acts and specify the extent of such a restriction in its decision.** The court can impose limits on the individual's legal capacity in **only two cases:**

1. in cases of **mental health problems or intellectual disabilities**, where:
 - an adult has a **mental disorder**;
 - this mental disorder is **not temporary**;
 - and as a result the individual possesses a **limited capacity to undertake legal acts.**
2. in cases of **excessive consumption of alcohol, narcotics or intoxicants**, where:
 - an adult **consumes alcoholic** beverages, narcotics or intoxicants excessively;
 - **and as a result**, the adult **possesses a limited capacity to undertake legal acts.**

The court may **appoint a curator as a statutory representative** to represent persons whose capacity is in doubt. In the decision regarding the appointment of a curator, **the court must specify the scope of the curator's rights and duties** (§ 192 of the Czech Civil Procedure Code). **The determination of scope can be both, negative** (listing the areas where the person is not entitled to act independently) **and positive** (listing those areas where the person is capable of making independent decisions), since the Law does not provide any further guidance.

³⁴⁸ Under Czech law, capacity ends at death and unless death can be proved in the manner prescribed by law, the court will declare the individual dead.

³⁴⁹ Attaining majority through marriage cannot be invalidated even if the marriage is annulled.

1.3. Termination of the status of incapacity

The court may change or cancel restrictions relating to the ability of a person to undertake legal acts if the reasons for the restrictions have changed or no longer exist (§ 10 of the CC).

2. Legal consequences of incapacity

2.1. Degrees of incapacity and the legal consequences thereof

A legal act must be accomplished freely, seriously, definitely and intelligibly; otherwise, it is invalid. Consequently, a legal act accomplished by a person incapable of acting as such is invalid.³⁵⁰ Moreover, impossibility of performance and incapacity render a legal act invalid. Furthermore, pursuant to § 38 of the CC, a legal act accomplished by a person with an incapacitating mental disorder is invalid. If an individual is able to do only certain legal acts due to a permanent mental illness, the court may restrict his or her ability to undertake legal acts and will specify the extent of such a restriction in its decision. The Civil Code recognises two categories of incapacity: (1) full deprivation of legal capacity (when the adult is placed under full or all-encompassing curatorship); and (2) partial deprivation of legal capacity (when the adult is placed under partial curatorship).

2.1.1. Proceedings on capacity

Decisions on legal capacity are established through court proceedings, or a combination of court and administrative processes, during which an adult is found to either partially or completely lack capacity to make decisions on his or her own behalf. The outcome of such findings could be that the person is found to be “legally incapable”. **Proceedings on legal capacity are regulated by the Czech Civil Procedure Code** (hereinafter “the CPC”). An adult must be represented during the incapacitation proceedings, and may select his own representative. Only when the adult does not select such a representative does the court appoint a procedural guardian / curator who must be an attorney (§ 187/1 of the CPC). **The court must tell the adult of his or her right to select a representative and other procedural rights.** The court may decide not to hear the adult in cases where a hearing is not possible without causing detriment to the health of the person (§ 187/2 of the CPC). If the person requests a hearing, the court is obliged to hold one. In order to evaluate the mental capacity of the person concerned, the courts must always hear an expert (§ 187/3 of the CPC). If it is necessary, the adult may be detained in a hospital for a maximum period of six weeks in order for an incapacity assessment to take place. There is also **a procedure to remedy wrong decisions**, for example those based on invalid or defective expert opinions (§ 190 of the CPC)³⁵¹. Finally, the legal capacity procedure is exempted from court fees.

Following a judgement depriving or restricting the adult of legal capacity, it is the court’s responsibility to initiate the appointment of a curator (§ 192 - 193 of the CPC). **The court is responsible for ensuring that a curator as a statutory representative is appointed to each adult without legal capacity, but there is no time limit** (§ 192/1 of the CPC). The court is obliged to inform all of the parties of the proceedings for the appointment of a curator (§ 81/3 of the CPC), including the person, who is the subject of the proceedings.³⁵² The curator’s specific authority is defined either

³⁵⁰ Mistakes in writing or calculations make the act invalid if its meaning is disputed (§ 37 of the CC).

³⁵¹ See also Winterová, A. et al.: *Občanský soudní řád s vysvětlivkami a judikaturou*, 2. aktualizované vydání, Praha, Linde, 2005, p. 517.

³⁵² This obligation was often breached since the courts erroneously applied by analogy art. 189(2) of the Civil Procedure Code. In contrast to the procedure depriving or restricting the adult of legal capacity, the public prosecutor is not entitled to intervene in the guardianship procedure (§ 35(1)(e) CPC). There is no right to legal representation or a procedural guardian. A „special curator“

by law or by court order. Generally, the curator has **both decision-making authority over the adult and an obligation to protect the adult's welfare**. The effectiveness of curatorship as an institution depends on certain personal qualities of the curator, such as his or her diligence and conscientiousness.³⁵³

2.1.2. Proceedings regarding sanitary institutions

An institution for medical care (hereinafter an "institution"), in which persons are placed for reasons referred to by special regulation, must within 24 hours of admitting a patient without his consent, inform the court in the district where the institution is located. If a person's free movement or contact with persons outside the institution has been restricted during the course of medical care, **the institution must inform the court within 24 hours of the imposition of such restrictions** (§ 191a of the CPC). The court in the district where the institution is located will not commence proceedings if a person is admitted into an institution pursuant to another proceeding. For other proceedings, the court will appoint a curator if the person does not have a representative. **The court will investigate whether the reasons for admitting the person into the institution were lawful** and will examine documents relating to the person and the attending doctor, though a meeting is not usually ordered. **The court will determine, within seven days, whether admitting the patient was lawful** (§ 191b of the CPC).

The ruling is delivered to the person who has been admitted unless, according to the **opinion of the attending doctor**, he is unable to understand the contents of such a ruling. The ruling shall be also delivered to his representative (curator) and to the institution. **An appeal against this ruling has no deferring effect**. An appeal may be filed by the institution if the court has decided that the basis for admitting the person was unlawful. The institution may release the person even if the court has declared that the basis for admitting the person was lawful (§ 191c of the CPC).

Even if the court has stated that there were lawful reasons for admitting the person, if person's contact with persons outside the institution has been restricted, the court will continue the proceedings. **The court will appoint an expert to assess the health conditions** of the person and to determine (i) whether it is necessary for the person to remain in the institution and (ii) whether it is necessary to maintain contact restrictions. A doctor employed by the institution may not be appointed as an expert. The court shall order a hearing to which the person (if he is, according to the report of an attending doctor, able to understand the nature of the hearing) and his representative will be summoned. At the hearing, the court will examine the expert and, depending on the circumstances, the attending doctor and the person concerned. The court must, within three months after deciding on the admissibility of the person in an institution, **decide whether the person should remain in the institution and for what period** (§ 191d of the CPC).

may be appointed, but this is not obligatory. The Supreme Court of the former Czechoslovakia held in 1984 that it is not necessary to appoint a procedural curator to an adult deprived of legal capacity for a curatorship procedure since the adult's rights are not at stake (Decision Rc 2/1984/IV). Although this decision is rather old, it is still reproduced in most of the commentaries on the Code of Civil Procedure (See e.g., WINTEROVÁ, A. et al.: *Občanský soudní řád s vysvětlivkami a judikaturou*, 2. aktualizované vydání, Praha, Linde, 2005, p. 525, or BUREŠ, J., DRÁPAL, L., KRČMÁŘ, Z., MAZANEC, M.: *Občanský soudní řád s judikaturou a souvisejícími předpisy*, Praha, C. H. Beck, 2004, p. 529..168).

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There is no duty on the curator to take into account the opinion of the adults under curatorship when making decisions about the life of that person. Curatorship agencies of local authorities have statutory responsibility for the oversight of curatorship arrangements, but their duties are not adequately defined in legislation. This means that negligent and abusive curators may go undetected.

Unless a shorter period is stipulated in the decision, the court must re-examine the case within one year of its decision to keep the person in the institution. This does not preclude either the institution from releasing the person before the end of the one-year period or the curator from taking other measures (§ 191e of the CPC).

If a person in an institution is capable of undertaking legal acts, his representative (curator) and persons close to him may, **before the one-year period has elapsed, require a new examination and decision on the person's release based on the justified** presumption that keeping the person in the institution is unfounded. If the court dismisses the petition for release, it may also decide that **further examination will not be carried out before the end of the one-year period** (§ 191f of the CPC).

2.2. Publication of the status of incapacity and of its termination

According to § 156 of the CPC, a **judgment must always be declared in public**. It is declared by the chairman of the panel in the name of the Czech Republic. The chairman must specify **the verdict of the judgment, together with the reasons and an instruction on appeals**, as well as the possibility of enforcing the decision. After announcing the judgment, the chairman of the panel usually asks the parties to state whether they intend to waive or pursue an appeal against the declared judgment. **The judgment is usually declared immediately after the hearing** preceding the judgment unless the court adjourned the hearing for deliberation, which is possible for a maximum of **ten calendar days**. The court is bound by the judgment as soon as it is declared. This general rule applies to all judgments, and there is in this respect no special rule concerning judgments related to the status of incapacity.

2.3. National systems of protection

“In the Czech Republic, there is **no specific law on psychiatric care to regulate the rights of persons with mental disorders or to create a legislative framework for the reform of care for persons with mental disorders.**”³⁵⁴

The Czech Civil Code contains substantive provisions on incapacity (§ 10 of the CC) and curatorship, (§ 27(2), 29 and 30 of the CC) which are very concise. On the contrary, the **Code of Civil Procedure devotes specific chapters both, to incapacitation under the heading “Proceedings related to capacity to undertake acts in law”** (§ 186-191 of the CPC) and curatorship procedure under the heading “Proceedings on guardianship” (§ 192-193 of the CPC). The Civil Code recognises two categories of incapacity: (1) full deprivation of legal capacity (when the adult is placed under full or all-encompassing curatorship); and (2) partial deprivation of legal capacity (when the adult is placed under partial curatorship).

A legal act accomplished by a person incapable of acting as such is invalid as is a legal act accomplished by a person with an incapacitating mental disorder. The court will generally appoint a legal representative to assist a person deemed incapable or whose capacity to act is restricted.

If, due to a permanent mental illness, an individual is able to undertake certain legal acts, the court may restrict his or her capacity to act and specify the extent of such a restriction. Nobody can be represented by an incapable person or by a person whose interests are at odds with the interests of the represented person. Unless a relative of the individual or other person meeting the requirements

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Government Council for Human Rights, Report on the State of Human Rights in the Czech Republic in 2005, §4.7.1, p. 50.

therefore can be appointed as curator for the individual, the court may appoint a local administrative authority as curator entitled to act in its own name.

Decisions taken by a representative or curator in relation to property of the represented person require court approval unless these are part of the usual affairs. If, at any time, the interests of the legal representative, or other persons represented by him, change such that they are at odds with the interests of the represented person, the court will appoint a special representative.

3. Analysis of the national systems of protection

3.1. Types of protective measures

Protective measures concerning the protection of adults lacking legal capacity are, in the Czech Republic, exercised by curators. An individual who has been deprived of his or her capacity to undertake legal acts by decision of a court or whose capacity to legal acts was restricted by a decision of the court is legally represented by a curator appointed by the court, a court-appointed curator (“opatrovník“) is his statutory representative. Unless a relative of the individual or other person meeting the requirements therefore can be appointed as curator for the individual, the court may appoint a local administrative authority as curator entitled to act in its own name (§ 27 of the CC). The Civil Code recognises full and partial deprivation of legal capacity.

Decisions taken by a representative or curator in relation to property of the represented person require court approval unless these are part of the usual affairs (§ 28 of the CC)³⁵⁵. If, at any time, the interests of the legal representative, or other persons represented by him, change such that they are at odds with the interests of the represented person, the court will appoint a special representative (§ 30 of the CC).

There is **much criticism regarding the Czech system of protection of persons** with diminished capacity to undertake legal acts,³⁵⁶ in particular (but not only) because of the lack of financial resources for legal representatives of these persons.

A representative is defined as a person who is entitled to act for someone else in his name. Rights and duties arise directly as regards to the represented person. Nobody can be represented by an incapable person or by a person whose interests are at odds with the interests of the represented person (§ 22 of the CC).

Legal representation arises as a result of an act or **decision of a state authority** or on the basis of a power of attorney (§ 23 of the CC). **The representative must act in person**; he can have himself represented by a substitute only if this is allowed by regulation or agreed to by the parties. Even the substitute's legal acts establish rights and duties related to the represented person (§ 24 of the CC).

If individuals are unable to undertake legal acts, they are **represented by their legal representatives** (§ 26 of the CC). If, due to a permanent mental illness, an individual is able to undertake certain legal

³⁵⁵ The court may also appoint a curator to a person of unknown residence if it is necessary for the protection of his or her rights or if it is in the public interest. The court may appoint a curator for other serious reasons as well.

³⁵⁶ See documents of the League of Human Rights (Liga lidských práv): <http://www.llp.cz/cz/konference-a-seminare/2008> (15.09.2008); statements of the Civic Association for Help of Mentally Ill persons in the Czech Republic (Občanské sdružení pomoci duševně nemocným ČR <http://www.spdn-cr.org/aktuality/> (15.09.2008).

acts, the court may restrict his or her capacity to act and specify the extent of such a restriction (§ 10 para 2 of the CC).

3.2. Period of protection

The court may change or cancel restrictions relating to the ability of a person to undertake legal acts if the reasons for the restrictions have changed or no longer exist (§ 10 of the CC).

Unless a shorter period is stipulated in the decision, the court must re-examine the case within one year of its decision to keep the person in the institution. This does not preclude either the institution from releasing the person before the end of the one-year period or the curator from taking other measures (§ 191e of the CPC).

If a person in an institution is capable of undertaking legal acts, his representative (curator) and persons close to him may, **before the one-year period has elapsed, require a new examination and decision on the person's release based on the justified** presumption that keeping the person in the institution is unfounded. If the court dismisses the petition for release, it may also decide that **further examination will not be carried out before the end of the one-year period** (§ 191f of the CPC).

3.3. Financing of protective measures

The costs of the legal representation/curatorship are paid by the person who accepted or is obligated to accept the duty. The costs of all court proceedings are paid by the state. Where it can be reasonably demanded, the court grants the State the right to claim reimbursement from the person whose legal capacity was the subject of the proceedings (§ 191/1 of the CPC). **A person who files an obviously unreasonable petition must compensate the person concerned, his representative and the State** (§ 191 of the CPC).³⁵⁷ The State covers the cost of legal representation except in cases referred to in § 30 paragraph 2³⁵⁸ of the Act (§ 191g of the CC).

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Upon petition, the chairman of the panel may grant a participant full or partial exemption from judicial fees if it is justified by the participant's condition and, unless the matter is an obviously unsuccessful, exercise or defense of a right. Unless the chairman of the panel decides otherwise, the exemption applies to the entire proceeding and shall have retroactive validity; however, fees paid before the decision on exemption shall not be returned. The chairman of the panel may withdraw the awarded exemption at any moment during the proceedings even with retroactive effect if it is revealed, before the final and conclusive termination of the proceedings, that the participant's condition does not or did not justify the exemption. If a representative was appointed for a participant exempted from judicial fees, the exemption applies within the granted scope even to cash expenses of the representative and to a remuneration for representation (§ 138 of the CPC).

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According to the § 30 of the CPC, if the participant meets the requirements for exemption from judicial charges (see above § 138 of the CPC), the chairman of the panel appoints, upon request, a representative if it is necessary for protection of the participant's interests. The chairman of the panel must instruct the participant about the fact that he may file this request. Where it is necessary for the protection of the participant's interests or in case of compulsory representation by an attorney at law (or notary), the chairman of the panel shall appoint an attorney at law as the representative in the case.

4. Persons/authorities establishing the system of protection

4.1. Request for protective measures

A petition for **commencement of proceedings** relating to capacity (deprivation or restriction of capacity / certification of renewed capacity) may be, according to the provisions of the Czech Civil Procedure Code (hereinafter “the CPC”), filed by **any physical or legal person or by a sanitary institution (which becomes a participant in the proceedings in such a case)**. Unless the petition for commencement of proceedings was filed by a state authority or by a sanitary institution, the court may order that the petitioner **submit, within an adequate period of time, a medical report on the mental condition** of the person. If no medical report is submitted during this period, the court will grant a stay of proceedings. A petition for the certification of renewed capacity may be submitted by the person upon whom restrictions were previously placed however, if the court dismisses his petition and no improvement of his condition can be expected, the court may decide that **his right to petition therefore cannot be exercised for a certain period of time, which must not exceed one year** (§ 186 of the CPC).

4.2. Preparation of the file

The court may appoint a **curator to represent the person whose capacity is the subject of proceedings** and may abstain from meeting the person if examination cannot be carried out or cannot be carried out without causing harm **to the health of the person concerned**. The **court will always hear an expert on issues concerning the health of the person concerned**. Where necessary, the court may order, pursuant to an expert's petition, that the person **be examined in a sanitary institution for up to six weeks** (§ 187 of the CPC).

The chairman of the panel does not need to order a meeting if a meeting is not a suitable option. The court may decide to **abstain from rendering a decision on capacity if such a decision could adversely affect the person concerned** due to mental illness or an inability to understand the nature of the decision (§ 189 of the CPC).

4.3. Declaration of incapacity

If, due to a permanent mental illness, an individual is unable to undertake certain legal acts, the court may restrict his or her capacity to act. The decision is **always be declared in public**. It is declared by the chairman of the panel in the name of the Czech Republic. The chairman must specify **the verdict of the judgment, together with the reasons and an instruction on appeals**, as well as the possibility of enforcing the decision.

The court may change or cancel restrictions relating to the ability of a person to undertake legal acts if the reasons for the restrictions have changed or no longer exist (§ 10 of the CC).

4.4. Exercise of the protective measure

As has been said above protective measures concerning the protection of adults lacking legal capacity are exercised by curators. There are several types of curatorship. The Civil Code elaborates the main form of curatorship, *i.e.* “regular curatorship” and provides that the “legal representative of the person who was deprived of legal capacity or whose legal capacity was limited is a curator appointed by the court” (§ 27/2 of the CC). There is no comprehensive definition of curatorship.

An individual whose ability to undertake legal acts has been restricted by a decision of the court is legally represented by a curator appointed by the court. Unless a relative of the individual or other person meeting the requirements therefore can be appointed as curator for the individual, the court may appoint a local administrative authority as curator entitled to act in its own name (§ 27 of the CC).

Decisions taken by a representative or curator **in relation to property** of the represented person **require court approval unless these are part of the usual affairs** (§ 28 of the CC).³⁵⁹

A “**special curator**” may be appointed when “**compelling reasons**” exist, (§ 29 of the CC) and when one of the following conditions is met: either (1) it is necessary for the protection of the interests of the person concerned; or (2) it is required by public interest. This form of curatorship may be seen as **less restrictive than regular curatorship**. In reality special curators are rarely used.³⁶⁰ Another curator is appointed when there is a conflict of interest: 1. between the (regular) curator and the person under curatorship; or 2. between the different people under (regular) curatorship (*e.g.* between two incapable people) who are represented by the same curator (§ 30 of the CC). Substantive curatorship must be distinguished from the “**procedural curatorship**”. The major difference is that the **procedural curator represents the adult only during legal proceedings** and is not entitled to undertake any substantive acts on the adult’s behalf.³⁶¹

4.5. Rights of appeal

According to § 201 of the CPC a decision of the court issued in first instance **proceedings may be appealed** unless this mode of recourse is excluded by law. Apart from the general requisites, the appeal must specify the decision against which it is directed, the extent to which the decision is contested, the **reasons** for which the decision or the procedure of the court is considered incorrect (reason of appeal), and **the outcome requested** by the appellant. Appellants in the proceedings concerning the status of incapacity may be parties to the proceedings, *i.e.* the petitioner (plaintiff) and that person whose rights are to be considered either may or must be assisted by a legal representative.

An appeal against a judgment **on the merits of the case may be based solely on the following**: a) unfair procedure, lack of jurisdiction or competence of the court or judge, incorrect composition of the court; b) ignorance of facts in evidence at first instance; c) unfair procedure causing prejudice; d) incomplete ascertainment of facts by court of first instance; e) unfounded judgment based on incorrect factual findings; f) existence of additional relevant facts or changes in circumstances likely to affect basis for decision of court of first instance; g) error in law or legal reasoning.

The court may change or cancel restrictions relating to the ability of a person to undertake legal acts if the reasons for the restrictions have changed or no longer exist (§ 10 of the CC).

The court may quash a judgment restricting the ability of a person to undertake legal acts where it is subsequently revealed that there was no basis for the judgment (§ 190 of the CPC).

³⁵⁹ The court may appoint a curator to a person of unknown residence if it is necessary for the protection of his or her rights or if it is in the public interest. The court may also appoint a curator for other serious reasons.

³⁶⁰ See Mental Disability Advocacy Center, Guardianship and Human Rights in the Czech Republic, Analysis of Guardianship Law and Policy, 2007.
http://www.mdac.info/documents/Czech_report_English.pdf (15.09.2008).

³⁶¹ Ibid.

D Bibliography

- BUBNÍK G., Schvalování důležitých úkonů nezletilého soudem, *Socialistická zákonnost*, 1966, č. 6 S. 339.
- BUREŠ, J., DRÁPAL, L., KRČMÁŘ, Z., MAZANEC, M.: *Občanský soudní řád s judikaturou a souvisejícími předpisy*, Praha, C. H. Beck, 2004
- DOUDOVÁ M., K problematice rozsudečných výroků určujících rozsah omezení způsobilosti občana k právním úkonům, *Socialistická zákonnost*, 1979, č. 9, S. 510n.
- HADERKA J., Zásahy soudu do způsobilosti občana k právním úkonům, *Socialistické soudnictvo*, 1977, č. 6, S. 34n.
- HADERKA J., K některým problémům opatrovnického řízení, *Socialistická zákonnost* 1971, S. 267n.
- HADERKA J., Poručenství a opatrovnictví od účinnosti zákona č. 91/1998 Sb. *Ppr*, 1999, č. 1 S. 40
- HADERKA J., K některým domnělým (i skutečným) nedostatkům zákona č. 91/1998 Sb. ve vztahu k osvojení, *PPr* 1999, č. 7, S. 406
- HADERKA J., Některé sporné otázky řízení a rozhodování o způsobilosti k právním úkonům. *Bulletin advokacie*, 1980, červenec-září, S. 13n.
- HALOUZKA V., Právní způsobilost (subjektivita) občana. *Socialistická zákonnost*, 1976, č. 7, S 385n.
- HOLUB M. a kol., *Občanský zákoník. Komentář. Sv. 1, 2 vyd.*, Praha, Linde Praha 2003, S. 61n.
- HURDÍK J., *Osoba a její soukromoprávní poslání v měnícím se světě*, Brno, Masarykova universita, 2004
- KNAPPOVÁ M., *Pojem právní subjektivity a způsobilosti k právním úkonům v čs. občanském právu*, Acta universitatis Carolinae, 1958, No. II
- KNAPPOVÁ M., *Právní subjektivita Právní subjektivita a způsobilost k úkonům v československém občanském právu*, Praha NČSAV 1961
- KNAPPOVÁ M., ŠVESTKA J., a kol. *Občanské právo hmotné*, Vol. 1 š. ed. Praha ASPI 2002, S. 162n.
- KRUTSKÝ J., K některým podmínkám a důsledkům zrušení rozsudku zasahujícího do způsobilosti k právním úkonům. *Socialistická zákonnost*, 1985, No. 6, S 347n.
- KUČERA Z., *Mezinárodní právo soukromé*, 3. vyd., Doplněk Brno 1996
- MENTAL DISABILITY ADVOCACY CENTER, *Guardianship and Human Rights in the Czech Republic, Analysis of Guardianship Law and Policy*, 2007
- MYSLIL S., Plná moc udělená více zmocněncům, *Bulletin advokacie* 2002, S. 26
- NEDELKA M., Prohlášení zmocněnce o přijetí plné moci – její povinná náležitost, *Právní rádce*, 2005, č.4 S.138n.
- POKORNÝ M., *Zákon o mezinárodním právu soukromém a procesním Komentář*, C.H. Beck Praha 1998
- SPÁČIL J., Poznámky k problematice zastoupení na základě plné moci. *Právo a podnikání*, 1996, č. 1.
- ŠVESTKA J., SPÁČIL J., ŠKÁROVÁ M., HULMÁK M., a kol. *Občanský zákoník I. II. Komentář*, Nakladatelství C.H.Beck, Praha 2008,
- VARŠO J., *Ochrana práv fyzických osob v občanskoprávních vztahov s cudzím prvkom podľa čs. medzinárodného súkromého práva*, Acta Iuridica Cassoviensia, Košice 1986/12
- WINTROVÁ A., a kolektiv, *Občanský soudní řád s vysvětlivkami a judikaturou*, Linde Praha 2005

Section VI

Romania

Summary

In Romania, systems of protection for persons lacking capacity include guardianship, and in exceptional cases, curatory.

Incapacity is related to an inability to appreciate the nature and consequences of one's actions as a result of insanity or mental disability. Whether a particular protective measure is taken will depend on the person's capacity to appreciate the nature and consequences of his or her actions: if the person can no longer manage his or her affairs due to old age or physical illness, a curator may be appointed to assist the person. The same is true for persons requiring temporary assistance.

In imposing restrictions on a person, a court will assume that there is more than a temporary loss of capacity. Restrictions remove a person's decision-making capacity and involve guardianship placements, as well as the imposition of permanent medical supervision.

Substantive criteria for the imposition of restrictions include loss of capacity – the onset of which may be due either to a psychological event or to mental disability preventing the affected person from properly managing his or her affairs. The imposition of such measures may be requested by any person capable of justifying his or her interest in the welfare of the affected person.

A person found to be incapable may not exercise his or her civil law rights with the exception of certain rights relating to the preservation of patrimonial (estate) property – as specified in doctrinal sources and case-law – and daily activities without legal effect.

Incapacity may be invoked as against third parties from the time of the registration of a declaration of incapacity in a special register or from the time that the third party becomes aware, through other means, of restrictions imposed on the affected person.

Guardianship is characterised by its mandatory nature, its application to individuals on a case-by-case basis and its gratuity. Nevertheless, remuneration – limited to 10% of the income of the person lacking capacity and calculated according to the guardian's tasks – is provided for by law. In order to avoid conflicts of interest, exceptions prevent certain persons from becoming guardians; otherwise, any physical person may be appointed to guardianship. In some cases, guardianship may be revoked due to a guardian's misconduct.

An affected person may appeal against a decision to impose restrictions.

A Introduction

Under Romanian law, the protection of persons lacking capacity is guaranteed for insane and mentally disabled persons by the imposition of restrictive measures followed by guardianship, or in rare cases curatory. Persons with diminished mental capacity, insane or mentally disabled persons who present a danger are subject to mandatory medical treatment.³⁶²

Persons without limited capacity, who are unable to manage their affairs, are, in exceptional circumstances, protected under the system of curatory.³⁶³

Statistical Data

There is no available data at this time.

B Listing

1. Legislation enacted

- Family Code³⁶⁴
- Decree No.31/1954 concerning physical and legal persons³⁶⁵
- Decree No.32/1954 concerning the entry into force of the Family Code and Decree No. 31/1954 concerning physical and legal persons³⁶⁶
- Law No.487/2002 on Mental Health and the Protection of Persons Exhibiting Mental Difficulties³⁶⁷
- Civil Procedure Code

2. Draft Legislation

- Bill of law relating to the Romanian Civil Code (approved by the Senate during discussions before Parliamentary Commissions of the House of Representatives)³⁶⁸
- Amendments to the Bill of law relating to the Romanian Civil Code (work in progress with the Ministry of Justice)

³⁶² Law No.487/2002 concerning mental health and the protection of persons exhibiting psychiatric problems, published in Official Monitor No.589 of 8 August 2002.

³⁶³ Ghoerghe Belei, *Drept civil*, p.373. For differences between the various forms of curatory, see Point 4.4.1.2 *infra*.

³⁶⁴ Law No.4/1953 published in Official Gazette No.1 of 4 January 1954, republished in Official Gazette No.13 of 18 April 1956.

³⁶⁵ Published in Official Gazette No.8 of 30 January 1954, modified by Law No.4 of 1956, published in Official Gazette No. 11 of 4 April 1956.

³⁶⁶ Published in Official Gazette No.9 of 31 January 1954.

³⁶⁷ Published in Official Monitor No.589 of 8 August 2002.

³⁶⁸ Available online at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=5810.

3. Jurisprudence

Court Decision	Relevant Passages
<p>The Constitutionality of Imposing Restrictions</p> <p>Curtea Constituțională decizia nr.226/3 iunie 2003</p>	<p>“...given that the physical person upon whom restrictions have been imposed finds himself in a different situation from that of other individuals and that the inability to appreciate the nature and consequences of his actions makes him different from others, and given that different situations impose and call for different legal solutions, it is evident that we cannot uphold these restrictions, as they violate the constitutional principle of equality of citizens.</p> <p>Moreover, legal rights, including free access to justice, and more importantly, the right to make decisions regarding his person, as well as any liberties, including those relating to expression, cannot be exercised unknowingly or unwillingly. Where a court finds that there is an absence of such wilfulness, the affected person, who does not have the capacity to freely exercise his rights, loses the benefit of Articles 21, 30 paragraph 1 and 26 paragraph 2 of the Constitution.</p> <p>Finally, taking into account the purpose of restrictions, notably those protecting persons unable to appreciate the nature and consequences of their actions, the regulation contained in the contested law does not violate constitutional provisions found at Article 26 paragraph 1 regarding the obligation of public authorities to respect and protect the intimate, family and private life of a person.”</p>
<p>Application for the Imposition of restrictions</p> <p>Înalta Curte de Justiție și Casație, secția civilă, decizia nr. 2196/2004</p>	<p>“According to Article 143 of the Family Code, persons listed at Article 115 may only request that restrictions be imposed in the limited cases provided for by Article 142, namely where loss of mental capacity, insanity or mental disability leads to an inability to appreciate the nature and consequences of one’s actions – not in other cases, nor where physical disability has not resulted in a loss of mental capacity.”</p>
<p>Application for the Imposition of restrictions</p> <p>Curtea Supremă de Justiție, decizia nr. 1098/2002</p>	<p>“The defendant’s application, which requests the imposition of restrictions as against the applicant, does not satisfy the criteria of a counter claim within the meaning of Article 119 paragraphs 1 and 2 of the Civil Procedure Code, as the preliminary procedure prescribed by Articles 30 and following of Decree No. 32/1954 has not been followed.”</p>

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<p>Imposition of Restrictions without a Hearing Involving the Affected Person</p> <p>Curtea Supremă de Justiție, decizia nr. 2880/2000</p>	<p>“The imposition of restrictions aims to protect the person who, as a result of loss of mental capacity, insanity or mental disability, can no longer appreciate the nature and consequences of his or her actions in a manner that is sufficient to manage his or her interests.</p> <p>There are cases in which such a person attempts, through various means, to avoid attending a hearing and for this reason cannot benefit from a hearing, though the state of his health may require that protective measures be taken through the imposition of restrictions.</p> <p>In such cases, if the court finds that it is not possible to conduct a hearing, yet there is probative evidence of the state of physical health, which is sufficient to justify the imposition of restrictions, the court may impose such restrictions. Deciding otherwise would mean giving too formalistic an interpretation to the law and would diminish the legal effects of an institution meant to protect persons with mental illness.”</p>
<p>Responsibilities of the Curator</p> <p>Curtea Supremă de Justiție, decizia nr. 2880/2000</p>	<p>“Where the authority of a guardian usurps the authority of a curator, the curator may not defend the interests of the beneficiary of the curatory.”</p>
<p>Conditions Necessary for the Imposition of Restrictions</p> <p>Tribunalul Suprem, decizia nr. 993/1985</p>	<p>“Decree 32/1954 contains at Articles 30 and following a list of actions that must be taken by a court seized of an application for the imposition of restrictions.</p> <p>Since the imposition of restrictions is based on a finding of mental incapacity of the person against whom restrictions are being sought, and since by virtue of Article 142 of the Family Code, it is only on the person unable to manage his own affairs by reason of mental incapacity or disability that restrictions may be imposed, actions taken by the court involve the request for a medical opinion by a commission of specialised medical practitioners.</p> <p>In this case, the court did not respect the legal provisions mentioned, as it decided the case without ordering an expert medical opinion regarding the mental status of the person against whom the restrictions were to be imposed.”</p>
<p>Condition of the Affected Person</p> <p>Tribunalul Suprem, decizia nr. 1015/1979</p>	<p>“From Article 142 of the Family Code, which is exhaustive, it is clear that restrictions may be imposed on a person who does not have the necessary mental capacity to manage his own interests due to loss of mental capacity, insanity or mental disability.</p> <p>As a result, restrictions may not be imposed on a person who despite age, illness or physical infirmity, remains lucid and benefits from mental capacity though, pursuant to Article 152 of the Family Code, a curator may be appointed to that person where he is unable to adequately defend his interests.”</p>

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<p>Presumption of Capacity</p> <p>Tribunalul Județean Timiș, decizia nr.1285/1978</p>	<p>“As long as restrictions have not been imposed on an insane person, there is a presumption of capacity, which may be refuted by proof of the contrary consisting of proof of illness and inability to appreciate the nature and consequences of his or her actions. In order to avoid a legal transaction entered into during a state of reduced mental capacity or to obtain the elimination of restrictions on civil law rights after the performance period, proof of the inability to appreciate the nature and consequences of one’s actions must specifically relate to the time of contracting the agreement or to the time when mental capacity was reduced.”</p>
<p>Domicile of a Person Lacking Capacity</p> <p>Tribunalul Suprem, secția civilă, decizia nr.2951/1974</p>	<p>“While a person lacking capacity is domiciled at his guardian’s domicile, this principle only applies where appropriate conditions exist such that the person lacking capacity, in effect, lives with his guardian. This is not the case where a separate room is required for the care of the person lacking capacity and cannot be made available in the guardian’s domicile (cf body of text).”</p>
<p>Criteria for the Imposition of Restrictions</p> <p>Tribunalul Suprem, secția civilă, decizia nr.1035/1970</p>	<p>“According to Article 142 of the Family Code, restrictions may be imposed on persons who, due to loss of mental capacity or mental disability, are unable to appreciate the nature and consequences of their actions in a manner that allows for the adequate management of their interests.</p> <p>This legal provision makes it necessary for general and permanent mental difficulties to exist before restrictions may be imposed. Temporary loss of mental faculties, unconsciousness resulting from intoxication, hypnosis, etc. do not meet the standard required for restrictions to be imposed.”</p>
<p>Proof of Inability to appreciate the nature and consequences of actions</p> <p>Tribunalul Suprem, colegiul civil, decizia nr.237/1967</p>	<p>“The imposition of restrictions creates a presumption of permanent loss of capacity to appreciate the nature and consequences of actions from the moment the decision is taken to impose the restrictions.</p> <p>Before the imposition of the restrictions, the adult person is presumed to have capacity and the onus is on him to prove that, at the moment when a legal act was undertaken, he lacked the capacity to appreciate the nature and consequences of his actions.”</p>

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<p>Extent of Restrictions</p> <p>Tribunalul Suprem, decizia nr.900/1966</p>	<p>“While the imposition of restrictions aims at protecting the interests of persons unable to adequately appreciate the nature and consequences of their actions by removing certain rights and designating a legal representative (guardian) to conclude legal acts and transactions as agent, the objective of Decree 12/1965³⁶⁹ is to protect the lives and personal integrity of persons who feel threatened by persons lacking capacity, who are dangerous and free to roam and, at the same time, establishes procedures for the hospitalisation and treatment of these persons.”</p>
<p>Procedures for Imposing Restrictions</p> <p>Tribunalul Suprem, colegiul civil, decizia nr. 1472/1958</p>	<p>“Decisions regarding applications for the imposition of restrictions require the presence of the prosecutor and the interrogation of the person upon whom restrictions may be imposed.”</p>
<p>Procedures for Imposing Restrictions</p> <p>Tribunalul Suprem, colegiul civil, decizia nr. 459/1957</p>	<p>“The procedure for imposing restrictions presupposes that there has been a written opinion issued by a medical commission of psychiatrists, as well as a recorded transcription made of the interrogation of the affected person.”</p>
<p>Medical Expertise</p> <p>Tribunalul Suprem, colegiul civil, decizia nr. 1446/1955</p>	<p>“A court is not bound by the findings in an expert medical report and may judge, based on other evidence, the capacity of the person upon whom restrictions may be imposed.”</p>
<p>Right of Appeal</p> <p>Tribunalul Suprem, colegiul civil, decizia nr. 835/1955</p>	<p>“The affected person may appeal against the rejection of an application for the imposition of restrictions.”</p>
<p>Jurisdiction of the Court and Authority of the Guardian</p> <p>Tribunalul Suprem, colegiul civil, decizia nr.2465/1955</p>	<p>“Where the court finds no basis for imposing restrictions, it has no jurisdiction to determine whether or not to impose curatory and authorise the production of supplementary proof to that end, as jurisdiction to impose curatory, in all cases provided for by law, rests exclusively with the guardian in its authority (Art. 152 of the Family Code).</p>

³⁶⁹

Repealed and replaced by Law No.487/2002 on Mental Health and the Protection of Persons Exhibiting Mental Difficulties.

C NATIONAL REPORT

1. Notion and causes of incapacity

1.1. Notion of incapacity

According to the law of Romania, simple insanity or mental disability does not in itself constitute incapacity. Loss of capacity to exercise civil law rights can only result from a judicial decision made in a procedure for the imposition of restrictions.³⁷⁰

Restrictions may be imposed on a person for reasons of insanity or mental disability where the person does not have the necessary capacity to manage his or her interests.

The decision to impose restrictions may be made as against adults and minors.³⁷¹

The notion of incapacity is related to the absence of capacity to appreciate the nature and consequences of actions, which implies an inability to consciously appreciate the nature and consequences of judicial proceedings.³⁷²

1.2. Causes of incapacity

In order for restrictions to be imposed, the **absence of capacity to appreciate the nature and consequences of actions must be a result of insanity or mental disability.**

If a person remains capable of appreciating the nature and consequences of his or her actions but can no longer manage his or her interests in a satisfactory manner due to age, illness, or physical infirmity, restrictions may not be imposed.³⁷³ In such a case, a curator may be appointed by virtue of the provisions of Article 152 of the Family Code.³⁷⁴

Mental difficulty must be of a general and permanent nature in order to result in the imposition of restrictions.³⁷⁵ Temporary loss of mental faculties, unconsciousness caused by drunkenness or hypnosis, disorganisation or similar causes do not justify taking measures toward the imposition of restrictions.³⁷⁶

³⁷⁰ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p. 320. Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.157.

³⁷¹ Article 142 Family Code. For the consequences of restrictive measures imposed on minors, see *infra* point 2.1.

³⁷² Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p. 321.

³⁷³ ÎCCJ, Civ. Sec., Dec. Nr. 2196/2004 "Restrictions may be requested under Article 115 of the same code only in limited cases provided for under Article 142, notably where insanity or mental disability results in the loss of judgment and not in other cases of physical disability, which do not result in a loss of judgment...".

³⁷⁴ Trib. Suprem, Civ. Sec., Dec. Nr. 691/1978 in R.R.D. no.7/1976, p.61-69. Trib. Suprem, Civ.Sec., Dec. Nr. 1015/1979.

³⁷⁵ Eugen Lazăr, *Aspecte referitoare la punerea sub interdicție a bolnavului de alienație mintală sau debilitate mintală.*

³⁷⁶ Trib. Suprem, Civ. Sec., Dec Nr.1035/1970 in Ioan Mihuță, *Repertoriu de practică judiciară în materie civilă a Tribunalului Suprem și a altor instanțe judecătorești pe anii 1969-1975*, p.61.

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Mental difficulties of a continuous nature do not justify the imposition of such measures where they seriously affect the person's capacity to manage his or her interests. Thus, the Supreme Court has found that a person suffering from morbid paranoia of a vengeful nature, an illness that diminishes civil responsibility but does not lead to a loss of capacity, cannot form the basis for the imposition of restrictions.³⁷⁷

The fact that insanity or mental disability is either congenital or the result of an accident or other illness is irrelevant.³⁷⁸

Similarly, the fact that the affected person has moments of lucidity does not prevent restrictions from being imposed on the person as long as insanity or mental disability is the person's habitual state.³⁷⁹ The decisive element is that insanity or mental disability renders the concerned person incapable of managing his or her interests.

1.3. Termination of the status of incapacity

Restrictions imposed in relation to incapacity are removed:

1. at death;
2. by judicial declaration of the death of the person lacking capacity;
3. by the removal of restrictions following a judicial decision.

If the causes leading to the imposition of restrictions cease to exist, the court, after hearing the prosecutor's conclusions, will render a decision regarding the removal of restrictions. That the person's state of mind has improved is not sufficient to put an end to the status of incapacity. To this end, it is necessary that a judicial decision be taken.³⁸⁰

An application for the removal of restrictions may be made by the person upon whom such restrictions have been imposed, by his guardian or by any other interested person.

The procedure for the removal of restrictions is the same as the procedure for their imposition with one particularity being that the guardian is given notice of the commencement of proceedings and is invited to participate.³⁸¹

The decision to remove restrictions takes effect at the moment that it becomes irrevocable.

It is communicated to the court of the place where the decision to impose restrictions was registered in order to ensure that it is mentioned in the special register and in a note in the margin of the original decision to impose restrictions.

The removal of restrictions, and thus the termination of the guardian's power to act as such, is valid as against third parties only as of the date of registration in the special register of the decision to remove the restrictions unless the concerned third party comes to know by other means.³⁸²

³⁷⁷ Trib. Suprem, col.civ., Dec.Nr.835/1955 in Culegere de Decizii ale Tribunalului Suprem pe anul 1955, I, p.248.

³⁷⁸ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.322.

³⁷⁹ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.323.

³⁸⁰ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.341.

³⁸¹ For procedural aspects of the imposition of restrictions, see point 4.2. *infra*.

³⁸² Gabriel Boroj, *Drept civil. Partea generală. Persoanele*, p. 383.

2. Legal consequences of incapacity

2.1. Degrees of incapacity and the legal consequences thereof

The imposition of restrictions:

- (a) remove the person's capacity to exercise his or her rights;
- (b) leads to the appointment of a guardian for adult lacking capacity
- (c) leads to the setting up of permanent medical supervision.

From the moment of the irrevocable declaration of incapacity and to the extent that the formalities of publication ensure its validity as against third parties, the affected person is considered as no longer having the sense of judgment necessary to exercise his civil law rights.³⁸³

Restrictions offer, therefore, a supplementary protection for the person lacking capacity against the legal consequences of his or her acts, as it covers not only acts undertaken during moments where mental difficulty is manifest, but also those undertaken by the person lacking capacity during temporary moments of lucidity.³⁸⁴ The person lacking capacity is, in all cases, required to demonstrate proof of the loss of capacity in order to obtain the cancellation of legal acts that run counter to his interests.³⁸⁵

Since restrictions may be imposed on an adult or a minor, the effect of such restrictions depends of the state of mind of the affected person.

For a minor under 14 years, the decision to impose restrictions will take effect only after the minor reaches 14 years of age (before reaching this age, the minor is, in any event, unable to exercise his civil law rights). Restrictions will ensure that the minor will not be able to personally undertake legal acts. The minor will only be able to act through an intermediary – that being his legal representative.³⁸⁶ The setting up of restrictions has particular effects on custody or guardianship in that, as opposed to the minor person without limited capacity, the minor person who lack capacity must benefit from priorities being placed on his or her health and living standards where the management of his or her patrimony (estate) is concerned.³⁸⁷

³⁸³ Trib. Suprem, col. civil, dec. nr.237/1967.

³⁸⁴ Gheorghe Beleiu, *Drept civil*, p.391. Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.334. Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.161.

³⁸⁵ As outlined in the case-law, "As long as restrictions have not been imposed on an insane person, there is a presumption of capacity, which may be refuted by proof of the contrary consisting of proof of illness and inability to appreciate the nature and consequences of actions. In order to avoid a legal transaction entered into during a state of reduced mental capacity or to obtain the elimination of restrictions on civil law rights after the performance period, proof of the inability to appreciate the nature and consequences of one's actions must specifically relate to the time of the contracting of the agreement or to the time when mental capacity was reduced." Trib.Jud.Timiș, dec.1285/1978.

³⁸⁶ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.325. Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.162.

³⁸⁷ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.325.

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Through the imposition of restrictions, the minor person aged between 14 and 18 years loses the limitation on his or her capacity to exercise civil law rights, a limitation acquired at age 14, and returns to the status of a person lacking capacity.³⁸⁸

In all other cases, the person who, before restrictions were imposed, had the benefit of full capacity to exercise his civil law rights, loses such capacity.

According to Article 11, paragraph 2 of Decree No. 31/ 1954, a person who lacks the capacity to exercise his civil law rights may only undertake legal acts through his legal representative.

Following doctrinal sources and case-law, this is not a strict rule. It is, thus, conceded that the person lacking capacity can undertake

6. acts to preserve his patrimony (estate)³⁸⁹ ;
7. daily acts without legal significance (purchases in shops, purchases of tickets to shows or for transportation).³⁹⁰

The adult who lacks capacity can neither undertake administrative acts relative to his or her patrimony,³⁹¹ nor can he undertake acts that only a guardian or curator – depending on the situation – may undertake.

Any acts undertaken by a person lacking capacity relative to the administration or disposition of his or her patrimony (estate) are voidable.³⁹² Only the legal representative of the person lacking capacity and the person lacking capacity him/herself, after the removal of restrictions, may plead incapacity as a basis for nullity.³⁹³ The other contracting party may not, under any circumstances, invoke the incapacity of the other in order to avoid performance obligations. It is important to note, in this respect, that acts of administration or disposition of patrimony (estate) undertaken by the person lacking capacity, may be cancelled without having to demonstrate prejudice to the patrimony of the person lacking capacity.³⁹⁴

In terms of illicit acts, criminal liability may only be imputed to a person lacking capacity where the victim is able to prove that the person lacking capacity appreciated the nature and consequences of his or her actions at the time that he committed the illicit act.³⁹⁵

Taking particular circumstances into account, the court, with approval from the competent medical authority, will decide, at the time when it imposes restrictions, whether the person lacking capacity

³⁸⁸ Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.162.

³⁸⁹ Acts to preserve one's patrimony are necessary for the preservation of a right or to avoid a loss. They require small expenses as compared to the value of the right at issue.

³⁹⁰ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.335.

³⁹¹ Acts to administer patrimony are those by which patrimony is exploited in a normal manner. These acts include certain acts relating to the disposition of individual property, such as perishable goods or goods with a nominal value that are of little use to the person lacking capacity.

³⁹² Ernest Lupan, Dan. A. Popescu, *Drept civil. Persoana fizică*, p. 187.

³⁹³ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.336. Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.162.

³⁹⁴ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.336.

³⁹⁵ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.336. Ernest Lupan, Dan. A. Popescu, *Drept civil. Persoana fizică*, p. 187.

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will receive medical supervision at his or her place of domicile or in a specialised institution (Art. 149 Family Code).

2.2. Publication of the status of incapacity and of its termination

The imposition of restrictions takes effect from the moment the decision becomes irrevocable.³⁹⁶

The decision is communicated without delay to the court of the place of registration of the affected person's birth so that it can be mentioned in a special register.

Where the review / appeal of a decision to impose restrictions is dismissed, the review court is required to communicate the decision and provide a copy thereof to the court of the place of registration of the affected person's birth.

The person's incapacity becomes enforceable as against third parties

- as of the date of registration, in the special register or
- when the third party comes to know by other means of the existence of these restrictions (Art.144 Family Code).

The consensual act between the person lacking capacity and a *bona fide* third party undertaken before the decision to impose restrictions is registered cannot be cancelled for reasons of incapacity. In order for the act to be cancelled, the person lacking capacity must prove that he or she lacked the requisite capacity at the moment when the act was undertaken. As a result, the person lacking capacity may not cancel acts undertaken during moments of lucidity, even if they cause him prejudice.

The third party who acts in bad faith, *i.e.* who knows of the existence of the restrictions, cannot benefit from a failure to register these restrictions.³⁹⁷

The registration of the decision in the register carries with it a legal presumption of knowledge regarding the restriction, which may be imputed to all other persons.³⁹⁸

2.3. National system of protection

The civil protection of adults lacking capacity is ensured by the imposition of restrictions followed by the setting up of either a guardianship or curatory.

³⁹⁶ The first instance decision becomes irrevocable if none of the parties intervenes by appeal. The decision on appeal remains irrevocable if the decision is not attacked by further appeal. The decision on further appeal is irrevocable (Art.377 C.pr.civ). Gheorghe Beleiu, *Drept civil*, p.391. Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.160.

³⁹⁷ Gabriel Boroș, *Drept civil. Partea generală. Persoanele*, p. 382.

³⁹⁸ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.332. Ernest Lupan, Dan. A. Popescu, *Drept civil. Persoana fizică*, p. 184.

3. Analysis of the national system of protection

3.1. Types of protective measures

3.1.1. *Imposition of Restrictions, Guardianship and Curatory*

The procedure for the imposition of restrictions followed by the setting up of a guardianship or curatory is as follows:

The judicial imposition of restrictions is a protective measure imposed by a court in favour of a person who lacks the requisite capacity to manage his or her interests for reasons of mental insanity or disability and that has the effect of removing the person's ability to exercise his or her civil law rights.³⁹⁹

The judicial imposition of restrictions only affects the capacity to exercise civil law rights, leaving intact the capacity to benefit from these rights. It follows that the person lacking capacity may be the holder of rights and the bearer of obligations. His patrimony, *i.e.* his moveable and immoveable property – present or future – is used to meet his obligations.

The judicial imposition of restrictions is a distinct measure, which is part of mandatory medical treatment governed by Law No. 487/2002, which applies to persons manifesting grave mental difficulties or representing a social danger. Mandatory medical treatment has no effect on the civil capacity of the person. As opposed to the imposition of restrictions, which results from a judicial decision, mandatory medical treatment may be ordered by an administrative body.⁴⁰⁰

3.1.2. *Prerequisites for the imposition of protective measures*

According to Article 142 of the Family Code, the conditions for the imposition of restrictions are:

- (a) **the person lacks capacity;**
- (b) **the absence of capacity is due to mental insanity or disability;**
- (c) **the absence of capacity prevents the person from managing his or her interests.**

The conditions enumerated under Article 142 of the Family Code for the imposition of restrictions are exhaustive and are subject to strict interpretation.⁴⁰¹

The absence of capacity in the management of interests is the only condition that may justify the imposition of restrictions on a person. If, in remaining sane or mentally sound, the person is incapable of managing his or her interests in a satisfactory manner as a result of age, illness or physical infirmity, a curator is appointed under Article 152 of the Family Code.⁴⁰²

³⁹⁹ Gheorghe Beleiu, *Drept civil*, p.388.

⁴⁰⁰ Gabriel Boroi, *Drept civil. Partea generală. Persoanele*, p. 380. Regarding provisions in force prior to Decree 12/1965, the Supreme Court has held that "While the imposition of restrictions aims at protecting the interests of persons unable to adequately appreciate the nature and consequences of their actions by removing certain rights and designating a legal representative (guardian) to conclude legal acts and transactions as agent, the objective of Decree 12/1965 is to protect the lives and personal integrity of persons who feel threatened by persons lacking capacity, who are dangerous and free to roam and, at the same time, establishes procedures for the hospitalisation and treatment of these persons." Trib. Suprem, col.civ., dec. nr.900/1966.

⁴⁰¹ Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.158. Ernest Lupan, Dan. A. Popescu, *Drept civil. Persoana fizică*, p. 183.

⁴⁰² Trib. Suprem, sec. civ., dec. no.691/1978 in R.R.D. no.7/1976, p.61-69.

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The imposition of the protective measure is justified by the fact that the affected person can no longer take care of his or her interests for reasons of incapacity. Since this is a question of fact, it may be proved by various means, including witness depositions or simple presumptions.

4. Persons / authorities establishing the system of protection

4.1. Requests for protective measures

The imposition of restrictions may be requested by any person who can justify his or her interest in this regard (Art. 143 and 115 of the Family Code), namely:

- persons who are close to the person lacking capacity, such as his or her landlord or roommates;
- the registrar of civil status, at the time of registration of the death of a person, as well as notaries when a will is subject to probate;
- courts, prosecutors and the police when a detention or limitation on the person's liberty is imposed;
- agencies of the public administration, public organisations, institutions mandated to offer protection and any other persons.

The request may be formulated by the person, who may ultimately be the subject of the imposed restrictions.⁴⁰³

There are a number of people who may request that restrictions be imposed on a person lacking capacity. Doctrinal sources indicate that this is justified by the fact that restrictions are aimed primarily at protecting the person lacking capacity from the consequences of his own actions.

4.2. Preparation of the file

4.2.1. Jurisdiction

The court of first instance (judecătoria) has subject-matter jurisdiction (*ratione materiae*) to judge requests for the imposition of restrictions according to Article 1 pct.1 C.pr.civ.⁴⁰⁴

The court of the place of the affected person's domicile has territorial jurisdiction (*ratione loci*) (Art. 5 C.pr.civ.).

4.2.2. Investigative Procedure

The imposition of restrictions involves two procedural steps.

In the first no contest procedure, the necessary elements of proof are gathered. The investigative phase is mandatory.⁴⁰⁵

⁴⁰³ Trib. Suprem, col.civ., dec. nr. 835/1955. Ion Retca, *Contribuții la studiul procedurii interdicției*, p.24.

⁴⁰⁴ Gheorghe Beleiu, *Drept civil*, p.390.

⁴⁰⁵ As a result, the imposition of restrictions may not be requested by counter claim. Curtea Supremă de Justiție, decizia nr. 1098/2002 "The defendant's application, which requests the imposition of restrictions as against the applicant, does not satisfy the criteria of a counter claim within the

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After receiving the request for the imposition of restrictions, the President of the court transfers the file to the prosecutor.⁴⁰⁶

The prosecutor orders an investigation regarding the issues deemed pertinent by the judge. He must consult a commission of specialised doctors in this regard.⁴⁰⁷ If the affected person is hospitalised, the prosecutor must request a medical opinion from the treating doctor.⁴⁰⁸ Doctrinal sources and case-law indicate that the medical opinion of specialised doctors is different from medical-legal expertise, but constitutes a simple opinion as to whether the affected person suffers from insanity or mental disability and if, as a result thereof, the person is incapable of managing his or her own interests and property.⁴⁰⁹

The opinions of specialised doctors have probative value because of their scientific nature and conclusions, though their probative value is not absolute. Like any other element of proof, the opinions of specialised doctors are subject to examination by the court, which may draw different conclusions based on other evidence.⁴¹⁰

As an interlocutory measure, the court may, if it deems it to be necessary, designate a curator to take care of the needs, to represent and to manage the property of the person who is the subject of proceedings for the imposition of restrictions (Art.146 Family Code).

On the basis of the prosecutor's conclusions, the court may order the temporary hospitalisation of the person for a maximum of six weeks where:

- according to the specialised doctor, such a measure is necessary to extend observation of the person's mental health condition and
- observation is not otherwise possible.

meaning of Article 119 paragraphs 1 and 2 of the Civil Procedure Code, as the preliminary procedure prescribed by Articles 30 and following of Decree No. 32/1954 has not been followed."

⁴⁰⁶ Such a request cannot be made directly to the prosecutor. Nevertheless, since the prosecutor is one of the persons who may request that restrictions be imposed on a person, the court may be seized by the prosecutor. Ion Retca, *Contribuții la studiul procedurii interdicției*, p.23.

⁴⁰⁷ Trib. Suprem, col. civ., dec. nr. 459/1957. Previous case-law confirms that the absence of specialised doctors' opinions constitutes a gross procedural error. "Decree 32/1954 contains at Articles 30 and following a list of actions that must be taken by a court seized of an application for the imposition of restrictions.

Since the imposition of restrictions is based on a finding of mental incapacity of the person against whom restrictions are being sought, and since by virtue of Article 142 of the Family Code, it is only on the person unable to manage his own affairs by reason of mental incapacity or disability that restrictions may be imposed, actions taken by the court involve the request for a medical opinion by a commission of specialised medical practitioners.

In this case, the court did not respect the legal provisions mentioned, as it decided the case without ordering an expert medical opinion regarding the mental status of the person against whom the restrictions were to be imposed."

⁴⁰⁸ Gheorghe Beleiu, *Drept civil*, p.390.

⁴⁰⁹ Eugen Lazăr, *Aspecte referitoare la punerea sub interdicție*; Trib. Suprem, col. civ., dec. no.459/1957.

⁴¹⁰ Trib. Suprem, col. civ., dec. nr. 1446/1955 "A court is not bound by the findings in an expert medical report and may judge, based on other evidence, the capacity of the person upon whom restrictions may be imposed."

4.2.3. Contested Procedure

Having received the results of the prosecutor's investigation and the opinion of the commission of specialised doctors, as well as the opinion of the treating doctor, the president of the court sets the date of the public hearing citing the parties' names and the date on which the pertinent documents from the file are sent to the affected person.

The contested procedure takes place as any other civil litigation, and the affected person becomes a defendant.⁴¹¹ There are two particularities of the procedure, however. Firstly, the judgment cannot be rendered until after the closing arguments of the prosecutor, who must participate in the proceedings. Secondly, the court must question the affected person in order to form its own opinion as to his or her condition.

The inquiry is mandatory and the validity of the decision depends on this procedural step.⁴¹² The subject of the request for the imposition of restrictions must be present at the public hearing.⁴¹³ According to Article 33 of Decree no. 32/1954, where the affected person cannot appear before the court, the inquiry shall take place at the person's location. Neither the doctors' opinions, nor the testimony of witnesses can replace the questioning of the affected person, a procedural step which allows the judge to form his or her own opinion on the merits of the conclusions regarding the mental state of that person.⁴¹⁴

The High Court of Appeals and Justice recently held that, in exceptional cases, a decision to impose restrictions may be rendered without questioning the affected person: "The imposition of restrictions aims to protect the person who, as a result of loss of mental capacity, insanity or mental disability, can no longer appreciate the nature and consequences of his or her actions in a manner that is sufficient to manage his or her interests."

There are cases in which such a person attempts, through various means, to avoid attending a hearing and for this reason cannot benefit from a hearing, though the state of his health may require that protective measures be taken through the imposition of restrictions.

In such cases, if the court finds that it is not possible to conduct a hearing, yet there is probative evidence of the state of physical health, which is sufficient to justify the imposition of restrictions, the court may impose such restrictions. Deciding otherwise would mean giving too formalistic an interpretation to the law and would diminish the legal effects of an institution meant to protect persons with mental illness."

The contested procedure ends when the decision rendered becomes irrevocable. The decision is communicated to the competent authorities in order to put an end to any curatory set up and to designate a guardian.

4.3. Declaration of incapacity

The decision to impose restrictions on a person is a decision that produces *ex nunc* effects. Even if insanity or mental disability existed before the decision was rendered, the inability to exercise one's

⁴¹¹ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.328.

⁴¹² Trib. Suprem, col. civ., dec. nr. 459/1957. Trib. Suprem, col. civ., dec. nr. 1472/1958.

⁴¹³ Eugen Lazăr, *Aspecte referitoare la punerea sub interdicție, cit.*

⁴¹⁴ Cour Suprême de Justice, dec.no.2880/2000.

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civil rights only produces its effects for the future from the moment that the irrevocable court decision is rendered provided that the formalities ensuring appeals or opposability are ensured.⁴¹⁵

4.4. Exercise of the protective measure

4.4.1. Persons designated to exercise protective measures

4.4.1.1. The guardian of the person lacking capacity

Definition and Principles

Guardianship is precisely the legal measure through which the protection of persons who, for reasons of insanity or mentally disability, is ensured through the imposition of restrictions.⁴¹⁶

In Romanian Law, guardianship is characterised by its mandatory nature, its application to individuals on a case-by-case basis and its gratuity.

Thus, the setting up of guardianship, the procedure involved in the designation of a guardian, the obligation of certain persons to assume responsibility as guardians and the termination of guardianship are all governed by mandatory legal provisions.

In principle, the appointed person may not refuse to act as guardian. It is important to note, however that Article 118 of the Family Code nuances the mandatory nature of guardianship and allows for the possibility of refusal by the appointed guardian for physical, social or moral reasons such as:

- the person is over 60 years of age;
- the person is pregnant or is the mother of a child under 8 years of age;
- the person cares for two or more children;
- the person already has responsibilities under another guardianship or curatory regime;
- the person cannot take on the responsibility for reasons of illness, infirmity, occupation, distance between his or her domicile and the location of the affected minor's property or for all other serious reasons.

If such circumstances arise during the guardianship, the guardian may request that he or she be replaced.

Guardianship is a personal responsibility. The guardian cannot delegate his or her duties, and especially not his or her powers of representation, to another person.

Guardianship is free (Art.121 Family Code). Nevertheless, the Family Code allows the guardianship authority⁴¹⁷ to remunerate the guardian up to a maximum of 10% of the income of the person lacking capacity, calculated on the basis of the guardian's tasks to ensure the proper management of the estate (patrimony) of the person.

⁴¹⁵ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.332.

⁴¹⁶ Ernest Lupan, Dan. A. Popescu, *Drept civil. Persoana fizică*, p. 187.

⁴¹⁷ The guardianship authority is an agency of the local administration, which is responsible by law, etc... for the establishment and organisation of guardianship, supervision, and control and coordination of activities for the protection of minors and other persons lacking capacity.

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Guardianship is governed by the principles of generality, exercise of functions in the exclusive interest of the person lacking capacity, and independence as between the guardian and the person lacking capacity of the estate (patrimony) from permanent State control.⁴¹⁸

Thus, guardianship is set up each time restrictions are imposed on a person.

Article 114 of the Family Code, applied *mutatis mutandis* to the guardianship of the person lacking capacity imposes on the guardian the duty to exercise the guardianship exclusively in the interests of the person lacking capacity.

Article 125 of the Family Code, which provides for the separation of the minor child's estate (patrimony) from his or her parents', applies by analogy to the relations between the guardian and the person lacking capacity.

The guardianship authority has permanent control over the activities of the guardian. The delegates of the guardianship authority have the right to visit the person lacking capacity, to ask questions regarding his or her situation and to give necessary instructions to the guardian.

Appointment of the guardian

According to Article 145 of the Family Code, the irrevocable decision to impose restrictions is communicated to the competent court, which then appoints a guardian to the person lacking capacity.

Where the person upon whom restrictions are imposed is a minor who, at the time of the imposition of restrictions, was under the authority of his parents, the person remains under the care of his or her parents until the age of majority and no guardian need be appointed (Art. 150 of the Family Code).

If, upon attaining the age of majority, the person is still subject to restrictions, the court will appoint a guardian.

Where the minor is subject to guardianship at the time of the imposition of restrictions, the court will decide whether the guardian continues in his or her duties or whether a new guardian shall be appointed.

Capacity to be a guardian

Any physical person, as well as a spouse domiciled in Romania, who meets the criteria of a guardian and sufficient standards of morality may be a guardian. With respect to standards of morality, the person or the family called upon to take responsibility for the guardianship is evaluated by the head of social welfare.

Under Article 117 of the Family Code, the following persons cannot be appointed as guardians:

- “(a) the minor person or the person upon whom restrictions have been imposed;
- (b) a person who has been denied parental rights or has been declared incapable of being a guardian;
- (c) a person whose exercise of political or civil rights has been limited by law or by judicial decision, as well as one who is guilty of bad behaviour;

⁴¹⁸

Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.145.

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- (d) a person who does not have the right, according to the special law, to elect and to be elected a deputy;
- (e) a person who, having exercised duties of a guardian, has had his status revoked;
- (f) a person who, because of a conflict of interest with the interests of the minor person, cannot fulfill his or her obligations under the guardianship.”

As soon a situation of incompatibility arises during the guardianship, the guardian’s duties shall be revoked.

In terms of conflicts of interests between the guardian and the person lacking capacity as a reason for their incompatibility, doctrinal sources indicate that revocation of the guardianship duties must only be in cases that are so severe that the exercise of guardianship duties is rendered impossible. In all other case, a curator will be appointed to represent the person lacking capacity.⁴¹⁹

Duration of the guardianship

As opposed to guardianship of a minor, which has a limited duration, and ends at the time when the minor reaches the age of majority, the duration of guardianship for an adult lacking capacity is, in principle, indeterminate. Given the length and the difficulty of the responsibility, the law allows the guardian of a person lacking capacity to request to be replaced three years after his or her appointment (Art. 148 of the Family Code).

The guardianship of the adult lacking capacity comes to an end when an irrevocable decision regarding the removal of restrictions is rendered.⁴²⁰

Guardianship may be revoked:

- if the guardian commits abuses in the exercise of his duties
- if the guardian is guilty of gross negligence or wilful acts that make him unfit to be a guardian
- if the guardian does not fulfil his duties in a satisfactory manner (Art.138 para. 2 of the Family Code).

Any person, including the person lacking capacity, may request the revocation of the guardianship (Art. 138 of the Family Code).

The effect of revocation is to render the former guardian unfit to take on the tasks involved in a new guardianship (Art. 117 of the Family Code).

4.4.1.2. The curator of the person lacking capacity

Romanian law recognises various forms of curatory. Thus, curatory may be

- curatory said to be for the purpose of protecting a person who is capable but unable to manage his or her estate (patrimony) for particular reasons, such as age, illness, infirmity, etc.
- curatory of a person lacking capacity created to ensure the temporary protection of a person who has been deprived of the ability to exercise his or her civil rights.

⁴¹⁹ Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.148. For the curatory of the person lacking capacity, see point 4.4.1.2. *infra*.

⁴²⁰ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.340.

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Curatory for the person lacking capacity may be set up:

- as a temporary measure while awaiting the appointment of a guardian (Art.119, para. 3 and 139 of the Family Code), after restrictions have been imposed, and where guardianship has been revoked
- where the parents or guardian are temporarily unable to exercise their duties ; for example where the parents or guardian cannot perform certain tasks due to illness or other circumstances;
- where there is a conflict of interests between the guardian and the person lacking capacity, which does so serious as to call for the revocation of guardianship (Art.132 of the Family Code);
- during proceedings for the imposition of restrictions where the interests of the affected person so require (Art.146 of the Family Code). This type of curatory presents the particular situation where the rules regarding guardianship of a person lacking capacity will be applied with respect to a person with capacity.⁴²¹

Whether or not to set up one or the other type of curatory depends on context. The first is meant for the person who, although not lacking capacity, finds him or herself unable to exercise his or her rights. The second aims to protect the person who no longer has the capacity necessary to manage his or her interests and is meant to replace guardianship or parental authority for a certain period of time.⁴²² It follows that curatory is, in fact, subject to the rules of the order, while the curatory of a person lacking capacity is subject to the rules applicable to guardianship.⁴²³

Doctrinal sources reveal the fact that, by its legal nature, curatory of the person lacking capacity is, in reality, guardianship. It follows that all of the rules concerning the setting up, the exercise and the termination of guardianship apply *mutatis mutandis* to curatory of a person lacking capacity.⁴²⁴

4.4.2. The powers of the persons setting up protective measures

According to Article 147 of the Family Code, the rules concerning guardianship of a minor who is less than 14 years of age apply to guardianship of persons upon whom restrictions have been imposed, except where the law provides otherwise.

According to Article 122 of Family Code, applied by analogy to guardianship cases of persons lacking capacity, the domicile of the person lacking capacity is the domicile of the guardian. Case-law, however, qualifies the extent of this provision: "While a person lacking capacity is domiciled at his guardian's domicile, this principle only applies where appropriate conditions exist such that the person lacking capacity, in effect, lives with his guardian. This is not the case where a separate room is required for the care of the person lacking capacity and cannot be made available in the guardian's domicile."

The powers of the guardian aim, on the one hand, to protect the person lacking capacity, and on the other hand, to manage his estate (patrimony).

⁴²¹ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.362.

⁴²² Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.351.

⁴²³ Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.170. Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.361.

⁴²⁴ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.362.

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Protection of the person

With respect to the protection of the person lacking capacity, it is important to remember that according to Article 122 of the Family Code, the guardian has the obligation to exercise his guardianship duties in the exclusive interest of the person lacking capacity.⁴²⁵ He or she must work to ensure the recovery and improvement of the person's living conditions. To this end, he may use the income and, to the extent needed, the property of the person lacking capacity.⁴²⁶

The management of the estate (patrimony)

At the setting up of the guardianship, the representative of the guardianship authority draws up a list of the property of the person lacking capacity. The person's debts toward the guardian, his or her spouse, parents or siblings shall be paid only upon authorisation by the guardianship authority.

The guardianship authority established the annual sum necessary for the care of the person lacking capacity and for the management of his property, which shall be covered by the income of the person lacking capacity. If the income is insufficient, the guardianship authority shall authorise the sale of the property of the person lacking capacity.

Surplus income over and above the necessary costs, as approved by the guardianship authority, shall be deposited into a bank account and shall not be withdrawn without the authorisation of the guardianship authority.

During the guardianship, the guardian must, within the 30 days following year-end, present to the guardianship authority, an annual report regarding the management of the property of the person lacking capacity (Art. 134 of the Family Code).

The guardian must also account for his management at every request by the guardianship authority.

The guardianship authority periodically verifies the accounts related to the guardianship.

At the end of the guardianship, the guardian must provide a general report, return any property belonging to the person formerly deemed to lack capacity, to his heirs or to the new guardian depending on the situation. After the return and the approval of the guardianship accounting, the guardianship authority covers any losses caused involuntarily by the guardian. The guardian remains liable for any damages or losses resulting from his fault, and the new guardian is required to demand reparation.

The guardian is the legal representative of the person lacking capacity. According to Article 124 of the Family Code, he has the obligation to manage the property of the person lacking capacity and to represent that person for the conclusion of any civil acts.

Acts relating to the management of estate (patrimony) of the person lacking capacity are divided into three categories:

- acts that the guardian may conclude on his or her own without prior approval of the guardianship authority;
- acts that the guardian cannot conclude without prior approval of the guardianship authority;

⁴²⁵ Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.148.

⁴²⁶ Constantin Stătescu, *Drept civil, Persoana fizică, Persoana juridică. Drepturile reale*, p.338. Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.164.

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- acts that the guardian cannot conclude even with prior authorisation of the guardianship authority.

Firstly, the guardian may conclude, on his or her own, without authorisation from the guardianship authority, acts without much importance related to the estate (patrimony) of the person lacking capacity and acts for its preservation or management. Acts to preserve the estate (patrimony) are those which are necessary to preserve a right or to avoid a loss. The cost of preserving the right is much less than the value of the right preserved. Acts for the management of the estate (patrimony) are those which allow for the normal exploitation of the patrimony. Acts for the management of the estate (patrimony) include those for the disposition of certain property such as perishable property or property of little value and use for the person lacking capacity.

Secondly, acts for the disposition of property, such as acts to alienate rights, acts for the constitution of real rights, acts to renounce property or to rent immoveable property for more than three years cannot be concluded without the prior authorisation of the guardianship authority. Under Article 129, para. 2 of the Family Code, the guardian cannot:

- alienate the property of the person lacking capacity;
- secure a lien on the property of the person lacking capacity;
- renounce rights related to the estate (patrimony) of the person lacking capacity;
- do anything that is outside the scope of his or her management powers;
- pay creditors of his or her own, his or her spouse's, parents or siblings
- withdraw sums of money deposited in the bank.

Finally, the guardian may not

- conclude acts between him or herself, his or her spouse, a parent or siblings and the person lacking capacity;
- make gifts or donations on behalf of the person lacking capacity;
- guarantee the obligations of another with the property of the person lacking capacity.

The guardian of the person lacking capacity may participate in proceedings regarding the civil status of the person lacking capacity. He or she may, therefore, exercise a right in a paternity suit (Art.54 of the Family Code)⁴²⁷.

He cannot commence divorce proceedings on behalf of the person lacking capacity, but must represent the person in an action commenced by the spouse.

4.5. Rights of Appeal

The procedure to impose restriction is, in the contested proceedings, an ordinary procedure of a civil nature marked, nonetheless, by particularities presented above at point 4.2.

The decision to impose restrictions only produces its effects after it becomes irrevocable, that is to say after the confirmation of the decision on appeal and the denial of future leave to appeal.

⁴²⁷

Teofil Pop, *Drept civil român. Persoanele fizice și persoanele juridice*, p.164.

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It follows that the affected person may appeal or take recourse against a decision to impose restrictions on him or her.

Moreover, since the restrictive measures are taken in the interests of the affected person, he or she may appeal or take recourse against the decision of first instance or against a decision on appeal rejecting the request to impose restrictions.⁴²⁸

List of Abbreviations

Trib. Suprem	Tribunalul Suprem (Supreme Court)
Trib.Jud.	Tribunalul Județean (Regional Court)
Art. Civ	secția civilă (Civil Section)
Col.Civ.	colegiul civil (the civil college)
Dec. Nr.	decizia numărul (Decision Number)
R.R.D.	Revista Română de Drept (The Romanian Law Review)
ICCJ	Înalta Curte de Casație și Justiție (the High Court of Appeals and Justice)
C.pr.civ	Civil Procedure Code

D Bibliography

Books

CONSTANTIN STĂTESCU, „Drept civil. Persoana fizică. Persoana juridică. Drepturile reale”, Editura Didactică și Pedagogică, București, 1970.

ERNEST LUPAN, DAN A. POPESCU, „Drept civil. Persoana fizică”, Lumina Lex, București, 1993

Teofil Pop, „Drept civil român. Persoanele fizice și persoanele juridice”, Lumina Lex, București, 1994

GABRIEL BOROI, „Drept civil. Partea generală. Persoanele”, Editura All Beck, București, 2002

GHEORGHE BELEIU, “Drept civil roman. Introducere în dreptul civil. Subiectele dreptului civil”, Ediția a X-a revăzută și adăugită de Marian Nicolae și Petrică Trușcă, Universul Juridic, București, 2005

CORNELIU TURIANU, “Drept civil. Partea generală. Persoanele. Culegere de practică judiciară.”, C.H. Beck, București, 2007

ION P. FILIPESCU, ANDREI I. FILIPESCU, “Tratat de dreptul familiei”, All Beck, București, 2002

MILENA TOMESCU, „Dreptul familiei. Protecția copilului”, All Beck, București, 2005

GABRIELA LUPȘAN, „Dreptul familiei”, Junimea, Iași, 2001

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Trib. Suprem, col. civ., dec. nr. 835/1955 “The affected person may appeal against the rejection of an application for the imposition of restrictions.”

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Articles

EUGEN LAZĂR, „Aspecte referitoare la punerea sub interdicție a bolnavului de alienație mintală sau debilitate mintală”, *Revista Română de Drept* nr.3/1980, p.23-25.

ION RETCA, „Contribuții la studiul procedurii interdicției”, *Revista Dreptul* nr.8/2000, p.23-34.

Chapter II

INTERNATIONAL LAW PRINCIPLES

Section I UNITED NATIONS

Declaration on the Rights of Mentally Retarded Persons (Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971)

The UN General Assembly has, in light of human rights and fundamental freedoms and in the principles of dignity of the human person and aware of the necessity of protecting the rights and assuring the welfare and rehabilitation of the physically and mentally disadvantaged issued a declaration which should be a basis of every national or international act concerning the protection of adults.

The UN Declaration on the Rights of Mentally Retarded Persons underlines the necessity of assisting mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life. It tends to be a frame of reference for the protection of the rights of the concerned adults.

According to this declaration

1. The mentally retarded person has, to the maximum degree of feasibility, **the same rights as other human beings.**
2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to **develop his ability and maximum potential.**
3. The mentally retarded person has a right to **economic security** and to a decent standard of living. He has a right to perform **productive work** or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
4. Whenever possible, the mentally retarded person should **live with his own family** or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to a **qualified guardian when this is required to protect his personal well-being and interests.**
6. The mentally retarded person has a right to **protection from exploitation**, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become **necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse.** This procedure must be based on an **evaluation** of the social capability of the mentally retarded person by qualified experts and must be subject to **periodic review** and to the right of appeal to higher authorities.

Section II COUNCIL OF EUROPE

Recommendation N° (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (23 February 1999)

The CE Recommendation N° 99 (4) fixes principles applying to the protection of adults who are incapable of making autonomous decisions concerning their personal and economic concerns, because they suffer of impairment or insufficiencies of their personal faculties due to mental disability or disease. These principles shall govern measures of protection (representation or assistance) in relation to the concerns the concerned adults are unable to handle by themselves. National rules shall correspond to these principles.

The guiding principles of the recommendation are:

A Substantive Law Principles

- ***The respect for human rights (Principle 1)***

The laws and practices on the protection of incapable adults must be driven by the respect for the dignity of everybody as a human being and of their human rights and fundamental freedoms

- ***The flexibility in legal response (Principle 2)***

The measures of protection of the personal and economic interests of incapable adults must in scope and flexibility respond to different degrees of incapacity and the different circumstances of the individual cases. They should be simple and inexpensive and respect, where possible, the legal capacity of the concerned adult. The range of measures should include those which are limited to one specific act without requiring the appointment of a representative and those under which the carer acts jointly with the concerned adult and measures involving more than one representative. Also emergency measures must be available.

Persons should be able to provide for legal arrangements in a state of capacity for any subsequent incapacity.

Decisions relating to health or personal welfare should, especially if they concern minor or routine interventions, be taken by legal representatives rather than by those appointed by the court or on the basis of administrative measures.

- ***The maximum preservation of capacity (Principle 3)***

Any legislative framework should distinguish different and variant degrees of incapacity. Legal capacity should be preserved as far as possible.

Protective measures should not deprive the concerned adult from his right to vote, his right to make a will or to consent and refuse consent to interventions in health matters or to make other personal decisions, when his capacity permits to take these decisions. The adult should, as far as possible, be permitted to act in areas where representation is necessary with the consent of the representative. He should, as far as possible be able to undertake legally effective transactions of everyday nature.

- ***Publicity (Principle 4)***

The disadvantage of an automatic publicity to measures of protection should be weighed in the balance against any protection which might be afforded to the adult or to third parties.

- ***Necessity and subsidiarity (Principle 5)***

No measure should be taken unless it is necessary in light of the individual circumstances and the needs of the concerned adult, except where the adult gives his full and free consent. The assistance of family members and other less formal arrangements must be taken into account.

- ***Proportionality (Principle 6)***

Measures must be proportionate to the degree of incapacity and in light of the individual circumstances and needs. Any measure taken should interfere with legal capacity, rights and freedoms to a minimum extent.

- ***Procedural fairness and efficiency (Principle 7)***

Procedures in the field of protective measures should be fair and efficient. Adequate procedural safeguard should protect against violations of human rights and abuses.

- ***Respect of interests and welfare of the protected person (Principle 8)***

The interests and welfare of the protected person should be the paramount consideration in implementing any measure. Any carer chosen must be suitable to safeguard and promote the adult's interests and welfare. The property of the adult should be used for his benefit and to secure his welfare.

- ***Respect for wishes and feelings(Principle 9)***

The wishes and feelings of the adult must underlie as far as possible the undertaken measures. This concerns in particular the choice of the representative or assistant as far as this is possible. The carer has to duly inform the adult where possible and appropriate, in particular about any major decision.

- ***Consultation (Principle 10)***

Those having a close interest in the welfare of the concerned adult should be consulted in the process of establishment and implementation of protective measures (in particular family members and representatives).

B Procedural Law Principles

- ***Institution of proceedings (Principle 11), provisional measures (Principle 15)***

The circle of persons entitled to institute proceedings with the aim of establishing protective measures for the protection of an adult should be wide. It may be necessary to provide for a right to initiate proceedings for public officials or bodies, the court or other competent authorities. The concerned adult should be informed promptly in a language he understands unless such information would be manifestly without meaning or would present a severe health danger. Also for provisional measures needed in case of emergency, this should be applicable as far as possible.

- ***Investigation and assessment (Principle 12)***

Adequate procedures shall ensure the investigation and assessment of the adult's personal facilities. No measure restricting the legal capacity of the adult should be taken unless the adult has been seen and unless an up-date report of at least one expert has been submitted in writing.

- ***Right to be heard in person (Principle 13)***

The concerned adult should be heard in person in any proceeding which could affect his legal capacity.

- ***Duration, review, appeal (Principle 14), provisional measures (Principle 15)***

Measures should be of limited duration, periodical reviews should be instituted. They should also be reviewed on a change of circumstances and a change in the adult's condition and terminated if these conditions are no longer fulfilled. Adequate rights of appeal should be guaranteed. Also for provisional measures needed in case of emergency, this should be applicable as far as possible.

- ***Adequate control (Principle 16)***

The operations of measures and of acts and decisions of representatives should be adequately controlled.

- ***Qualified persons (Principle 17)***

An adequate number of suitably qualified people should be provided to assist the concerned adults. The establishment or support of associations or other bodies ensuring the provision and training of carers should be considered.

C The role of representatives

- *Control of powers (Principle 18)*

Powers conferred on representatives by law to act on behalf of an incapable adult should be limited and controlled and not deprive the adult of legal capacity. These powers should be capable of being modified or terminated by a measure of protection taken by a court or administrative authority. The interests and wishes and the welfare of the adult should be respected.

- *Limitation of powers (Principle 19)*

National laws must determine which acts are of highly personal character and thus exempted from the representative's scope of functions. They must also determine which decisions on certain serious matters require a specific approval by a court or other body.

- *Liability (Principle 20)*

Representatives should be liable for any loss or damage cause to the incapable adults in the exercise of their functions. National laws on liability should apply.

- *Remuneration (Principle 21)*

Remuneration and reimbursement of expenses of the carers should be regulated, but distinctions can be made between those acting in professional capacity and those acting in other capacities taking also into account the individual scopes of functions.

D Recommendations on interventions in the health field

- *Consent (Principles 22, 23)*

If an adult remains capable of giving free and informed consent to interventions in the health field, the intervention may only be carried out with his consent given to the person empowered to intervene. If this is not the case, the carrying out of the intervention depends on the authorization given by the representative or an authority or a person authorized by law and must be for the direct benefit of the concerned adult. The law should designate appropriate persons, authorities or bodies which authorize such interventions in cases, where the adult has no representative. In case of serious interventions, the need to provide for a court or other body's authorization should be considered. Mechanisms for a solution of conflicts between different authorized bodies should be given.

If the above-mentioned principles are not respected, and the respective State provides for the consent of a body or a person provided for by law, the consent of the adult should nevertheless be sought and remedies should be provided for allowing the concerned adult to be heard before the intervention. If the adult is incapable of free consent, the intervention depends on the same criteria as described above.

- ***Exceptional Cases (Principle 24)***
Special rules should be provided for in case of interventions requiring additional protection and may involve a limited derogation from the criterion of direct benefit for the concerned adult, if the possibility of abuse is reduced to a minimum.
- ***Protection of adults with mental disorder (Principle 25)***
Without their consent, adults with mental disorder of serious nature may be subjected to an intervention aimed at treating their disorder only where serious harm is likely to result to their health
- ***Interventions in emergency situations (Principle 26)***
Medically necessary interventions may be carried out immediately even if the appropriate consent cannot be obtained, provided that this is for the benefit of the health of the adult.
- ***Wishes of the concerned adult (Principle 27)***
The wishes and interests of the concerned adult have also to be respected in the health field. Especially previous wishes relating to medical interventions expressed by an adult, who is, at the time of the intervention, incapable to express his wishes should be taken into account.
- ***Special rules on certain matters (Principle 28)***
Special rules may be provided in relation to interventions which are necessary in the interest of public safety, for the prevention of crime, protection of public health or the protection of rights and freedoms of others.

Part Two

PRIVATE INTERNATIONAL LAW

Chapter I

INTERNATIONAL CONVENTIONS

Section I

HAGUE CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS OF 13 JANUARY 2000

The Hague Convention on the International Protection of Adults of 13 January 2000

The Convention becomes effective the first day of the month following the expiration of three months after the deposit of the third ratification instrument, acceptance or approval (Art. 57). The United Kingdom (in 2003), Germany (in 2007) and France (18 September 2008) having now ratified the Convention, it will become effective in these three countries (as of this day, 25 October 2008, the only countries to have ratified the Convention) on 1 January 2009. This instrument as well as the solutions it proposes is therefore of capital importance to the study that the SICL has been commissioned to perform. We will first present the scope of the Convention (1), then we will summarize its rules concerning jurisdiction to impose protective measures for adults (2), those concerning the law applicable in the exercise of such jurisdiction and the law applicable to the representation of adults (3), those concerning the recognition and execution of the measures imposed (4), and those concerning cooperation among the authorities of the Contracting States (5.). These are the five points that constitute the “object” of the Convention as set forth in Art. 1 par. 1.

1. Scope

The purpose of the Convention, as stated in the second clause of its brief preamble, is to “avoid conflicts between the legal systems [of the Contracting States] in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults”⁴²⁹. The idea is to insure the protection of adults in situations of an international nature and this in the interests of all parties concerned; first, the adults concerned, then the persons who assist them, and, finally, the authorities, often numerous, who must organize and oversee the protection⁴³⁰. The Convention then pre-supposes an international situation⁴³¹. The classic case is that of a distinction between the country of habitual residence and the nationality of the person concerned; however it is also often the case that the representative of the adult resides in a country other than the country of residence of the adult under his or her protection or that the adult has assets in a country other than his country of residence. One can also envision many other international hypotheses; it would appear that the necessity of an international nature must be interpreted in a fairly flexible manner⁴³².

⁴²⁹ For a history of the Convention, see T. Guttenberger, *Das Haager Uebereinkommen über den internationalen Schutz von Erwachsene*, Bielefeld, 2004, p. 3-7 and the “Rapport explicatif de la convention sur la protection internationale des adultes”, prepared by P. Lagarde, n° 1 *et seq.*

⁴³⁰ V. E. Clive, « The New Hague Convention on the Protection of Adults », *YPIL*, 2000, p. 1 *et seq.*

⁴³¹ V. T. Guttenberger, *op.cit.*, p. 62; cf. art. 44 of the Convention. Concerning the notion that the interpretation of the characteristic should be left to the court, see K. Siehr, *Der internationale Schutz Erwachsener nach dem Haager Uebereinkommen von 1999*, FS D. Henrich, 2000, p. 567 *et seq.*, p. 568, note 9.

⁴³² Accord, *e.g.*, T. Guttenberger, *op.cit.*, p. 62

The Convention defines “adults” requiring “protection” as “persons who have reached the aged of 18 years” (Art. 2 par. 1)⁴³³ who, “by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.” (Art. 1, par. 1). This is an autonomous and “factual” definition whose aim is to go beyond the various conceptions of the legal term of “incapacity” in the various Contracting States⁴³⁴. Although the Convention is primarily aimed at the elderly, it is nonetheless intended to cover the protection of all adults who may not have full use of their personal faculties⁴³⁵. Its object is limited to the protection of adults whose need for protection stems from a deficiency in their faculties (impairment or insufficiency) that is manifested by an absence or a diminution of the person’s decision-making capacity⁴³⁶ rather than a vulnerability resulting from other situations, such as protection against domestic violence or persons in detention⁴³⁷. It would appear that the Convention would not be applicable to a simple case of prodigality⁴³⁸. Its silence on this point notwithstanding, it is clear that this impairment or insufficiency may be permanent or temporary⁴³⁹. The “interest” in question are both pecuniary and personal, *i.e.* those concerning his or her physical state and health⁴⁴⁰. In principle, the Convention no longer applies after the death of the adult, for example in the case of recognition of powers of *post mortem* representation of such person⁴⁴¹.

In order for the Convention to be applicable, at least with respect to its provisions concerning jurisdiction and recognition of judgments⁴⁴², all restrictions on capacity or even with respect to the exercise of rights must be the result of a protective measure⁴⁴³. The “measures” referred to in the Convention are those that can be taken by public, administrative or judicial authorities, by not by other persons such as members of the medical profession⁴⁴⁴ (e.g. prescribing an antibiotic) or by the representative of the adult (whose nomination can, on the other hand, be the object of a protective measure as that term is used in the Convention), for example, the establishment of a system of accounting of the adult’s assets, the decision to have the adult wear a bicycle helmet, etc.⁴⁴⁵. These measures are individual measure, not general measures (such as the inspection of a retirement home, etc.)⁴⁴⁶. Similarly, the legal representation of one spouse by the other for the purposes of making medical decisions following an accident that left the first spouse in a coma does not fall within the scope of the Convention⁴⁴⁷.

The non-exhaustive list of the measures covered by the Convention is formulated in a very broad fashion in order to include virtually all modern legislation together with all of its respective national particularities. We refer here to a) the determination of the incapacity and the imposition of a protective regime; b) the placing of the adult under the protection of a judicial or administrative authority; c) guardianship, curatorship and analogous institutions; d) the nomination and the

⁴³³ Eighteen years of age is the same as the age used in the Convention on Children of 19 October 1996

⁴³⁴ Cf. P. Lagarde, *op.cit.*, p. 165.

⁴³⁵ See. A. Bucher, « La Convention de La Haye sur la protection international des adultes », RSDIE 2000, p. 37 *et seq.*, p. 39.

⁴³⁶ E. Clive, *op.cit.*, p. 5.

⁴³⁷ See A. Bucher, *op.cit.*, p. 41 ; cf. *eg.* E. Clive, *op.cit.*, p. 5 et T. Guttenberger, *op.cit.*, p. 62.

⁴³⁸ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 9.

⁴³⁹ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 9.

⁴⁴⁰ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 9.

⁴⁴¹ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 16.

⁴⁴² E. Clive, *op.cit.*, p. 18.

⁴⁴³ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 90.

⁴⁴⁴ V. See E. Clive, *op.cit.*, p. 18.

⁴⁴⁵ These examples are given by E. Clive, *op.cit.*, p. 18.

⁴⁴⁶ See E. Clive, *op.cit.*, p. 19.

⁴⁴⁷ This example is given by P. Lagarde, « Rapport explicatif », *op.cit.*, n° 90.

functions of each person or organisation responsible for taking care of the adult or his or her assets, to represent him or her or to provide assistance; e) the placement of the adult in an institution or other place where his or her protection can be assured (in principle, a voluntary placement, but also an involuntary one)⁴⁴⁸; f) the administration, the conservation or the disposition of the assets of an adult (a very broad formulation that covers all transactions concerning the assets: sales of real estate, management of an investment portfolio, placements, inheritances of the adult)⁴⁴⁹; g) authorization of a specific intervention for the protection of the adult or his or her assets (the purpose of these last measures, according to one commentator, being a decision relating to the protection of the adult's health⁴⁵⁰).

The task of defining the scope is filled by a list of exclusions which is, in this case, theoretically exhaustive: support obligations, marriage, trusts and estates, marital regimes, social security, health measures of a general nature (*e.g.* required vaccinations), measures taken as a result of crimes or misdemeanors (*e.g.* imprisonment) asylum and immigration. The personal consequences of marriage, as opposed to the financial effects, are not excluded. Thus "the power for which a spouse can petition a court to represent the other spouse who is not able to express his or her will (Art. 219 French Civil Code) is a protective measure under the Convention⁴⁵¹. Nonetheless, even in some of the excluded subject matters, it would appear that the Convention will apply to the capacity of an individual to act as a representative of the adult (see Art. 1 par. 2). If, for example, a representative is to be named to receive revenues from a trust or social security benefits or to act as an heir or to take care of an immigration procedure, the nomination and the confines of the representative's mandate will be governed by the Convention.⁴⁵² On the other hand, the determination of whether the representative can act on his or her own or only together with a third party, or event not at all, remains within the purview of the law applicable to the object matters⁴⁵³. A question that was hotly debated during the negotiations concerned medical acts. Even though medical acts do not constitute "protective measures" under the Convention (doctors not being qualified under the Convention as « authorities », as we have seen), the decision regarding a medical act and, more specifically, the legal questions concerning the representation of the adult related to these medical acts would appear to fall within under the Convention⁴⁵⁴, even if the line separating the two is difficult to draw⁴⁵⁵.

2. Jurisdictional Rules

The Convention provides for concurrent jurisdiction of competent authorities, deemed useful for the protection of adults, given the difficulty that sometimes exist in finding persons willing to take responsibility for them, as opposed to the protection of children where the conflict of jurisdictions runs the risk of resulting in the child being torn between two persons each of whom wishes to play the protective role⁴⁵⁶. The jurisdictional system must be viewed in the context of the paucity of

⁴⁴⁸ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 24.

⁴⁴⁹ Accord P. Lagarde, « Rapport explicatif », *op.cit.*, n° 25.

⁴⁵⁰ See A. Bucher, *op.cit.*, p. 40.

⁴⁵¹ P. Lagarde, *op.cit.*, p. 167.

⁴⁵² See A. Bucher, *op.cit.*, p. 42 ; E. Clive, *op.cit.*, p. 6.

⁴⁵³ See K. Siehr, « Der internationale Schutz Erwachsener nach dem Haager Uebereinkommen von 1999 », *Festschrift D. Henrich, Bielefeld, 2004*, p. 567 *et seq.*, p. 569.

⁴⁵⁴ See A. Lagarde, *op.cit.*, n° 42.

⁴⁵⁵ See A. Bucher, *op.cit.*, p. 44, who excludes the decision or decisions made by an authority that bases its actions essentially on considerations of a medical nature; cf. K. Siehr, *op.cit.*, p. 569.

⁴⁵⁶ See P. Lagarde, « La convention de La Haye du 13 janvier 2000 sur la protection internationale des adultes », *Rev. crit.*, 2000, p. 159 *et seq.* ; P. Lagarde, « Rapport explicatif », *op.cit.*, n° 5 ; E. Clive, *op.cit.*, p. 4.

potential jurisdictions, which are subject to a rigorous and coordinated hierarchy: A. a primary jurisdiction, that of the habitual residence, B. several concurrent and subsidiary jurisdictions: first, that of the national State, then other authorities with the consent of the authorities of the habitual resident (“transferred or delegated jurisdiction”); and C. finally, certain parallel jurisdictions: those of the authorities of the place where the assets are situated with respect to questions concerning such assets and an emergency jurisdiction of the authorities where the adult or his or her assets are found. The jurisdictions mentioned above under B and C remain subject to the approval of the authorities of the habitual resident, approval which can be evidenced either by a transfer of jurisdiction (Art. 8) or by the fact that the authority of the habitual residence abstains from taking measures that would replace those taken by the other authority (Arts. 7, 9 et 10)⁴⁵⁷.

The primary jurisdiction is exercised by the authorities – both judicial and administrative – of the State of the habitual residence of the adult (Art. 5) (no definition of this factual notion is provided in the Convention)⁴⁵⁸. These are the authorities that, in theory, are competent to impose the measures that will protect the adult’s person and assets. There is an international consensus on this point⁴⁵⁹. In the event of a change of resident, the authorities of the new place of residence are competent but measures imposed by the authorities of the former place of residence remain in effect for so long as the authorities of the new place of residence have not modified, replace or terminated them. (Art. 12). For adults who are refugees or who have been internationally displaced or for whom no habitual residence can be established, the authorities of the State in which they “are present” exercise this jurisdiction (Art. 6).

The authorities of the State of nationality have concurrent jurisdiction that they may exercise “if they consider that they are in a better position to assess the interests of the adult” (Art. 7). Such jurisdiction has appeared to be opportune, notably when an adult is placed by his or her family in a foreign medical or retirement facility⁴⁶⁰, for example, as was discussed during the debates, in spa resorts or cities with a milder climate where the authorities are often ill-equipped to impose measures, particularly when the adult’s assets are located elsewhere. Such jurisdiction is also appropriate when the elderly person wishes to return to his or her country of origin, for example, to be welcomed into the home of his or her family⁴⁶¹ or simply where another person of the same nationality as the adult resides in the State of nationality and is willing to take care of the adult⁴⁶². The concurrent jurisdiction of the authorities of the State of nationality is nonetheless subsidiary in several respects; such authorities must inform the authorities of the State of residence in advance of any measures they intend to impose; they must abstain from exercising their jurisdiction if the authorities of the State of residence inform them that they have taken all necessary measures or if they have decided that no measures should be imposed or that a procedure is pending before them. Measures previously taken by the State of nationality will cease to have effect in such circumstances. In other words, in the event of a conflict between the authorities of the State of nationality and the State of habitual residence, the latter prevail⁴⁶³. This is why it has been said that the authorities of the State of nationality, in order to avoid initiating a procedure that may not reach its conclusion, would be wise to obtain prior assurance from the authorities of the State of residence that they have “free reign”⁴⁶⁴.

⁴⁵⁷ See A. Bucher, *op.cit.*, p. 45; cf. K. Siehr, *op.cit.*, p. 569.

⁴⁵⁸ See P. Lagarde, *op.cit.*, n° 49.

⁴⁵⁹ E. Clive, *op.cit.*, p. 7.

⁴⁶⁰ Cf. P. Lagarde, *op.cit.*, p. 168.

⁴⁶¹ Accord A. Bucher, *op.cit.*, p. 46.

⁴⁶² Cf. K. Siehr, *op.cit.*, p. 570, citing the decision in *Re S* (hospital patient, court’s jurisdiction), [1995] 1 All.E.R.449 (Fam.D.); [1995] 3 All. E.R. 290 (C.A.).

⁴⁶³ Accord E. Clive, *op.cit.*, p. 7.

⁴⁶⁴ Accord A. Bucher, *op.cit.*, p. 46.

The authorities of the State of residence can proceed with a transfer or delegation of jurisdiction in favour of the other authorities, on their own initiative or upon the request of such authorities (it is not inconceivable that the request be presented by the adult him or herself)⁴⁶⁵, if they consider that the interest of the adult justifies it (Art. 8). The States to which it is possible to transfer jurisdiction are, in addition to the State of nationality (who then exercises a delegated, rather than a subsidiary, jurisdiction as in the case provided for in Art. 7), that of the prior habitual residence (for example because of the recent nature of the change of residence and the presence, in the State of prior residence of the adult, of the person who knew the adult)⁴⁶⁶, the State where the assets are located, the State that the adult has designated himself in writing, the State of habitual residence of the person close to the adult (not necessarily a relative)⁴⁶⁷ who is willing to take responsibility for the protection of the adult (which may be that of the next residence of the adult)⁴⁶⁸, the State in whose territory the adult is present, in matters concerning the protection of his person. With respect to the extent of autonomy granted to the adult, it is a “response to the concern of recognition and encouragement of the need for autonomy of handicapped persons”⁴⁶⁹. The adult’s choice is nevertheless subject to the approval of the authorities of the State of habitual residence and of the chosen authority⁴⁷⁰. This concern also is expressed through the freedom of choice with respect to applicable law. The object of the petition that the authorities of the State of residence address to the above-mentioned authorities is to “take measures towards the protection of the person or the assets of the adult”; such a petition can relate to only a part of the protection, for example, if it is addressed to the authorities of the State where certain assets are located, it can be limited to the protection of the assets that are located in that State⁴⁷¹. There is no obligation on the part of the authorities to which those of the State of residence address a petition to accept the transfer of jurisdiction; in the event that it is not accepted, the authorities of the State of residence retains its jurisdiction.

Adults requiring protection being generally owners of property, the jurisdiction of the State in which the assets are located is admitted (Art. 9). Such jurisdiction is, however, limited in principle to the protection of the property that is located in such State. This jurisdiction is useful, for example, when the law of the State where the property is located requires judicial authorisation for the sale of an asset or to accept an inheritance or the registration in, or publication, concerning a real property registry and such measures do not exist under the law of the State of habitual residence⁴⁷². The measures taken by the local authorities must be compatible with those taken by the authorities of the State of residence in order to avoid any incoherencies. In the event of incompatibility, the measures taken by the latter authorities take precedence and terminate those taken by the local authorities⁴⁷³.

Finally, in cases of urgency, the authorities of the State in whose territory the adult or his property are found may have jurisdiction. There is urgency in the event of a situation which may result in irreparable harm to the adult or his or her property⁴⁷⁴. The negotiators of the Convention envisioned primarily measures concerning medical treatment⁴⁷⁵. The urgency of the situation is to be

⁴⁶⁵ Such a hypothesis has been envisaged by A. Bucher, *op.cit.*, p. 48.

⁴⁶⁶ See P. Lagarde, « Rapport explicatif », *op.cit.* n° 69.

⁴⁶⁷ Cf. P. Lagarde, « Rapport explicatif », *op.cit.*, n° 72.

⁴⁶⁸ Cf. P. Lagarde, « Rapport explicatif », *op.cit.*, n° 71.

⁴⁶⁹ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 71.

⁴⁷⁰ See A. Bucher, *op.cit.*, p. 47.

⁴⁷¹ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 66.

⁴⁷² This example is taken from P. Lagarde, « Rapport explicatif », *op.cit.*, n° 75.

⁴⁷³ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 76.

⁴⁷⁴ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 78.

⁴⁷⁵ See. pour tous E. Clive, *op.cit.*, p. 19.

interpreted strictly; for example, an abortion of a young handicapped woman does not generally constitute a situation of⁴⁷⁶. On the other hand, such jurisdiction may be exercised, for example, in order to assure the representation of an adult who is far from his or her residence and who must undergo emergency surgery or if assets must be sold quickly in order to avoid diminution of value⁴⁷⁷. In theory, the authorities of the State in which the adult or the adult's assets are located can take measures relating to assets located abroad⁴⁷⁸. If the adult has his or her residence in a Contracting State, these measures cease to be effective as soon as the authorities of this State have taken the necessary measures. In the case of a residence in a Non-Contracting State, the situation is more complex from a legal standpoint as the recognition of these measures is not governed by the Convention but rather by the law of the Contracting States: the measures then cease to be effective in each Contracting State as soon as the measures required by the situation taken by the authorities of another State are recognized (pursuant to internal law). The local authorities who have taken urgent measures must so inform the authorities of the State of habitual residence, at least « to the extent possible », in general, once the measure has been taken rather than in advance (which would be incompatible with the urgency)⁴⁷⁹.

Independently from any urgency, exceptional jurisdiction is provided for the authorities of the State where the adult is present in order to take measures concerning the protection of such adult (and not of his or her property)⁴⁸⁰ that are of a temporary nature and a territorial effect restricted to such State. One might imagine that, given the long debates that preceded the adoption of this text, the measure might have a medical object: measures of placement or of temporary hospitalization other than in cases of urgency, measures of isolation of the adult from certain persons from her entourage, removal of a malignant abscess or the placement of an artificial tooth etc. But the text is not deemed to give to the State where the adult is present jurisdiction to authorise serious and definitive measures, such as an abortion, sterilization or a surgical procedure to remove an organ or amputate a member⁴⁸¹. The measures taken by the State where the adult is present must respect all the measures that were taken by the authorities of the State of habitual residence. In this instance, however, prior information is required.

Finally, as stressed above, the Convention provides for the principle of maintaining effectiveness of measures in the event of a change of circumstances, for so long as the authorities who have jurisdiction following the change have not modified, replaced or terminated. The concern here is to assure the continuity of the protection of the adult: one thinks of the necessity of a tutor, designated by the authorities of the former residence, to exercise his or her function after the change of residence, given that the authorities of the new residence, who now have primary jurisdiction, can revoke the tutor's appointment⁴⁸². It should, moreover, be noted that this continued effectiveness does not apply to measures of urgency or temporary measures of protection for the person of the adult. Furthermore, the measures survive only within their respective territorial scope. The State of residence may well have taken measures applicable only so long as the adult resides in that State; this is also generally the case for the adult placed under the supervision of a public social service whose powers are limited to the territory of the State to which the service belongs.

⁴⁷⁶ Accord, P. Lagarde, "Rapport explicatif", *op.cit.*, n° 78 ; K. Siehr, *op.cit.*, p. 571.

⁴⁷⁷ Accord, P. Lagarde, « Rapport explicatif », *op.cit.*, n° 79.

⁴⁷⁸ Accord, P. Lagarde, "Rapport explicatif", *op.cit.*, n° 79.

⁴⁷⁹ V. P. Lagarde, « Rapport explicatif », *op.cit.*, n° 82.

⁴⁸⁰ V. P. Lagarde, "Rapport explicatif", *op.cit.*, n° 83.

⁴⁸¹ Accord, P. Lagarde, "Rapport explicatif", *op.cit.*, n° 84.

⁴⁸² This example is given by P. Lagarde, « Rapport explicatif », *op.cit.*, n° 86.

3. Applicable Law

The theory, on which there was complete agreement during the negotiations⁴⁸³, is that the competent authorities apply their own law, the *lex fori*. The forum law determines, in principle, all the issues that may be raised; the conditions of the measure, the modification or termination of the protective measure, as well as the legal consequences thereof (in particular with respect to the capacity of the person concerned and the power of representation)⁴⁸⁴, including the criteria of aptitude of the representative, whether a person can or cannot be named a representative (e.g. the spouse), whether such person is required to accept the nomination, to what extent, the will or desire manifested by the person concerned must be taken into consideration.

The Convention allows for a certain flexibility in the determination of the law applicable to the protective measure. Exceptionally, and to the extent that the measure of protection of the person or the property of the adult so requires, the competent authorities can *apply*, or in any event *take into consideration*, the law of another State with which the situation presents a close connection that can, it would appear, also be that of a Non-contracting State⁴⁸⁵. The State where the property is located is one such example⁴⁸⁶. Nonetheless, such a provision can apply only in a fairly restrictive manner, in particularly when the State where the property is located refuses recognition, for example, by raising a public order objection⁴⁸⁷, which implies a an analysis concerning whether recognition will be granted (*Anerkennungsprognose*), or where there is an imminent future change of residence to another State⁴⁸⁸, even though, in this case, one can also envisage a transfer of jurisdiction under Art. 8.

One important exception to the principle of the application of the *lex fori* is the application, in the case of a measure taken in a Contracting State that is implemented in another State, of such other State's law to the conditions of implementation of the measure (art. 14). It is nevertheless difficult to define the « conditions of application »⁴⁸⁹. We cite, as an example, of a change of residence of an adult who has already been the object of protective measures; transactions such as opening a bank account or renting a place to live are deemed « implementation » of the measures taken in the State of the prior residence⁴⁹⁰. The same thing has been said with respect to a tutor, designated by the authorities of a State, who must implement a protective measure in another State and the law of such other State requires, for a sale, the authorisation of the judge of tutorships ; this would be characterized as a condition of application which must, therefore, be respected⁴⁹¹. Inversely, one might wonder whether the tutor o proceed without autorisation with certain important acts may be freed from the obligation to obtain such autorisation based solely on the fact that the law of the State in which the act is to be executed does not require such authorization⁴⁹².

The situation in which the adult arranges by him or herself for protection in advance for the moment when he or she will no longer be able to protect his or her interests has been regulated separately.

⁴⁸³ E. Clive, *op.cit.*, p. 10.

⁴⁸⁴ See, on this point, T. Guttenberger, *op.cit.*, p. 142.

⁴⁸⁵ Accord T. Guttenberger, *op.cit.*, p. 143, who cites in support Art. 18 of the Convention ; see also K. Siehr, *op.cit.*, p. 572.

⁴⁸⁶ See E. Clive, *op.cit.*, p. 11.

⁴⁸⁷ This example is given by T. Guttenberger, *op.cit.*, p. 143.

⁴⁸⁸ Example given by P. Lagarde, Rapport explicatif, n° 89 et repris par T. Guttenberger, *op.cit.*, p. 144.

⁴⁸⁹ Cf. A. Bucher, *op.cit.*, p. 50.

⁴⁹⁰ See, for such an example, T. Guttenberger, *op.cit.*, p. 146.

⁴⁹¹ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 94.

⁴⁹² This is the example given by A. Bucher, *op.cit.*, p. 50.

This is surely one of the principal innovations of the Convention⁴⁹³. In the countries that recognise this possibility (in Europe, for example, the United Kingdom, Ireland and Spain)⁴⁹⁴, what is referred to as a “mandate of inaptitude” is generally accorded by the adult concerned to another person of his or her choice (spouse, close friend attorney) either by an agreement or by a unilateral act. The powers that may thus be granted are quite varied: management of assets, treatment to be given to the adult, refusal of extraordinary medical measures, etc. The “medical representative” responsible for making necessary medical decisions when the patient becomes incapable of discernment, is also covered by this provision⁴⁹⁵.

Thus, “the existence, scope, modification and termination of the powers of representation”⁴⁹⁶ are regulated by the law of the State of habitual residence of the adult at the time of execution of the agreement or unilateral act. The adult, however, retains the power of designation. Since this is a voluntary act, the principle of freedom of choice was not contested. In addition, it is possible that the State of the habitual residence does not recognise such an institution whereas the adult wished to establish such a mandate in preparation for a future change of residence or in order to protect his or her property located in another State⁴⁹⁷. This choice, however, is made within the framework of specific laws since it can only be made under the law of his or her State of nationality, the State of a former habitual residence or the State in which property is located with respect to property there situated. The law of the State of habitual residence of a person close to the adult who is willing to assure the protection of the adult as well as the law of the future residence of the adult have been excluded. The Convention allows for *dépeçage* (the application of different laws to different issues)⁴⁹⁸, a possibility that presents a certain interest to the extent that the person concerned has property in several different States⁴⁹⁹. If the designated law does not provide for the mandate of inaptitude, the powers conferred by the adult must be held not to exist and, as a result, the competent authority must impose a protective measure⁵⁰⁰. The designation must be made « expressly and in writing ». An implicit choice is prohibited. The Les « conditions of exercise » of these powers of representation, on the other hand, are regulated by the laws of the State in which they are to be exercised ; this “responds to the concern that unscrupulous foreign mandatees may invoke their powers in opposition to local law in order to authorise, for example organ transplants or extraordinary medical measures”⁵⁰¹. The notion of “conditions” must be interpreted in a restrictive manner (more strictly, for example, than the “conditions of application” under Art. 14)⁵⁰²: it suffices to consider the verification by means of a local procedure of the existence and scope of the powers, the filing of the act conferring such powers or even of the authorisation procedure in the event that the mandate of inaptitude provides for an authorisation⁵⁰³. According to one commentator, the requirement that an authority determine that there is inaptitude is not a « condition of exercise » and, as such, remains subject to the law applicable to the mandate⁵⁰⁴.

⁴⁹³ Accord A. Bucher, *op.cit.*, p. 50 ; see also M. Révillard, *op.cit.* at the following note, p. 729, that speaks, in this context of « the remarkable contribution » of this convention.

⁴⁹⁴ M. Révillard, « La Convention de La Haye sur la protection internationale des adultes et la pratique du mandat d’inaptitude », *Mélanges P. Lagarde*, Paris, 2005, p. 725 *et seq.*

⁴⁹⁵ En ce sens A. Bucher, *op.cit.*, p. 53.

⁴⁹⁶ See P. Lagarde, “Rapport explicatif », *op.cit.*, n° 97.

⁴⁹⁷ Cf. A. Bucher, *op.cit.*, p. 52 ; M. Révillard, *op.cit.*, p. 732.

⁴⁹⁸ See P. Lagarde, “Rapport explicatif », *op.cit.*, n° 103.

⁴⁹⁹ See M. Révillard, *op.cit.*, p. 732.

⁵⁰⁰ See P. Lagarde, “Rapport explicatif », *op.cit.*, n° 105 ; M. Révillard, *op.cit.*, p. 732.

⁵⁰¹ See M. Révillard, *op.cit.*, p. 733.

⁵⁰² Accord, A. Bucher, *op.cit.*, p. 52.

⁵⁰³ See P. Lagarde, “Rapport explicatif », *op.cit.*, n° 107.

⁵⁰⁴ A. Bucher, *op.cit.*, p. 53.

Finally, it should be emphasized that these powers of representation can be withdrawn or modified by measures taken by a competent authority, but only if they are not “exercised in such a manner as to sufficiently assure the protection or the property of the adult. In addition, the law governing the mandate of inaptitude, that may have been chosen by the adult, must be taken into account as far as possible, specification particularly welcome in the event that the competent authority does not recognise the mandate of inaptitude⁵⁰⁵.

There also exists a provision for the protection of good faith third parties: the validity of an agreement made between such third party and a person who, under the law of the place the agreement is concluded, has the power of representation of the adult who is on the territory of the same State (“apparent representative”)⁵⁰⁶, cannot be contested, nor can the third party be held liable, based spéeéy pm the fact that such person did not have the power of representation pursuant to the law designated by Convention, absent bad faith on the part of the third party. A large number of acts are targeted by this measure: agreements concerning assets (remittance of funds by a banker), medical acts (surgery), etc⁵⁰⁷. The text, however, applies only in the event that the third party has dealt with the apparent representative and not directly with the adult⁵⁰⁸.

4. Recognition

Recognition is essential each time the execution of an agreement presupposes a power of representation and that the agreement must be executed in a country other than the country whose authorities have granted such power. If the representative’s power – or, more specifically, the measure pursuant to which such power has been conferred – is not recognized, the representative does not have the power to act⁵⁰⁹. Moreover, in the event of non-recognition of the measure, the adoption of a measure may be necessary in the State that has refused recognition, in order to avoid any denial of justice. The Convention applies only to the recognition of measures and therefore does not provide for an action to declare the validity or voidness of a mandate of inaptitude⁵¹⁰. The Convention makes distinctions among recognition, the declaration of exequatur or the registration for execution and the execution itself.

The theory here is that the measures taken by the authority of a Contracting State are automatically recognised by the other Contracting States. Automatic recognition means that such recognition is obtained without the necessity of any procedure whatsoever. Proof of the measure will normally be had by a written document issued by the original authority; but it is also possible, notably in cases of urgency, that the measure be taken by telephone with a handwritten note added to the file. This is why the Convention does not subject recognition to the production of a written document, signed and dated by the original authority⁵¹¹. Any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State. (Art. 23).

⁵⁰⁵ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 108.

⁵⁰⁶ Accord, P. Lagarde, « Rapport explicatif », *op.cit.*, n° 109.

⁵⁰⁷ See M. Révillard, *op.cit.*, p. 734.

⁵⁰⁸ See P. Lagarde, “Rapport explicatif », *op.cit.*, n° 110.

⁵⁰⁹ See T. Guttenberger, *op.cit.*, p. 197.

⁵¹⁰ Accord, P. Lagarde, « Rapport explicatif », *op.cit.* n° 124.

⁵¹¹ See P. Lagarde, Rapport explicatif, *op.cit.*, n° 117.

There are several grounds for the refusal of recognition (refusal that is permitted without being imposed on the requested State)⁵¹²: a) measure taken by an authority who (at the time the measure was taken) was not competent under the terms of the Convention (*e.g.* when the national authorities take measures without informing the authorities of the State of residence⁵¹³; a measure taken without the adult having had the opportunity to be heard, in violation of the fundamental principles of the requested State, other than cases of urgency; a measure clearly in contradiction with public order or a provision of imperative law (particularly in the medical field⁵¹⁴; such is the case, for example, of foreign appointees who have powers deemed to be excessive in the forum, notably with respect to certain imminent person rights such as those concerning organ transplants)⁵¹⁵; incompatibility with a measure previously taken in a Non-contracting State competent Articles 5 and 9 when the measure fulfils the conditions of recognition (in the event of incompatibility of two measures, preference is accorded to the second, which will be more recent and taken by an authority who is closer to the adult)⁵¹⁶; failure to respect the required procedure of consultation provided for under Art. 33 prior to any measure of placement of the adult in another Contracting State (this point will be addressed subsequently). The authority of the requested State is bound by the findings of fact on which the jurisdiction of the authority having taken the measure is based (thus, the determination of the habitual residence will not be re-examined).

If an act of execution is required in another Contracting State, is declared executory or registered for the purpose of execution (provided that it is executory in the State that has taken it) upon request by any interested party, in accordance with the procedure provided for by the law of such State. Nonetheless, each State must apply a “simple and rapid procedure” to the declaration of exequatur or registration. The States may decide freely what means are employed to achieve the goal. Moreover, no specific time period is imposed⁵¹⁷. The measures are then executed as if they had been taken by such other State. If, for example, the law of the State of execution allows for a stay of execution of a placement measure in the event of refusal by the adult, the State of execution can exercise this power even where the authorities of the State have declared the measure executory in such State. The grounds for refusal are the same.

We mention in the regard the language that provides for the deliverance of an international certificate to any person who is charged with the protection of the person or the assets of the adult. This provision demonstrates the concern of the negotiators to facilitate the practical application of the Convention. The certificate indicates the status and the powers of the representative. It has a particular evidentiary power as the status and the powers indicated in the certificate are deemed to be established, as of the date of the certificate, in the absence of proof to the contrary. It has been stressed that such a certificate “is of particular interest in notarial practice as evidence of the status and the powers conferred by the adult in the case of a mandate of inaptitude⁵¹⁸”.

⁵¹² See T. Guttenberger, *op.cit.*, p. 201.

⁵¹³ This example is given by T. Guttenberger, *op.cit.*, p. 202.

⁵¹⁴ Cf. E. Clive, *op.cit.*, p. 22.

⁵¹⁵ See A. Bucher, *op.cit.*, p. 55 ; M. Révillard, *op.cit.*, p. 733, who attributes to Arts. L.1231-1 *et seq.* of the Code of Public Health on the Harvest of Organs the character of a “loi de police” (such characterization of a law implies that the law is of such importance that it must be immediately applied without an examination of whether any foreign law might be applicable).

⁵¹⁶ See P. Lagarde, “Rapport explicatif”, *op.cit.*, n° 122.

⁵¹⁷ See P. Lagarde, “Rapport explicatif », *op.cit.*, n° 126.

⁵¹⁸ See M. Révillard, *op.cit.*, p. 735.

5. Cooperation

The section of the Convention dedicated to the cooperation of the authorities is that which contains the greatest number of article. This is evidence of the importance that the negotiators attached to this issue. The negotiators were conscious of the necessity of creating a communication network, this being the only means of efficiently managing cases⁵¹⁹. The Convention provides for the institution in each Contracting State of a Central Authority that will act as a sort of linchpin that can be contacted by the authorities of other States and which can reply to their requests. The Convention also provides for a large possibility of direct communication and requests for information among all the authorities of the States called upon to take protective measures as well as the possibility of concluding amongst them agreements to facilitate such cooperation. It should be emphasized that the Central Authorities and the other public authorities (we mean here administrative authorities rather than courts) are responsible for the costs of cooperation (operating costs, communication costs, information gathering, organization of mediation and settlement, etc.). Court costs and legal fees are not addressed in this Article⁵²⁰. Nonetheless, the authorities are free to “request payment of reasonable costs” which correspond to services rendered, such a request, however, must be “formulated with a certain moderation”⁵²¹.

The Central Authorities “must cooperate amongst themselves and promote cooperation among the competent authorities of their State in order to achieve the objectives of the Convention” (Art. 29 par. 1). They must, in particular, take all appropriate steps to facilitate communications by all means (including by electronic means), among the competent authorities in the situations in which the Convention applies and help locate the adult when it appears that he or she is present in the territory of the requested State. They must also encourage the use of mediation, conciliation and any other analogous method allowing for amicable settlements.

When the competent authorities envision taking protective measure, they can directly request any authority of another Contracting State (*e.g.* in the case of a change of residence) that has information useful for such protection (Art. 32 par. 1), although each State can demand that such requests be addressed through the intermediary of its Central Authority (Art. 32 par. 2). In order to avoid the unsupervised/unlimited collection of information, however⁵²², the request for information will be authorised only “if the adult’s situation so requires”. Moreover, if an authority believes that the request or provision of information could endanger the person or the assets of the adult or threaten the liberty or the life of a member of his or her family, the authority must abstain from requesting or providing such information (Art. 35).

If the competent authority envisions the place of the adult in an institution or any other place where his or her protection can be assured, and such placement will be in another Contracting State, such authority must consult in advance with the Central Authority of other competent authority of the latter State. This is the only obligatory consultation procedure provided for by the Convention⁵²³. This consultation gives to the State in which the placement is to be made supervisory power and allows it to regulated in advance the conditions of the stay of the adult in such State, for example with respect to immigration laws. This decision cannot be made if the competent authority of the requested State opposes it within a reasonable period of time (an “approval” as such is not, then, required)⁵²⁴. This consultation entails the communication by the competent authority of a report on the adult and the

⁵¹⁹ See A. Bucher, *op.cit.*, p. 56.

⁵²⁰ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 142.

⁵²¹ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 142.

⁵²² See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 134.

⁵²³ See P. Lagarde, « Rapport explicatif », *op.cit.*, n° 138.

⁵²⁴ See A. Bucher, *op.cit.*, p. 57 ; E. Clive, *op.cit.*, p. 21.

grounds for its proposed placement. The authority of the State in which the placement is to be made can oppose the placement decision. As previously stated, the failure to respect this procedure is sanctioned by the refusal to recognize the placement measure (Art. 22 par. 2, e).

If the competent authorities of a Contracting State, who have taken or will take protective measures concerning an adult exposed to a grave danger (drugs, influence of a sect, etc.) are informed of a change of residence or of the presence of the adult in another State, they are required to inform the authorities of such other State of the danger and of the measure taken or to be taken.

We note, finally, that provision has been made for assuring the protection of personal data and confidentiality as well as provisions concerning the language of communications (the communication must be addressed in the original language and accompanied by a translation in the official language or an official language of the State to which the communication is addressed or, if not, in French or in English; the State have the possibility of emitting a reserve on this point). Fairly standard provisions concerning the application of the Convention in States whose legal system is not unified ("federal clauses"), conflicts with other conventions and periodic review of the practical operation of the Convention are also included among the final provisions.

Section II

ROME CONVENTION AND ROME I REGULATION

According to its predecessor in Art. 1 para. 2 lit. a of the Rome Convention, Art. 1 para. 2 lit a of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) **excludes its application to questions involving the status or legal capacity of natural persons.**

The only provision which relates to matters of legal capacity is **art. 13 Rome I (*Incapacity*)**⁵²⁵. In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Legal capacity is in most of the countries subject to the **law of origin** of the person concerned. In cases of **contractual relationships** with incapable adults, the law applicable to the contract and the law applicable at the place where the contract is concluded would consequently not be of relevance for the questions of legal capacity. As a result, contract and legal capacity would most probably not be subject to the same legal order.

This disjunction can entail a situation in which a contracting partner, considered to be incapable under his law of origin, concludes a contract in another Member State, where he is considered to possess legal capacity and allows the incapable adult to subsequently invoke the lack of capacity to invalidate the contract in which he might simply have lost interest. Although this result would **protect the incapable adult**, it would be doubtful in light of **third party protection and the safeguard of the other contractual partner's interests**. Art. 13 tends to find a compromise solution between these conflicting interests.⁵²⁶

The provision is however **limited** to cases, in which a legislative intervention is of utmost necessity: It only covers cases, in which both contractual partners sojourn in the same country and conclude the contract under physical presence of both of the parties (i.e. cases where a cross-border implication, which carries a greater economic risk and requires a higher attention of the contractual partners, is not clearly visible).⁵²⁷ The provision protects only the contracting partner who does legitimately ignore, that his partner is incapable.

The legal consequences of the incapacity are then subject to the law applicable to the contract.

The Rome I Regulation does not contain any rule which could solve conflict of laws issues related to **agency / lasting powers of attorney**. On the occasion of the drafting of the Rome I Regulation, the Commission planned to introduce such a provision. The national laws do not provide satisfactory

⁵²⁵ Art. 11 of the Rome Convention.

⁵²⁶ See GIULIANO/LAGARDE, Bericht über das Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht, ABl 1980,Nr. C 282/1, 34; CZERNICH/HEISS (ed.), EVÜ - Das Europäische Schuldvertragsübereinkommen, Kommentar, 1999, Art. 11, note 1 and 2.

⁵²⁷ REITHMANN/MARTINY, Internationales Vertragsrecht, 6th ed. 2004, note 2061.

solutions in this field.⁵²⁸ Art. 7 of the Commission's Proposal for a Rome I Regulation⁵²⁹ contained a conflict of laws rule which was intended to harmonise at least partly the diversity of national conflict rules. As the proposed provision was not sufficiently well drafted, it was not however, taken over into the final version of the Regulation.

⁵²⁸ The Hague Convention of 14 March 1978 on the law applicable to agency has not been a success, as only three Member States have signed and/or ratified the Convention.

⁵²⁹ COM 650 (2005) final.

Chapter II

NATIONAL REPORTS

Section I UNITED KINGDOM

A Listing

1. Legislation

Mental Capacity Act 2005

2. Jurisprudence

KC & Anor. v City of Westminster Social & Community Services Dept. & Anor [2008] EWCA Civ 198 (19 March 2008) : The England and Wales Court of Appeal refused to recognise, either on its own or in the context of the development of English Private International Law, the validity of a marriage between two people whose marriage would otherwise have been valid under the law of Bangladesh. One of the parties to the marriage suffered from severe impairment of intellectual functioning and autism and could not be left alone without risk. The Court found him to lack the fundamental capacity to marry, though the marriage would not be precluded in Bangladesh.

B Conflicts of laws

1. PIL norms directly concerning legal capacity

International protection of adults

The *Mental Capacity Act 2005* gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13 January 2000 (Cm. 5881) (the "Convention") and makes related provisions as to the private international law of England and Wales (Section 63 and Schedule 3). Where a public authority proposes to place an adult in an establishment in a Convention country other than England and Wales, the public authority must consult an appropriate authority in that other country about the proposed placement and must send for that purpose a report on the adult and a statement of its reasons. Unless opposed by the appropriate authority of the other country within a reasonable time, the proposal must proceed. A public authority has an obligation to tell the appropriate authorities in a Convention country other than England and Wales about any adult known to be in serious danger, in relation to whom protective measures have been or are to be taken. The public authority may not send or request information in relation to an adult if it thinks that doing so is likely to endanger the adult or his property, or pose a serious threat his liberty or life. A certificate given by an authority in a Convention country other than England and Wales is, unless the contrary is shown, proof of the matters contained in it (Schedule 3).

2. Other PIL norms taking into account legal capacity

Her majesty may by Order in Council confer on the Lord Chancellor, the court or another public authority, functions for enabling the Convention to be given effect in England and Wales. Regulations

may make provisions giving further effect to the Convention or may be about the private international law of England and Wales in relation to the protection of adults. They may confer functions on the court or another public authority; amend Schedule 3 of the *Mental Capacity Act 2005*; provide for Schedule 3 to apply with specified modifications; or make provisions concerning countries other than Convention countries.

C Conflicts of jurisdictions

1. Competence/Jurisdiction

Part II of Schedule 3 of the *Mental Capacity Act 2005* provides grounds on which the Court of Protection will exercise its jurisdiction where a case raises an international element. It is based on articles 5-11 of the Hague Convention on the International Protection of Adults.⁵³⁰ The court may exercise its functions under the *Mental Capacity Act* in relation to an adult habitually resident in England and Wales; an adult's property in England and Wales; an adult present in England and Wales or who has property there, if the matter is urgent; or an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him. When the Convention takes effect, the court will be able to exercise jurisdiction in two further situations: in relation to an adult of British nationality who has a closer connection with England and Wales than with Scotland or Northern Ireland (when the terms of Article 7 of the Convention have been met) and if the Lord Chancellor (the Central Authority for England and Wales) agrees to request a transfer of jurisdiction to an appropriate forum under Article 8 of the Convention.⁵³¹

In exercising jurisdiction, the Court will apply English law unless it believes that the matter has a substantial connection with a country other than England and Wales. In that case, it may apply the law of the country with a substantial connection to the matter. In deciding on applicable law, the Court must act in the best interests of the adult, and renvoi is excluded by both, Article 19 of the Convention and paragraph 2(4) of Schedule 3 to the 2005 Act.⁵³² Where a protective measure directed at protecting the person or property of an adult is taken in one country but implemented in another, the conditions of implementation are governed by the law of the other country.

In terms of lasting powers of attorney under the *Mental Capacity Act 2005*, if the donor is habitually resident in England and Wales at the time of the granting of the power, the law applicable to the existence, extent, modification or extinction of the power is the law of England and Wales. However, if the donor specifies in writing that the law of a connected country applies for that purpose, then that law applies. If the donor is habitually resident in another country at the time the power is granted, but England and Wales is a connected country, then the law applicable in that respect is the law of the other country unless the donor specifies in writing that the law of England and Wales applies for that purpose. The law applicable to the manner of the exercise of a lasting power or enduring power of attorney is the law of the country where it is exercised. Where the law applicable to the power is that of a country other than England and Wales, the court must, so far as possible, have regard to the law of the other country.

⁵³⁰ R.M. Jones, *Mental Capacity Act Manual* (London : Sweet & Maxwell, 2005) at 126.

⁵³¹ G.C. Cheshire, *Cheshire and North's Private International Law* (London : Butterworths, 2008) at 1180.

⁵³² G.C. Cheshire, *Cheshire and North's Private International Law* (London : Butterworths, 2008) at 1180.

Where a representative acting on behalf of an adult enters into a transaction with a third party, the validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because the law applicable to the authority in one or more respects is the law of a country other than England and Wales or the representative is not entitled to exercise the authority under the law of that other country. This rule applies where the representative and third party are in England and Wales when entering into the transaction. On the other hand, where they are in another country at that time, the validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because the law applicable to the authority in one or more respects is the law of England and Wales, and the representative is not entitled to exercise the authority under that law. The two rules above do not apply if, (i) where the representative and third party are in England and Wales when entering into the transaction, the third party knew or ought to have known that the applicable law was the law of the other country; or (ii) where they are in another country at that time, the third party knew or ought to have known that the applicable law was the law of England and Wales.

Where the court is entitled to exercise jurisdiction, the mandatory provisions of the law of England and Wales apply, regardless of any system of law which would otherwise apply in relation to the matter, and nothing in the law requires or enables the application in England and Wales of a provision of the law of another country if its application would be manifestly contrary to public policy (Schedule 3).

2. Recognition and enforcement

In terms of recognition, under the *Mental Capacity Act 2005*, a protective measure taken in relation to an adult under the law of a country other than England and Wales is recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country. If taken in relation to an adult under the law of a Convention country other than England and Wales, it is to be recognised in England and Wales if it was taken based on the rules relating to jurisdiction. The Court may decide not to recognise a protective measure if it thinks that the case in which the measure was taken was not urgent, the adult was not given an opportunity to be heard, and that omission amounted to a breach of natural justice or if it thinks that recognition of the measure would be manifestly contrary to public policy, the measure would be inconsistent with a mandatory provision of the law of England and Wales, or the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult. An interested person may apply to the Court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales, and no permission is required for an application in this regard. However, any finding of fact relied on when the measure was taken is conclusive.

In terms of enforcement, under the *Mental Capacity Act 2005*, an interested person may apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with Court of Protection Rules. The Court must make the declaration if the measure was taken in relation to an adult under the law of a country other than England and Wales on the ground that the adult is habitually resident in the other country or if the measure was taken in relation to an adult under the law of a Convention country other than England and Wales on jurisdictional grounds. Any such measure is enforceable in England and Wales as if it were a measure of like effect taken by the Court.

In terms of powers of a foreign curator over property or affairs situated in England and Wales, section 18(4) of the *Mental Capacity Act 2005* provides for the vesting of stock in a curator appointed outside England and Wales. Where the Court of Protection is satisfied that the curator was properly appointed under foreign law to exercise authority over the property and affairs of a person lacking capacity, the Court may direct that any stocks standing in that person's name and any rights to receive dividends be transferred to the curator's name or dealt with as requested by the curator.⁵³³

D Bibliography

ASHTON (ED.), G.R., *Mental Capacity: The New Law* (Bristol: Jordans, 2006).

ASHTON, G. & WARD, A., *Mental Handicap and the Law* (London: Sweet & Maxwell, 1992).

BARTLETT, P., *Blackstone's Guide to the Mental Capacity Act 2005* (Oxford: Oxford University Press, 2005).

CHESHIRE G.C., *Cheshire and North's Private International Law* (London : Butterworths, 2008).

CLASHFERN, LORD MACKAY OF.(ed.), *Halsbury's Laws of England* (London, 4th), Vol. 30(2) (2005).

DEPARTMENT OF HEALTH AND WELSH OFFICE, *Code of Practice Mental Health Act 1983* (London: HMSO, 1993).

JONES, M.A. & MORRIS, A.E., *Blackstone's Statutes on Medical Law* (London: Blackstone Press Limited, 1992).

JONES, R.M., *Mental Capacity Act Manual* (London: Sweet & Maxwell, 2005); *Mental Health Act Manual*, 10th ed. (London: Sweet & Maxwell, 2006).

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G.C. Cheshire, *Cheshire and North's Private International Law* (London : Butterworths, 2008) at 1180.

Section II France

A Listing

1. Applicable Rules

Article 3 par. 3 of the Civil Code, as “bilateralised”⁵³⁴ by the opinion of the **Court of Appeal of Paris, 13 June 1814**, in *Busqueta*, GA 2006, 5e éd. Dalloz, Paris, n° 1 : the law concerning incapacity applicable is the national law of the person in question.

Articles 1243 (which adopts the same solution as that for jurisdiction over minors provided for under article 1211) **and 1262 of the Code of Civil Procedure**, extended to international matters: le the judge of the incapacitated adult’s domicile has jurisdiction.

Articles 14 and 15 of the Civil Code, which provides that, where the petitioner/defendant is of French nationality, the French judge is competent.

2. Jurisprudence

Cass. Req. 16 Jan. 1861, Lizardi, GA 2006, 5e éd. Dalloz, n°5 : notion of “excusable ignorance”.

Cass. Civ., 28 February 1860, Bulkley, GA 2006, 5e éd. Dalloz, n°4 : in the absence of opposition from one of the parties, foreign decisions concerning matters of civil status and capacity of persons will be recognised in France; no specific procedure is required.

B Conflicts of Laws

1. PIL Laws Directly Concerning Incapacity

Article 3 par. 3 of the Civil Code provides that “the laws concerning the civil status and capacity of persons govern the French, even when residing in foreign countries”. This article has been « bilateralised » by the jurisprudence⁵³⁵, which submits the personal status of foreigners to their **national law**. This solution has been reaffirmed by a recent decision of the Cour de cassation⁵³⁶. This applies to incapacity to exercise rights. Indeed, general incapacity to enjoy rights having practically disappeared, only the special incapacity to enjoy rights that attach to a specific institution (e.g. a physician’s incapacity to inherit, incapacity of spouses) exists. It is the **law that governs the**

⁵³⁴ The term « bilateralised » in this context means that as French law concerning a person’s civil status and capacity “follows” the French citizen wherever he or she travels, the law of the nationality of a foreigner will apply to such foreigner even when he or she is in France.

⁵³⁵ CA Paris, 13 June 1814, *Busqueta*, GA 2006, 5e éd. Dalloz, Paris, n° 1 : “this capacity, like everything that relates to a person’s civil status, is governed by the person, so to speak, follows such person wherever he or she goes. al status of such person and« cette capacité, comme tout ce qui intéresse l’état civil, se règle par le statut personnel qui affecte la personne et la suit, en quelque lieu qu’elle aille et se trouve ».

⁵³⁶ Cass. 1^e, 18 Jan. 2007 (n°05-20.529)

institution that apply to these (i.e. the law applicable in matters of succession or marriage, respectively) The incapacity to exercise rights, on the contrary, depends truly on the person and, as a result, are subject to their national law.

More specifically, national law is applicable to the determination of :

- the causes of the incapacity (which allows the qualification of suffering from dementia;
- the actions that the incapacitated adult can take alone, those for which assistance is required and those which are prohibited to such ;
- the penalty for failure to respect the forms of protection of the incapacitated adult: relative or absolute voidness, rescission ...

In the event of a difference between the national law of the incapacitated adult and that of his or her protector, the jurisprudence, which is consistent on this point, confirms the application of the national law of the incapacitated adult.⁵³⁷

Nonetheless, national law gives way to the law of the place where the object in question is located (*lex rei sitae*) whenever there is a question specifically concerning the assets of the incapacitated adult (publication or transcription of a transfer of real property, possession of a tangible asset, etc.). Similarly, if national law governs the conditions of the tutorship and, notably, the existence of a mortgage for the benefit of the incapacitated adult on the assets of the protector, the local law must be taken into account through a cumulative application of the potentially applicable laws; i.e. the mortgage will be admitted only if it violates neither national law nor the *lex situs*.⁵³⁸

The law concerning civil status and capacity must also enter into competition with **forum law or the law of the residence of the incapacitated adult** in the event that protective measures are to be imposed. The protection provided for under the foreign national law by the judicial or administrative organisations cannot always be executed in the country of residence of the incapacitated adult, either because there are no competent local authorities, or because the role that the foreign law attributes to the protective authorities is incompatible with that which is attributed to the local authorities. One should nevertheless note that local authorities are generally cooperative in connection with the operation of protective measures imposed outside the country.⁵³⁹

Forum law may also apply when such law is deemed to be *loi de police*⁵⁴⁰ to automatically impose on foreign incapacitated adults constraining measures, in particular the institutionalisation or hospitalisation of an adult.

2. Other PIL Norms Taking Into Account Legal Capacity

French jurisprudence has described the notion of “excusable ignorance” of the law in order to preserve legal certainty in international commerce. When an adult is deemed to be incapacitated under his or her national law travels to a foreign country and enters into a contract, in the event that, at the moment of execution of such contract the co-contractor faces a refusal to execute by such

⁵³⁷ Cass. 1^e, 2 June 1908, DP 1912.1.457.

⁵³⁸ Loussouarn (Y.), Bourel (P.), Vareilles-Sommières (P. de), *Droit international privé*, Dalloz, Paris, 8^e édition, 2004, p.382.

⁵³⁹ Cass. 1^e civ., 19 May 1958, *Rev. Crit. DIP* 1958, p. 700, note Batiffol ; TGI Aix-en-Provence, 27 February 1970, *Rev. Crit. DIP* 1972, p. 472, note Patarin.

⁵⁴⁰ such characterisation of a law implies that the law is of such importance that it must be immediately applied without an examination of whether any foreign law might be applicable.

incapacitated person, such co-contractor can plead **excusable ignorance** of such legal determination. The co-contractor cannot be held to know the rules concerning incapacity of the national law of all individuals with which such co-contractor enters into a contract. This excusable ignorance allows the co-contractor to avoid application of the aforementioned law⁵⁴¹.

As a practical matter, this situation arises only rarely it being difficult for a party that habitually does business with foreigners from a specific country to invoke such excusable ignorance of such foreign law⁵⁴².

C Conflicts of Jurisdictions

1. Competence/Jurisdiction

French courts may be competent to determine the basis of residence of an incapacitated adult⁵⁴³, to the extent that the authorities of the country of residence are often in a better position than the relevant national authorities to evaluate the situation. Moreover, the national authorities tend to take little interest in the question when the incapacitated adult lives in a country that is far away. .

The local authorities, then, will often be called upon to take protective measures governed by a foreign law, i.e. that of the nationality of the incapacitated adult..

French incapacitated adults residing abroad can also go before French courts on the basis of the exorbitant jurisdictional provisions of French law⁵⁴⁴.

2. Recognition and Enforcement

In the absence of opposition from one of the parties, foreign decisions concerning matters of civil status and capacity of persons will be recognised in France; no specific procedure is required. This solution was adopted in 1860 by the Cour de cassation in divorce matters⁵⁴⁵, and was subsequently confirmed in the context of annulment of a marriage⁵⁴⁶. Its purpose it so assure the permanence of personal status which is required where the person crosses borders. The *Hainard* case thus instituted the notion that “judgments rendered by a foreign court concerning the civil status and the capacity of adults, which have effects in France independant of any order of exequatur, except where such judgments lead to material acts of execution over the assets, or coercive acts over such persons”.⁵⁴⁷.

⁵⁴¹ Cass. Req. 16 Jan. 1861, *Lizardi*, GA 2006, 5e éd. Dalloz, n°5.

⁵⁴² Accord, the Convention of Rome Concerning the Law Applicable to Contractual Obligations, which allows a co-contractor to avoid the contract based on his or her incapacity “if at the time of conclusion of the contract, the other contracting party knew or should have known of such incapacity.” (article 11).

⁵⁴³ Extension to the international context of articles 1243 (which follows the jurisdiction provided for, with respect to minors, under article 1211) and 1262 of the Code of Civil Procedure.

⁵⁴⁴ Articles 14 and 15 of the Civil Code, providing that, in certain circumstances, the French judge is competent by virtue of the fact that the petitioner/defendant is of French nationality.

⁵⁴⁵ Cass. Civ., 28 February 1860, *Bulkley* : GA 2006, 5e éd. Dalloz, n°4.

⁵⁴⁶ Cass. Civ., 9 May 1900, *de Wrède* : GA 2006, 5e éd. Dalloz, n°10.

⁵⁴⁷ Cass. req. 3 March 1930, *Heinard* : J.D.I., 1930, p. 981.

Thus, the person responsible for assisting or representing the incapacitated adult can have recourse to the authorities, for example to seize the assets of a debtor of such adult, if he or she has obtained a court order to do so since this does not constitute the foreseeable execution of a foreign judgment imposing protective measure but, rather, is limited to a specific act. If, however, the court order has been issued by a foreign court, an exequatur procedure is required⁵⁴⁸.

With respect to decisions made within the framework of a tutorship, the jurisprudence is less clear : certain cases require exequatur whereas others are more flexible. In addition, in the event of a change of applicable law, some cases are in favor of a reorganization of new protective measures under the new law, refusing to allow the protection organisations named *ab initio* to retain their powers⁵⁴⁹.

NB : All of the rules described above will be replaced by the provisions of the Hague Convention of 13 January 2000 on the international protection of adults, France having filed its ratification documents, France having adopted the law necessary to its ratification⁵⁵⁰. The Convention should become effective in the beginning of the year 2009.

D Bibliography

AUDIT BERNARD, *Droit international privé*, Economica, Paris, 2000, spéc. pp. 508-520.

BUREAU DOMINIQUE, MUIR WATT HORATIA, *Droit international privé*, PUF Thémis, Paris, 1^{er} édition, 2007, spéc. pp. 32-36.

LOUSSOUARN YVON, BOUREL PIERRE, DE VAREILLES-SOMMIERES PASCAL, *Droit international privé*, Dalloz, Paris, 8^e édition, 2004, spéc. pp. 377-387.

VIGNAL THIERRY, *Droit international privé*, Armand Colin, Paris, 1^{er} édition, 2005, spéc. pp. 133-141.

ANCEL BERTRAND, LEQUETTE YVES, *Les grands arrêts de la jurisprudence française de droit international privé*, Dalloz, Paris, 5e édition.

⁵⁴⁸ We refer here specifically to the requirement, in the context of an exequatur procedure, that the French court make certain substantive determinations (*e.g.* jurisdiction of the foreign court, absence of fraud) concerning the foreign judgments to be executed in France. This requirement has been in place since the decision in Cass. Civ., 19 April 1819, *Parker* : GA 2006, 5e éd. Dalloz, n°2.

⁵⁴⁹ Cass. 1^{er} civ., 7 November 1972 (n°71-12243) : Bull. civ. I, n°232 p. 202.

⁵⁵⁰ Law n° 2008-737 of 28 July 2008 authorising the ratification of the Hague Convention of 13 January 2000 on the International Protection of Adults.

Section III Germany

A Listing

1. Legislation

- EGBGB (Einführungsgesetz zum Bürgerlichen Gesetzbuch in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. 2494, ber. BGBl. 1997 I S. 1061), last amendment : 12. 8. 2008 (BGBl. I S. 1666))
- FGG (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit (RGBl. S. 771) in der Fassung der Bekanntmachung vom 20. Mai 1898, last amendment: 4. 7. 2008 (BGBl. I S. 1188))

2. Jurisprudence

Bayerisches Oberstes Landesgericht, 31.10.2001, 3Z BR 198/01

(Guardianship and applicable law; competences of the guardian abroad; continuation of the guardianship after the protected adult has returned to his home country)

A guardian can be appointed according to German (substantive) law for foreign nationals provided that he or she has his habitual residence, or a residence in Germany. The competences of the guardian are, however, not limited to the German territory.

The guardian can decide upon the residence of the protected adult after he returns to his State of origin. He can inform the competent authorities about the planned return and the need for protection of the affected adult. Even if the guardian's mission comes to an end, when the concerned adult definitively leaves the German territory, the guardian is entitled to undertake certain acts in order to ensure the proper placement or other necessary measures until the foreign competent authorities have taken over the case.

B Conflicts of laws

Preliminary remark

Germany has not signed any bilateral agreements with other EU Member States in the field of the international protection of adults. However, Germany was one of the first signatory States of the Hague Convention on the International Protection of Adults, which improves the protection of incapable adults in cross-border cases. The Convention ensures that a court certificate is granted and possesses evidentiary value in other Member States. This assists the carer in disposing of property or assets in the home country of the protected adult.

It is clear that European citizens have become increasingly mobile and in cross-border cases, where a problem of incapacity arises, clear answers are needed in order to answer legal questions involving protective measures. The Convention has not yet entered into force, as the minimum number of

signatory States has not yet been achieved. This will, however, be the case in the next weeks, and the Convention will enter into force for Germany in January 2009.

1. PIL norms directly concerning legal capacity

Legal / Contractual Capacity

The German EGBGB contains in its sec. 7⁵⁵¹ a conflict of laws rule on legal capacity and the capacity to contract (*Rechts- und Geschäftsfähigkeit*) and subjects capacity to the law of the **State of origin** of the person concerned. In case of individuals with multiple nationalities, sec. 5 EGBGB refers to the “effective nationality” (based on the closest connection principle). The applicable law to this particular question is, thus, independent from the law applicable to a legal transaction undertaken by the person whose capacity is questioned. The scope of sec. 7 EGBGB includes the conditions of full or limited legal / contractual capacity, for example different degrees of age (concerning minors), the extension of capacity due to marriage (Art. 7 para. 1 subpara. 2 EGBGB), mental health, etc. The loss or limitation of legal capacity for adults is also governed by the law of origin. The provision does not, however, allow German courts to completely find that a person is incapable even if the foreign law provides for this solution.⁵⁵²

The question as to whether a person can act as a party in a court proceeding is subject to the *lex fori*, as this question relates to the law of procedure. (Sec. 50 para. 1 ZPO, however, equally refers to the person’s law of origin).

A different approach from sec. 7 EGBGB is followed in specific areas of law, such as the law of successions or the capacity of committing a tort. In these cases of *leges speciales* questions of capacity are subject to the applicable law and not considered independently from it.

PIL norms concerning guardianship

Sec. 24 EGBGB, which has been abrogated by German legislation since 1992, provides for conflict of laws rules in the field of guardianship (*Betreuung*). The term *Betreuung* is to be understood broadly.⁵⁵³ Sec. 24 EGBGB distinguishes **conditions** for appointment orders, their modifications and the termination of guardianship (para. 1) from the **content** of such orders, *i.e.* the choice of the guardian, the scope of the guardian’s duties, judicial authorisation for particular matters, etc. (para. 3).⁵⁵⁴ The constitution of protective measures and any changes to the established guardianship structure and its termination⁵⁵⁵ are subject to the **law of origin** of the person concerned (see sec. 24 para. 1 EGBGB).⁵⁵⁶ However, a guardian can be appointed according to German (substantive) law for

⁵⁵¹ Artikel 7 EGBGB Rechtsfähigkeit und Geschäftsfähigkeit
(1)¹Die Rechtsfähigkeit und die Geschäftsfähigkeit einer Person unterliegen dem Recht des Staates, dem die Person angehört. ²Dies gilt auch, soweit die Geschäftsfähigkeit durch Eheschließung erweitert wird.

(2)Eine einmal erlangte Rechtsfähigkeit oder Geschäftsfähigkeit wird durch Erwerb oder Verlust der Rechtsstellung als Deutscher nicht beeinträchtigt.

⁵⁵² Von Bar, IPR II, n. 47; Palandt/Heldrich, cit., Art. 7 EGBGB, n. 3.

⁵⁵³ The question of “incapacitation” is not subject to Art. 7 EGBGB. Oelkers, Internationales Betreuungsrecht, p. 221 ; Guttenberger, Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen, 2004, p. 26.

⁵⁵⁴ Oelkers, Internationales Betreuungsrecht, p. 223, 224 ss.

⁵⁵⁵ As well as the content of the *legal* tutorship or custodianship.

⁵⁵⁶ Artikel 24 EGBGB Vormundschaft, Betreuung und Pflegschaft

(1)¹Die Entstehung, die Änderung und das Ende der Vormundschaft, Betreuung und Pflegschaft sowie der Inhalt der gesetzlichen Vormundschaft und Pflegschaft unterliegen dem Recht des

foreign nationals (see sec. 24 para. 1 subpara. 2 EGBGB), provided that he or she has his habitual residence, or in default of it, a residence in Germany. This provision is controversially discussed, but interpreted by jurisprudence as giving the German court the competence to choose the applicable law.⁵⁵⁷ Consequently, there is a clear tendency to apply German substantive law.⁵⁵⁸ On the contrary, temporary measures and the content of the guardianship are subject to the law of the State that **gives the respective order** (sec. 24 para. 3 EGBGB).

Sec. 24 para. 1 and 3 FGG are also applicable in cases of *Betreuungs – und Patientenverfügungen*. Since these measures anticipate either the designation of a guardian or decisions concerning medical treatment, and do not replace the appointment of a guardian and the definition of his or her duties, they must be assessed under the PIL norms relating to guardianship.

PIL norms concerning lasting powers of attorney (Vorsorgevollmachten)

The applicable rules on powers of attorney are less clear. Sec. 24 EGBGB does not apply and German law contains no specific provision dealing with conflict of laws in cases of powers of attorney. There is a tendency to apply either the law of the State in which the power of attorney produces effects (*Wirkungsland*)⁵⁵⁹ or the law of the State in which use is made of it (*Gebrauchsort*)⁵⁶⁰ If the power of attorney relates actions to be undertaken in Germany, they will generally be recognised and enforceable.⁵⁶¹

2. Other PIL norms taking into account legal capacity

A specific provision can be mentioned here, which modifies the principles cited under Part 1 in the public interest: Art. 12 EGBGB⁵⁶² states that if a contract is concluded between individuals residing in the same State and having, according to the law of this State legal / contractual capacity, a party can

Staates, dem der Mündel, Betreute oder Pflegling angehört.²Für einen Angehörigen eines fremden Staates, der seinen gewöhnlichen Aufenthalt oder, mangels eines solchen, seinen Aufenthalt im Inland hat, kann ein Betreuer nach deutschem Recht bestellt werden.

(2) Ist eine Pflegschaft erforderlich, weil nicht feststeht, wer an einer Angelegenheit beteiligt ist, oder weil ein Beteiligter sich in einem anderen Staat befindet, so ist das Recht anzuwenden, das für die Angelegenheit maßgebend ist.

(3) Vorläufige Maßregeln sowie der Inhalt der Betreuung und der angeordneten Vormundschaft und Pflegschaft unterliegen dem Recht des anordnenden Staates.

⁵⁵⁷ See also RÖTHEL, A., Das Betreuungsrecht im IPR, Rechtliche Fürsorge für ausländische Erwachsene in Deutschland, BtPrax 2006, p. 90 et seq.

⁵⁵⁸ Guttenberger, Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen, 2004, p. 26; Staudinger/Kropholler, Art. 24 EGBGB, n. 31; Soergel/Kegel Art. 24 EGBGB, n. 4s.

⁵⁵⁹ BGH NJW 90, 3088 ; 128, 41/47 ; NJW 04, 1315/1316.

⁵⁶⁰ Von Hoffmann, IPR, § 10, n. 14.

⁵⁶¹ Guttenberger, Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen, 2004, p. 37;

⁵⁶² Artikel 12 EGBGB Schutz des anderen Vertragsteils

¹Wird ein Vertrag zwischen Personen geschlossen, die sich in demselben Staat befinden, so kann sich eine natürliche Person, die nach den Sachvorschriften des Rechts dieses Staates rechts-, geschäfts- und handlungsfähig wäre, nur dann auf ihre aus den Sachvorschriften des Rechts eines anderen Staates abgeleitete Rechts-, Geschäfts- und Handlungsunfähigkeit berufen, wenn der andere Vertragsteil bei Vertragsabschluß diese Rechts-, Geschäfts- und Handlungsunfähigkeit kannte oder kennen mußte.

²Dies gilt nicht für familienrechtliche und erbrechtliche Rechtsgeschäfte sowie für Verfügungen über ein in einem anderen Staat belegenes Grundstück.

only claim incapacity pursuant to provisions of another State (State of origin) if the other party knew or should have known of the incapacity. The provision limits its scope and excludes transactions in successions and family law, as well as transactions concerning land in another State. It is basically limited to the law of obligations.

C Conflicts of jurisdictions

1. Competence/Jurisdiction

Sec. 65 FGG contains a provision which relates to the local competence, but equally to the international competence of the German courts of protection.

Sec. 65 FGG designates, as competent for guardianship matters, the court in the district where the adult has his **habitual residence**. If a guardian has previously been appointed, the court that issued the order of appointment remains competent for any other question relating to this guardianship.

If the adult concerned **does not have his habitual residence in Germany** or if such residence is not determinable, the court of the district where the **need for protection** became apparent is competent.⁵⁶³

If the adult concerned is a **German national** and no court is competent according to the criteria mentioned above, the court of protection of Berlin-Schöneberg has international competence in guardianship matters.

Through Sec. 69e, 47 FGG, **conflicts may be avoided** where they arise out of the fact that another State provides for jurisdiction based on nationality German courts would have jurisdiction on the basis of the residence of the affected adult. In case of such a conflict of jurisdictions, the German court is, according to sec. 47 para. 1 FGG, not obliged to undertake any measures in Germany, if a request for protective measures is pending in a court of the other State, provided that this solution is in the interest of the person in need of protection. This can be the case, if the concerned adult is of German nationality but has abandoned close ties to his home country because has lived for a long time⁵⁶⁴ in the foreign State. On the other hand, if, under the above-mentioned conditions, a case is pending in Germany, the court can transfer the matter to the foreign court if this corresponds to the interests of the person in need of protection, *e.g.* when a German national moves to a foreign State. If a guardian has been appointed, he must consent and the other State must accept the transfer.⁵⁶⁵

If necessary, the court may appoint a curator for the proceedings (*Verfahrenspfleger*) pursuant to sec. 67 FGG.

⁵⁶³ If an internal habitual residence can be determined, the court of the district in which the need for protection has become apparent has equally an alternative competence (besides the court of the district of habitual residence) for temporary measures, but has to inform the court in the district of residence about its activity.

⁵⁶⁴ See the example of Guttenberger, *Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen*, 2004, p. 24.

⁵⁶⁵ Sec. 69e, 47 para. 2 FGG.

2. Recognition and enforcement

The recognition of decisions in guardianship matters is subject to the general rule in sec. 16a FGG. Pursuant to sec.16a FGG, the recognition of foreign decisions is only excluded in the following circumstances:

1. if the courts of the foreign State were, according to German law, not competent to take any decision in the matter;
2. if a party that did not express itself during the proceedings and claims thereon has not been notified correctly or in a timely manner of the writ initiating the proceedings in which he would have had an opportunity to exercise his rights;
3. if the decision is incompatible with a prior decision taken or recognised in Germany or if the proceedings are incompatible with a pending proceeding (Sec. 16a para. 3 FGG can be problematic, as decisions concerning the protection of adults are frequently overruled due to sudden changes in circumstances (*e.g.* concerning the health of the adult, etc.). Some authors suggest that sec. 16a para. 3 FGG be adapted in guardianship matters such that prior decisions are only relevant if the circumstances of the case have not fundamentally changed.)⁵⁶⁶
4. or if the recognition of the decision would lead to an outcome which would be incompatible with the fundamental principles of the German legal order, and especially fundamental rights. (The German *public order* can be affected if the fundamental principles of procedure or of substantive law have been violated - *e.g.* a guardian has been appointed without a medical opinion). It is subject to debate whether or not the recognition of a foreign decision regarding the declaration of incapacity (*Entmündigung*), which is based on criteria no longer recognised under German law, may be denied on the basis of sec. 16a para. 4 FGG. This would be consistent with the German approach, which attempts to guarantee a maximum preservation of the adult's rights and dignity. In order to avoid legal lacunae due to a denial of recognition (the affected adult would risk losing the benefit of protection altogether) the preferred solution is to recognise a foreign *Entmündigung*, but to reduce its consequences. This entails setting up a *Betreuung* with maximal scope.⁵⁶⁷

In sum, foreign decisions in the field of guardianship, notably guardianship orders, will be recognised in Germany except where they infringe upon the German *public order*. Once a foreign measure has been recognised, its effects must correspond to those that it would have in the foreign State.⁵⁶⁸

⁵⁶⁶ Guttenberger, Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen, 2004, p. 31, Oelkers, Internationales Betreuungsrecht, p. 280 ss.

⁵⁶⁷ Guttenberger, Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen, 2004, p. 31, Oelkers, Internationales Betreuungsrecht, p. 280 ss.

⁵⁶⁸ Staudinger/Kropholler, Art. 24 EGBGB, n. 127s.; Oelkers, Internationales Betreuungsrecht, p. 296 ss.

D Bibliography

GUTTENBERGER, Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen, Bielefeld, 2004.

MÜNCHENER KOMMENTAR ZUM BGB, 5th ed. , München, 2008.

NITZINGER, Das Betreuungsrecht im internationalen Privatrecht, Frankfurt, 1998.

OELKERS , Internationales Betreuungsrecht, Frankfurt a.M., 1996.

PALANDT, Bürgerliches Gesetzbuch, 68th ed., München, 2008.

RÖTHEL, Das Betreuungsrecht im IPR, BtPrax 2006, p. 90 ss.

RUDOLF/BITTER, Vorsorgevollmacht, Bonn, 2000.

STAUDINGER, BGB, Neubearbeitung 2006, München, 2006.

VON BAR, Internationales Privatrecht, vol. II, 1991.

VON HOFFMANN/Thorn, Internationales Privatrecht, 9th ed., München, 2007.

Section IV

Sweden

A Listing

1. Applicable Rules

- chapter 5 of the law of 8 July 1904 dealing with certain questions of international law concerning marriage and tutorship (*lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap*, hereinafter "IÄL")
- articles 14-21a of the Royal Order No. 429 of 31 December 1931 dealing with questions of marriage, adoption and tutorship (*förordning om vissa internationella rättsförhållanden rörande äktenskap, adoption och förmynderskap*, hereinafter "NÄF")
- law no. 1321 of 1 December 1988 on certain Nordic questions concerning tutorship under the Marriage Code *et al.* (*lag om nordiska rättsförhållanden rörande förvaltarskap enligt föräldrabalken m.m.*)
- the Rome Convention
- article 79 of the law on bills of exchange – *växellagen* – and article 58 of the law on cheques – *checklagen*
- article 3 of chapter 1 of law no. 81 of 5 March 1937 dealing with questions of international law concerning successions (*lag om internationella rättsförhållanden rörande dödsbon*, hereinafter "IDL")
- article 10 of law no. 44 of 1 March 1935 dealing with questions of succession and of wills of a Danish, Finnish, Icelandic or Norwegian citizen, who had his habitual residence in the country *et al.* (*lag om dödsbo efter dansk, finsk, isländsk eller norsk medborgare som hade hemvist här i riket m.m.*, hereinafter "NDL").

2. Jurisprudence

No relevant jurisprudence

B Conflicts of law

1. Private international law rules applicable to issues of capacity

1.1. General rules of conflicts of law

The capacity to act in Swedish legal proceedings is guaranteed by Chapter 11, Article 1, Par. 1 of the Code of Judicial Procedure (SFS 1942:740) (*rättegångsbalken*) :

« Anyone can be a party to judicial proceedings ».⁵⁶⁹

⁵⁶⁹

Liberal translation by the SIR of « Envar kan vara part i rättegång ».

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The birth and the death of a physical person are regulated by specific laws and by jurisprudence. Foreign rules of different effect should be considered to be contrary to Swedish *ordre public*.

International instruments on the subject of international **tutorship (in the broad sense and in application to both adults and minors)**, contain provisions concerning the capacity to act, in particular:

- (a) chapter 5 of the law of 8 July 1904 dealing with certain questions of international law concerning marriage and tutorship (*lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap*, hereinafter "IÄL");
- (b) articles 14-21a of the Royal Order No. 429 of 31 December 1931 dealing with questions of marriage, adoption and tutorship (*förordning om vissa internationella rättsförhållanden rörande äktenskap, adoption och förmynderskap*, hereinafter "NÄF"); and
- (c) law no. 1321 of 1 December 1988 on certain Nordic questions concerning tutorship under the Marriage Code *et al.* (*lag om nordiska rättsförhållanden rörande förvaltarenskap enligt föräldrabalken m.m.*).

1.1.1. The law of 8 July 1904 dealing with certain questions of international law concerning marriage and tutorship (IÄL)

The IÄL applies to questions, within its scope of application, concerning tutorships which are **linked to a foreign element**. The NÄF however, applies to questions having a Nordic link⁵⁷⁰ and Regulation (CE) No. 2201/2003 of the Council of 27 November 2003 concerning jurisdiction, recognition and execution of decisions on matrimonial and on matters of parental responsibility, repealing Regulation (CE) No. 1347/2000, governs certain matters also covered by the IÄL.⁵⁷¹

The Swedish law of tutorships is applicable to any person of Swedish nationality, even if she does not have a "habitual residence" (hemvist) in Sweden.⁵⁷² A Swedish judge can nevertheless decide to exclude the application of Swedish law to the tutorship of a Swede, if the tutorship was imposed in the State of the person's "habitual residence" (*hemvist*) and she has a tutor in Sweden or makes an application for the appointment of a tutor.⁵⁷³

In respect of an application for the tutorship of a **foreign citizen having his habitual residence in Sweden, the judge must ask the Ministry of Foreign Affairs whether the tutorship application may be determined in the foreign State of citizenship.**⁵⁷⁴ If he is informed of the absence of any foreign decision on this tutorship or if he does not receive a response within six months, a tutor can be designated according to Swedish law.⁵⁷⁵

If a Swede is under tutorship in a foreign country, the guardianship can nevertheless be terminated in Sweden according to the Swedish law governing the termination of the tutorship.⁵⁷⁶ If tutorship has

⁵⁷⁰ A "Nordic link" describes the situation in which a person has the nationality of one of the Nordic countries (ie. Denmark, Finland, Iceland, Norway and Sweden) or his habitual residence ("hemvist") in one of these countries.

⁵⁷¹ Chap. 7, art. 5-6 IÄL.

⁵⁷² Chap. 5, art. 1 IÄL.

⁵⁷³ *Ibid.*

⁵⁷⁴ Chap. 5, art. 1 IÄL.

⁵⁷⁵ *Ibid.*

⁵⁷⁶ Chap. 5, art. 3 IÄL.

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been ordered in Sweden for a foreign citizen when he was already under foreign tutorship, the tutor appointed in Sweden will be dismissed.⁵⁷⁷

If, in a particular case, Swedish law concerning tutorship is not applicable to a person living in Sweden, or if its applicability has not yet been determined, the court or even the *överförmyndare* may, where delay would obviously be dangerous, make a temporary decision on tutorship according to Chap. 11, Art. 18 FB, until such time as the care of his affairs is arranged according to the law of his State of nationality or the court is finally able to make a decision concerning the tutorship according to Chap. 11, Art. 7 FB.⁵⁷⁸

A declaration of tutorship notified by a jurisdictionally competent foreign authority must be published by the Swedish court, upon demand, in the *Post- och Inrikes Tidningar* (official gazette).⁵⁷⁹

A person living in Sweden under tutorship according to foreign law is considered to be a person under tutorship with an unlimited mandate in what concerns the management of projects, the allocation of posts and engagement in any activity requiring authorisation.⁵⁸⁰

1.1.2. Royal Order No. 429 of 31 December 1931 dealing with questions of marriage, adoption and tutorship (NÄF)

The law applicable to tutorship in a situation with a Nordic link is to be determined according to the NÄF (which is based upon the Nordic Convention on this subject). Questions pertaining to **the appointment and the establishment of a tutorship** with respect to a person having the nationality of a State Party (ie. one of the Nordic States), or having his "habitual residence" (*hemvist*) on the territory of a State Party, **as well as questions concerning the establishment of a temporary tutorship and provisional measures** (under Arts. 14 and 15 of NÄF), are governed by the law **applicable in each of the States.**⁵⁸¹ The same is true of the law applicable to the termination of tutorship.⁵⁸²

With the exception of cheques and bills of exchange, the effects of guardianship on the property of wards and the powers of guardians are determined by the law of the State in which the tutorship is exercised.⁵⁸³

1.1.3. Law no. 1321 of 1 December 1988 on certain Nordic questions concerning tutorship under the Marriage Code et al.⁵⁸⁴

The rules on tutorship set out in the NÄF (ie. in Arts. 16 to 20) **apply to the appointment of a tutor for a person having the nationality of a State foreseen by the NÄF and having his "habitual residence" (*hemvist*) in Sweden**, on the condition that guardianship is not already being exercised by a guardian in another State Party.⁵⁸⁵ If a person under tutorship in Sweden establishes an

⁵⁷⁷ Chap. 5, art. 3, al. 2 IÄL.

⁵⁷⁸ Chap. 5, art. 4 IÄL.

⁵⁷⁹ Chap. 5, art. 5 IÄL.

⁵⁸⁰ Chap. 5, art. 6, al. 2 IÄL.

⁵⁸¹ Art. 16 NÄF.

⁵⁸² Art. 19, al. 2 NÄF.

⁵⁸³ Art. 17 NÄF.

⁵⁸⁴ The concept of "Nordic questions" refers to situations and cases having a "Nordic link". These are situations concerning a person who has the nationality of one of the Nordic countries (ie. Denmark, Finland, Iceland, Norway and Sweden) or his habitual residence ("*hemvist*") in one of these countries.

⁵⁸⁵ Art. 1, al. 2 of law no. 1321 of 1 December 1988 on certain Nordic questions concerning tutorship under the Marriage Code *et al.*

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"habitual residence" (*hemvist*) in another State Party, the mandate of the Swedish tutor terminates.⁵⁸⁶

A person having the nationality of another State Party and who has been subjected to tutorship is considered in Sweden to be a person under tutorship with an unlimited mandate in what concerns his employment and his engagement in any professional activity requiring authorisation.⁵⁸⁷

1.2. Specific rules of conflicts of law

Above and beyond these rather general rules, specific rules of conflicts of law governing the capacity to carry out certain types of acts can be found in certain laws. This applies to marriage (Art. 1 of Chap. 1 IÄL and Art. 1 NÄF), the conclusion of contracts (Art. 11 of the Rome Convention), the issuance of bills of exchange and cheques (Art. 79 of the law on bills of exchange – *växellagen* – and Art. 58 of the law on cheques – *checklagen*), as well as the execution and the revocation of a will (Art. 3 of Chap. 1 of law no. 81 of 5 March 1937 dealing with questions of international law concerning successions (*lag om internationella rättsförhållanden rörande dödsbon*, hereinafter "IDL") and Art. 10 of law no. 44 of 1 March 1935 dealing with questions of succession and of wills of a Danish, Finnish, Icelandic or Norwegian citizen, who had his habitual residence in the country *et al.* (*lag om dödsbo efter dansk, finsk, isländsk eller norsk medborgare som hade hemvist här i riket m.m.*, hereinafter "NDL").

If a rule of private international law specific to the capacity to carry out a particular act does not exist, Swedish general law applies.⁵⁸⁸ Every physical person in Sweden is recognised as a subject of the law and is therefore considered to have the capacity to act⁵⁸⁹, meaning the capacity to have rights and obligations, as well as to be a party to judicial proceedings. This applies equally to foreigners, irrespective of their domiciles (refer in particular to Chap. 11, Art. 3 of the Judicial Procedure Code). Swedish law on tutorship may even be applied to a person of non-Nordic nationality, but only on the condition that her habitual residence be located in Sweden (refer to section A.1, above).

2. Other private international law rules concerning capacity

Refer to point A.1, above

⁵⁸⁶ Art. 2 of law no. 1321 of 1 December 1988 on certain Nordic questions concerning tutorship under the Marriage Code *et al.*

⁵⁸⁷ Art. 3 of law no. 1321 of 1 December 1988 on certain Nordic questions concerning tutorship under the Marriage Code *et al.*

⁵⁸⁸ Refer *inter alia* to BOGDAN, M., *Svensk internationell privat- och processrätt*, Stockholm, 2004, p. 161.

⁵⁸⁹ Concerning the capacity to act, the principle rule of Swedish law is that set out in chap. 9, art. 1 FB, which foresees that anyone less than eighteen years old is a minor and cannot dispose of his property, nor bind himself in excess of what is permitted by law or by conditions laid down in respect of gifts and wills, or by provisions designating him as the beneficiary of insurance or a retirement savings plan. This capacity to act can be further limited by a tutorship mandate.

C Jurisdictional Conflicts

1. Jurisdiction

Judicial jurisdiction over facts including a Nordic link is to be determined according to the abovementioned NÄF. A Swedish judge has jurisdiction where the relevant person has the nationality of a State foreseen by the NÄF and his **“habitual residence”** (*hemvist*) in Sweden, unless tutorship is already being exercised by a tutor in another State Party (ie. one of the Nordic States).⁵⁹⁰ Where the relevant person has the nationality of a State Party but his **“habitual residence”** in another State Party, decisions about his tutorship are to be made in the State on the territory of which the person has his habitual residence, unless tutorship is already being exercised by a tutor in another State Party.⁵⁹¹ Temporary tutorship, as well as provisional measures, can nevertheless be arranged and ordered in each of the States Parties.⁵⁹²

Temporary tutorship can in fact be arranged in Sweden even if the person concerned does not have her **“habitual residence”** (*hemvist*) there.⁵⁹³ The rules of tutorship which are laid down by the Royal Order (in particular Arts. 16 to 20) apply to the appointment of a tutor. On the other hand, a tutorship under which the mandate of the tutor is limited cannot be transferred to another State Party.⁵⁹⁴

If the tutor has the nationality of a State Party, any application by a person in a State Party for the termination of the tutorship must be lodged with the jurisdictionally competent authorities of the State in which the tutorship was originally established.⁵⁹⁵

If a rule of private international law specific to the capacity to carry out a particular act does not exist, Swedish general law applies. Every physical person in Sweden (whether or not she has Swedish nationality) can be a party to judicial proceedings.⁵⁹⁶

2. Recognition and Enforcement

The recognition of a tutorship decision in circumstances including a Nordic link is governed by the above-mentioned NÄF, which guarantees the mutual recognition of tutorship decisions. If a tutorship, under which the tutor’s mandate is unlimited, is transferred from Sweden to another State Party foreseen by the NÄF, the person under guardianship will also be considered as being under tutorship under the law of that other State.⁵⁹⁷ The same solution applies in the equivalent case in which a tutorship is transferred to Sweden from another State Party.⁵⁹⁸

⁵⁹⁰ Art. 1 of law no. 1321 of 1 December 1988 on certain Nordic questions concerning guardianship under the Marriage Code *et al.*

⁵⁹¹ Art. 14 NÄF.

⁵⁹² Art. 15 NÄF.

⁵⁹³ *Ibid.*

⁵⁹⁴ Art. 1, al. 2 of law no. 1321 of 1 December 1988 on certain Nordic questions concerning guardianship under the Marriage Code *et al.*

⁵⁹⁵ Art. 19 of law no. 1321 of 1 December 1988 on certain Nordic questions concerning guardianship under the Marriage Code *et al.*

⁵⁹⁶ Refer also to chap. 11, art. 3 of the Judicial Procedure Code.

⁵⁹⁷ Art. 1, al. 3 of law no. 1321 of 1 December 1988 on certain Nordic questions concerning guardianship under the Marriage Code *et al.*

⁵⁹⁸ Art. 1, al. 4 of law no. 1321 of 1 December 1988 on certain Nordic questions concerning guardianship under the Marriage Code *et al.*

If a rule of private international law specific to the recognition of a judgment concerning the capacity to carry out a particular act does not exist, Swedish general law applies.

D. Bibliography

BERGQVIST, U., *Internationell arvs- och bodelningsrätt. En kommentar*, Stockholm, 2003.

BOGDAN, M., *Advokaten*, 1994, pp. 355-356.

BOGDAN, M., *Svensk internationell privat- och processrätt*, Stockholm, 2004 (en particulier, chap. 9.6-9.9)

BOGDAN, M., et MOBERG, *Balans*, no. 3, 1984.

EEK, H., *Lagkonflikter i tvistemål II*, Stockholm, 1978 (en particulier pp. 23 et ss.)

HOBÉR, K., "Tillämplig lag på utländska företags emissionsprospekt i Sverige, jämte något om amerikanska bestämmelser om emissionsprospekt", *Svensk Juristtidning*, 1987, p. 586-599.

KARLGREN, H., *Kortfattad lärobok i internationell privat- och processrätt*, Lund, 1974 (en particulier pp. 82 et 92)

LANDO, O., *Kontraktstatuttet*, Copenhagen, 1981 (en particulier pp. 233 et ss.)

MICHAELI, W., *Internationales Privatrecht gemäss schwedischem Recht und Schwedischer Rechtsprechung*, Stockholm, 1948 (en particulier, pp. 109 et ss.)

MICHAELI, W., *SvJT* 1946 p. 457.

NIAL, H., *Internationell förmögenhetsrätt*, Stockholm, 1953 (en particulier p. 78 et ss.)

PHILIP, A., *Dansk international privat- og procesret*, Copenhagen, 1976 (en particulier pp. 358 et ss.)

PHILIP, A., *Recueil des cours*, 1959 I (vol. 96) (en particulier pp. 303-304)

WALIN, G., *Kommentar till ärvdabalken II*, Stockholm, 2001 (en particulier p. 285 et ss.)

Section V Czech Republic

A Listing

1. Legislation

- The Czech Act on international private and procedural law No. 97/1963 Coll. of Laws of December 4, 1963

2. Jurisprudence

No pertinent jurisprudence.

B Conflicts of laws

1. PIL norms directly concerning legal capacity

Legal capacity is, according to the Czech Act on Private and Procedural International Law⁵⁹⁹ (hereinafter "the PILC") **governed by the law of the State of the person's nationality**. However, if a foreign person accomplishes a legal act in the territory of the Czech Republic, it is sufficient, in order for the act to be valid, that the **person had capacity under Czech law** (§ 3 of the PILC).

2. Other PIL norms taking into account legal capacity

Unless otherwise stated by law or unless something else is necessary for the reasonable regulation of relationships, the **validity of legal acts, as well as the consequences of nullity and avoidance are governed by the same laws**. However, as far as the form of the legal act is concerned, it is sufficient if the participants complied with the law of the place where the will was expressed (§ 4 of the PILC).

C Conflicts of jurisdictions

1. Competence/Jurisdiction

Czech courts have jurisdiction over Czech citizens even if they live abroad where restrictions on the ability of persons to undertake legal acts, as well as guardianship, is concerned. The Czech courts

⁵⁹⁹ The Czech Act on international private and procedural law No. 97/1963 Coll. of Laws of December 4, 1963 (Zákon ze dne 4.prosince 1963 o mezinárodním právu soukromém a procesním) with following changes of No. 158/1969, 234/1992, 264/1992, 125/2002, 37/2004, 257/2004, 361/2004, 377/2005, 57/2006, 70/2006, 233/2006, 296/2007, 123/2008 Coll. of Laws.

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abstain from involvement in proceedings if measures taken abroad suffice to protect the rights and interests of the Czech citizen concerned. **As for foreign nationals** living in the Czech Republic, the **Czech courts are restricted to measures necessary for protection of the foreign national's rights** and will notify relevant authorities of the domestic state where a foreign national is concerned. Unless the relevant authority of the foreign national's State regulates his or her affairs within a reasonable period, the Czech court will do so according to Czech substantive law (§ 42 of the PILC).

2. Recognition and enforcement

Decisions of foreign authorities in capacity matters and foreign notarial deeds in these matters are effective in the Czech Republic if they have become **final and conclusive** as confirmed by **the foreign authority and were recognised by the Czech authorities** (§ 63 of the PILC).

The foreign decision is neither recognised nor enforced in the Czech Republic if

- a) **the Czech courts** have **exclusive jurisdiction** or if the application of provisions concerning the competence of Czech courts would otherwise have prevented proceedings from being conducted before the foreign authority. ;
- b) in the same case, a **final and conclusive decision has been issued by Czech authorities** or a final and conclusive decision of an authority of a third state has been recognised in the Czech Republic;
- c) the authority of the foreign state prevented **the person against whom the decision is to be recognised from being party to the proceedings**, particularly if service of process was improper ;
- d) recognition or enforcement is **contrary to Czech public order**; or
- e) **reciprocity** is not guaranteed (reciprocity is not required if the foreign decision is not directed against a Czech citizen or a Czech legal entity (§ 64 of the PILC)).

In connection with the Czech Republic's membership in the European Union, a special addendum to the PILC was adopted (the "Special provisions on the recognition and enforcement of certain foreign decisions") concerning proceedings on the **recognition and enforcement of foreign decisions, other public instruments and judicial conciliations in which procedure pursuant to European Community or International Treaty regulations approved by Parliament and binding on the Czech Republic** (§ 68a, 68b, 68c)⁶⁰⁰. **The Czech law is, in principle, applied only** when the EU Regulations (e.g. Council

600 Amendmend to the PILC made by the Law No 361/2004 Coll. On 14. June 2004: § 68a: The provisions of this subdivision shall apply in proceedings on the recognition and enforcement of foreign decisions, other public instruments and judicial conciliations (hereinafter "decisions"), in which procedure is according to the regulations of the European Community or under an announced international treaty whose ratification has been approved by Parliament and which is binding upon the Czech Republic (hereinafter "international treaty").

§ 68b: If a party requests, pursuant to European Community law or an international treaty, that the recognition of a decision be adjudicated in special proceedings, a court shall rule on such recognition.

Section 68c: (1) A motion for the ordering of enforcement of a decision or distraint pursuant to a special law may also be filed together with a motion for the declaration of enforceability. In such a case, the court shall render separate, reasoned verdicts on both motions in a single ruling. The ruling must include a rationale even when it concerns only one of such motions. (2) If a court has proceeded pursuant to subsection 1 above, and if a European Community regulation stipulates a term for filing remedies against decisions on the recognition or declaration of enforceability of foreign decisions which is longer than the term stipulated in the special law 2 for filing remedies

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Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) **explicitly leaves space for or requires** its application, or in cases that are not within the scope of the Regulation.

Differences can be found, for example, in § 64(c) of the PILC, in contrast to Article 34(2) of the Council Reg (EC) 44/2001, which formulates grounds for refusal where the procedure of a foreign authority deprived a person of the possibility of participating in proceedings (breach of the principle of *audiatur et altera pars*) and where service of process was not in person. Further, the refusal of recognition due to a conflict with a prior decision is provided for in the PILC where the earlier decision was final and recognised [§ 64(b)], whereas Article 34(4) of the Regulation sets forth grounds for refusal where the earlier decision merely meets the conditions necessary for recognition, without actually having to be final and recognised. Furthermore, grounds for the refusal of recognition based on lack of jurisdiction, as provided for in § 64(a) of the PILC, ensure that award proceedings cannot be conducted where provisions on the jurisdiction of Czech courts were used to assess the jurisdiction of foreign authorities. This is definitely a stricter condition than that set forth in Article 35(1) of the Regulation.

Paragraph 68b of the PILC sets forth an alternative for a decision to be made on the recognition of a foreign decision. This is an exception to the current PILC regime, which explicitly bars decisions on the recognition of foreign decisions by a special verdict⁶⁰¹. The provisions of § 68b of PILC allow recognition to be expressed, in the sense of Article 33(2) of the Regulation, by a special verdict of a Czech court, regardless of the subject matter of the case. Since **the Regulation is directly applicable, the fact that there is no analogous provision to Article 37.1 of the Regulation in Czech law is not an issue.**

C. Bibliography

BĚLOHLÁVEK A., Uznání a výkon rozhodnutí německých orgánů, *Právní rádce*, 1999/2, S. 27

FENYK J., ONDRUŠ R., *Právní styk s cizinou v trestním a netrestním řízení a před orgány veřejné správy*, Linde Praha a.s.-Právnícké a ekonomické nakladatelství Bohumily Hořínkové a Jana Tuláčka, Praha 1997

KUČERA Z., Použití tuzemského práva v občanskoprávních vztazích s mezinárodním prvkem, *Právník* 1985, S. 792-803

KUČERA Z., *Mezinárodní právo soukromé*, 3. vyd., Doplněk Brno 1996

against decisions ordering the enforcement of decisions or distraint, such longer term shall also apply for filing remedies against the decision ordering the enforceability of the decision or distraint. (3) In the event an appellate court examines the grounds for refusing to recognise a foreign decision when such grounds could not have been examined by the first instance court pursuant to the relevant European Community regulations or an international treaty, then if such grounds indicate that recognition of the foreign decision should be refused, the appellate court shall annul the decision of the first instance court and rule for the rejection of the motion. (4) The decision rendered in a verdict ordering the enforcement of a decision or distraint may not take legal force earlier than in the verdict declaring such decision enforceable.

⁶⁰¹

Pursuant to the PILC, in proprietary matters, recognition is not expressed by a special verdict. A foreign decision is recognised by a Czech court and another authority considering it as though it were a decision of a Czech body (§ 65 of PILC). In status matters recognition is then provided for by special laws (§ 67-68 of the PILC).

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KUČERA Z., Tschechische und Slowakische Föderative Republik – Internationale Zuständigkeit und die Anerkennung und Vollstreckung ausländischer Gerichtsurteile in JAYME E. (Hrsg.), *Ein internationales Zivilverfahrensrecht für Gesamteuropa*, Heidelberg, 1992, S. 53-64.

MÁSILKO V., K některým otázkám mezinárodního práva soukromého v justiční praxi, *Socialistická zákonnost* 1981, S. 470-476

MÁSILKO V., Cizí subjekt v československé justiční praxi, *Socialistická zákonnost* 1977, S.543-548

POKORNÝ M., K otázce uznávání cizích rozhodnutí na území České republiky, *Právní rozhledy*, 1994/6, S. 185

POKORNÝ M., *Zákon o mezinárodním právu soukromém a procesním* Komentář, C.H. Beck Praha 1998

SKRDLIK Y., *Anerkennung und Vollstreckung deutscher Entscheidungen in Tschechien unter besonderer Berücksichtigung der internationalen Zuständigkeit*, Verlag Dr. Kovač, Bielefelder Schriftenreihe für Anwalts- und Notarrecht, Hamburg 2000

TICHÝ L., *Základy uznání cizích soudních rozhodnutí v českém a evropském právu*, *Iuridica* 1-2/1995, Universita Karlova, Praha 1996

Section VI

Romania

A Listing

1. Legislation

- Act n° 105 of 22 September 1992 on Private International Law, Monitorul Oficial de la Roumanie, 1st part, n° 245, 1st Oktober 1992

2. Jurisprudence

No pertinent jurisprudence

B Conflict of Laws

1. PIL norms directly concerning legal capacity

The Romanian private international law can be found in Law 105 of 22 September 1992 on the Regulation of Relations in Private International Law,⁶⁰² a text that is still in force in Romania even though it is in the process of being modified concurrently with the revision of the Civil Code.

According to Article 11 of Law n° 105, “the state, capacity and family relations of the physical person are governed by the **national law** unless special provisions state otherwise.” According to article 12, the national law is the **law of the State where the person in question is a citizen**. The proof and determination of citizenship must be according to the law of the State where the citizenship is invoked. In case of dual nationality, where one is Romanian, the Romanian nationality prevails. In case of dual foreign nationality, the law of the place where the person has his or her domicile is looked to, or if this is not the case, the law of the place of residence. To the expatriate, the law of domicile or by default, the law of residence is applied.

Capacity, on the whole, that is to say, the conditions and the forms of incapacitation and their effects (nullity, voidability or lack of effectiveness – partial or total, absolute or relative in terms of acts concluded by a person lacking capacity), in general, is governed, in the Romanian legal order by the national law, as well as according to the norms detailed above.

Article 17, para. 1, which is based on the well known *Lizardi* case in France brings an important exception to the law by stating that “the person who, in conformity with the national law or with the law of his or her domicile, lacks the capacity or has only a limited capacity to exercise his rights, may not oppose a third party unless it is a *bona fide* third party, that is, in substance, was not aware of the person’s lack of capacity through no fault of his or her own; this, then, gives priority to the local law,

⁶⁰² V. Monitorul Oficial of Romania, Part 1, n° 245, du 1^{er} octobre 1992 ; v. the chronicals of Romanian case-law published by the Journal of International Law: 1968, 412-445 ; 1971, 618-640 ; 1977, 383-401 ; 1982, 170-182 ; 1988, 475-489 ; 1995, 653-671 ; 2002, 653-671.

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that is, the law of the place of establishment of the act, as opposed to the national law that would otherwise be applicable.

This exception is, however, not applicable where the legal act concluded by the person lacking capacity (according to the national law, but with capacity under the local law) relates to a question of family law (marriage or recognition of a paternity), succession (wills or renouncing a testamentary inheritance) or transfer of immovables (act of sale of an immovable).

2. Other PIL norms taking account legal capacity

Section 5 of Law n° 105 relates more specifically to “the protection of persons lacking capacity or having a limited capacity to exercise rights.” Such provisions are set out for

1. **minors** (Art. 36 and 38)
2. **persons subject to guardianship** (Art. 37 and 38)
3. persons subject to **curatory or other measures of protection for persons lacking capacity or with limited capacity** (Art. 40).

It must be noted that “the protection of a minor person born in a marriage or adopted, exercised by the parents, or as the case may be, by the father or mother, is governed by Article 20 of the law” (Art. 36). Article 20, which relates to personal relations and patrimonial relations between the spouses, subjects the spouses to the **national law common to the spouses** and, where nationalities differ, to the **law of the domicile common to the spouses**, and as a default, to the law of the State in which the spouses had their common residence or where they commonly have their closest ties.

With respect to **guardianship**, Article 37 states that the “setting up, modification, effects and termination of guardianship, as well as the relations between the guardian and the person lacking capacity or having limited capacity, are subject to the **national law of the protected person.**” Additionally (second paragraph), the obligation to accept and to exercise guardianship duties is subject to the **national law of the guardian.**

Nevertheless, the national law of the protected person leaves room for the law of the State where authorities supervise **the exercise of protection**, i.e. the measures taken by the parents or guardian with respect to the minor or another person lacking capacity, having limited capacity or with respect to his property. This application of the national law of the person protected by the effects of guardianship and the law of the State where authorities supervise the exercise of protection (more often the law of the *habitual residence* of the protected person) runs the risk of creating practical difficulties.

In a general provision, Article 39 extends the scope of Articles 37 and 38 to **curatory and all other measures of protection of persons lacking capacity** or having limited capacity.

It is important to cite as well the provision according to which legal representation of the physical person lacking capacity, as well as the assistance of the physical person with reduced capacity are subject to the **law applicable to legal relations from which representation or assistance are derived** (Art. 47). Moreover, “the capacity to be party to proceedings is **governed by the national law of each party.**”

C Conflict of jurisdictions

1. Competence / Jurisdiction

Law n° 105 also contains rules of international civil procedure (Art. 148 and following).

Under Article 150, “Romanian courts have jurisdiction to judge: [...] proceedings between persons domiciled abroad in relation to acts or civil status issues registered in Romania if at least one of the parties is a Romanian citizen [...] and] the proceedings relate to the **protection of a minor or of the person upon whom restrictions have been imposed, who is a Romanian citizen domiciled abroad.**”

Under Article 151, “the Romanian courts have **exclusive jurisdiction** to decide cases on relations in private international law concerning:

1. acts of civil status drawn up on Romania that relate to persons domiciled there, who are Romanian citizens or foreigners without citizenship [...]
2. **guardianship and curatory of a person domiciled in Romania, who is a Romanian citizen or foreigner without citizenship;**
3. **the imposition of restrictions on a person domiciled in Romania.** Finally, “the courts in Romania may decide, upon request, regarding restrictive measures in case of urgency in order to protect the rights, interests or property relating to their jurisdiction, even if they otherwise have no jurisdiction, as stated in the present chapter, to decide on the merits of the case in view of or during which the measures in question are necessary.

A final rule of importance relates to that contained at Article 156 regarding parallel cases, which generally excludes taking into account foreign litigation by the same parties on the same issues: “the jurisdiction of the Romanian courts established under Articles 148 to 152 is not lost simply because the same litigation or a connected litigation is brought before a foreign court.”

2. Recognition and Enforcement

In Romania, the notion of “foreign judgment” is very broad and includes any claim of jurisdiction by courts, but also **notaries and other competent authorities of another nature** (Art. 165). The measures taken by foreign guardianship or curatory authorities or generally by institutions for protection are seemingly covered by the notion of foreign judgment, which is deliberately broad.

Based on the French system, Article 166 states that “foreign judgments are **recognised with full force and effect** in Romania if they deal with the **civil status of citizens of the foreign State where they were rendered**, or, having been rendered in a third State, if they were first recognised by the **State of citizenship of each party**.

Moreover, judgments requiring enforcement in Romania, and in general those that are rendered in proceedings other than those discussed at Article 166 cannot be recognised and benefit from the authority of the judgment if following conditions are met cumulatively: a) the judgment is final, as according to the law of the State where it was rendered; b) the court that rendered the judgment, according to the mentioned law, had jurisdiction; c) there is reciprocity regarding the effects of foreign judgments between Romania and the State where the judgment was rendered. Other guarantees are provided for by default (Art. 167, para. 2).

Romania (R)

Article 168 provides other reasons for denial of recognition: “the recognition of the foreign judgment may be denied in any of the following cases:

1. The judgment is the result of fraud committed during the the proceedings in the foreign State;
2. judgment offends the public order of the private international law of Romania;
3. A judgment, even if not final, was rendered as between the same parties in Romania or the case was before the Romanian courts when the foreign court became seized of the case.”

It is very important to note that the “violation of Article 151 regarding exclusive Romanian jurisdiction is a reason of public order based on which recognition of a judgment may be denied.” According to this provision, “guardianship and curatory relating to a person domiciled in Romania, a Romanian citizen or foreigner without citizenship,” as well as the imposition of restrictions on a person domiciled in Romania is subject to the **exclusive jurisdiction of Romanian courts, which is, in the circumstances, likely to prevent the recognition of foreign judgments.**

There is one final reason based on which the recognition of a foreign judgment may be denied: where the litigation is related to the civil status and capacity of a Romanian citizen and the result differs from that which a Romanian court would have found, recognition must be denied. This is an exception to the general principle regarding the absence of control of the applicable law (see Art. 168, para. 2, part 1).

PART THREE

REFLECTIONS ON A POSSIBLE EU LEGISLATIVE INITIATIVE

Section I

LEGAL BASES FOR AN INITIATIVE AT THE COMMUNITY LEVEL

The volume of cross-border legal activity concerning adults in need of, or under, protection appears to be rising (A). This raises the question of whether, and on what bases, the Community may take action in the field (B).

A. A Phenomenon on the Rise

As the **statistics** that we have gathered and inserted in the national reports demonstrate, the **number** of persons who find themselves under some form or another of protection resulting from a reduction in their capacity to protect their own interests, has, in recent years, in the countries studied, **increased** significantly⁶⁰³. There are no convincing reasons to suspect that the same is not true for **other Member States**. Given the **increased facility** of movements across borders, in particular **(intra) Community** movements of individuals and assets as well as the increase in **welfare** in Europe – difficult to dispute on a global level given the developments of the past ten years – one may imagine, even if no reliable statistics are available in this regard, that the number of adults to be protected who, for example, reside in a country other than that of which they are nationals, or who own or wish to acquire assets in, or make occasional or regular visits to, a country other than their country of residence or nationality, is also **on the rise**. The evolution of life expectancy and the resulting **aging** of the population⁶⁰⁴, as well as the concern underlying the recent national reforms, notably in Germany, France and England, that the **adult's liberty be restricted as little as possible**⁶⁰⁵, leads us to predict that this dual tendency will **continue**, if not **accelerate**, in the **upcoming decades**.

As a matter of fact, the insufficiency of their personal faculties notwithstanding, these protected adults have a legal capacity, *i.e.* as the subject of rights and obligations, their lives have **legal consequences**. We cite as examples the accomplishment - possible to varying degrees from one country to another depending on the diverse national conditions and the degree of incapacity - of personal legal acts such as marriage, adoption, recognition of a child or the conclusion of an employment contract, but also, simple *material* acts and the making of decisions relative thereto, such as a change of residence, an abortion, a trip for pleasure, the placement in a medico-social institution, etc. Obviously, such acts may also have a **direct pecuniary content** as these adults **often own assets** (in any event more often than the other category of persons requiring protection, *i.e.* children⁶⁰⁶) and these assets must be **administered**. It suffices to mention the purchase, sale or rental of an asset, the management of an investment portfolio, the opening of a bank account, the acceptance of an inheritance, or the establishment of a will. As we have seen, it is a natural and increasingly **recurrent** phenomenon that these acts which have legal consequences, **extend**, or include elements that extend, beyond the context of a single country to take on an **international character**; to use the terms of Art. 65 of the EC Treaty, to have a "**cross-border incidence**" which is, more specifically, a **Community incidence**.

⁶⁰³ See, in particular, the National Report of France, under section A, the National Report of Germany (and relevant Annexes) and the National Report of Sweden, also under Section A.

⁶⁰⁴ See, in this respect, the National Report of Sweden, under Section A.

⁶⁰⁵ This is above all the case in France, of the law n° 2007-308 of 5 March 2007, of the German *Erstes und Zweites Gesetz zur Aenderung des Betreuungsrecht* (1998-2005), of the *Mental Capacity Act 2005* and the of the *Mental Health Act 2007* in England. See, also, the National Report of Sweden under Section A.

⁶⁰⁶ See the Rapport explicatif by P. Lagarde on the Hague Convention of 13 January 2000 on the International Protection of Adults, available at the Hague Conference website (www.hcch.net), n° 12.

B. Articles 61 and 65 EC as Sufficient Legal Bases

The national **systems of protection** of the States studied **differ significantly**, for the reasons we have seen⁶⁰⁷. These **differences** are today perhaps even **more extensive** than before⁶⁰⁸ as a result of the fact that, while some States have made considerable efforts to **modernise their laws** (such as France, Germany and the United Kingdom, as well as Sweden), others (Romania and the Czech Republic), have not.

It is therefore unrealistic to envision, in the short or mid-term, a **uniform substantive Community law initiative** in the field of protection of adults. At present, it is highly **doubtful** that a legal basis in Community law for such an undertaking exists. It would appear then that an international – notably *Community*-level – regime of protection of adults cannot be substituted for the national substantive legislations. However, this European legal patchwork must be **“managed”**⁶⁰⁹ in such a manner as to **avoid posing obstacles to “the proper operation of the internal market.”**

As a factual matter, the objective of the internal market, as well as the freedoms that establish it, is achieved only to the extent that these freedoms are *effective*, *i.e.* to the extent that **legal activities and commerce within the Community is encouraged** or, at the very least, is not discouraged, in one manner or another. The creation of an **“area of liberty, security and justice”** envisaged by Art. 61 of the EC Treaty is, specifically, subjugated to “the proper operation of the internal market” as those terms are used in Art. 65, which article is, itself, a tool for the **“promotion of economic and social progress”**⁶¹⁰ which is one of the primary “objectives” of the Union pursuant to Art. 2 (first paragraph)⁶¹¹. In the absence of substantive uniformity, the proper operation of the internal market must rely on the adoption of measures in the **field of private international law** (in its broad sense) *i.e.* as under Art. 61 subparagraph c), in the field of **“judicial cooperation in civil matters”**⁶¹². Art. 65, which specifically targets such measures, is formulated in broad terms in the sense that it invites the “simplification and amelioration of the recognition and execution of judgments, including extra-judicial judgments” through the adoption of such measures, in order to “favour the compatibility of rules applicable to questions of conflicts of law and jurisdiction” and the “compatibility of the rules of civil procedure”⁶¹³. It is, moreover, on this legal basis that a **considerable number of regulations** concerning the jurisdiction of authorities, applicable law, and the recognition of judgments and notarial acts in a wide variety of fields of law.

⁶⁰⁷ See *supra*, Part One – Executive Summary of the Comparative Study.

⁶⁰⁸ Cf. T. Guttenberger, *Das Haager Uebereinkommen über den internationalen Schutz von Erwachsene*, Bielefeld, 2004.

⁶⁰⁹ According to the well-known expression of Ph. Francescakis, which defines the task of private international law.

⁶¹⁰ See Art. 2 of the Treaty on the European Union.

⁶¹¹ Article 2.

⁶¹² Article 61 “In order to establish progressively an area of freedom, security and justice, the Council shall adopt: (...) (c) measures in the field of judicial cooperation in civil matters as provided for in Article 65.”

⁶¹³ Article 65 “Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include: (a) improving and simplifying: - the system for cross-border service of judicial and extrajudicial documents; - cooperation in the taking of evidence; - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.”

The domain of protection of adults, or at least the questions we have been asked to address in the national reports, falls within the category of **“civil matters”**⁶¹⁴. The Community’s adoption of rules relating to **“judicial cooperation”** in the broad sense of the term are, essentially, rules concerning jurisdiction, applicable law and recognition of judgments in the field of protection of the adult ; Articles 61, (particularly subparagraph c), and 65 EC, provide a **sufficient legal basis** provided that one can demonstrate that these measure are, as Art. 65 EC requires, “necessary for the proper operation of the internal market”, *i.e.* in substance, necessary for the creation of “an area of freedom, security and justice” and, of course, that one can also demonstrate the **proportionality** of the measures desired to be taken with respect to such an objective. It would appear, then, in substance, that Community intervention is justified if the international regime of protection of the adult that is the result of the application of national systems, of substantive law and of private international law, would lead to **the creation of an obstacle to the legal consequences of life on an international – and notably, Community – scale, for these individuals, their freedom of movement and that of their assets**. In other words, the intervention is justified, or even required, if this is the only means to assure that the legal (in the strict sense of the term) or material act taken by such adults or concerning their person or their assets, is not **rendered more difficult, less practical, more uncertain or more costly, for no useful purpose** – first, for such individuals but also for what we might call the “the Community society” as a result of the different substantive-law regimes coupled with the absence of international coordination of these regimes.

As a result, one should enquire whether the national regimes of private international law are **sufficiently coordinated** and, if this is not the case, to what extent this insufficiency of coordination **runs the risk of posing obstacles to Community legal activity and commerce** involving the adults to be protected. One may also ask how these legal obstacles may be removed.

⁶¹⁴ Concerning the difficulty in distinguishing between public law and private law in matters relating to the protection of the adult, see P. Lagarde, Rapport explicatif, *op. cit.*, p. n° 24, concerning subparagraph e) of the Hague Convention.

Section II

INADEQUACIES OF THE EXISTING SYSTEMS

A. Difficulties Posed by Cross-Border Situations

We must note that the protection of the adult implicates several persons, authorities or organs, notably: 1. the **adult him or herself** requiring protection or, depending upon the point in time selected, placed under a protective regime⁶¹⁵; 2. the **authority that imposes the protective measure** (or who refuses to do so on the grounds that the conditions required are not fulfilled); 3. one or more **individuals or legal entities** who assist or represent the person in the sense discussed above; 4. an **authority that delivers the necessary authorisations** and oversees the operation of the protection; and 5. the **parties** with whom the protected adult concludes bilateral legal acts (for example and *par excellence*, the co-contractor).

The protection covers, or may cover, the **person and/or the assets of the adult**; that is to say that the legal or material acts that may be imputed to him or her or, more generally, the decisions that concern him or her can concern the person and/or his or her assets.

The contacts that “localise” these individuals, organs or authorities as well as the contacts that “localise” the adult’s assets to be protected, at the time that the need for protective measure becomes apparent, **may be dispersed, or rather distributed, amongst several countries, in particular several Member States**. The geographical location of these contacts **may in addition be modified subsequently during the course of the situation requiring legal protection** that, as a “dynamic” situation, can be modified at any time (by the modification of the protective measure imposed or its revocation and/or substitution by another measure which may be more or less restrictive). One must first identify the relevant contacts and demonstrate the degree of international distribution that they can attain (1). One must then examine the difficulties that result from such distribution (2).

1. International Distribution of the Relevant Contacts

The **adult** subject to protection represents the *centre of gravity* of the legal situations here discussed; the relevant connecting factors are, thus, those that concern the **adult’s person, as well as his/her property**. These factors depend on the type of protection measures requested. Among these, one may distinguish, on the one hand, *general* or *special* measures of protection relating to the protected adult’s *person* (e.g. in the case of an abortion), and on the other hand, *special* measures of protection having rather a *patrimonial* character (e.g. urgent reparation of real property) (1.1). Other relevant connecting factors concern, in some aspects of the legal situations discussed, **the person taking care of the adult** under protection (1.2.). There are also the connecting factors relating to the **place of enforcement of the protection measures** (1.3) and **the geographical situation of transactions** attributable to the latter (1.4.).

1.1. Connecting Factors Relating to the Adult’s Person

It is known that there are multiple personal connecting factors which localise an individual. These are **nationality** which may, as well, be multiple; **domicile**, a legal notion which may be understood quite differently from one State to another, such that two States may both consider the domicile to be located on their territory; **habitual residence**, a factual notion which is not always easy to situate, especially in cases where stays in multiple countries are of comparable duration (a fairly common

⁶¹⁵ See P. Lagarde, Rapport explicatif, *op. cit.*, n° 96.

situation even for retired for adults); **place of stay**, *i.e.* the simple act of being present at a given place and at a given time, notwithstanding the characterization or the definition of the stay.

Before the protective measure is imposed, a person (X) may have the **nationality of State A** (for instance, Romania); X may **reside in State B** (for instance, Germany) and may have chosen to transfer his/her place of residence to **State B from State C which is his former place of residence** (where X may still have important points of contact, for instance: England); X may **stay temporarily** (while being on a trip) in **State D** (for instance, the Czech Republic). Before the need for protection measures occurs, *i.e.* while X is still in possession of his or her personal faculties, X may want to know if he or she can establish a “**mandate of inaptitude**”, namely, in the form of a *Vorsorgevollmacht* in German law, or of a *lasting power of attorney* in English law, England being the place of his/her former residence. In other words, X (as well as Y, a potential *Vorsorgebevollmächtigte* or *donee*) may wish to know which law will apply to the **regime of voluntary protection**.

When the need for protection becomes clear, X or persons close to him or her, may well be interested to know **which authority is competent** to take either a general measure of protection, or a special measure of protection (for example, in the case of a need to effectuate an abortion). This then raises the problem of determining **which law will be applicable** to the **conditions** which should be satisfied in order for the measure to be authorised, then and above all, to the **substance** of the envisaged protection measure. In other words, X will need to know what person is competent to assist or to represent him or her, the transactions for which the assistance or the representation is necessary, his or her powers, the consequences of failure to respect the established protection regime, *etc.* *After* the measure has been authorized by the authorities of State A, the country where X habitually resides and where X has fixed his or her habitual place of residence (for instance, Romania), (measures that consist in nominating a **curator** Y according to the law of State A), X may be staying temporarily in State B (for instance, in England) where she or he might wish to conclude a transaction (for instance, to buy a painting). As a more general example, X may also wish to transfer his or her residence to State B. Once the residence has been transferred to State B, X may wish to be placed into a **medico-social establishment** in State C (for instance, in France). X may also wish to apply to the authorities of State B, which are henceforth much closer for X, to obtain revocation or modification of the measure taken by the authorities of the State A.

1.2. Connecting Factors Relating to the Person Taking Care of the Adult

The legal situation resulting from the protection measure involves, as we have said, a **person assisting or representing the adult**. This person may have the nationality of State A, a domicile or a place of habitual residence in State B, *etc.* Thus, the adult and the person taking care of the adult may have **two different nationalities** and, although this is much rarer, **two different places of habitual residence**. The “person” taking care of the adult may be a legal entity, whose domicile is determined by its **corporate seat**, as is the case in England. However, the connecting factors of the person taking care of the adult are, in principle, far from being negligible. One might imagine, that *before* X is placed under protection, Y, who had taken care of X *de facto* and who is willing to take responsibility for X’s protection, but who continues to reside in State A (for instance, in France) other than the State where X has his or her place of residence (for instance, Germany) might have an interest in applying to the French authorities (in the place of Y’s residence) to be assigned as X’s guardian according to French law (namely, in order to anticipate the future transfer of X’s place of residence to France). One might then think that, in the abstract, Y’s personal law should be applied to resolve a **certain number of questions** directly concerning Y – for example, Y’s aptitude to assume such responsibility⁶¹⁶, Y’s obligation to accept the responsibility⁶¹⁷, eventual conflicts of interest between X and Y, *etc.*

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See in this regard, the National Report of Romania, point 4.4.1.1.

1.3. Place of Enforcement of Measures or Decisions Concerning the Adult

It is necessary to distinguish here between *patrimonial measures of protection*, meaning legal transactions concerning pecuniary matters to be accomplished within the framework of general protection measures, and *personal measures of protection*. The object of patrimonial acts is property. Yet, property is localised, first and foremost, **by the place of its physical geographical situation**. This is doubtless true for real property, as **its geographical situation may not be modified and is easily identified**. In addition, the geographical situation of real property is necessarily the place of enforcement of any measure relating to it. As for moveable property, its effective localisation is not always easy, because of the **dematerialisation** of the value of the asset. Before any protection measure may be taken, there may be a need to take a **special** measure to protect certain of X's assets. These assets may be situated in State E (for instance, in France), different from the State of X's nationality (State A, for instance, Romania) and/or other than that of X's professional domicile (State B: for instance, England) or habitual residence (State C: for instance, Germany). One may initially think it desirable that the French authorities be competent to take such a measure, for example, by assigning a person (Y) residing in France as an *ad hoc* curator of the property in question. Once the **general** protection measure is imposed, for example, by the authorities of State A, the place of habitual residence of Y (for instance, in Germany), by virtue of which Y is assigned as a *Totalbetreuer* of X, it may be necessary to carry out an **act of administration, conservation or alienation** of a part of the property situated in State B, for instance in France.

When a *special measure of protection of personal character* (for example, an abortion) must be taken, or a decision, notably one relating to X's health, must be made within the framework of a general protection measure (for example, placement of X in a special care establishment, such as a thalassotherapy centre), State A (for instance, France) called upon **to enforce** the measure or the decision (the place where the establishment is situated) may be different from State B (for instance, England), the authorities of which have issued the protective measure. One might imagine that the placement in a special care establishment may be necessary following a surgical operation which has been realized in State C (for instance, Germany). This shows that, however **unique and indivisible**, a measure or a decision concerning X may be executed in **multiple operations** which are to be carried out in **different countries**.

1.4. The Place Where a Transaction is Concluded

After the adoption of a measure of protection by, for example, the authorities of State A, of the habitual residence of the adult, a contract, *e.g.* a contract of sale, may be **accomplished** in State B. The place where the contract is executed may have particular importance for the **protection of the third parties** having contracted with X. The necessity to protect the interests of third parties having contracted in good faith and who are unaware of X's impairment, is of particular importance here. Such a situation may give rise to the risk of a conflict between the different protection regimes having contacts with this situation.

2. Risk of Conflicts Between Different Protection Regimes

2.1. Plurality of Authorities

It seems reasonable to suppose that many **countries** may be **entitled or have a vocation to** take measures of protection and determine whether such measures are really necessary for the person or his/her property.

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See in this regard, the National Report of Romania, point 4.4.1.1.

As far as *general measures of protection* are concerned, it is rational to consider first the concerned person's **personal connecting factors**. The following points must then be taken into account: a) the authorities of the country of the adult's **nationality** – the country which often happens to be the country of the adult's **former place of residence**, in cases where the country of nationality and the place of residence are dissociated; b) the authorities of the place where the adult habitually resides, bearing in mind that s/he may periodically reside in several countries during comparable time periods (in the latter case, each authority may possibly consider the place of habitual residence to be situated in the territory of its jurisdiction); c) the authorities of the former place of residence (these authorities' potential competence seems all the more justified since the transfer of residence is recent and the adult remains strongly integrated into the social network of the country); d) one may also consider the authorities of the **country in the territory of which the person is actually staying** (this is particularly important in cases of **emergency**, e.g. when there is a need for a surgical operation, following an urgent hospitalization); and in general, emergency cases aside, the authorities of the country where the **protection measure is to be enforced or accomplished**.

As for *special protection measures of a patrimonial character*, i.e. concerning one or several pieces of the adult's property (sale of shares, sale of immobile property, coming into an inheritance), one can imagine that the *local* authorities of the place where the property is situated would be concurrently competent to take this sort of measure.

It is not easy to systematize the above authorities' eventual competence, in general and *in abstracto*, into some **hierarchical scale**. It is generally true that the authorities of the person's habitual residence are a *principal vocation* to take protection measures. However, in some cases, the authorities of the person's nationality would be better adapted to this purpose, whereas in other cases, these would be the authorities of the State where the person willing to take care of the adult resides, or the authorities of the State where the property is located, subject to special patrimonial measures of protection. It is extremely difficult to exclude the competence of some authorities to the detriment of the other. The answer to the problem depends not only on the distribution of the relevant connecting factors *in concreto*, but also on the **nature of the measure to be taken** (general or special, personal or patrimonial, legal transaction or decision relating to the person's health) and **on its scope**. A certain flexibility is therefore wholly appropriate.

What needs to be avoided, on the other hand, is the simultaneous activation of the above authorities' competence. In other words, one needs to prevent these authorities from **each pronouncing a decision to be applied to the same legal situation**, covering **the same material or legal acts** or concerning, in general, **the same decisions with respect to the adult's life**. Otherwise, there occurs a considerable risk of **conflict between the protection measures**.

2.2. Conflict Between Protection Measures

Conflicts between protection measures may arise in **multiple forms: conflict of status** for X recognized as having a full legal capacity in some States and partial or total incapacity in others (**Examples 1 and 2**); conflicts of protection measures relating to their substance (**Example 3 and 4**); or conflicts of protection measures relating to the person assigned to carry out the adult's protection (**Example 5**). Here are some examples.

Example 1 The authorities of State A (the State of X's nationality), for instance, Romania, attribute to X the status of total or partial **incapacity** to provide for his/her interests and designate a person, Y, who will ensure X's protection (as a guardian or a curator, according to Romanian law). The authorities of State B where X has his/her habitual residence, for instance, Germany, consider that X is (still) apt to provide for his/her interests and reject the application aiming to designate for him/her a *Betreuer*. The different outcomes of the two

procedures may result from applying **different legislations** (material law) to the conditions of the requested measure, Romanian authorities having applied Romanian law which proves to be more restrictive of X's liberty and German authorities having applied German law which is more respectful of X's liberty. The differences of approach may even more often result from an **effort of concretisation** of identical or similar rules. In fact, if both legislative systems allow discretionary powers, there is a chance that such powers will be exercised differently or contradictorily by the named authorities in State A and in State B, or by the doctors to whom the above authorities have entrusted the analysis of X's residual capacities. It is well-known that the results of several medical assessments conducted on the same patient may diverge substantially, when one needs to determine whether alcohol or drug abuse has so altered the person's discernment as to limit his/her legal capacity. One must note a certain "**conflict of status**" in this case: the same person, X, is at the same moment and with respect to the same acts and decisions recognized as **entirely capable** in Germany and **partially or totally incapacitated** in Romania.

Example 2. An analogous situation may occur more frequently, when the authorities of both countries, A and B - for instance, Sweden and France - each impose a protection measure, but one of the measures **covers** some **legal transactions** that are not covered by the second (and vice versa). (For demonstration purposes, we shall assume that X has dual (French and Swedish) nationality and resides in both countries for substantially equivalent periods). Thus, on the one hand, according to the measure adopted by the Swedish authorities, X needs the assistance of a *förvaltar* in order to sell or buy real property, but s/he may still freely conclude an **employment contract**⁶¹⁸. The French authorities, on the other hand, have placed X under curatorship, such that X must be represented by a curator Y "in all transactions relating to civil life"⁶¹⁹, including the conclusion of an **employment contract**.

Example 3. The person may be deemed to need a measure of protection from both States, A and B (according to both legislations applied, *i.e.* that of A and that of B). However, with respect to the same transactions, the protection measures actually applied are **different and incompatible with each other**. Thus, looking back at the example of a Romanian citizen residing in Germany (Example 1), it might be possible that pursuant to the measure adopted by the German authorities, X needs only the **assistance** of Y, X's *Betreuer*, to effectuate a series of transactions, including, for instance, the management of an investment portfolio, provided that X and Y **co-sign** the power of attorney. Pursuant to the measure adopted by the Romanian authorities, X has the status of a fully incapacitated person (*interdit*), and, as a result Y, assigned as a guardian according to Romanian law, is the only person who may make decisions relating to the management of bank assets.

Example 4. The English authorities have assigned a deputy, Y, for X, a Czech citizen residing most of the time in England (but coming regularly to stay several months in the Czech Republic). In order to have X's residence transferred, Y must apply for an authorisation to the Protection Court⁶²⁰. The Czech judicial authorities have placed X under Y's total curatorship. By application of the Czech legal provision giving to the judge broad discretion to determine the scope of the curator's powers⁶²¹, the Czech authorities have given Y an express authorization to decide freely concerning **any change** of X's place of residence. There appears to be, once again, a conflict of status characterized by the **different degree** to which the transactional capacity is limited.

Example 5. The possible incompatibility of protective measures adopted in States A and B may be due to the fact that the persons assigned to take care of X's interests are **different**. Thus, looking back at the example of a **French-Swedish bi-national** (Example 2), one can imagine the

⁶¹⁸ That is established by Swedish law : see point 2.1.1.

⁶¹⁹ This is the effect resulting from the French curatorship: see National Report of France, point 3.1.1.6.

⁶²⁰ This is generally the case in English law: see National Report of the United Kingdom, point 3.1.1.

⁶²¹ Art. 192 of the Czech Code of Civil Procedure: see National Report of the Czech Republic, point 1.2.

situation where, on the one hand, the French authorities place X under curatorship, designating X's brother Y as a curator, and, on the other hand, Swedish authorities place X under *godmanskap*, vesting in the *god man* powers that are substantially analogous to those exercised by the curator according to French law and the protection measure adopted. The Swedish authorities, however, have rejected brother Y's application to be assigned as a *god man* and have assigned Z, X's spouse, instead⁶²². The conflict of protection measures may thus manifest itself in the form of a “**conflict of guardians or assistants**”, here “**a conflict of curators**”: the brother in France, and the spouse, in Sweden, having both principally the same powers in the same sphere of X's life and activity.

The types of conflicts and, specifically, the types of incompatibilities between the possible protection measures **are numerous**. It is impossible to evoke all of them here. It is important, however, to establish the eventual **consequences** of such conflicts, bearing in mind the “proper functioning of the internal market” provided for in Art. 65 EC and, more generally, the creation of the “area of freedom, security and justice” envisaged in Article 61 EC⁶²³.

2.3. Consequences of the Conflict between Protection Measures

It is possible to solve the problem by admitting the fact that **each protection measure in conflict** is efficient exclusively within the **legal order** that has emitted it. We shall call this “**territorial efficiency**” of protection measures. Thus, in *Example 1*, X could conclude himself the needed transactions and take the necessary decisions relating to that part of his legal life **that is located in Romania**, whereas in Germany X would need to seek assistance from the *Betreuer* for the part of his legal life located in that country. In the same manner, in *Example 5*, X needs Y's assistance, as far as his activity in France is concerned, and his spouse's assistance while living in Sweden, etc. This solution however often **reveal itself to be impracticable** and, by itself, **likely to generate insecurity and instability** on the Community level with respect to the substance of the rights, powers, responsibilities and obligations of persons involved (protected adults, persons assigned to assist them, third parties) (2.3.1). Even in the situations when it is *theoretically* practicable, it may nonetheless engender **unnecessary costs and activities on the Community level** (2.3.2.).

2.3.1. A Solution Likely to Generate Insecurity and Instability Incompatible with the Proper Functioning of the Internal Market

Quite often, legal and material acts may not be localised exclusively **within the frontiers of one State**, but imply **many States at a time**. Let us return, as in *Example 1*, to the situation where X wishes to buy an expensive painting during his/her stay in Germany. At the moment of sale, the painting is situated in Germany, but X may quite likely wish to transfer it to the place of his/her secondary residence in Romania. In conformity with the German authorities' rejection of the application aimed at obtaining a protection measure, X may conclude the transaction **himself** with the seller Z⁶²⁴, whereas, according to the protection measure in effect in Romania, X needs the **assistance of the Romania guardian Y**. If the question arises before the transaction's accomplishment, X may try to obtain the assistance of the guardian Y, in which case the transaction will be deemed valid within the two legal orders involved. It may occur, however, that the guardian Y does not give his/her assent to the transaction and, notwithstanding that refusal, X wishes to use the entire capacity that Germany recognizes in him to purchase the painting. *After* the conclusion of the sale, the transaction will, in principle, be valid in Germany and invalid in Romania. As a result, in Romania,

⁶²² See the judgment of the Supreme Court of Sweden relating to this question, NJA, 1980, cited in the National Report of Swedish, point 4.4.

⁶²³ See *supra*, Point A.2.

⁶²⁴ We will assume that the seller Z is aware of the existence of a measure of protection in Romania and that art. 13 of the Rome I Regulation is not applicable.

the guardian Y (or X him(her)self) may obtain **annulment** of the transaction, following which, according to Romania law, X would lose his/her right of property in respect to the painting and the price that X has paid for it would need to be reimbursed. There seems to be little probability of recognition of the annulment decision in Germany⁶²⁵. Therefore, within the German legal order, X remains the proprietor of the painting and must pay the purchase price to Z. This situation is prone to create **instability with respect to the rights and obligations of the parties concerned**. It is doubtful that such outcome is in conformity with the objective of creating “the area of freedom, security and justice” according to Art. 61 EC. One may establish that the mere circulation of the property (from Romania to Germany) generates **insecurity**. Yet, such insecurity runs the risk of increasing with subsequent transfers of the property and of the persons having rights and titles thereto (X, Y and Z) within the Community area. This seems to diminish the **efficiency** of the freedom of movement of persons and goods. The persons concerned (X, Y and Z) may well be tempted to decrease, as much as possible, the international character, and more precisely, the Community character of the situation, in order to diminish the inconveniences resulting from it. Concretely, X may seek to waive the exercise of his/her legal activity in Romania; Y may try to discourage X’s trips to this country; Z may refuse to contract with X. Such consequences are contrary to the objective of “the proper functioning of the internal market” established in Art. 65 EC.

Let us suppose that **Example 5** gives rise to a question relating to **acceptance** by X of an inheritance. Pursuant to the Swedish measure, with the exception of the case of a conflict of interest, the *godman* Z, Y’s spouse, is competent to give assent to the **acceptance** by X of an inheritance. According to the French measure, X’s brother Y disposes of such power. To be certain of the result, X may seek to obtain the assent of both Y and Z, even if that implies duplication of X, Y and Z’s activity. It may well be possible, however, that Y is ready to give his/her assent, whereas Z is not. What happens in case of such a **conflict of will of the two curators**? Such conflict is resolved within each legal system; in Sweden by resorting to the curatorship surveillance authority⁶²⁶. Yet, while the conflict here bears an international character, meaning that it happens “between (national) legal systems”⁶²⁷ and each measure supposedly has a limited territorial efficiency, such solution may apparently not be put into practice. Moreover, if we follow this logic to its extreme, there would be no conflict, as the spheres of efficiency of the protection measures are **different**. One may imagine, in the end, that *god man* Y is exclusively competent to accept the inheritance *situated in France*. But for that to happen, one needs to know where the property is located, which may well be problematic, especially if we are talking about **financial investments in the stock market or bank assets**. What would happen if the bank assets deposited in a Swedish bank are transferred to France, namely, after Y’s refusal to give his/her assent to acceptance of the inheritance and before Y voices his/her opinion? The uncertainty resulting from this with respect to **rights, powers, responsibilities and obligations relating to this property**, is analogous to that described above and calls for the same observations.

Let us imagine, in **Example 3**, that X wishes to undergo a **surgical operation** (for instance, an abortion or an organ transplant). In his capacity as a deputy by virtue of the English protection measure, Y applies for an authorization with the Protection Court, which **refuses** the authorisation for reasons of risks that the operation might represent for X. As an *opatrovnik* in Czech Republic, Y may himself make a decision et considers such operation desirable. One may also imagine that the Czech judicial authority of surveillance, which may be consulted by Y, gives its assent to the operation or even issues a mandatory order to proceed with the medical intervention. Y may be

⁶²⁵ Because it is, principally, incompatible with the Romanian decision having rejected the application to obtain a protection measure.

⁶²⁶ See the Swedish national report, point 4.3.

⁶²⁷ This is the exact expression provided in the “Preamble” of the Hague Convention of 13 January 2000.

tempted to bypass the Protection Court's refusal by bringing X to the Czech Republic to have him/her operated on in this country⁶²⁸. Y runs the risk, however, of being **sued in England**, where his property is located, for violation of the English protection measure, namely, if the operation will have entailed **damageable consequences**, whereas Y has merely exercised a power, or even a duty, according to the Czech legal order. This situation results in an inextricable **"conflict of duties"** for Y who is in charge of X's protection, who, on the one hand, is prohibited from having X undergo an operation under the laws of one jurisdiction and, on the other hand, is permitted (or even obliged) to organise such an operation and assist X therein under the laws of another. This would clearly not be considered to be in conformity with the idea of the **"area of freedom, security and justice"** promoted by Art. 61 EC.

2.3.2. A Situation that Generates Unnecessary Costs on a Global Level and Tends to Discourage Intra-Community Legal Activity

The solution envisaged is *theoretically* practical only to the extent that the transaction or activity is, by its *nature*, **territorially limited**. This is notably the case for transactions concerning **real estate**. Let us suppose that, in **Example 2**, X, subject to a *förvalterskap* in Sweden and placed under a tutorship in France, owns **several buildings**, distributed between Sweden and France. The *förvalter* can take charge of the administration of the Swedish buildings (if necessary, by requesting the authorisations required from the oversight **authority**) and the *tutor*, of the administration of the French buildings. This solution can be **justified a posteriori**, that is to say once the two measures have been **effectively imposed** and what is necessary is to draw the **dividing line of allocation** of the powers/duties as between the persons named by the respective authorities as responsible. When viewed from an **ex ante perspective**, such a solution, however, presents **several disadvantages**.

First of all, other than cases of urgency, a protective measure, including a general one, should, in such a system, **be requested in each country in which the legal activities of X that the measure is intended to cover are, or can be, geographically located**. Thus, if X possesses real estate in Romania, France, Germany and England, which X cannot manage as a result of the alteration of his faculties, he (or those who must *de facto* take care of him) must seize at the same time the Romanian, French, German and English authorities in order to obtain from **each of them a protective measure** that will have only a limited level of efficacy. Yet, as the national reports demonstrate, the procedure resulting in a measure of protection is often **costly and time-consuming**⁶²⁹: the procedure entails, in the first place, an *instruction* phase requiring one or more **medical experts**⁶³⁰, one or more **hearings** of the adult concerned⁶³¹, sometimes the obtaining of **opinions of other organisations or institutions** (such as a commission of medical specialists⁶³², the Department of the Prosecutor⁶³³, or the "family council")⁶³⁴; as a result, the number of "actors" is often quite significant. The phase of *appointment*

⁶²⁸ One may observe that the English measure is supposedly "territorial" and, therefore, there is no "violation", provided that the measure is enforced in a foreign territory. One may, however, object that trying to read some territorial limit into the English decision is at the very least artificial (the *Protection Court* considers that the operation must not be performed because it is dangerous for the adult's health, and from its point of view, the operation does not cease to be risky if it is performed outside England). One might consider that Y has already violated the measure if s/he prepares and organises X's transfer from England for this purpose.

⁶²⁹ Except for cases of urgency, which generally result in the adoption of a measure which is just provisional and which implies the opening of a main procedure.

⁶³⁰ See e.g. the French report, point 4.2.2, the Romanian report, point 4.2.2, the German report, point 4.3, the Czech report, point 4.1.

⁶³¹ See e.g. French report, point 4.2.2 ; Romanian report, point 4.2.3.

⁶³² This is e.g. the case in Romania: see Romanian report, point 4.2.2.

⁶³³ See e.g. French report, point 4.2.3 ; Romanian report, point 4.2.3.

⁶³⁴ In France, the « conseil de famille » : see French report, point 4.2.5.

of the person responsible for his protection can also be **delicate and laborious** (examination of the respective aptitudes of the “candidates”, taking into consideration the wishes of the adult concerned, etc.). It would appear that the **multiplication of these procedures**, and the judicial, administrative, medical, social and, more generally, human activities, each of which may result in a **measure of protection** that has only a **restricted effectiveness**, is, above all with respect to the verification of the *conditions*, *i.e.* the verification of the **state of health of adult X**, undesirable. This is true both from the *specific* point of view of the actors concerned as well as from a *general* point of view.

From the point of view of X, the adult to be protected, Y who is responsible for X’s protection but also those who are close to X, one need only think of **the time, the costs, the activities** as well as the **psychological and emotional stress** engendered by the initiation of multiple procedures – the necessity for X to submit himself to repeated hearings before the judicial authorities of all of the relevant countries and for Y to accompany him, the risk for X to be required to submit to multiple expert medical examinations, at least to the extent that such medical experts are appointed by the courts, coordination with attorneys and representatives, etc. – for this conclusion to be obvious. Since the legal activities of the persons concerned, as a result of their overflowing the frontiers of *internal* system to become (*intra*) *Community* activities they **thereby become, we hypothesise, more complex, more weighty, more costly and more trying**, there is the risk that, in order to avoid these costs and other disadvantages, the persons concerned will be encouraged to attempt, here again, to **reduce, wherever possible, or even eliminate the *international* - more precisely, the *Community* – element; in other words, to give up the opportunity to exercise the freedoms guaranteed by the *Community***. If X is the owner of four buildings in Countries A (Romania), B (France), C (Germany) and D (England), and, in order to obtain an efficient measure of protection with respect to **each** of these four buildings, X or Y (or someone with close ties to X) must seize the authorities of the four countries, initiate four separate procedures and the costs of the four different protective regimes that will be imposed as a result, X is probably better off finding a way to avoid this situation, for example by not purchasing four buildings in four different Member States but rather in only one such State (that of his residence, Romania under our hypothesis) and, in general, reducing his travel and his activities (be they legal or material) within the *Community*.

If one take a higher vantage point and loos at the situation from the *more global* point of view of the *Community legislator*, one cannot help but admit that our hypothetical situation, because of the duplication of judicial and administrative activities that it implies, does not comply with the notion of **reasonable administration of justice** in what wants to view itself as an “integrated” judicial space; it does not constitute an **efficient allocation of resources** within this space.

2.4. Means of Avoiding Such Consequences

In order to avoid a **conflict of protection regimes**, it is imperative to eliminate the necessity of having several authorities (*i.e.* the authorities of several *countries*) who impose **measures of protection applicable at the same time and to the same sectors of activity of the adult to be protected** (as well as to the activities that the persons responsible for such adult’s protection undertake or are supposed to undertake in connection therewith). Needless to say, this will require **close coordination** among the authorities of the countries concerned.

More specifically, this will require that the authorities of country A must **be able to determine** whether a procedure has already been initiated in country B or if a measure of protection has already been imposed there. The existence of a framework for cross-border (between country A and country B) transmission of information on this subject would make this a real possibility. It would then be necessary that, if such a procedure has, indeed, been initiated, one of the two authorities **abstain**

from exercising its jurisdiction in favour of the other, and, of course, that the latter effectively exercises its jurisdiction, without which there would be a **legal vacuum** as a result of which it would be impossible for the adult concerned and those close to him or her to obtain protective measures in both countries. This objective is achieved either through the establishment of a **hierarchy of judicial competence** (that is compatible, for example, with the possibility of a **transfer** of jurisdiction from the hierarchically superior jurisdiction to the hierarchically inferior jurisdiction), such a hierarchy being necessarily **accepted by all the authorities**; or by the possibility of a **dialogue among the authorities** in order to determine which of them is best suited, in the specific case, to impose the protective measure. This system presupposes, evidently and above all, that the measure that is imposed by the authority that has exercised its jurisdiction (let us suppose that it is that of country A) can be **effective with respect to the activities that the adult may undertake in the country whose authorities have abstained from exercising their jurisdiction concerning this question (country B), i.e. that the measure (and the judicial or administrative decision that incorporates it) will be recognised in that country**. More generally, each time a protective measure imposed in country A is not recognised in another country B or in several countries (B and C) where the person has activities, it becomes necessary for the person, or those who take care of the person, to initiate in this or these other country or countries a procedure to obtain protective measures effective in such country or countries. The risk then exists that a conflict of regimes will arise with the inherent consequences that we have discussed. It is for this reason that the **rules concerning the recognition of protective measures be as liberal as possible**. In this respect, recognition *ipso iure* saves the time and necessary costs that a judicial procedure for recognition would imply.

It is, however, **possible** that two authorities will each impose a protective measure with respect to the same sector of activity, but at **different times**, and that, notably, as soon as one of these measures is imposed by the authority of B, the measure previously adopted by the authority of country A **ceases** to have effect. This system presupposes the willingness of one country, here country A, **to terminate** a measure based on the fact that a measure has subsequently been adopted in another country, here the country B, that is the most appropriate **taking into account, notably, the evolution of the situation of the adult in question**. It is also possible that the authorities of the two countries, A and B, will take measures destined to take effect simultaneously but with respect to **two different sectors of activity or transactions**. With the exception of cases of urgency, this runs the risk, in general, of being **inefficient** on a global level because of the duplication of procedures discussed above. It is desirable that, even in these cases, the **results** of the instruction phase before the authorities of country A, notably, with respect to the state of health (establishment of a medical report, hearing of the adult concerned, opinion of the prosecutor, etc.) be able to be used, subject, of course, to the consent of the persons concerned, in the procedure in country B (and that the intervention of such authorities be limited, to the extent possible, to the phase of appointment of the person to be responsible for the affairs of the adult concerned that are geographically located in that country).

It remains to be seen to what extent the current systems of private international law are able to **satisfy these imperatives**.

B. Inadequacies of the National Systems of Private International Law

As discussed above⁶³⁵, private international law in the field of the protection of adults remains, in the EU countries, of an **essentially national source**. Each of the countries studied has **its own rules** both with respect to the **authorities' competencies (1)**, concerning **applicable law (2)** and concerning the **recognition of judgments (3)**. We remind the reader that only the United Kingdom has adopted **solutions** that correspond, with several **minor** adaptations, to the rules contained in the Hague Convention of 13 January 2000.

1. Jurisdiction

1.1. Rules Sometimes Lack Precision

The rules concerning the **international jurisdiction of the authorities** do not differ **significantly** from one country to another, even if they are not always formulated with the **necessary precision**; the jurisdiction of the forum where measures of urgency are executed and of the place of the geographical location of assets in the case of specific measures relating to these assets, is in particular **not always** clearly established. On a more fundamental level, with the exception of England, who has adopted the solutions offered in the Hague Convention of 13 January 2000, no legal system expressly provides for **the forum of the residence of the person willing to take responsibility for the protection of the adult in question** (although, under French law, in the event that France is the country of *nationality* of such person, it appears to be possible for such person to seize the French authorities as plaintiff). Nor is the possibility for the adult concerned **to designate in advance the authorities who will be responsible for his or her protection**, notably within the framework of a **mandate of inaptitude**, explicitly offered. In our opinion, the express admission of these two types of jurisdiction would be **useful** as well as being in conformity with the evolution of internal legislation in this field. This would, of course, extend the palette of potential jurisdictions which is already fairly wide. This is not, however, necessarily a disadvantage. On the one hand, the risk of *forum shopping* is relatively low in an area, such as this one, in which jurisdiction is most often that which is sometimes referred to as “benevolent” or “voluntary”, and, in any event, of a constitutive, rather than declarative, nature.⁶³⁶ On the other hand, coordination among the several potentially competent authorities, or, better yet, the establishment of a hierarchy amongst them, should suffice to avoid any excesses.

1.2. Insufficient System of Coordination of Jurisdictions

With respect to the coordination between two procedures, some legal systems attempt to institute it at the **legislative** level, through **fairly specific** rules, notably in Sweden, Germany and the Czech Republic, and others, such as France, at the level of the **practical application** of the protective measures. None of the legal systems studied, however, impose on the authority of the forum **the obligation to abstain** from exercising its jurisdiction in favour of the foreign authorities; they offer only the *possibility of abstaining*. Some legal systems, such as in Germany, allow for this possibility only on the express condition that it be in “**the interest of the adult**”, but other systems do not expressly mention this condition. Thus, in **Example 1**, concerning a Romanian citizen resident in Germany, if a procedure had been **initiated in both countries**, the German authority could, in principle, refrain from exercising its jurisdiction in order to avoid a conflict concerning X's status. The

⁶³⁵ See *supra*, Part One – Executive Summary of the Comparative Study, point B.

⁶³⁶ See G. P. Romano, « La bilatéralité éclipsée par l'autorité – Développements récentes en matière d'état des personnes », *Rev. crit.*, 2006, p. 456 *et seq.*

German authority, however, must be certain that the Romanian authorities will not, themselves, decline to exercise their jurisdiction pursuant to the same principle, given that a common regime of transmission of information does not currently exist between these two countries, or any other countries, for that matter. Moreover, in such a regime of discretion, and in the absence of an institutionalised framework of concerted cooperation, there exists the risk that the *national* judge, who specifically does not have as his or her mission to prevent or resolve *international conflicts*, will not perceive the danger of an international conflict of measures and regimes of the type described above.

Other legal systems are not interested in such types of coordination; still others prohibit it. As we have seen, among the countries studied, this is the case in Romania. The Romanian authorities, in the same **Example 1**, do not have the possibility of declining to exercise their jurisdiction in favour of the German authorities, even if the Romanian authorities consider that the German authorities are better situated to take responsibility for this issue and the German authorities do not refrain from exercising their jurisdiction (for example, because X has few contacts with Romania even if he or she still owns certain assets there).

A clear **hierarchy of judicial competencies** is established from the outset only in the Czech Republic, where the **national authorities**, whether they be the authorities of the forum or foreign authorities, are recognized as having **primary authority**. A hierarchy of judicial competencies among several countries, however, makes little sense and, in any event, may well be ineffective if it is established unilaterally by one of the other of such countries. Thus, in **Example 4**, the Czech authorities, who are the authorities of the country of nationality, may well consider themselves to be in a higher position on the hierarchical ladder, but it is still necessary that the English authorities (of the country of residence) recognize this supremacy (which, in principle, is not the case). The coordination can also be accomplished at the phase of the **transfer of jurisdiction**. This system is, as yet, not highly developed in current legal system as, here again, in order to function well it presupposes a coherent institutional framework. In **Example 3**, the German authorities, even though they have appointed a *Betreuer* Y with respect to X, can terminate the *Betreuung* in the event that the Romanian authorities place X under the tutorship of Y following the prohibition that they have pronounced (to the extent that Y consents thereto), that this is in X's best interests, and that the Romanian authorities assume the management of the protective measures including with respect to any interests which might arise in Germany. This presupposes, nonetheless, the German authorities' recognition of the prohibition pronounced in Romania. In **Example 5**, the Swedish authorities have the freedom to terminate the *godmanskap* under Swedish law (and, as a result, terminate the *godman* Y), in favour of the tutorship pronounced in France and the tutor Z. With respect to the **recognition of the protective measures**, we should note the closed regime of Romania which, for example, prohibits the recognition of the *Betreuung* under German law in **Examples 1 and 3**. In order not to leave X without protection, notably in **Example 3**, the Romanian authorities will be required to rule on the question *ex officio* and thereby to open the way to a conflict of status or a conflict of measures of protection of the type described above. It is far from certain that, in **Example 2**, the *godmanskap* under Swedish law will be recognised in France with respect to a **French citizen**, notwithstanding the fact that French jurisprudence shows a desire for coordination. Yet, here again, there is **no obligation** to do so.

2. Applicable Law

2.1. Rules Sometimes Complex

With respect to **applicable law**, the distinction between the law applicable to the *conditions* and the law applicable to the *effects* in certain legal systems flows from a concept concerning which one

might ask – and concerning which the doctrine does, indeed, ask⁶³⁷ – whether it **remains relevant today**. In a more general, and perhaps more fundamental, manner, one might ask whether the willingness to apply the **national law of the adult concerned** – which, in the event of a dissociation between the nationality and the habitual residence of such adult is, for the forum, most often, a *foreign law* – is truly **appropriate in this domain**. The disadvantage, in our opinion, is not so much the difficulties, often emphasised, that are posed for the authorities of the forum to establish the substance of the foreign law since, with the exception of cases of urgency, the procedures that lead to the imposition of measures of protection are, as we have seen, already fairly lengthy as well as costly. If, in the **interest of justice**, it would appear to be more desirable to apply a foreign law, we do not see why, in principle, this option should not be followed⁶³⁸ (even if, here, as always, the law of the forum will be applied if it is impossible to establish accurately the provisions of such foreign law). Nor is the law of the **habitual residence** necessarily always better adapted than the law of the country of nationality, or in closer conformity with the **principle of non-discrimination**, a delicate question that it is not necessary to address here. We contend that it is the **mere opportunity** of applying the foreign law at the stage of the imposition of a measure of protection that is **arguable**. Since it concerns a measure destined to be applied **at some future time** (rather than a decision declaring the existence of rights and obligations arising from past or executed transactions or acts), the need for the application of a foreign law is, indeed, **hardly pressing**⁶³⁹. The applicable law could well be that of the jurisdiction (the so-called *Gleichlauf* principle).

The application of forum law also presents the advantage, among others, of relieving the judge of the necessity of looking into the intricate questions of **qualification** and of **adaptation**: it is of little importance to know if, for example, the necessity of a medical evaluation performed by a council of specialists (such as is required under Romanian law⁶⁴⁰) or the requirement of the consent of the adult concerned (as is the case with respect to a *godmanskap* under Swedish law)⁶⁴¹, is a procedural issue or a substantive issue since it is always the law of the ruling authority that governs. Similarly, the risk that an authority must apply a foreign law which presupposes the intervention of an organisation that does not exist in the forum (a situation which can lead to a deadlock in the administration of the law) simply does not exist. Thus, if we posit that the adult concerned, in **Example 1**, is of **French nationality**, the German authorities will not be required to find the nonexistent equivalent in German law of the “family council” provided for under French law.

2.2. Rules Sometimes not Adjusted to Practice

An analysis of the practice reveals that the **law of the forum is, for all practical purposes, nearly always applied to the conditions, the procedure and the effects of the protective measures**. One cannot help but notice a **discrepancy, often noted, particularly in Germany and in France, between the law as written law and the law as applied in real life** – a discrepancy that in and of itself calls for a legal reform⁶⁴². It is, of course, imperative that care be taken with respect to the **harmonisation of the solutions adopted**. In this field, such harmonisation of solutions consists of avoiding **conflicts among protective measures or regimes**; we have seen why it is absolutely necessary to avoid such conflicts⁶⁴³. There are methods of achieving this objective that are **more certain**, and positive laws are currently moving in this direction. These are above all the **rules of coordination among the authorities** involved.

⁶³⁷ See T. Guttenberger, *op. cit.*, in particular p. 40 *et seq*

⁶³⁸ Cf. our observations in G. P. Romano, « La bilatéralité éclipsée par l’autorité », *op. cit.*

⁶³⁹ See G. P. Romano, « La bilatéralité éclipsée par l’autorité », *op. cit.*

⁶⁴⁰ See National Report of Romania, Point 4.1.

⁶⁴¹ See National Report of Sweden, Point 4.2.1.

⁶⁴² See, *e.g.*, T. Guttenberger, *op. cit.*, p. 41.

⁶⁴³ See *supra*, B.2.

3. Recognition and Cooperation

3.1. Hypotheses of Refusal of Recognition Unjustifiable

With respect to the **recognition of the measures**, we can point to the closed regime of Romania, which, for example, is prohibited from recognising the *Betreuung* under German law in **Examples 1 and 3**. In order to avoid leaving X without protection, notably in **Example 3**, the Romanian authorities will be obliged to assume jurisdiction *ex officio* over the question thereby opening the way to a conflict of status or a conflict of protective measures of the type that we have sketched out above. It is not certain that, in **Example 2**, the *godmanskap* under Swedish law will be recognised in France, in the case of a **French citizen**, even though the French jurisprudence has shown itself to be in favour of coordination.

3.2. Insufficient Systems of Cooperation

Finally, we should look back to the question of the **absence of a common regime of communication and of transmission of information**. Such a regime is the only one that can guarantee that an attempt at coordination will be effective, as the rules evoked above demonstrate. This is an **important**, but, finally, inevitable, lacuna for so long as one remains within a national system. In Sweden, as we have seen, it is through the offices of the **Minister of Justice** that the Swedish authority must attempt to discover whether the foreign State of nationality of the adult to be protected has already taken protective measures. The absence, in the foreign States, of an authority that is clearly designated to receive such requests for information and to transmit them to the appropriate persons, slows down the process significantly. In Germany, the application of the rule concerning the transfer of jurisdiction presupposes that the foreign authority will **be contacted**, which foreign authority must consent to take jurisdiction of the question *ex officio*; it has not been possible to determine how this rule functions in practice. These two rules, however, clearly demonstrate the real need that can be truly satisfied only if there exists a common **official framework** of communication and transmission of information that is constructed in a concerted fashion.

4. Conclusions

Although the frequency of situations that are effectively problematic is, at the present time, difficult to measure precisely, we must believe that the solutions that issue from the **national systems of private international law** of the Member States are not able to assure a regime of protection of the adult that is, on all points and always, **satisfactory**. Aside from the national rules, systems and mechanisms that clearly raise obstacles to the coordination and the recognition of measures of protection, and that open the way to a conflict of protective regimes that generate obstacles to the international (and particularly intra-Community) legal activities of the adult and those who are responsible for the adult, certain national systems contain other rules, systems and mechanisms that are more **modern, and more open to coordination**. But these rules are either often still formulated in too timid a fashion or not sufficiently specific or clear, or, in any event, do not lead to a satisfactory level of effectiveness in the absence of a **supranational framework and wide-ranging acceptance**.

Section III

POSSIBLE SOLUTIONS AT THE INTERNATIONAL LEVEL

We will consider to what extent the acceptance into the Community legal order of the solutions adopted by the **Hague Convention of 13 January 2000** on the International Protection of Adults that we have summarised in Part II of the Comparative Study⁶⁴⁴ – the most recent and without question **the most detailed** instrument in the field – could contribute to the amelioration and reinforcement of the protection of the adult at the Community level (A). We will then examine the possibility of the European Community acceding to the Hague Convention for the totality of its Member States (B) and the option of a European Regulation (C).

A. Solutions of the Hague Convention of 13 January 2000

1. Clarity of the Proposed Rules

The Hague Convention on the International Protection of Adults of 13 January 2000 will become effective on 1st January 2009. More precisely, the solutions that it adopts will be applicable, from that date on, in the **three Member States** that have thus far ratified the Convention, and that are also the most densely population States in the EU: **Germany, the United Kingdom and France**, *i.e.* to more than **one-third** of the citizens of the European Union. Even if the Convention has not yet been proven to be effective, the system that it puts into place appears to be globally **coherent, balanced, clear and precise** and as a result – it seems easy to predict – **relatively easy to apply**, notwithstanding the fairly elaborate character of the solutions it proposes. It is not excessive to affirm that this system represents, in its totality, at the current stage of development and reflection on the law and legal practice, on a private international law plane, the **most modern and highly perfected** example of “judicial cooperation in civil matters” in the sense of Art. 65 EC that exists in the field of protection of adults. The authority of the multitude of experts who participated in its construction, moreover, attests to the exceptional balance of the expertise involved. The modernity of the approach appears as early as in its preamble: the Convention’s aim is to avoid “**conflicts between legal systems**” (not simply conflicts of laws), in other words, in substance, the “conflicts between protection regimes” or “conflicts between protective measures” that we sought to explain in the preceding discussion.

It is nonetheless important to underscore that the general philosophy underlying the systems adopted by the Convention is not substantively different than the philosophy that is behind the **most fully developed national systems**, on many points (the German and Swedish systems), as well as **the current tendencies** of the law in practice. Quite the contrary, in many respects, the system of the Convention aims only at affording the necessary clarity and predictability and, above all, assuring the **effectiveness** of the mechanisms and solutions **already adopted** in the national legislative rules (even though they may be “timid” or unclear in their formulation) or already perceived, more or less consciously, by judges to be useful. We cite as examples the **establishment of a hierarchy of jurisdictions**, or the **transfer of jurisdiction**, and, in general, the **coordination of these judicial competencies** by means of a **contact** to be established between the authorities of the forum and foreign authorities. These *national* solutions and mechanisms already exist, as we have seen, either on a legislative basis or *de facto*, even if only in an embryonic state, in certain Member States, but they run the risk, at present, of not being able to blossom and be effective to the extent that they do not form part of a multinational institutional framework that would confirm them and establish roads of efficient and reliable cooperation and transmission of information. Nonetheless, this

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See, *infra*, Part II of the Comparative Study.

philosophical affinity allows us to hold the conviction that the **acclimatisation of the systems proposed by the Convention in the national systems is possible, in most cases, without major modifications** (moreover, the States that ratify the Convention undertake to designate a central Authority responsible for satisfying the obligations imposed upon it). In any event, this is the conclusion to be drawn from the incorporation of the **solutions adopted by the Convention** in the private international law of England and Wales and, of course, the ratification of the Convention by the United Kingdom, France, and Germany.

2. Balance between Flexibility and Predictability

The solutions adopted by the Convention are **clearly established by specific rules**. In and of itself, this represents a **step ahead** with respect to a certain number of national rules that are, practically speaking, **difficult to interpret**. The rules adopted by the Convention are, in addition, **quite flexible**. And the flexibility of the law is particularly important in this field *at the stage* where measures of protection must be imposed, modified or revoked. This is demonstrated by internal law which, as we have seen, leaves substantial liberty to the judge with respect to the decision concerning whether or not a protective measure is necessary, concerning the choice of the appropriate measure and, above all, in the **crafting of the substance** of such measures. A large palette of judicial competencies has been retained by the Convention. The wishes of the adult concerned and the residence of the person responsible for the protection of such adult are accorded special weight: two **useful** jurisdictions that, as discussed above, are globally absent from the national systems analysed. The concern here is to allow, with respect to the identification of the authority whose jurisdiction is the most justified, **greater adaptability to the specificities of a given case**, to the geographical location of the pertinent contacts and to their respective weights, in order to better assure the assumption of responsibility for the “interests of the adult”. The **predictability** of the law, or **legal certainty**, must be assured above all *after* the protective measure has been imposed; the necessities of legal commerce require that, at that moment, the adult concerned, the person in charge of his or her protection, the oversight authorities and third parties be able to determine which are the transactions that the adult can complete him or herself, which will require assistance or authorisation, and which person or organisation must grant such authorisation. From there must follow the **establishment of a strict hierarchy** of the jurisdictions retained and, if necessary, of the measures that the authorities of such jurisdiction may have imposed, in **space** and in **time**, given the *dynamic*, and potentially evolving, nature of the protection regime.

3. Search for a Coordination of Competences

This ordering is, of course, quite **complex**: we must provide for a *primary* jurisdiction (that of the habitual residence), *subsidiary* jurisdictions, *delegated* jurisdictions, jurisdictions with respect to *general* protective measures and jurisdiction with respect to *specific* measures or acts, jurisdictions of *urgency* and *ordinary* jurisdictions... For the details, we refer the reader to the **executive summary** of this subject. It is the underlying concern of this ordered set of jurisdictions that must be underlined here, *i.e.* that of making certain that several authorities do not **pronounce measures of protection applicable at the same time and to the same sectors of activity of the adult**, in other words to avoid the “incompatibility” of protective measures, the “conflict of measures of protection” and the obstacles, discussed above, that such a conflict runs the risk of **presenting for the fluidity and the security of international judicial commerce, including on the Community level**. It is, on the other hand, **possible**, pursuant to the Convention, that two authorities each impose a protective measure with respect to the same sector of activity, but **at different times**, and that, notably, as soon as one measure is imposed by the authority of one State, the measure previously adopted by the authority of the other State **ceases** to be effective: this is the dovetailing between the primary

jurisdiction and a subsidiary jurisdiction or between a jurisdiction of urgency and an ordinary jurisdiction. It is also possible that two authorities impose measures intended to be effective simultaneously, but with respect to **two different sectors of activity or two different operations**. Thus, a general measure of protection imposed by the authority of the habitual residence and a specific protective measure imposed by the authority of the geographical location of a particular asset can coexist perfectly well.

4. Modern Rules on Applicable Law

The **applicable law** is, in principle, that of the authority seized. This law governs both the conditions and the substance of the protective measure. This solution, that was **consensual** during the negotiations, adopts the solution that flows from **legal practice** even in the countries that, formally, adhere to a different conception such as Germany and France. Here, again, the adoption of such a rule represents progress with respect to transparency and the predictability of the law; it also brings all of the advantages in terms of simplicity and the avoidance of sticky problems of adaptation and qualification that we have previously discussed. Nonetheless, **flexibility** continues to be assured here as well: the authority of the forum can “apply or take into consideration” albeit “exceptionally” at least when the protection of the person or the assets of the adult so require, “**the law of another State with which there is a close connection**”. These formulations may be a bit vague but they should above all refer to the law of the place of execution of the measure to be imperatively applied.”

The Convention is also the **first instrument** of private international law that provides for specific solutions in the new field of the **mandate of inaptitude**. This is **another significant element** of modernisation of the rules of the Convention. The private international law systems of the six Member State are not, on this point, adapted to the innovations that the reforms of substantive law have brought. Such a lack of direction obviously **engenders insecurity and, therefore, litigation**. The adoption of a **clear legislative solution** obviously would diminish the problem, particularly if the rule is adopted by all of the Member States. The substance of the rule adopted by the Convention appears to be quite reasonable in that it accords importance to the **autonomy of the adult** (after all this is a *Rechtsgeschäft*) without allowing him or her to circumvent the prohibitions that may be provided for by all of the countries with which he or she has significant contacts (the circle of eligible laws is, indeed, limited). Such a norm should allow for the recognition of this form of power of attorney in those contracting States that do not possess an instrument of this type, which guarantees to the adult **the assurance that the provisions of such mandate will be respected in other contracting States**, for example in the event of a change of residence (and at this time we do not know to what extent this might be in opposition to the public order).

5. Broad Recognition of the Measures of Protection

The broad **recognition of measures of protection imposed abroad**, limited by a small and clearly established number of justifications, would allow the avoidance, most often in all cases, of a **conflict of protection regimes**. The solutions adopted by the Convention represent, here again, **distinct progress** with respect to existing law, notably in Romania (which clearly allows exorbitant exclusive jurisdiction), and the Czech Republic (because of reciprocity) but also perhaps in France (given the uncertainty concerning the scope of the suppression of verification of the law applied). The fact that recognition is *ipso iure* (a point that is not always elucidated in current legal systems) **facilitates** the management of the protective measures across borders by **rendering it faster and less expensive**.

6. Cooperation System

The **system of cooperation organised by the Convention** is fundamental in assuring its operation. Numerous provisions are dedicated to this cooperation. This is the **concerted international institutional framework**, that, as we have noted, is sorely lacking at present and that is essential in order to guarantee the **effectiveness** of the mechanisms of international coordination. The mission of helping to find **concerted solutions that are therefore viable for an international – more specifically, Community - life** for the adult and those who assure his or her protection, is particularly important. The principal actors in this cooperation are, in addition to the competent authorities, the **central Authorities** who “must cooperate amongst themselves to promote the cooperation among the competent authorities of their State in order to realise the objectives of the Convention.” New in the field of protection of adults, this **network** of “liaison agents” is not new in the absolute as it has existed for decades in the related field of protection of children where, on the whole, it renders services that are greatly appreciated. If the system of Central Authorities obviously has a **cost** – the norms with respect to operating costs are, moreover, provided for – we must believe that this cost (more precisely, the sum of the operating costs of the national central Authorities) will be **less** than the savings it will allow, on a **global level**, of costs currently generated by the lack of coordination, the possibility of the initiation of parallel procedures and the establishment of conflicting protection regimes which, by their nature, will be at least partially **ineffective**.

7. Conclusions

The work undertaken over the past fifteen years at the Hague Conference confirms that the organisation of an international regime for the protection of the adult is opportune. The Hague Convention of 13 January 2000 on the International Protection of Adults which was the result of this work contains a group of rules that are clear, coherent, modern and well thought out, in which the cooperation among authorities appropriately plays a dominant role. One can imagine that the adoption by the Member States of the solutions provided for by the Hague Convention would represent great progress both for their respective legal orders and that of the Community, given, in particular, the objectives of the “proper functioning of the internal market” and the progressive creation of a “space of liberty, security and justice.” Hailed in a practically unanimous manner by specialists in private international law since its adoption, the entry into force of the Convention in three large European countries (Germany, France and the United Kingdom), on 1st January 2009, is evidence of the political favour that these solutions enjoy as well. One may well conclude that the integration of these solutions into the legal systems of the largest possible number of Member States would present only advantages. It appears to us that Articles 61 and 65 EC offer the European Union sufficient legal bases to intervene. It remains to be determined how best to use them, considering that the Hague Convention will soon become effective in three of the Member States and that other States, including third party States, might well follow in their footsteps.

B. Accession of the European Community to the Hague Convention of 13 January 2000

The Hague Convention offers rules of coordination of the disparities in the national legislations concerning the protection of incapacitated adults in order to manage cross-border situations. The simplest solution, then, would be to envision the European Community’s accession to this Convention, which would thereby bind the Member States such that these rules of coordination apply throughout the territory of the European Community.

1. The European Community and the Hague Conference

The European Community has formally become a member of the Hague Conference in order to exercise its external competence by participating as a full member in the negotiations of conventions in areas of its competence.⁶⁴⁵ The status of the Community within the Hague Conference is specified in the Statute of the Hague Conference. Amended 1 January 2007, Article 3 subpar. 3 of the Statute provides that “each regional organisation of economic integration who deposits a request for accession must present, together with its request, a declaration of competence specifying the questions for which its Member States have transferred competence to it”. Article 5 of the Statute further provides that “the Member States of a member organisation are **deemed to retain their competencies over all questions for which a transfer of competence has not been specifically declared or notified.**”

The Statute provides that the European Community “is entitled, with respect to questions falling within its competence, in any meeting with the Conference in which it is authorised to participate, **to the same number of votes as the Member States who have transferred to it their competence over the matters in question, and who are entitled to vote at such meeting and are so registered.** When the Community exercises its right to vote, the Member State will not exercise their voting rights and *vice versa*” (article 8).

The declaration of competence specifying the questions for which the Member States have transferred their competence to the Community appears in Annex II to the Council Decision of 5 October 2006 Relating to the Accession of the European Community to the Hague Conference on Private International Law (2006/719/EC)⁶⁴⁶. The Community thus declares itself to be competent:

2. [...] The European Community has internal competence to adopt general and specific measures relating to private international law in various fields in its Member States. In respect of matters within the purview of the HCCH, the European Community notably has competence under Title IV of the EC Treaty⁶⁴⁷ to adopt measures in the field of judicial cooperation in civil matters having cross-border implications insofar as necessary for the proper functioning of the internal market (**Articles 61(c) and 65 EC Treaty**). Such measures include:

(a) improving and simplifying the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

3. In areas which **do not fall within its exclusive competence**, the European Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action **cannot be sufficiently achieved by Member States** and can therefore, by reason of the scale or effects of the proposed action, **be better achieved by the European Community**. Any action by the European Community shall not go beyond what is necessary to achieve the objectives.

⁶⁴⁵ Council Decision of 5 October 2006 relating to the Accession of the European Community to the Hague Conference on Private International Law (2006/719/EC), OJ L 297, 26.10.2006, p. 1 *et seq.*

⁶⁴⁶ *Ibid.*

⁶⁴⁷ Denmark, the United Kingdom and Ireland are subject to a special regime, see also recitals 12, and 13 of the Decision 2006/719/EC of the Council of 5 October 2006, *op. cit.*

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4. Furthermore, the European Community has competence in other fields which can be subject to conventions of the HCCH, as in the field of the internal market (Article 95 EC Treaty) or consumer protection (Article 153 EC Treaty).

5. The European Community **has made use** of its competence by adopting a number of instruments under Article 61(c) of the EC Treaty, such as:

- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings,
- Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters,
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement in civil and commercial matters,
- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,
- Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes,
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, and
- Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

Provisions on private international law can also be found in other Community legislation, notably in the area of consumer protection, insurance, financial services and intellectual property. Thus, the Community Directives affected by the Hague Convention on the Law Applicable to Certain Rights of Securities held with an Intermediary were adopted on the basis of Article 95 of the EC Treaty.

6. Even if there is no explicit reference to external competence in the EC Treaty, it results from the jurisprudence of the Court of Justice of the European Communities that the provisions of the EC Treaty referred to above constitute legal bases not only for internal acts of the Community, but also for the conclusion of international agreements by the Community. The Community may conclude international agreements whenever the internal competence has already been used in order to adopt measures for implementing common policies, as listed above, or if international agreement is necessary to obtain one of the European Community's objectives. **The Community's external competence is exclusive to the extent to which an international agreement affects internal Community rules or alters their scope. Where this is the case, it is not for the Member States but for the Community to enter into external undertakings with third States or International Organisations.** An international agreement can fall entirely or only to some extent within exclusive Community competence.

7. Community instruments are normally binding for all Member States. Concerning Title IV of the EC Treaty which comprises the legal basis for judicial cooperation in civil matters, a special regime applies to Denmark, Ireland and the United Kingdom. Measures taken under Title IV of the EC Treaty are not binding upon or applicable in Denmark. Ireland and the United Kingdom take part in legal instruments adopted under Title IV of the EC Treaty if they notify the Council to that effect. Ireland and the United Kingdom have decided to opt in on all measures listed at point 5 above.

8. The extent of competence which the Member States have transferred to the European Community pursuant to the EC Treaty is, by its nature, liable to continuous development. The European Community and its Member States will ensure that any change in the Community's competences will be promptly notified to the Secretary-General of the HCCH as stipulated in Article 2A(4) of the Statute.

2. The Nature of the External Competence of the Community

The accession of the Community to a Hague convention is subject to the presence of an **external competence of the Community** in the concerned area.

The European Community has **exclusive external competence** in two different situations:

In the first situation, the Community's external competence is **explicit**. It is the result of a Community act which expressly confers on Community institutions the competence to negotiate with Third Party States⁶⁴⁸.

In the second situation, the exclusive external competence of the Community is **implicit**. It flows from a parallelism between the external competencies and internal competencies of the Community which is explained by a simple reason: the effectiveness of an intra-Community measure, in existence prior to the agreement, must not be compromised by the subsequent conclusion of an international agreement⁶⁴⁹. Consequently, it is competent if an international agreement affects internal Community legislation or alters its scope. Consequently it is not for the Member States but for the Community to enter into external undertakings with third party States or International Organisations.⁶⁵⁰ **The European Court of Justice has expanded this second situation.** Indeed, internal Community measures can be adopted only upon the conclusion and entry into force of the international agreement concerned. In this case, the Community has exclusive competence to conclude such an international agreement, but its participation in the agreement must be deemed **"necessary to the realisation of the objectives of the Community"**. In its opinion of 7 February 2006⁶⁵¹, the "objective of the Community" became the "objective of the treaty". The Court links exclusive competence in that opinion to the fact **"that the internal competence can be exercised effectively only at the same time as external competence, the conclusion of the international agreement being therefore necessary** in order to realise the objectives of the treaty that could not be achieved by the establishment of autonomous rules"⁶⁵².

⁶⁴⁸ See, e.g., in the EC Treaty, articles 310 (agreements of association), 111 paragraphs 1 and 3 (monetary policy) and 133 (formerly article 113) as interpreted by the Court notably in its opinion 1/75 of 11 November 1975 rendered pursuant to Article 228, paragraph 1, subparagraph 2, of the EEC Treaty, Rec. 1975 p. 1355 (commercial policy).

⁶⁴⁹ The Court of Justice held, in the E.R.T.A. case that "each time that, for the implementation of a common policy provided for by the Treaty, the Community has put into place, in whatever manner, common rules, the Member States no longer have the right, individually or collectively, to contract with third party States obligations affecting such rules (point 17). The Court does not limit this analysis to the implementation of a common policy specified in the Treaty, adding further that "to the extent that the Community rules have been established in order to realise the purposes of the Treaty, the Member States cannot, outside the framework of the common institutions, make commitments that might affect said rules or alter their scope of application" (point 22).

⁶⁵⁰ See point 6 of the Council Decision of 5 October 2006 relating to the Accession of the European Community to the Hague Conference on Private International Law (2006/719/EC), OJ L 297, 26.10.2006, p. 1 et seq.

⁶⁵¹ ECJ., Opinion 1/03, *Competence of the Community to conclude the new Lugano convention concerning judicial competence, recognition and execution of decisions in civil and commercial matters*, 7 February 2006, JO C 262 of 23.10.2004, p. 8.

⁶⁵² ECJ, Opinion 1/03, 7 February 2006, *Competence of the Community to conclude the new Lugano convention concerning jurisdiction, recognition and execution of decisions in civil and commercial matters*, point 115.

Moreover, the subsequent jurisprudence of the C.J.E.C. has shown that “**concurrent competencies are the rule and exclusive competence, the exception**”⁶⁵³. The Court of Justice, in an opinion concerning the WTO agreements⁶⁵⁴, thus limited the external competence of the Community derived from article 113 to the agreements relating to merchandise and cross-border services rendered without the provider crossing the border, refusing to include the agreements concerning all other services, including transportation (GATS) and the agreements concerning intellectual property (TRIPs). Allowing itself “an extremely limited interpretation of its E.R.T.A decision and of its opinion 1/76”⁶⁵⁵, it also refused to find an implicit external competence of the Community flowing from the objectives of the Treaty. Furthermore, the **doctrine** of implicit external competence was developed in relation to economic questions – quite different from private international law. For certain authors, the scope of the Community’s external competence must be determined on a case by case basis in light of the internal instrument used⁶⁵⁶. The analysis of Professor B. Hess of the external competences of the European Community in international law on procedure makes distinctions among the various provisions of a single Community instrument and indicates, for example with respect to EC Regulation 1347/2000, that “the Community has acquired an exclusive external competence with respect to conflicts of jurisdiction in marital matters, whereas the external competence with respect to the recognition of such decisions remains shared as between the EC and the Member States”⁶⁵⁷.

In the area of the protection of adults, the following EU consequences can be drawn:

- the Community has **no exclusive external competence**: no **explicit** competence is foreseen in the treaty relating to the protection of incapacitated adults, the Community has **not yet taken internal measures** in this area and, in light of the ECJ jurisprudence, the **internal competence of the Community can be detached from its external competence**⁶⁵⁸
- as a result, the Community authorities have not yet “occupied” the territory concerned⁶⁵⁹, and the Member States can conclude agreements with third party States in the domain concerned, thus benefiting from **concurrent competence**; consequently, the European

⁶⁵³ Hess (B.), « Les compétences externes de la Communauté européenne dans le cadre de l’article 65 CE », in *Les conflits de lois et le système juridique communautaire*, colloque organisé conjointement par l’Académie de droit européen de Trèves (ERA) et l’UMR de droit comparé de l’Université Panthéon-Sorbonne (Paris I), les 17 et 18 novembre 2003, sous la direction de A. Fuchs, H. Muir-Watt et E. Pataut, Paris, Dalloz, 2004, p. 88.

⁶⁵⁴ ECJ., opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Procedure Article 228, paragraph 6, of the EC Treaty*, 15 November 1994, Rec. 1994 p. I-05267.

⁶⁵⁵ Dutheil de la Rochère (J.), « L’ère des compétences partagées », *Rev. Marché Commun et de l’U.E.*, 1995, p. 463.

⁶⁵⁶ Borrás (A.), “The Frontiers and the Institutional Constitutional Question”, *International civil litigation in Europe and relations with third States*, Bruxelles, Bruylant, 2005, p. 33.

⁶⁵⁷ Hess (B.), « Les compétences externes de la Communauté européenne dans le cadre de l’article 65 EC », in *Les conflits de lois et le système juridique communautaire*, colloque organisé conjointement par l’Académie de droit européen de Trèves (ERA) et l’UMR de droit comparé de l’Université Panthéon-Sorbonne (Paris I), les 17 et 18 novembre 2003, A. Fuchs, H. Muir-Watt, E. Pataut, Paris, Dalloz, 2004, p. 96.

⁶⁵⁸ Schütze (F.), « Dual federalism constitutionalised : the emergence of exclusive competencies in the EC legal order », *European Law Review*, n°32, 2007, p. 15 ; the author adds that this form of exclusivity represents an “anomaly” in the typology of allocation of competencies between the European Community and the Member States.

⁶⁵⁹ Van Raepenbusch (S.), *Droit institutionnel de l’Union européenne*, Bruxelles, Larcier, 2005, p. 156.

Community **can act within the framework of the HCCH** pursuant to point 3 of the Council Decision of 5 October 2006 (2006/719/EC).

- however, as point 3 of the Council Decision shows, the European Community shall in accordance with the principle of subsidiarity in areas which **do not fall within its exclusive competence**, act only if and insofar as the objectives of the proposed action **cannot be sufficiently achieved by Member States** and can therefore, by reason of the scale or effects of the proposed action, **be better achieved by the European Community**. Any action by the European Community shall not go beyond what is necessary to achieve the objectives.
- due to the **concurrent competence** of the Community, the conclusion of international agreements **in the field of protection of adults** is subject to these conditions;
- it can be argued that these conditions are fulfilled, in light of the preceding analysis which showed an **absence of coordination** between the national private international law regimes, absence which **potentially creates obstacles to the functioning of the internal market**, in light of the fact that cross border situations in this area **implicating Third Party States as well as EU member States** can for analogous reasons **endanger the functioning of the internal market** and, finally, in light of the **difficulty in drawing a dividing line** between purely internal situations and those implicating Third Party States.

3. Community Competence for the Conclusion of Hague Conventions Prior to its Accession to the HCCH

In the area examined, the exercise of the Community competence within the framework of the Hague Conference seems complex, as the Hague Convention on the international protection of adults was adopted in 2000, prior to the accession of the Community to the Hague Conference. Regarding the Hague Conventions adopted prior to the accession of the European Community, one must distinguish among:

- the conventions adopted in or before 1999 (date of effectiveness of the Treaty of Amsterdam) that provide for the possibility of the Member States of the EU to sign, ratify, accept, approve or accede "in the interest of the Community" in compliance with an approved procedure, to the extent that the legislative competence has been granted to the Community in the subject area concerned;
- the conventions adopted after 1999 that already include a clause specifically covering the signature, the acceptance, the approval or the accession to a Hague Convention by a regional organisation of economic integration such as the European Community; and
- the conventions adopted after 1999 that do not include such a clause.

Thus, the Hague Convention on forum selection agreements, concluded 30 June 2005, affects the application of Regulation 44/2001 referred to as "Brussels I"⁶⁶⁰. As a result, the Convention provided for the possibility of "a regional organisation of economic integration" concluding the convention

⁶⁶⁰ Jurisdiction, recognition and enforcement of judgments in civil and commercial matters ("Brussels I" Regulation (EC) n°44/2001 of the Council of 22 December 2000 concerning jurisdiction, recognition and enforcement of judgments in civil and commercial matters, O.J. n. L 012 of 16.01.2001 p. 1.

together with its Member States (Article 29) or alone, the consequence of which would be to bind the Member States(Article 30)⁶⁶¹.

The Hague Convention of 13 January 2000 on the International Protection of Adults, however, **does not include a specific clause relating to the accession of the European Community**. The text of the Convention recognises as parties to the Convention only sovereign States. Consequently, an **adaptation of its text would be required to allow for the accession of a regional organisation of economic integration**. As a practical matter, this does not appear to be an insoluble problem. On the occasion of the accession of the Community to the HCCH, such modalities were discussed in this regard⁶⁶² in order to overcome the difficulties resulting from the absence of a clause allowing the accession of a Regional Organisation of Economic Integration with respect, among others, to conventions for which the jurisdiction of the Community had not been exercised but that might be envisaged in the broader context of a concerted action involving the Member States of the European Union. The accession to the Convention of 13 January 2000 therefore appears to be **technically possible**.

C. The Adoption of a European Regulation in the Field

1. The Possible Adoption of a European Regulation

An alternative means of achieving the simultaneous effectiveness of the solutions adopted by the Hague Convention of 13 January 2000 on the International Protection of Adults in **all** of the Member States⁶⁶³ would be to integrate such solutions in a **new Community instrument**. Such an instrument could be adopted on the basis of **Articles 61 and 65 EC**. The fact that there exists in the field a Hague Convention to which certain Member States are already parties and which may already be effective at the time of adoption of such Regulation, does not, in principle, constitute an **obstacle** in and of itself to the exploitation of the possibilities offered to the Community by Articles 61 and 65. It appears certain that a **regulation** is, in this regard, the type of instrument best adapted to the realisation of the objectives indicated in those articles.

2. Advantages and Disadvantages of the Adoption of a European Regulation

2.1. Advantages

Technically, the adoption of a regulation would allow for **only the partial**, and therefore **selective, acceptance** of the solutions offered by the Convention. Thus the Community's intervention could notably be limited to the imposition of the **principle of mutual recognition** of the decisions and measures in the field (Chapter IV of the Convention)⁶⁶⁴. We believe, nonetheless, that such a partial acceptance would in any case be **inopportune**. First of all, one of the major innovations that the

⁶⁶¹ The procedure of negotiation of the convention, whose initial scope of application was considerably broader and related to foreign jurisdiction, recognition and execution in civil and commercial matters largely inspired by the Brussels Convention of 1968 which gave rise to the regulation. The Commission thus negotiated the convention in the name of the European Community by virtue of the negotiation directives of the Council.

⁶⁶² See the Note of the Secretary General of the Hague Conference on private international law with respect to the European Community's examination of the existing Hague Conventions.

⁶⁶³ With the exception of Denmark, to which Title IV of the Treaty of Amsterdam is not applicable.

⁶⁶⁴ The extent to which an intervention on the part of the EU that is limited to the "principle of the mutual recognition of acts with respect to capacity" is opportune is discussed in the description of the mandate for which the SICL has been given responsibility, in particular under point D.c).

Hague Convention of 13 January 2000 introduced is the regulation of the **mandate of inaptitude** and similar institutions, regulation which concerns the **applicable law** (Chapter III). Second, the part relating to the hierarchical organisation of **jurisdiction** is closely linked to the part concerning recognition; moreover, it does not appear that the rules concerning the jurisdiction of authorities (Chapter II) would here, as a result of their substantive content, have **more difficulty** in being accepted by the States than those concerning recognition. Finally, one party or the other would run the risk of their effectiveness being diminished without the application of the **rules of cooperation** (Chapter V). In summary, then, a **significant solidarity** connects the various sections amongst each other (notably Chapters II to V) under the system of the Convention. If one were to opt for an acceptance of the Convention's solutions, it would then be desirable that there be **global**, rather than partial acceptance of such solutions, with the exception of **certain adjustments** to be made due to the regulatory nature of the instrument to be adopted.

The regulation could also, theoretically, have a **broader** substantive application than the Hague Convention of 13 January 2000 also applying, for example, to **matters excluded** from the Convention. However, on the one hand, the substantive scope of application of the Convention is already **sufficiently broad**; on the other hand, and more generally, the system adopted by the Convention appears to be **quite complete**. If one were to take the option of a regulation, it would appear not to be necessary, at least at present, to go farther, considering the **desirable extent** to which the solutions adopted by the Convention **coincide** with the solutions of a regulation.

The adoption of a regulation also offers the advantage of the possibility of **modification** and **modernisation** of any of these solutions whose practical application has revealed the necessity or the utility thereof. The solutions of a regulation could, indeed, be easily modified by the issuance of a **new regulation**; we cite as an example the Brussels II Regulation, quickly replaced by the Regulation Brussels II-bis. On the other hand, any modification the Community might deem desirable with respect to the solutions included in an international convention in effect both in the Member States and in third party States, must, in order to be **effective** in the Member States, be **accepted** by the third party States as well, in accordance with a decision-making process over which the Community obviously has no control. Here again, if one leans towards the regulatory option, this would represent an advantage of little use since it is desirable that the solutions under the Convention and the regulatory solutions continue to coincide completely even after their entry into force.

2.2. Disadvantages

The **non-Community** nature of the Hague Convention of 13 January 2000, which is available to be ratified and to enter into force in third party States as well, nonetheless gives rise to **two disadvantages** which are not negligible.

The *first disadvantage* concerns the States who, upon adoption of the regulation, were **already parties to the Convention**. This presents the risk that the adoption of a regulation would affect the obligations that these Member State would already have contracted for with respect to third party States who are already, or will become, parties to the Convention. This disadvantage does not, however, appear to be insurmountable. There are two possible paths imaginable to attenuate its effects. One may first imagine inserting in the regulation a **disconnection clause** specifying that the "regulation does not affect the international conventions to which one or more Member States are parties upon the adoption of the regulation"; in order to preserve the useful effect of the regulation, one might add that it "takes **precedence** among the Member States over conventions concluded exclusively between two or more such Member States"⁶⁶⁵. But one might also attempt assure that

⁶⁶⁵ Art. 28 Regulation (EC) N° 864/2007– "This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this

the **solutions under the Convention and under the regulation** coincide such that the delicate question of the respective scope of application of each of the two instruments would lose a good deal of its pertinence.

The *second disadvantage* is that the exercise of the jurisdictions of the Community in the field of the protection of the adult, in other words the “conquest” by the Community of this new domain, would probably provide an obstacle to a procedure for the accession to the Hague Convention of 13 January 2000 and, in any event, would tend to discourage *de facto* this process by the Member States, to the extent that, at the time of the adoption of the Regulation, they had not yet adhered to the Convention. Moreover, the **lack of success** of the text of the Convention among the Member States might, in turn, discourage the accession to the Convention of **Third Party States**. This would be doubly regrettable: considering, in the first instance, the quality of the solutions offered by the Convention and the possibility that they may be widely accepted in order to improve the **international life of the adult, both Member States and Third Party States are implicated**; second, even though many of the solutions, hypothetically identical, would be included both in the Convention and in the Regulation⁶⁶⁶, they would not, in principle, be applicable in the relations between Member States that are not parties to the Hague Convention of 13 January 2000 and the third party States that are parties to the Convention⁶⁶⁷.

It is above all because of this second disadvantage that we conclude that **it is not desirable that the Community adopt a European Regulation adopting the essential portions of the solutions offered under the Hague Convention and that, on the contrary, it is preferable that the Community accede, itself, to this Convention.**

D. Conclusions

Three Member States have decided to adopt the system offered by the Convention for which it will become effective on 1st January 2009 (Germany (ratification 3 April 2007), France (ratification 18 September 2008) and the United Kingdom (ratification 5 November 2003)). The protective regime of the instrument will thus be put into place for an important part of the population of the EU. In addition, the Convention has been met with an ever-increasing success and has now been signed by Finland, Greece, Ireland, Luxembourg, Poland and, most recently, Italy.

Provided that the above-mentioned formal difficulties (point B) are resolved, the ratification of the Hague Convention of 13 January 2000 on the International Protection of Adults would allow the Community to have access to a modern tool for the resolution of the weaknesses identified in the national systems and would offer an adequate legal protection to face the growing phenomenon of the aging of the population of the EU. It provides solutions that will also allow for the establishment, in the EU, of a space of liberty, security and justice, with respect to the matters concerned, that

Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations. 2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.”

⁶⁶⁶ In any event some of them, and notably those concerning the establishment of a hierarchy of jurisdictions, the recognition of decisions and cooperation.

⁶⁶⁷ Thus, for example, if we suppose that Romania has not acceded to the Hague Convention when the Regulation is adopted and that Argentina has, the rules concerning the coordination of jurisdictions and notably, on the transfer of jurisdictions provided for in Art. 8, or those concerning the transmission of information via the Central Authority provided for in Art. 30, could not apply to a case implicating a Romanian adult residing in Argentina because there would be no international text connecting these two States.

Reflections on a Possible EU Legislative Initiative

guarantees the functioning of the internal market and that regulates in a satisfactory manner cross border situations with Third Party States which are parties to the Convention.

APPENDICES

APPENDICES

UNITED KINGDOM

Appendices United Kingdom (UK)

Annex I - Statistical data

State	Source of Data	Number of Adults Protected per Year	Number of Measures per Year	Number of Protected Adults Circulating in the EU
United Kingdom	Judicial and Court Statistics 2007		1	--
	Orders made under the <i>Mental Health Act 1983</i>	2007-2008: 201		
	Orders made on applications relating to the Enduring Powers of Attorney	2007-2008: 257		
	Transition Orders Made to allow Existing Receivers to Continue as Deputies under the <i>Mental Capacity Act</i> without repeated referrals to Court	2007-2008: 9,136		
	Amount in pounds (£) that Public Guardian held as agent for incapable persons	2007-2008: 2.5 billion		
	Enduring Power of Attorney Applications Received by Public Guardian	2007-2008: 20,030		
	Enduring Power of Attorney Applications registered	2007-2008: 15,969		

According to the Office of the Public Guardian, there are at present 26,994 deputyships in place in the United Kingdom. This number does not reflect the number of deputies acting, which is less, as many deputies have multiple deputyships.

Since an Enduring Power of Attorney or a Lasting Power of Attorney may be registered when a person still has capacity and may remain on the register even after a person's death, there are no statistics indicating how many registered Enduring Powers of Attorney and Lasting Powers of Attorney actually relate to people currently lacking capacity

APPENDICES

FRANCE

Appendix I – Tables and Numbers

Sources : Report of E, Blessig, deputy, 10 January 2007, entitled : « *Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi I (N° 3462), portant réforme de la protection juridique des majeurs. Il est publié sur le site de l'Assemblée nationale.* »

<http://www.assemblee-nationale.fr/12/rapports/r3557.asp>

1. Number of individuals under protection.

Changes in the number of protected adults

Year	Protected adults	Basis 100 = 1990
1990	348 271	100
1991	368 952	106
1992	389 593	112
1993	410 090	118
1994	427 483	123
1995	445 378	128
1996	465 002	134
1997	487 630	140
1998	512 814	147
1999	539 053	155
2000	561 631	161
2001	582 907	167
2002	601 481	173
2003	619 413	178
2004	636 877	183

Source : INED.

Age structure of the number of individuals under protection (2004)

Age	Number	%
TOTAL	636 877	100,0
<20	527	0,1
20-24	19 680	3,1
25-29	27 482	4,3
30-34	38 030	6,0
35-39	46 592	7,3
40-44	54 152	8,5
45-49	59 994	9,4
50-54	61 488	9,7
55-59	52 690	8,3
60-64	36 070	5,7
65-69	36 747	5,8
70-74	38 298	6,0

Appendices France (F)

75-79	39 746	6,2
80-84	46 885	7,4
85-89	26 191	4,1
90-94	33 565	5,3
95-99	18 740	2,9
80 et plus	125 382	19,7

2. Number of protective measures per year

Applications for protective measures are steadily increasing (+ 92,1 % between 1990 and 2004); the number of judgements has increased by 56,8 % between 1990 and 2004. While the number of tutorship measures has rather constantly increased (16,8 % within the same period), curatory measures have increased by 136,2 %, essentially because a higher number of adults was placed under the so-called “*curatelle renforcée*”.

Changes in the number of applications for tutorship and curatory

Year	Number	Basis 100 = 1990
1990	51 378	100
1991	53 082	103
1992	62 946	123
1993	60 759	118
1994	64 018	125
1995	66 238	129
1996	75 532	147
1997	80 116	156
1998	84 090	164
1999	84 622	165
2000	85 302	166
2001	84 536	165
2002	89 271	174
2003	92 790	181
2004	99 016	193

Source : Ministère de la Justice

Changes in the number of placements under tutorship and curatory

Year of judgment	Number	Year of judgment	Number	Year of judgment	Number

Appendices France (F)

1970	8 955	1982	32 115	1994	43 826
1971	11 031	1983	33 315	1995	46 511
1972	14 121	1984	34 515	1996	49 941
1973	21 316	1985	35 715	1997	53 729
1974	22 516	1986	36 915	1998	57 615
1975	23 716	1987	38 114	1999	57 177
1976	24 916	1988	39 314	2000	57 094
1977	26 116	1989	40 514	2001	54 578
1978	27 315	1990	41 714	2002	59 099
1979	28 515	1991	42 914	2003	61 541
1980	29 715	1992	44 114	2004	65 418
1981	30 915	1993	42 244		

Source : Ministère de la Justice

The family continues to pay for the majority of measures under the form of tutorship in form of the so-called *tutelle avec administration légale ou conseil de famille*, or via curatory, effectuated by a family member. On the other hand, measures exercised by other individuals or institutions, public tutorship or curatory measures increase (10,9 % of the number of in 2004, compared to 7,8 % in 1990).

Evolution of the number of placements under protection according to the nature and degree of the protective regime

Degree of the regime	1990		2002		2003		2004	
	Nombre	%	Nombre	%	Nombre	%	Nombre	%
TOTAL	41 714	100,0	59 098	100,0	61 541	100,0	65 418	100,0
Placement under tutorship	27 739	66,5	29 798	50,4	30 928	50,4	32 408	49,5
Tutorship	27 161	65,1	29 639	50,2	30 799	50,2	32 280	49,3
Lightened tutorship (tutelle alléguée)	578	1,4	159	0,3	129	0,2	129	0,2
Placement under curatory	13 975	33,5	29 300	49,6	30 614	49,9	33 009	50,5
Reinforced curatory (Curatelle aggravée)	11 161	26,8	25 397	43,0	26 692	43,5	29 367	44,9
Simple curatory	2 434	5,8	2 943	5,0	2 906	4,7	2 714	4,1
Lightened curatory (curatelle alléguée)	380	0,9	961	1,6	1 015	1,7	928	1,4

Source : Ministère de la Justice.

Changes in the number of placements under protection according to the exercise of the protective measures 1990-2004

Exercise of tutor- and	1990		2002		2003		2004		Variation 1990-2004 (%)
	Nombre	%	Nombre	%	Nombre	%	Nombre	%	

Appendices France (F)

curatorships									
TOTAL	41 714	100,0	59 098	100,0	61 541	100,0	65 418	100,0	56,8
Placement under tutorship	27 739	66,5	29 798	50,4	30 928	50,3	32 408	49,5	16,8
« Conseil de famille »	737	1,8	121	0,2	113	0,2	104	0,2	-85,8
« Adm. Légale »	12 631	30,3	16 331	27,6	16 894	27,5	18 055	27,6	42,9
<i>Sub-total « family tutorships »</i>	<i>13 368</i>	<i>32,0</i>	<i>16 452</i>	<i>27,8</i>	<i>17 007</i>	<i>27,6</i>	<i>18 160</i>	<i>27,8</i>	<i>35,8</i>
Administration	11 098	26,6	7 336	12,4	7 349	11,9	7 135	10,9	-35,7
State	3 273	7,8	6 011	10,2	6 571	10,7	7 113	10,9	117,3
Curatory	13 975	33,5	29 300	49,6	30 614	49,7	33 009	50,5	136,2
Curatory	10 898	26,1	17 321	29,3	17 378	28,2	18 293	28,0	67,9
Public curatory	3 078	7,4	11 979	20,3	13 236	21,5	14 717	22,5	378,2
Total public measures	6 351	15,2	17 990	30,4	19 807	32,2	21 830	33,4	243,8
Other management of protective measures	35 363	84,8	41 108	69,6	41 734	67,8	43 588	66,6	23,3
<i>Source : Ministère de la Justice.</i>									

Appendix II – Provisions of the French Civil Code applicable until 31 December 2008

Article 488

La majorité est fixée à dix-huit ans accomplis ; à cet âge, on est capable de tous les actes de la vie civile.

Est néanmoins protégé par la loi, soit à l'occasion d'un acte particulier, soit d'une manière continue, le majeur qu'une altération de ses facultés personnelles met dans l'impossibilité de pourvoir seul à ses intérêts.

Peut pareillement être protégé le majeur qui, par sa prodigalité, son intempérance ou son oisiveté, s'expose à tomber dans le besoin ou compromet l'exécution de ses obligations familiales.

Article 489

Pour faire un acte valable, il faut être sain d'esprit. Mais c'est à ceux qui agissent en nullité pour cette cause de prouver l'existence d'un trouble mental au moment de l'acte.

Du vivant de l'individu, l'action en nullité ne peut être exercée que par lui, ou par son tuteur ou curateur, s'il lui en a été ensuite nommé un. Elle s'éteint par le délai prévu à l'article 1304.

Article 489-1

Après sa mort, les actes faits par un individu, autres que la donation entre vifs ou le testament, ne pourront être attaqués pour la cause prévue à l'article précédent que dans les cas ci-dessous énumérés :

1° Si l'acte porte en lui-même la preuve d'un trouble mental ;

2° S'il a été fait dans un temps où l'individu était placé sous la sauvegarde de justice ;

3° Si une action avait été introduite avant le décès aux fins de faire ouvrir la tutelle ou la curatelle.

Article 489-2

Celui qui a causé un dommage à autrui alors qu'il était sous l'empire d'un trouble mental n'en est pas moins obligé à réparation.

Article 490

Lorsque les facultés mentales sont altérées par une maladie, une infirmité ou un affaiblissement dû à l'âge, il est pourvu aux intérêts de la personne par l'un des régimes de protection prévus aux chapitres suivants.

Les mêmes régimes de protection sont applicables à l'altération des facultés corporelles, si elle empêche l'expression de la volonté.

L'altération des facultés mentales ou corporelles doit être médicalement établie.

Article 490-1

Les modalités du traitement médical, notamment quant au choix entre l'hospitalisation et les soins à domicile, sont indépendantes du régime de protection appliqué aux intérêts civils.

Réciproquement, le régime applicable aux intérêts civils est indépendant du traitement médical.

Appendices France (F)

Néanmoins, les décisions par lesquelles le juge des tutelles organise la protection des intérêts civils sont précédées de l'avis du médecin traitant.

Article 490-2

Quel que soit le régime de protection applicable, le logement de la personne protégée et les meubles meublants dont il est garni doivent être conservés à sa disposition aussi longtemps qu'il est possible.

Le pouvoir d'administrer, en ce qui touche ces biens, ne permet que des conventions de jouissance précaire, lesquelles devront cesser, malgré toutes dispositions ou stipulations contraires, dès le retour de la personne protégée.

S'il devient nécessaire ou s'il est de l'intérêt de la personne protégée qu'il soit disposé des droits relatifs à l'habitation ou que le mobilier soit aliéné, l'acte devra être autorisé par le juge des tutelles, après avis du médecin traitant, sans préjudice des autres formalités que peut requérir la nature des biens. Les souvenirs et autres objets de caractère personnel seront toujours exceptés de l'aliénation et devront être gardés à la disposition de la personne protégée, le cas échéant, par les soins de l'établissement de traitement.

Article 490-3

Le procureur de la République du lieu de traitement et le juge des tutelles peuvent visiter ou faire visiter les majeurs protégés par la loi, quel que soit le régime de protection qui leur est applicable.

Article 491

Peut être placé sous la sauvegarde de justice le majeur qui, pour l'une des causes prévues à l'article 490, a besoin d'être protégé dans les actes de la vie civile.

Article 491-1

La sauvegarde de justice résulte d'une déclaration faite au procureur de la République dans les conditions prévues par le code de la santé publique.

Le juge des tutelles, saisi d'une procédure de tutelle ou curatelle, peut placer la personne qu'il y a lieu de protéger sous la sauvegarde de justice, pour la durée de l'instance, par une décision provisoire transmise au procureur de la République.

Article 491-2

Le majeur placé sous la sauvegarde de justice conserve l'exercice de ses droits.

Toutefois, les actes qu'il a passés et les engagements qu'il a contractés pourront être rescindés pour simple lésion ou réduits en cas d'excès lors même qu'ils ne pourraient être annulés en vertu de l'article 489.

Les tribunaux prendront, à ce sujet, en considération, la fortune de la personne protégée, la bonne ou mauvaise foi de ceux qui auront traité avec elle, l'utilité ou l'inutilité de l'opération.

L'action en rescision ou en réduction peut être exercée, du vivant de la personne, par tous ceux qui auraient qualité pour demander l'ouverture d'une tutelle, et après sa mort, par ses héritiers. Elle s'éteint par le délai prévu à l'article 1304.

Article 491-3

Lorsqu'une personne, soit avant, soit après avoir été placée sous la sauvegarde de justice, a constitué un mandataire à l'effet d'administrer ses biens, ce mandat reçoit exécution.

Toutefois, si la procuration mentionne expressément qu'elle a été donnée en considération de la période de sauvegarde, elle ne peut, pendant cette période, être révoquée par le mandant qu'avec l'autorisation du juge des tutelles.

Dans tous les cas, le juge, soit d'office, soit à la requête de l'une des personnes qui aurait qualité pour demander l'ouverture d'une tutelle, peut prononcer la révocation du mandat.

Il peut aussi, même d'office, ordonner que les comptes seront soumis au greffier en chef du tribunal d'instance pour approbation, sans préjudice de la faculté pour le juge d'exercer lui-même ce contrôle.

Article 491-4

En l'absence de mandat, on suit les règles de la gestion d'affaires.

Toutefois, ceux qui auraient qualité pour demander l'ouverture d'une tutelle ont l'obligation de faire les actes conservatoires que nécessite la gestion du patrimoine de la personne protégée quand ils ont eu connaissance tant de leur urgence que de la déclaration aux fins de sauvegarde. La même obligation incombe sous les mêmes conditions au directeur de l'établissement de traitement ou, éventuellement, à celui qui héberge à son domicile la personne sous sauvegarde.

L'obligation de faire les actes conservatoires emporte, à l'égard des tiers, le pouvoir correspondant.

Article 491-5

S'il y a lieu d'agir en dehors des cas définis à l'article précédent, tout intéressé peut en donner avis au juge des tutelles.

Le juge pourra soit désigner un mandataire spécial à l'effet de faire un acte déterminé ou une série d'actes de même nature, dans les limites de ce qu'un tuteur pourrait faire sans l'autorisation du conseil de famille, soit décider d'office d'ouvrir une tutelle ou une curatelle, soit renvoyer l'intéressé à en provoquer lui-même l'ouverture, s'il est de ceux qui ont qualité pour la demander.

Article 491-6

La sauvegarde de justice prend fin par une nouvelle déclaration attestant que la situation antérieure a cessé, par la péremption de la déclaration selon les délais du code de procédure civile ou par sa radiation sur décision du procureur de la République.

Elle cesse également par l'ouverture d'une tutelle ou d'une curatelle à partir du jour où prend effet le nouveau régime de protection.

Article 492

Une tutelle est ouverte quand un majeur, pour l'une des causes prévues à l'article 490, a besoin d'être représenté d'une manière continue dans les actes de la vie civile.

Article 493

L'ouverture de la tutelle est prononcée par le juge des tutelles à la requête de la personne qu'il y a lieu de protéger, de son conjoint, à moins que la communauté de vie n'ait cessé entre eux, de ses ascendants, de ses descendants, de ses frères et sœurs, du curateur ainsi que du ministère public ; elle peut être aussi ouverte d'office par le juge.

Les autres parents, les alliés, les amis peuvent seulement donner au juge avis de la cause qui justifierait l'ouverture de la tutelle. Il en est de même du médecin traitant et du directeur de l'établissement.

Les personnes visées aux deux alinéas précédents pourront, même si elles ne sont pas intervenues à l'instance, former un recours devant le tribunal de grande instance contre le jugement qui a ouvert la tutelle.

Article 493-1

Le juge ne peut prononcer l'ouverture d'une tutelle que si l'altération des facultés mentales ou corporelles du malade a été constatée par un médecin spécialiste choisi sur une liste établie par le procureur de la République.

L'ouverture de la tutelle sera prononcée dans les conditions prévues par le code de procédure civile.

Article 493-2

Les jugements portant ouverture, modification ou mainlevée de la tutelle ne sont opposables aux tiers que deux mois après que mention en aura été portée en marge de l'acte de naissance de la personne protégée, selon les modalités prévues par le code de procédure civile.

Toutefois, en l'absence même de cette mention, ils n'en seront pas moins opposables aux tiers qui en auraient eu personnellement connaissance.

Article 494

La tutelle peut être ouverte pour un mineur émancipé comme pour un majeur.

La demande peut même être introduite et jugée, pour un mineur non émancipé, dans la dernière année de sa minorité ; mais la tutelle ne prendra effet que du jour où il sera devenu majeur.

Article 495

Sont aussi applicables dans la tutelle des majeurs les règles prescrites par les sections 2, 3 et 4 du chapitre II, au titre dixième du présent livre, pour la tutelle des mineurs, à l'exception toutefois de celles qui concernent l'éducation de l'enfant et, en outre, sous les modifications qui suivent.

Article 496

L'époux est tuteur de son conjoint, à moins que la communauté de vie n'ait cessé entre eux ou que le juge n'estime qu'une autre cause interdit de lui confier la tutelle. Tous autres tuteurs sont datifs.

La tutelle d'un majeur peut être déferée à une personne morale.

Article 496-1

Nul, à l'exception de l'époux, des descendants et des personnes morales, ne sera tenu de conserver la tutelle d'un majeur au-delà de cinq ans. A l'expiration de ce délai, le tuteur pourra demander et devra obtenir son remplacement.

Article 496-2

Le médecin traitant ne peut être tuteur ni subrogé tuteur du malade. Mais il est toujours loisible au juge des tutelles de l'appeler à participer au conseil de famille à titre consultatif.

La tutelle ne peut être déferée à l'établissement de traitement, ni à aucune personne y occupant un emploi rémunéré à moins qu'elle ne soit de celles qui avaient qualité pour demander l'ouverture de la tutelle. Un préposé de l'établissement peut, toutefois, être désigné comme gérant de la tutelle dans le cas prévu à l'article 499.

Article 497

S'il y a un parent ou allié, apte à gérer les biens, le juge des tutelles peut décider qu'il les gèrera en qualité d'administrateur légal, sans subrogé tuteur ni conseil de famille, suivant les règles applicables, pour les biens des mineurs, à l'administration légale sous contrôle judiciaire.

Article 498

Il n'y a pas lieu d'ouvrir une tutelle qui devrait être dévolue au conjoint, si, par l'application du régime matrimonial, et notamment par les règles des articles 217 et 219, 1426 et 1429, il peut être suffisamment pourvu aux intérêts de la personne protégée.

Article 499

Si, eu égard à la consistance des biens à gérer, le juge des tutelles constate l'inutilité de la constitution complète d'une tutelle, il peut se borner à désigner comme gérant de la tutelle, sans subrogé tuteur ni conseil de famille, soit un préposé appartenant au personnel administratif de l'établissement de traitement, soit un administrateur spécial, choisis dans les conditions fixées par un décret en Conseil d'Etat.

Article 500

Le gérant de la tutelle perçoit les revenus de la personne protégée et les applique à l'entretien et au traitement de celle-ci, ainsi qu'à l'acquittement des obligations alimentaires dont elle pourrait être tenue. S'il y a un excédent, il le verse à un compte qu'il doit faire ouvrir chez un dépositaire agréé. Chaque année, il rend compte de sa gestion directement au greffier en chef du tribunal d'instance, sans préjudice de la faculté pour le juge de demander à tout moment au greffier en chef que le compte de gestion lui soit communiqué et que la reddition de celui-ci lui soit directement adressée.

Si d'autres actes deviennent nécessaires, il saisit le juge, qui pourra, soit l'autoriser à les faire, soit décider de constituer la tutelle complètement.

Article 501

En ouvrant la tutelle ou dans un jugement postérieur, le juge, sur l'avis du médecin traitant, peut énumérer certains actes que la personne en tutelle aura la capacité de faire elle-même, soit seule, soit avec l'assistance du tuteur ou de la personne qui en tient lieu.

Article 502

Tous les actes passés, postérieurement au jugement d'ouverture de la tutelle, par la personne protégée, seront nuls de droit, sous réserve des dispositions de l'article 493-2.

Article 503

Les actes antérieurs pourront être annulés si la cause qui a déterminé l'ouverture de la tutelle existait notoirement à l'époque où ils ont été faits.

Article 504

Le testament fait par le majeur après l'ouverture de la tutelle est nul de droit, à moins que le conseil de famille n'ait autorisé préalablement le majeur à tester avec l'assistance du tuteur. Toutefois, le majeur en tutelle peut seul révoquer le testament fait avant comme après l'ouverture de la tutelle.

Le tuteur ne peut représenter le majeur pour faire son testament, même avec l'autorisation du conseil de famille ou du juge.

Le testament fait antérieurement reste valable, à moins qu'il ne soit établi que, depuis l'ouverture de la tutelle, la cause qui avait déterminé le testateur à disposer a disparu.

Article 505

Avec l'autorisation du conseil de famille, des donations peuvent être faites au nom du majeur en tutelle en faveur :

- de ses descendants, en avancement de part successorale ;
- de ses frères ou sœurs ou de leurs descendants ;
- de son conjoint.

Article 506

Même dans le cas des articles 497 et 499, le mariage d'un majeur en tutelle n'est permis qu'avec le consentement d'un conseil de famille spécialement convoqué pour en délibérer. Le conseil ne peut statuer qu'après audition des futurs conjoints.

Il n'y a pas lieu à la réunion d'un conseil de famille si les père et mère donnent l'un et l'autre leur consentement au mariage.

Dans tous les cas, l'avis du médecin traitant doit être requis.

Article 506-1

Les majeurs placés sous tutelle ne peuvent conclure un pacte civil de solidarité.

Lorsque au cours d'un pacte civil de solidarité l'un des partenaires est placé sous tutelle, le tuteur autorisé par le conseil de famille ou, à défaut, le juge des tutelles peut mettre fin au pacte selon les modalités prévues au premier ou au deuxième alinéa de l'article 515-7.

Lorsque l'initiative de rompre le pacte est prise par l'autre partenaire, la signification mentionnée aux deuxième et troisième alinéas du même article est adressée au tuteur.

Article 507

La tutelle cesse avec les causes qui l'ont déterminée ; néanmoins, la mainlevée n'en sera prononcée qu'en observant les formalités prescrites pour parvenir à son ouverture, et la personne en tutelle ne pourra reprendre l'exercice de ses droits qu'après le jugement de mainlevée.

Les recours prévus par l'article 493, alinéa 3, ne peuvent être exercés que contre les jugements qui refusent de donner mainlevée de la tutelle.

Article 508

Lorsqu'un majeur, pour l'une des causes prévues à l'article 490, sans être hors d'état d'agir lui-même, a besoin d'être conseillé ou contrôlé dans les actes de la vie civile, il peut être placé sous un régime de curatelle.

Article 508-1

Peut pareillement être placé sous le régime de la curatelle le majeur visé à l'alinéa 3 de l'article 488.

Article 509

La curatelle est ouverte et prend fin de la même manière que la tutelle des majeurs.

Elle est soumise à la même publicité.

Article 509-1

Il n'y a dans la curatelle d'autre organe que le curateur.

L'époux est curateur de son conjoint à moins que la communauté de vie n'ait cessé entre eux ou que le juge n'estime qu'une autre cause interdit de lui confier la curatelle. Tous autres curateurs sont nommés par le juge des tutelles.

Article 509-2

Sont applicables à la charge de curateur les dispositions relatives aux charges tutélaires, sous les modifications qu'elles comportent dans la tutelle des majeurs.

Article 510

Le majeur en curatelle ne peut, sans l'assistance de son curateur, faire aucun acte qui, sous le régime de la tutelle des majeurs, requerrait une autorisation du conseil de famille. Il ne peut non plus, sans cette assistance, recevoir des capitaux ni en faire emploi.

Si le curateur refuse son assistance à un acte, la personne en curatelle peut demander au juge des tutelles une autorisation supplétive.

Article 510-1

Si le majeur en curatelle a fait seul un acte pour lequel l'assistance du curateur était requise, lui-même ou le curateur peuvent en demander l'annulation.

L'action en nullité s'éteint par le délai prévu à l'article 1304 ou même, avant l'expiration de ce délai, par l'approbation que le curateur a pu donner à l'acte.

Article 510-2

Toute signification faite au majeur en curatelle doit l'être aussi à son curateur, à peine de nullité.

Article 510-3

Dans les cas où l'assistance du curateur n'était pas requise par la loi, les actes que le majeur en curatelle a pu faire seul restent néanmoins sujets aux actions en rescision ou réduction réglées à l'article 491-2, comme s'ils avaient été faits par une personne sous la sauvegarde de justice.

Article 511

En ouvrant la curatelle ou dans un jugement postérieur, le juge, sur l'avis du médecin traitant, peut énumérer certains actes que la personne en curatelle aura la capacité de faire seule par dérogation à l'article 510 ou, à l'inverse, ajouter d'autres actes à ceux pour lesquels cet article exige l'assistance du curateur.

Article 512

En nommant le curateur, le juge peut ordonner qu'il percevra seul les revenus de la personne en curatelle, assurera lui-même, à l'égard des tiers, le règlement des dépenses et versera l'excédent, s'il y a lieu, à un compte ouvert chez un dépositaire agréé.

Le curateur nommé avec cette mission rend compte de sa gestion chaque année au greffier en chef du tribunal d'instance, sans préjudice de la faculté pour le juge de demander à tout moment au greffier en chef que le compte de gestion lui soit communiqué et que la reddition de celui-ci lui soit directement adressée.

Article 513

La personne en curatelle peut librement tester, sauf application de l'article 901 s'il y a lieu.

Elle ne peut faire de donation qu'avec l'assistance de son curateur.

Article 514

Pour le mariage du majeur en curatelle, le consentement du curateur est requis ; à défaut, celui du juge des tutelles.

Appendix III – Dispositions of the French Civil Code applicable from 1st of January 2009

Art. 414

La majorité est fixée à dix-huit ans accomplis ; à cet âge, chacun est capable d'exercer les droits dont il a la jouissance.

Art. 415

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

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

Elle a pour finalité l'intérêt de la personne protégée. Elle favorise, dans la mesure du possible, l'autonomie de celle-ci.

Elle est un devoir des familles et de la collectivité publique.

Art. 416

Le juge des tutelles et le procureur de la République exercent une surveillance générale des mesures de protection dans leur ressort.

Ils peuvent visiter ou faire visiter les personnes protégées et celles qui font l'objet d'une demande de protection, quelle que soit la mesure prononcée ou sollicitée.

Les personnes chargées de la protection sont tenues de déférer à leur convocation et de leur communiquer toute information qu'ils requièrent.

Art. 417

Le juge des tutelles peut prononcer des injonctions contre les personnes chargées de la protection et condamner à l'amende civile prévue par le code de procédure civile celles qui n'y ont pas déféré.

Il peut les dessaisir de leur mission en cas de manquement caractérisé dans l'exercice de celle-ci, après les avoir entendues ou appelées.

Il peut, dans les mêmes conditions, demander au procureur de la République de solliciter la radiation d'un mandataire judiciaire à la protection des majeurs de la liste prévue à l'article L. 471-2 du code de l'action sociale et des familles.

Art. 418

Sans préjudice de l'application des règles de la gestion d'affaires, le décès de la personne protégée met fin à la mission de la personne chargée de la protection.

Art. 419

Les personnes autres que le mandataire judiciaire à la protection des majeurs exercent à titre gratuit les mesures judiciaires de protection. Toutefois, le juge des tutelles ou le conseil de famille s'il a été constitué peut autoriser, selon l'importance des biens gérés ou la difficulté d'exercer la mesure, le versement d'une indemnité

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à la personne chargée de la protection. Il en fixe le montant. Cette indemnité est à la charge de la personne protégée.

Si la mesure judiciaire de protection est exercée par un mandataire judiciaire à la protection des majeurs, son financement est à la charge totale ou partielle de la personne protégée en fonction de ses ressources et selon les modalités prévues par le code de l'action sociale et des familles.

Lorsque le financement de la mesure ne peut être intégralement assuré par la personne protégée, il est pris en charge par la collectivité publique, selon des modalités de calcul communes à tous les mandataires judiciaires à la protection des majeurs et tenant compte des conditions de mise en œuvre de la mesure, quelles que soient les sources de financement. Ces modalités sont fixées par décret.

A titre exceptionnel, le juge ou le conseil de famille s'il a été constitué peut, après avoir recueilli l'avis du procureur de la République, allouer au mandataire judiciaire à la protection des majeurs, pour l'accomplissement d'un acte ou d'une série d'actes requis par la mesure de protection et impliquant des diligences particulièrement longues ou complexes, une indemnité en complément des sommes perçues au titre des deux alinéas précédents lorsqu'elles s'avèrent manifestement insuffisantes. Cette indemnité est à la charge de la personne protégée.

Le mandat de protection future s'exerce à titre gratuit sauf stipulations contraires.

Art. 420

Sous réserve des aides ou subventions accordées par les collectivités publiques aux personnes morales pour leur fonctionnement général, les mandataires judiciaires à la protection des majeurs ne peuvent, à quelque titre et sous quelque forme que ce soit, percevoir aucune autre somme ou bénéficier d'aucun avantage financier en relation directe ou indirecte avec les missions dont ils ont la charge.

Ils ne peuvent délivrer un mandat de recherche des héritiers de la personne protégée qu'après autorisation du juge des tutelles.

Art. 421

Tous les organes de la mesure de protection judiciaire sont responsables du dommage résultant d'une faute quelconque qu'ils commettent dans l'exercice de leur fonction. Toutefois, sauf cas de curatelle renforcée, le curateur et le subrogé curateur n'engagent leur responsabilité, du fait des actes accomplis avec leur assistance, qu'en cas de dol ou de faute lourde.

Art. 422

Lorsque la faute à l'origine du dommage a été commise dans l'organisation et le fonctionnement de la mesure de protection par le juge des tutelles, le greffier en chef du tribunal d'instance ou le greffier, l'action en responsabilité diligentée par la personne protégée ou ayant été protégée ou par ses héritiers est dirigée contre l'Etat qui dispose d'une action récursoire.

Lorsque la faute à l'origine du dommage a été commise par le mandataire judiciaire à la protection des majeurs, l'action en responsabilité peut être dirigée contre celui-ci ou contre l'Etat qui dispose d'une action récursoire.

Art. 423

L'action en responsabilité se prescrit par cinq ans à compter de la fin de la mesure de protection alors même que la gestion aurait continué au-delà. Toutefois, lorsque la curatelle a cessé par l'ouverture d'une mesure de tutelle, le délai ne court qu'à compter de l'expiration de cette dernière.

Art. 424

Le mandataire de protection future engage sa responsabilité pour l'exercice de son mandat dans les conditions prévues à l'article 1992.

Art. 425

Toute personne dans l'impossibilité de pourvoir seule à ses intérêts en raison d'une altération, médicalement constatée, soit de ses facultés mentales, soit de ses facultés corporelles de nature à empêcher l'expression de sa volonté peut bénéficier d'une mesure de protection juridique prévue au présent chapitre.

S'il n'en est disposé autrement, la mesure est destinée à la protection tant de la personne que des intérêts patrimoniaux de celle-ci. Elle peut toutefois être limitée expressément à l'une de ces deux missions.

Art. 426

Le logement de la personne protégée et les meubles dont il est garni, qu'il s'agisse d'une résidence principale ou secondaire, sont conservés à la disposition de celle-ci aussi longtemps qu'il est possible.

Le pouvoir d'administrer les biens mentionnés au premier alinéa ne permet que des conventions de jouissance précaire qui cessent, malgré toutes dispositions ou stipulations contraires, dès le retour de la personne protégée dans son logement.

S'il devient nécessaire ou s'il est de l'intérêt de la personne protégée qu'il soit disposé des droits relatifs à son logement ou à son mobilier par l'aliénation, la résiliation ou la conclusion d'un bail, l'acte est autorisé par le juge ou par le conseil de famille s'il a été constitué, sans préjudice des formalités que peut requérir la nature des biens. L'avis préalable d'un médecin inscrit sur la liste prévue à l'article 431 est requis si l'acte a pour finalité l'accueil de l'intéressé dans un établissement. Dans tous les cas, les souvenirs, les objets à caractère personnel, ceux indispensables aux personnes handicapées ou destinés aux soins des personnes malades sont gardés à la disposition de l'intéressé, le cas échéant par les soins de l'établissement dans lequel celui-ci est hébergé.

Art. 427

La personne chargée de la mesure de protection ne peut procéder ni à la modification des comptes ou livrets ouverts au nom de la personne protégée, ni à l'ouverture d'un autre compte ou livret auprès d'un établissement habilité à recevoir des fonds du public.

Le juge des tutelles ou le conseil de famille s'il a été constitué peut toutefois l'y autoriser si l'intérêt de la personne protégée le commande.

Un compte est ouvert au nom de la personne protégée auprès de la Caisse des dépôts et consignations par la personne chargée de la protection si le juge ou le conseil de famille s'il a été constitué l'estime nécessaire.

Lorsque la personne protégée n'est titulaire d'aucun compte ou livret, la personne chargée de la mesure de protection lui en ouvre un.

Les opérations bancaires d'encaissement, de paiement et de gestion patrimoniale effectuées au nom et pour le compte de la personne protégée sont réalisées exclusivement au moyen des comptes ouverts au nom de celle-ci, sous réserve des dispositions applicables aux mesures de protection confiées aux personnes ou services préposés des établissements de santé et des établissements sociaux ou médicosociaux soumis aux règles de la comptabilité publique.

Les fruits, produits et plus-values générés par les fonds et les valeurs appartenant à la personne protégée lui reviennent exclusivement.

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Si la personne protégée a fait l'objet d'une interdiction d'émettre des chèques, la personne chargée de la mesure de protection peut néanmoins, avec l'autorisation du juge ou du conseil de famille s'il a été constitué, faire fonctionner sous sa signature les comptes dont la personne protégée est titulaire et disposer de tous les moyens de paiement habituels.

Art. 428

La mesure de protection ne peut être ordonnée par le juge qu'en cas de nécessité et lorsqu'il ne peut être suffisamment pourvu aux intérêts de la personne par l'application des règles du droit commun de la représentation, de celles relatives aux droits et devoirs respectifs des époux et des règles des régimes matrimoniaux, en particulier celles prévues aux articles 217, 219, 1426 et 1429, par une autre mesure de protection judiciaire moins contraignante ou par le mandat de protection future conclu par l'intéressé.

La mesure est proportionnée et individualisée en fonction du degré d'altération des facultés personnelles de l'intéressé.

Art. 429

La mesure de protection judiciaire peut être ouverte pour un mineur émancipé comme pour un majeur.

Pour un mineur non émancipé, la demande peut être introduite et jugée dans la dernière année de sa minorité. La mesure de protection judiciaire ne prend toutefois effet que du jour de sa majorité.

Art. 430

La demande d'ouverture de la mesure peut être présentée au juge par la personne qu'il y a lieu de protéger ou, selon le cas, par son conjoint, le partenaire avec qui elle a conclu un pacte civil de solidarité ou son concubin, à moins que la vie commune ait cessé entre eux, ou par un parent ou un allié, une personne entretenant avec le majeur des liens étroits et stables, ou la personne qui exerce à son égard une mesure de protection juridique. Elle peut être également présentée par le procureur de la République soit d'office, soit à la demande d'un tiers.

Art. 431

La demande est accompagnée, à peine d'irrecevabilité, d'un certificat circonstancié rédigé par un médecin choisi sur une liste établie par le procureur de la République.

Le coût de ce certificat est fixé par décret en Conseil d'Etat.

Art. 431-1

Pour l'application du dernier alinéa de l'article 426 et de l'article 431, le médecin inscrit sur la liste mentionnée à l'article 431 peut solliciter l'avis du médecin traitant de la personne qu'il y a lieu de protéger.

Art. 432

Le juge statue, la personne entendue ou appelée. L'intéressé peut être accompagné par un avocat ou, sous réserve de l'accord du juge, par toute autre personne de son choix.

Le juge peut toutefois, par décision spécialement motivée et sur avis du médecin mentionné à l'article 431, décider qu'il n'y a pas lieu de procéder à l'audition de l'intéressé si celle-ci est de nature à porter atteinte à sa santé ou s'il est hors d'état d'exprimer sa volonté.

Art. 433

Le juge peut placer sous sauvegarde de justice la personne qui, pour l'une des causes prévues à l'article 425, a besoin d'une protection juridique temporaire ou d'être représentée pour l'accomplissement de certains actes déterminés.

Cette mesure peut aussi être prononcée par le juge, saisi d'une procédure de curatelle ou de tutelle, pour la durée de l'instance.

Par dérogation à l'article 432, le juge peut, en cas d'urgence, statuer sans avoir procédé à l'audition de la personne. En ce cas, il entend celle-ci dans les meilleurs délais, sauf si, sur avis médical, son audition est de nature à porter préjudice à sa santé ou si elle est hors d'état d'exprimer sa volonté.

Art. 434

La sauvegarde de justice peut également résulter d'une déclaration faite au procureur de la République dans les conditions prévues par l'article L. 3211-6 du code de la santé publique.

Art. 435

La personne placée sous sauvegarde de justice conserve l'exercice de ses droits. Toutefois, elle ne peut, à peine de nullité, faire un acte pour lequel un mandataire spécial a été désigné en application de l'article 437.

Les actes qu'elle a passés et les engagements qu'elle a contractés pendant la durée de la mesure peuvent être rescindés pour simple lésion ou réduits en cas d'excès alors même qu'ils pourraient être annulés en vertu de l'article 414-1. Les tribunaux prennent notamment en considération l'utilité ou l'inutilité de l'opération, l'importance ou la consistance du patrimoine de la personne protégée et la bonne ou mauvaise foi de ceux avec qui elle a contracté.

L'action en nullité, en rescision ou en réduction n'appartient qu'à la personne protégée et, après sa mort, à ses héritiers. Elle s'éteint par le délai de cinq ans prévu à l'article 1304.

Art. 436

Le mandat par lequel la personne protégée a chargé une autre personne de l'administration de ses biens continue à produire ses effets pendant la sauvegarde de justice à moins qu'il ne soit révoqué ou suspendu par le juge des tutelles, le mandataire étant entendu ou appelé.

En l'absence de mandat, les règles de la gestion d'affaires sont applicables.

Ceux qui ont qualité pour demander l'ouverture d'une curatelle ou d'une tutelle sont tenus d'accomplir les actes conservatoires indispensables à la préservation du patrimoine de la personne protégée dès lors qu'ils ont connaissance tant de leur urgence que de l'ouverture de la mesure de sauvegarde. Les mêmes dispositions sont applicables à la personne ou à l'établissement qui héberge la personne placée sous sauvegarde.

Art. 437

S'il y a lieu d'agir en dehors des cas définis à l'article 436, tout intéressé peut en donner avis au juge.

Le juge peut désigner un mandataire spécial, dans les conditions et selon les modalités prévues aux articles 445 et 448 à 451, à l'effet d'accomplir un ou plusieurs actes déterminés, même de disposition, rendus nécessaires par la gestion du patrimoine de la personne protégée. Le mandataire peut, notamment, recevoir mission d'exercer les actions prévues à l'article 435.

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Le mandataire spécial est tenu de rendre compte de l'exécution de son mandat à la personne protégée et au juge dans les conditions prévues aux articles 510 à 515.

Art. 438

Le mandataire spécial peut également se voir confier une mission de protection de la personne dans le respect des articles 4571 à 463.

Art. 439

Sous peine de caducité, la mesure de sauvegarde de justice ne peut excéder un an, renouvelable une fois dans les conditions fixées au quatrième alinéa de l'article 442.

Lorsque la sauvegarde de justice a été prononcée en application de l'article 433, le juge peut, à tout moment, en ordonner la mainlevée si le besoin de protection temporaire cesse.

Lorsque la sauvegarde de justice a été ouverte en application de l'article 434, elle peut prendre fin par déclaration faite au procureur de la République si le besoin de protection temporaire cesse ou par radiation de la déclaration médicale sur décision du procureur de la République.

Dans tous les cas, à défaut de mainlevée, de déclaration de cessation ou de radiation de la déclaration médicale, la sauvegarde de justice prend fin à l'expiration du délai ou après l'accomplissement des actes pour lesquels elle a été ordonnée. Elle prend également fin par l'ouverture d'une mesure de curatelle ou de tutelle à partir du jour où la nouvelle mesure de protection juridique prend effet.

Art. 440

La personne qui, sans être hors d'état d'agir elle-même, a besoin, pour l'une des causes prévues à l'article 425, d'être assistée ou contrôlée d'une manière continue dans les actes importants de la vie civile peut être placée en curatelle.

La curatelle n'est prononcée que s'il est établi que la sauvegarde de justice ne peut assurer une protection suffisante.

La personne qui, pour l'une des causes prévues à l'article 425, doit être représentée d'une manière continue dans les actes de la vie civile, peut être placée en tutelle.

La tutelle n'est prononcée que s'il est établi que ni la sauvegarde de justice, ni la curatelle ne peuvent assurer une protection suffisante.

Art. 441

Le juge fixe la durée de la mesure sans que celle-ci puisse excéder cinq ans.

Art. 442

Le juge peut renouveler la mesure pour une même durée.

Toutefois, lorsque l'altération des facultés personnelles de l'intéressé décrite à l'article 425 n'apparaît manifestement pas susceptible de connaître une amélioration selon les données acquises de la science, le juge peut, par décision spécialement motivée et sur avis conforme du médecin mentionné à l'article 431, renouveler la mesure pour une durée plus longue qu'il détermine.

Appendices France (F)

Le juge peut, à tout moment, mettre fin à la mesure, la modifier ou lui substituer une autre mesure prévue au présent titre, après avoir recueilli l'avis de la personne chargée de la mesure de protection.

Il statue d'office ou à la requête d'une des personnes mentionnées à l'article 430, au vu d'un certificat médical et dans les conditions prévues à l'article 432. Il ne peut toutefois renforcer le régime de protection de l'intéressé que s'il est saisi d'une requête en ce sens satisfaisant aux articles 430 et 431.

Art. 443

La mesure prend fin, en l'absence de renouvellement, à l'expiration du délai fixé, en cas de jugement de mainlevée passé en force de chose jugée ou en cas de décès de l'intéressé.

Sans préjudice des articles 3 et 15, le juge peut également y mettre fin lorsque la personne protégée réside hors du territoire national, si cet éloignement empêche le suivi et le contrôle de la mesure.

Art. 444

Les jugements portant ouverture, modification ou mainlevée de la curatelle ou de la tutelle ne sont opposables aux tiers que deux mois après que la mention en a été portée en marge de l'acte de naissance de la personne protégée selon les modalités prévues par le code de procédure civile.

Toutefois, même en l'absence de cette mention, ils sont opposables aux tiers qui en ont personnellement connaissance.

Art. 445

Les charges curatélaires et tutélaires sont soumises aux conditions prévues pour les charges tutélaires des mineurs par les articles 395 à 397. Toutefois, les pouvoirs dévolus par l'article 397 au conseil de famille sont exercés par le juge en l'absence de constitution de cet organe.

Les membres des professions médicales et de la pharmacie, ainsi que les auxiliaires médicaux ne peuvent exercer une charge curatérale ou tutélaire à l'égard de leurs patients.

Art. 446

Un curateur ou un tuteur est désigné pour la personne protégée dans les conditions prévues au présent paragraphe et sous réserve des pouvoirs conférés au conseil de famille s'il a été constitué.

Art. 447

Le curateur ou le tuteur est désigné par le juge.

Celui-ci peut, en considération de la situation de la personne protégée, des aptitudes des intéressés et de la consistance du patrimoine à administrer, désigner plusieurs curateurs ou plusieurs tuteurs pour exercer en commun la mesure de protection. Chaque curateur ou tuteur est réputé, à l'égard des tiers, avoir reçu des autres le pouvoir de faire seul les actes pour lesquels un tuteur n'aurait besoin d'aucune autorisation.

Le juge peut diviser la mesure de protection entre un curateur ou un tuteur chargé de la protection de la personne et un curateur ou un tuteur chargé de la gestion patrimoniale. Il peut confier la gestion de certains biens à un curateur ou à un tuteur adjoint.

A moins que le juge en ait décidé autrement, les personnes désignées en application de l'alinéa précédent sont indépendantes et ne sont pas responsables l'une envers l'autre. Elles s'informent toutefois des décisions qu'elles prennent.

Art. 448

La désignation par une personne d'une ou plusieurs personnes chargées d'exercer les fonctions de curateur ou de tuteur pour le cas où elle serait placée en curatelle ou en tutelle s'impose au juge, sauf si la personne désignée refuse la mission ou est dans l'impossibilité de l'exercer ou si l'intérêt de la personne protégée commande de l'écarter. En cas de difficulté, le juge statue.

Il en est de même lorsque les parents ou le dernier vivant des père et mère, ne faisant pas l'objet d'une mesure de curatelle ou de tutelle, qui exercent l'autorité parentale sur leur enfant mineur ou assument la charge matérielle et affective de leur enfant majeur désignent une ou plusieurs personnes chargées d'exercer les fonctions de curateur ou de tuteur à compter du jour où eux-mêmes décéderont ou ne pourront plus continuer à prendre soin de l'intéressé.

Art. 449

A défaut de désignation faite en application de l'article 448, le juge nomme, comme curateur ou tuteur, le conjoint de la personne protégée, le partenaire avec qui elle a conclu un pacte civil de solidarité ou son concubin, à moins que la vie commune ait cessé entre eux ou qu'une autre cause empêche de lui confier la mesure.

A défaut de nomination faite en application de l'alinéa précédent et sous la dernière réserve qui y est mentionnée, le juge désigne un parent, un allié ou une personne résidant avec le majeur protégé et entretenant avec lui des liens étroits et stables.

Le juge prend en considération les sentiments exprimés par celui-ci, ses relations habituelles, l'intérêt porté à son égard et les recommandations éventuelles de ses parents et alliés ainsi que de son entourage.

Art. 450

Lorsqu'aucun membre de la famille ou aucun proche ne peut assumer la curatelle ou la tutelle, le juge désigne un mandataire judiciaire à la protection des majeurs inscrit sur la liste prévue à l'article L. 471-2 du code de l'action sociale et des familles. Ce mandataire ne peut refuser d'accomplir les actes urgents que commande l'intérêt de la personne protégée, notamment les actes conservatoires indispensables à la préservation de son patrimoine.

Art. 451

Si l'intérêt de la personne hébergée ou soignée dans un établissement de santé ou dans un établissement social ou médicosocial le justifie, le juge peut désigner, en qualité de curateur ou de tuteur, une personne ou un service préposé de l'établissement inscrit sur la liste des mandataires judiciaires à la protection des majeurs au titre du 1° ou du 3° de l'article L. 471-2 du code de l'action sociale et des familles, qui exerce ses fonctions dans les conditions fixées par décret en Conseil d'Etat.

La mission confiée au mandataire s'étend à la protection de la personne, sauf décision contraire du juge.

Art. 452

La curatelle et la tutelle sont des charges personnelles.

Le curateur et le tuteur peuvent toutefois s'adjoindre, sous leur propre responsabilité, le concours de tiers majeurs ne faisant pas l'objet d'une mesure de protection juridique pour l'accomplissement de certains actes dont la liste est fixée par décret en Conseil d'Etat.

Art. 453

Nul n'est tenu de conserver la curatelle ou la tutelle d'une personne au-delà de cinq ans, à l'exception du conjoint, du partenaire du pacte civil de solidarité et des enfants de l'intéressé ainsi que des mandataires judiciaires à la protection des majeurs.

Art. 454

Le juge peut, s'il l'estime nécessaire et sous réserve des pouvoirs du conseil de famille s'il a été constitué, désigner un subrogé curateur ou un subrogé tuteur.

Si le curateur ou le tuteur est parent ou allié de la personne protégée dans une branche, le subrogé curateur ou le subrogé tuteur est choisi, dans la mesure du possible, dans l'autre branche.

Lorsqu'aucun membre de la famille ou aucun proche ne peut assumer les fonctions de subrogé curateur ou de subrogé tuteur, un mandataire judiciaire à la protection des majeurs inscrit sur la liste prévue à l'article L. 471-2 du code de l'action sociale et des familles peut être désigné.

A peine d'engager sa responsabilité à l'égard de la personne protégée, le subrogé curateur ou le subrogé tuteur surveille les actes passés par le curateur ou par le tuteur en cette qualité et informe sans délai le juge s'il constate des fautes dans l'exercice de sa mission.

Le subrogé curateur ou le subrogé tuteur assiste ou représente, selon le cas, la personne protégée lorsque les intérêts de celle-ci sont en opposition avec ceux du curateur ou du tuteur ou lorsque l'un ou l'autre ne peut lui apporter son assistance ou agir pour son compte en raison des limitations de sa mission.

Il est informé et consulté par le curateur ou le tuteur avant tout acte grave accompli par celui-ci.

La charge du subrogé curateur ou du subrogé tuteur cesse en même temps que celle du curateur ou du tuteur. Le subrogé curateur ou le subrogé tuteur est toutefois tenu de provoquer le remplacement du curateur ou du tuteur en cas de cessation des fonctions de celui-ci sous peine d'engager sa responsabilité à l'égard de la personne protégée.

Art. 455

En l'absence de subrogé curateur ou de subrogé tuteur, le curateur ou le tuteur dont les intérêts sont, à l'occasion d'un acte ou d'une série d'actes, en opposition avec ceux de la personne protégée ou qui ne peut lui apporter son assistance ou agir pour son compte en raison des limitations de sa mission fait nommer par le juge ou par le conseil de famille s'il a été constitué un curateur ou un tuteur ad hoc.

Cette nomination peut également être faite à la demande du procureur de la République, de tout intéressé ou d'office.

Art. 456

Le juge peut organiser la tutelle avec un conseil de famille si les nécessités de la protection de la personne ou la consistance de son patrimoine le justifient et si la composition de sa famille et de son entourage le permet.

Le juge désigne les membres du conseil de famille en considération des sentiments exprimés par la personne protégée, de ses relations habituelles, de l'intérêt porté à son égard et des recommandations éventuelles de ses parents et alliés ainsi que de son entourage.

Le conseil de famille désigne le tuteur, le subrogé tuteur et, le cas échéant, le tuteur ad hoc conformément aux articles 446 à 455.

Appendices France (F)

Il est fait application des règles prescrites pour le conseil de famille des mineurs, à l'exclusion de celles prévues à l'article 398, au quatrième alinéa de l'article 399 et au premier alinéa de l'article 401. Pour l'application du troisième alinéa de l'article 402, le délai court, lorsque l'action est exercée par le majeur protégé, à compter du jour où la mesure de protection prend fin.

Art. 457

Le juge peut autoriser le conseil de famille à se réunir et délibérer hors de sa présence lorsque ce dernier a désigné un mandataire judiciaire à la protection des majeurs comme tuteur ou subrogé tuteur. Le conseil de famille désigne alors un président et un secrétaire parmi ses membres, à l'exclusion du tuteur et du subrogé tuteur.

Le président du conseil de famille transmet préalablement au juge l'ordre du jour de chaque réunion.

Les décisions prises par le conseil de famille ne prennent effet qu'à défaut d'opposition formée par le juge, dans les conditions fixées par le code de procédure civile.

Le président exerce les missions dévolues au juge pour la convocation, la réunion et la délibération du conseil de famille. Le juge peut toutefois, à tout moment, convoquer une réunion du conseil de famille sous sa présidence.

Art. 457-1

La personne protégée reçoit de la personne chargée de sa protection, selon des modalités adaptées à son état et sans préjudice des informations que les tiers sont tenus de lui dispenser en vertu de la loi, toutes informations sur sa situation personnelle, les actes concernés, leur utilité, leur degré d'urgence, leurs effets et les conséquences d'un refus de sa part.

Art. 458

Sous réserve des dispositions particulières prévues par la loi, l'accomplissement des actes dont la nature implique un consentement strictement personnel ne peut jamais donner lieu à assistance ou représentation de la personne protégée.

Sont réputés strictement personnels la déclaration de naissance d'un enfant, sa reconnaissance, les actes de l'autorité parentale relatifs à la personne d'un enfant, la déclaration du choix ou du changement du nom d'un enfant et le consentement donné à sa propre adoption ou à celle de son enfant.

Art. 459

Hors les cas prévus à l'article 458, la personne protégée prend seule les décisions relatives à sa personne dans la mesure où son état le permet.

Lorsque l'état de la personne protégée ne lui permet pas de prendre seule une décision personnelle éclairée, le juge ou le conseil de famille s'il a été constitué peut prévoir qu'elle bénéficiera, pour l'ensemble des actes relatifs à sa personne ou ceux d'entre eux qu'il énumère, de l'assistance de la personne chargée de sa protection. Au cas où cette assistance ne suffirait pas, il peut, le cas échéant après l'ouverture d'une mesure de tutelle, autoriser le tuteur à représenter l'intéressé.

La personne chargée de la protection du majeur peut prendre à l'égard de celui-ci les mesures de protection strictement nécessaires pour mettre fin au danger que, du fait de son comportement, l'intéressé ferait courir à lui-même. Elle en informe sans délai le juge ou le conseil de famille s'il a été constitué.

Appendices France (F)

Toutefois, sauf urgence, la personne chargée de la protection du majeur ne peut, sans l'autorisation du juge ou du conseil de famille s'il a été constitué, prendre une décision ayant pour effet de porter gravement atteinte à l'intégrité corporelle de la personne protégée ou à l'intimité de sa vie privée.

Art. 459-1

L'application de la présente sous-section ne peut avoir pour effet de déroger aux dispositions particulières prévues par le code de la santé publique et le code de l'action sociale et des familles prévoyant l'intervention d'un représentant légal.

Toutefois, lorsque la mesure de protection a été confiée à une personne ou un service préposé d'un établissement de santé ou d'un établissement social ou médicosocial dans les conditions prévues à l'article 451, l'accomplissement des diligences et actes graves prévus par le code de la santé publique qui touchent à la personne et dont la liste est fixée par décret en Conseil d'Etat est subordonné à une autorisation spéciale du juge. Celui-ci peut décider, notamment s'il estime qu'il existe un conflit d'intérêts, d'en confier la charge au subrogé curateur ou au subrogé tuteur, s'il a été nommé, et, à défaut, à un curateur ou à un tuteur ad hoc.

Art. 459-2

La personne protégée choisit le lieu de sa résidence.

Elle entretient librement des relations personnelles avec tout tiers, parent ou non. Elle a le droit d'être visitée et, le cas échéant, hébergée par ceux-ci.

En cas de difficulté, le juge ou le conseil de famille s'il a été constitué statue.

Art. 460

Le mariage d'une personne en curatelle n'est permis qu'avec l'autorisation du curateur ou, à défaut, celle du juge.

Le mariage d'une personne en tutelle n'est permis qu'avec l'autorisation du juge ou du conseil de famille s'il a été constitué et après audition des futurs conjoints et recueil, le cas échéant, de l'avis des parents et de l'entourage.

Art. 461

La personne en curatelle ne peut, sans l'assistance du curateur, signer la convention par laquelle elle conclut un pacte civil de solidarité. Aucune assistance n'est requise lors de la déclaration conjointe au greffe du tribunal d'instance prévue au premier alinéa de l'article 515-3.

Les dispositions de l'alinéa précédent sont applicables en cas de modification de la convention.

La personne en curatelle peut rompre le pacte civil de solidarité par déclaration conjointe ou par décision unilatérale. L'assistance de son curateur n'est requise que pour procéder à la signification prévue au cinquième alinéa de l'article 515-7.

La personne en curatelle est assistée de son curateur dans les opérations prévues aux dixième et onzième alinéas de l'article 515-7.

Pour l'application du présent article, le curateur est réputé en opposition d'intérêts avec la personne protégée lorsque la curatelle est confiée à son partenaire.

Art. 462

La conclusion d'un pacte civil de solidarité par une personne en tutelle est soumise à l'autorisation du juge ou du conseil de famille s'il a été constitué, après audition des futurs partenaires et recueil, le cas échéant, de l'avis des parents et de l'entourage.

L'intéressé est assisté de son tuteur lors de la signature de la convention. Aucune assistance ni représentation ne sont requises lors de la déclaration conjointe au greffe du tribunal d'instance prévue au premier alinéa de l'article 515-3.

Les dispositions des alinéas précédents sont applicables en cas de modification de la convention.

La personne en tutelle peut rompre le pacte civil de solidarité par déclaration conjointe ou par décision unilatérale. La formalité de signification prévue au cinquième alinéa de l'article 515-7 est opérée à la diligence du tuteur. Lorsque l'initiative de la rupture émane de l'autre partenaire, cette signification est faite à la personne du tuteur.

La rupture unilatérale du pacte civil de solidarité peut également intervenir sur l'initiative du tuteur, autorisé par le juge ou le conseil de famille s'il a été constitué, après audition de l'intéressé et recueil, le cas échéant, de l'avis des parents et de l'entourage.

Aucune assistance ni représentation ne sont requises pour l'accomplissement des formalités relatives à la rupture par déclaration conjointe.

La personne en tutelle est représentée par son tuteur dans les opérations prévues aux dixième et onzième alinéas de l'article 515-7.

Pour l'application du présent article, le tuteur est réputé en opposition d'intérêts avec la personne protégée lorsque la tutelle est confiée à son partenaire.

Art. 463

A l'ouverture de la mesure ou, à défaut, ultérieurement, le juge ou le conseil de famille s'il a été constitué décide des conditions dans lesquelles le curateur ou le tuteur chargé d'une mission de protection de la personne rend compte des diligences qu'il accomplit à ce titre.

Art. 464

Les obligations résultant des actes accomplis par la personne protégée moins de deux ans avant la publicité du jugement d'ouverture de la mesure de protection peuvent être réduites sur la seule preuve que son inaptitude à défendre ses intérêts, par suite de l'altération de ses facultés personnelles, était notoire ou connue du cocontractant à l'époque où les actes ont été passés.

Ces actes peuvent, dans les mêmes conditions, être annulés s'il est justifié d'un préjudice subi par la personne protégée.

Par dérogation à l'article 225-2, l'action doit être introduite dans les cinq ans de la date du jugement d'ouverture de la mesure.

Art. 465

A compter de la publicité du jugement d'ouverture, l'irrégularité des actes accomplis par la personne protégée ou par la personne chargée de la protection est sanctionnée dans les conditions suivantes :

Appendices France (F)

1° Si la personne protégée a accompli seule un acte qu'elle pouvait faire sans l'assistance ou la représentation de la personne chargée de sa protection, l'acte reste sujet aux actions en rescision ou en réduction prévues à l'article 435 comme s'il avait été accompli par une personne placée sous sauvegarde de justice, à moins qu'il ait été expressément autorisé par le juge ou par le conseil de famille s'il a été constitué ;

2° Si la personne protégée a accompli seule un acte pour lequel elle aurait dû être assistée, l'acte ne peut être annulé que s'il est établi que la personne protégée a subi un préjudice ;

3° Si la personne protégée a accompli seule un acte pour lequel elle aurait dû être représentée, l'acte est nul de plein droit sans qu'il soit nécessaire de justifier d'un préjudice ;

4° Si le tuteur ou le curateur a accompli seul un acte qui aurait dû être fait par la personne protégée soit seule, soit avec son assistance ou qui ne pouvait être accompli qu'avec l'autorisation du juge ou du conseil de famille s'il a été constitué, l'acte est nul de plein droit sans qu'il soit nécessaire de justifier d'un préjudice.

Le curateur ou le tuteur peut, avec l'autorisation du juge ou du conseil de famille s'il a été constitué, engager seul l'action en nullité, en rescision ou en réduction des actes prévus aux 1°, 2° et 3°.

Dans tous les cas, l'action s'éteint par le délai de cinq ans prévu à l'article 1304.

Pendant ce délai et tant que la mesure de protection est ouverte, l'acte prévu au 4° peut être confirmé avec l'autorisation du juge ou du conseil de famille s'il a été constitué.

Art. 466

Les articles 464 et 465 ne font pas obstacle à l'application des articles 414-1 et 414-2.

Art. 467

La personne en curatelle ne peut, sans l'assistance du curateur, faire aucun acte qui, en cas de tutelle, requerrait une autorisation du juge ou du conseil de famille.

Lors de la conclusion d'un acte écrit, l'assistance du curateur se manifeste par l'apposition de sa signature à côté de celle de la personne protégée.

A peine de nullité, toute signification faite à cette dernière l'est également au curateur.

Art. 468

Les capitaux revenant à la personne en curatelle sont versés directement sur un compte ouvert à son seul nom et mentionnant son régime de protection, auprès d'un établissement habilité à recevoir des fonds du public.

La personne en curatelle ne peut, sans l'assistance du curateur, faire emploi de ses capitaux.

Cette assistance est également requise pour introduire une action en justice ou y défendre.

Art. 469

Le curateur ne peut se substituer à la personne en curatelle pour agir en son nom.

Toutefois, le curateur peut, s'il constate que la personne en curatelle compromet gravement ses intérêts, saisir le juge pour être autorisé à accomplir seul un acte déterminé ou provoquer l'ouverture de la tutelle.

Appendices France (F)

Si le curateur refuse son assistance à un acte pour lequel son concours est requis, la personne en curatelle peut demander au juge l'autorisation de l'accomplir seule.

Art. 470

La personne en curatelle peut librement tester sous réserve des dispositions de l'article 901.

Elle ne peut faire de donation qu'avec l'assistance du curateur.

Le curateur est réputé en opposition d'intérêts avec la personne protégée lorsqu'il est bénéficiaire de la donation.

Art. 471

A tout moment, le juge peut, par dérogation à l'article 467, énumérer certains actes que la personne en curatelle a la capacité de faire seule ou, à l'inverse, ajouter d'autres actes à ceux pour lesquels l'assistance du curateur est exigée.

Art. 472

Le juge peut également, à tout moment, ordonner une curatelle renforcée. Dans ce cas, le curateur perçoit seul les revenus de la personne en curatelle sur un compte ouvert au nom de cette dernière. Il assure lui-même le règlement des dépenses auprès des tiers et dépose l'excédent sur un compte laissé à la disposition de l'intéressé ou le verse entre ses mains.

Sans préjudice des dispositions de l'article 459-2, le juge peut autoriser le curateur à conclure seul un bail d'habitation ou une convention d'hébergement assurant le logement de la personne protégée.

La curatelle renforcée est soumise aux dispositions des articles 503 et 510 à 515.

Art. 473

Sous réserve des cas où la loi ou l'usage autorise la personne en tutelle à agir elle-même, le tuteur la représente dans tous les actes de la vie civile.

Toutefois, le juge peut, dans le jugement d'ouverture ou ultérieurement, énumérer certains actes que la personne en tutelle aura la capacité de faire seule ou avec l'assistance du tuteur.

Art. 474

La personne en tutelle est représentée dans les actes nécessaires à la gestion de son patrimoine dans les conditions et selon les modalités prévues au titre XII.

Art. 475

La personne en tutelle est représentée en justice par le tuteur.

Celui-ci ne peut agir, en demande ou en défense, pour faire valoir les droits extrapatrimoniaux de la personne protégée qu'après autorisation ou sur injonction du juge ou du conseil de famille s'il a été constitué. Le juge ou le conseil de famille peut enjoindre également au tuteur de se désister de l'instance ou de l'action ou de transiger.

Art. 476

La personne en tutelle peut, avec l'autorisation du juge ou du conseil de famille s'il a été constitué, être assistée ou au besoin représentée par le tuteur pour faire des donations.

Elle ne peut faire seule son testament après l'ouverture de la tutelle qu'avec l'autorisation du juge ou du conseil de famille s'il a été constitué, à peine de nullité de l'acte. Le tuteur ne peut ni l'assister ni la représenter à cette occasion.

Toutefois, elle peut seule révoquer le testament fait avant ou après l'ouverture de la tutelle.

Le testament fait antérieurement à l'ouverture de la tutelle reste valable à moins qu'il ne soit établi que, depuis cette ouverture, la cause qui avait déterminé le testateur à disposer a disparu.

Art. 477

Toute personne majeure ou mineure émancipée ne faisant pas l'objet d'une mesure de tutelle peut charger une ou plusieurs personnes, par un même mandat, de la représenter pour le cas où, pour l'une des causes prévues à l'article 425, elle ne pourrait plus pourvoir seule à ses intérêts.

La personne en curatelle ne peut conclure un mandat de protection future qu'avec l'assistance de son curateur.

Les parents ou le dernier vivant des père et mère, ne faisant pas l'objet d'une mesure de curatelle ou de tutelle, qui exercent l'autorité parentale sur leur enfant mineur ou assument la charge matérielle et affective de leur enfant majeur peuvent, pour le cas où cet enfant ne pourrait plus pourvoir seul à ses intérêts pour l'une des causes prévues à l'article 425, désigner un ou plusieurs mandataires chargés de le représenter. Cette désignation prend effet à compter du jour où le mandant décède ou ne peut plus prendre soin de l'intéressé.

Le mandat est conclu par acte notarié ou par acte sous seing privé. Toutefois, le mandat prévu au troisième alinéa ne peut être conclu que par acte notarié.

Art. 478

Le mandat de protection future est soumis aux dispositions des articles 1984 à 2010 qui ne sont pas incompatibles avec celles de la présente section.

Art. 479

Lorsque le mandat s'étend à la protection de la personne, les droits et obligations du mandataire sont définis par les articles 457-1 à 459-2. Toute stipulation contraire est réputée non écrite.

Le mandat peut prévoir que le mandataire exercera les missions que le code de la santé publique et le code de l'action sociale et des familles confient au représentant de la personne en tutelle ou à la personne de confiance.

Le mandat fixe les modalités de contrôle de son exécution.

Art. 480

Le mandataire peut être toute personne physique choisie par le mandant ou une personne morale inscrite sur la liste des mandataires judiciaires à la protection des majeurs prévue à l'article L. 4712 du code de l'action sociale et des familles.

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Le mandataire doit, pendant toute l'exécution du mandat, jouir de la capacité civile et remplir les conditions prévues pour les charges tutélaires par l'article 395 et le dernier alinéa de l'article 445 du présent code.

Il ne peut, pendant cette exécution, être déchargé de ses fonctions qu'avec l'autorisation du juge des tutelles.

Art. 481

Le mandat prend effet lorsqu'il est établi que le mandant ne peut plus pourvoir seul à ses intérêts. Celui-ci en reçoit notification dans les conditions prévues par le code de procédure civile.

A cette fin, le mandataire produit au greffe du tribunal d'instance le mandat et un certificat médical émanant d'un médecin choisi sur la liste mentionnée à l'article 431 établissant que le mandant se trouve dans l'une des situations prévues à l'article 425. Le greffier vise le mandat et date sa prise d'effet, puis le restitue au mandataire.

Art. 482

Le mandataire exécute personnellement le mandat. Toutefois, il peut se substituer un tiers pour les actes de gestion du patrimoine mais seulement à titre spécial.

Le mandataire répond de la personne qu'il s'est substitué dans les conditions de l'article 1994.

Art. 483

Le mandat mis à exécution prend fin par :

1° Le rétablissement des facultés personnelles de l'intéressé constaté à la demande du mandant ou du mandataire, dans les formes prévues à l'article 481 ;

2° Le décès de la personne protégée ou son placement en curatelle ou en tutelle, sauf décision contraire du juge qui ouvre la mesure ;

3° Le décès du mandataire, son placement sous une mesure de protection ou sa déconfiture ;

4° Sa révocation prononcée par le juge des tutelles à la demande de tout intéressé, lorsqu'il s'avère que les conditions prévues par l'article 425 ne sont pas réunies, lorsque les règles du droit commun de la représentation ou celles relatives aux droits et devoirs respectifs des époux et aux régimes matrimoniaux apparaissent suffisantes pour qu'il soit pourvu aux intérêts de la personne par son conjoint avec qui la communauté de vie n'a pas cessé ou lorsque l'exécution du mandat est de nature à porter atteinte aux intérêts du mandant.

Le juge peut également suspendre les effets du mandat pour le temps d'une mesure de sauvegarde de justice.

Art. 484

Tout intéressé peut saisir le juge des tutelles aux fins de contester la mise en œuvre du mandat ou de voir statuer sur les conditions et modalités de son exécution.

Art. 485

Le juge qui met fin au mandat peut ouvrir une mesure de protection juridique dans les conditions et selon les modalités prévues aux sections 1 à 4 du présent chapitre.

Lorsque la mise en œuvre du mandat ne permet pas, en raison de son champ d'application, de protéger suffisamment les intérêts personnels ou patrimoniaux de la personne, le juge peut ouvrir une mesure de protection juridique complémentaire confiée, le cas échéant, au mandataire de protection future. Il peut aussi autoriser ce dernier ou un mandataire ad hoc à accomplir un ou plusieurs actes déterminés non couverts par le mandat.

Le mandataire de protection future et les personnes désignées par le juge sont indépendants et ne sont pas responsables l'un envers l'autre ; ils s'informent toutefois des décisions qu'ils prennent.

Art. 486

Le mandataire chargé de l'administration des biens de la personne protégée fait procéder à leur inventaire lors de l'ouverture de la mesure. Il assure son actualisation au cours du mandat afin de maintenir à jour l'état du patrimoine.

Il établit annuellement le compte de sa gestion qui est vérifié selon les modalités définies par le mandat et que le juge peut en tout état de cause faire vérifier selon les modalités prévues à l'article 511.

Art. 487

A l'expiration du mandat et dans les cinq ans qui suivent, le mandataire tient à la disposition de la personne qui est amenée à poursuivre la gestion, de la personne protégée si elle a recouvré ses facultés ou de ses héritiers l'inventaire des biens et les actualisations auxquelles il a donné lieu ainsi que les cinq derniers comptes de gestion et les pièces nécessaires pour continuer celle-ci ou assurer la liquidation de la succession de la personne protégée.

Art. 488

Les actes passés et les engagements contractés par une personne faisant l'objet d'un mandat de protection future mis à exécution, pendant la durée du mandat, peuvent être rescindés pour simple lésion ou réduits en cas d'excès alors même qu'ils pourraient être annulés en vertu de l'article 414-1. Les tribunaux prennent notamment en considération l'utilité ou l'inutilité de l'opération, l'importance ou la consistance du patrimoine de la personne protégée et la bonne ou mauvaise foi de ceux avec qui elle a contracté.

L'action n'appartient qu'à la personne protégée et, après sa mort, à ses héritiers. Elle s'éteint par le délai de cinq ans prévu à l'article 1304.

Art. 489

Lorsque le mandat est établi par acte authentique, il est reçu par un notaire choisi par le mandant. L'acceptation du mandataire est faite dans les mêmes formes.

Tant que le mandat n'a pas pris effet, le mandant peut le modifier dans les mêmes formes ou le révoquer en notifiant sa révocation au mandataire et au notaire et le mandataire peut y renoncer en notifiant sa renonciation au mandant et au notaire.

Art. 490

Par dérogation à l'article 1988, le mandat, même conçu en termes généraux, inclut tous les actes patrimoniaux que le tuteur a le pouvoir d'accomplir seul ou avec une autorisation.

Toutefois, le mandataire ne peut accomplir un acte de disposition à titre gratuit qu'avec l'autorisation du juge des tutelles.

Art. 491

Pour l'application du second alinéa de l'article 486, le mandataire rend compte au notaire qui a établi le mandat en lui adressant ses comptes, auxquels sont annexées toutes pièces justificatives utiles. Celui-ci en assure la conservation ainsi que celle de l'inventaire des biens et de ses actualisations.

Le notaire saisit le juge des tutelles de tout mouvement de fonds et de tout acte non justifiés ou n'apparaissant pas conformes aux stipulations du mandat.

Art. 492

Le mandat établi sous seing privé est daté et signé de la main du mandant. Il est soit contresigné par un avocat, soit établi selon un modèle défini par décret en Conseil d'Etat.

Le mandataire accepte le mandat en y apposant sa signature.

Tant que le mandat n'a pas reçu exécution, le mandant peut le modifier ou le révoquer dans les mêmes formes et le mandataire peut y renoncer en notifiant sa renonciation au mandant.

Art. 492-1

Le mandat n'acquiert date certaine que dans les conditions de l'article 1328.

Art. 493

Le mandat est limité, quant à la gestion du patrimoine, aux actes qu'un tuteur peut faire sans autorisation.

Si l'accomplissement d'un acte qui est soumis à autorisation ou qui n'est pas prévu par le mandat s'avère nécessaire dans l'intérêt du mandant, le mandataire saisit le juge des tutelles pour le voir ordonner.

Art. 494

Pour l'application du dernier alinéa de l'article 486, le mandataire conserve l'inventaire des biens et ses actualisations, les cinq derniers comptes de gestion, les pièces justificatives ainsi que celles nécessaires à la continuation de celle-ci.

Il est tenu de les présenter au juge des tutelles ou au procureur de la République dans les conditions prévues à l'article 416.

Art. 495

Lorsque les mesures mises en œuvre en application des articles L. 271-1 à L. 271-5 du code de l'action sociale et des familles au profit d'une personne majeure n'ont pas permis une gestion satisfaisante par celle-ci de ses prestations sociales et que sa santé ou sa sécurité en est compromise, le juge des tutelles peut ordonner une mesure d'accompagnement judiciaire destinée à rétablir l'autonomie de l'intéressé dans la gestion de ses ressources.

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Il n'y a pas lieu de prononcer cette mesure à l'égard d'une personne mariée lorsque l'application des règles relatives aux droits et devoirs respectifs des époux et aux régimes matrimoniaux permet une gestion satisfaisante des prestations sociales de l'intéressé par son conjoint.

Art. 495-1

La mesure d'accompagnement judiciaire ne peut être prononcée si la personne bénéficie d'une mesure de protection juridique prévue au chapitre II du présent titre.

Le prononcé d'une mesure de protection juridique met fin de plein droit à la mesure d'accompagnement judiciaire.

Art. 495-2

La mesure d'accompagnement judiciaire ne peut être prononcée qu'à la demande du procureur de la République qui en apprécie l'opportunité au vu du rapport des services sociaux prévu à l'article L. 2716 du code de l'action sociale et des familles.

Le juge statue, la personne entendue ou appelée.

Art. 495-3

Sous réserve des dispositions de l'article 495-7, la mesure d'accompagnement judiciaire n'entraîne aucune incapacité.

Art. 495-4

La mesure d'accompagnement judiciaire porte sur la gestion des prestations sociales choisies par le juge, lors du prononcé de celle-ci, dans une liste fixée par décret.

Le juge statue sur les difficultés qui pourraient survenir dans la mise en œuvre de la mesure. A tout moment, il peut, d'office ou à la demande de la personne protégée, du mandataire judiciaire à la protection des majeurs ou du procureur de la République, en modifier l'étendue ou y mettre fin, après avoir entendu ou appelé la personne.

Art. 495-5

Les prestations familiales pour lesquelles le juge des enfants a ordonné la mesure prévue à l'article 375-9-1 sont exclues de plein droit de la mesure d'accompagnement judiciaire.

Les personnes chargées respectivement de l'exécution d'une mesure prévue à l'article 375-9-1 et d'une mesure d'accompagnement judiciaire pour un même foyer s'informent mutuellement des décisions qu'elles prennent.

Art. 495-6

Seul un mandataire judiciaire à la protection des majeurs inscrit sur la liste prévue à l'article L. 471-2 du code de l'action sociale et des familles peut être désigné par le juge pour exercer la mesure d'accompagnement judiciaire.

Art. 495-7

Le mandataire judiciaire à la protection des majeurs perçoit les prestations incluses dans la mesure d'accompagnement judiciaire sur un compte ouvert au nom de la personne auprès d'un établissement habilité

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à recevoir des fonds du public, dans les conditions prévues au premier alinéa de l'article 472, sous réserve des dispositions applicables aux mesures de protection confiées aux personnes ou services préposés des établissements de santé et des établissements sociaux ou médicosociaux soumis aux règles de la comptabilité publique.

Il gère ces prestations dans l'intérêt de la personne en tenant compte de son avis et de sa situation familiale.

Il exerce auprès de celle-ci une action éducative tendant à rétablir les conditions d'une gestion autonome des prestations sociales.

Art. 495-8

Le juge fixe la durée de la mesure qui ne peut excéder deux ans. Il peut, à la demande de la personne protégée, du mandataire ou du procureur de la République, la renouveler par décision spécialement motivée sans que la durée totale puisse excéder quatre ans.

Art. 495-9

Les dispositions du titre XII relatives à l'établissement, la vérification et l'approbation des comptes et à la prescription qui ne sont pas incompatibles avec celles du présent chapitre sont applicables à la gestion des prestations sociales prévues à l'article 495-7.

Art. 496

Le tuteur représente la personne protégée dans les actes nécessaires à la gestion de son patrimoine.

Il est tenu d'apporter, dans celle-ci, des soins prudents, diligents et avisés, dans le seul intérêt de la personne protégée.

La liste des actes qui sont regardés, pour l'application du présent titre, comme des actes d'administration relatifs à la gestion courante du patrimoine et comme des actes de disposition qui engagent celui-ci de manière durable et substantielle est fixée par décret en Conseil d'Etat.

Art. 497

Lorsqu'un subrogé tuteur a été nommé, celui-ci atteste auprès du juge du bon déroulement des opérations que le tuteur a l'obligation d'accomplir.

Il en est notamment ainsi de l'emploi ou du emploi des capitaux opéré conformément aux prescriptions du conseil de famille ou, à défaut, du juge.

Art. 498

Les capitaux revenant à la personne protégée sont versés directement sur un compte ouvert à son seul nom et mentionnant la mesure de tutelle, auprès d'un établissement habilité à recevoir des fonds du public.

Lorsque la mesure de tutelle est confiée aux personnes ou services préposés des établissements de santé et des établissements sociaux ou médicosociaux soumis aux règles de la comptabilité publique, cette obligation de versement est réalisée dans des conditions fixées par décret en Conseil d'Etat.

Art. 499

Les tiers peuvent informer le juge des actes ou omissions du tuteur qui leur paraissent de nature à porter préjudice aux intérêts de la personne protégée.

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Ils ne sont pas garants de l'emploi des capitaux. Toutefois, si à l'occasion de cet emploi ils ont connaissance d'actes ou omissions qui compromettent manifestement l'intérêt de la personne protégée, ils en avisent le juge.

La tierce opposition contre les autorisations du conseil de famille ou du juge ne peut être exercée que par les créanciers de la personne protégée et en cas de fraude à leurs droits.

Art. 500

Sur proposition du tuteur, le conseil de famille ou, à défaut, le juge arrête le budget de la tutelle en déterminant, en fonction de l'importance des biens de la personne protégée et des opérations qu'implique leur gestion, les sommes annuellement nécessaires à l'entretien de celle-ci et au remboursement des frais d'administration de ses biens.

Le conseil de famille ou, à défaut, le juge peut autoriser le tuteur à inclure dans les frais de gestion la rémunération des administrateurs particuliers dont il demande le concours sous sa propre responsabilité.

Le conseil de famille ou, à défaut, le juge peut autoriser le tuteur à conclure un contrat pour la gestion des valeurs mobilières et instruments financiers de la personne protégée. Il choisit le tiers contractant en considération de son expérience professionnelle et de sa solvabilité.

Le contrat peut, à tout moment et nonobstant toute stipulation contraire, être résilié au nom de la personne protégée.

Art. 501

Le conseil de famille ou, à défaut, le juge détermine la somme à partir de laquelle commence, pour le tuteur, l'obligation d'employer les capitaux liquides et l'excédent des revenus.

Le conseil de famille ou, à défaut, le juge prescrit toutes les mesures qu'il juge utiles quant à l'emploi ou au remploi des fonds soit par avance, soit à l'occasion de chaque opération. L'emploi ou le remploi est réalisé par le tuteur dans le délai fixé par la décision qui l'ordonne et de la manière qu'elle prescrit. Passé ce délai, le tuteur peut être déclaré débiteur des intérêts.

Le conseil de famille ou, à défaut, le juge peut ordonner que certains fonds soient déposés sur un compte indisponible.

Les comptes de gestion du patrimoine de la personne protégée sont exclusivement ouverts, si le conseil de famille ou, à défaut, le juge l'estime nécessaire compte tenu de la situation de celle-ci, auprès de la Caisse des dépôts et consignations.

Art. 502

Le conseil de famille ou, à défaut, le juge statue sur les autorisations que le tuteur sollicite pour les actes qu'il ne peut accomplir seul.

Toutefois, les autorisations du conseil de famille peuvent être suppléées par celles du juge si les actes portent sur des biens dont la valeur en capital n'excède pas une somme fixée par décret.

Art. 503

Dans les trois mois de l'ouverture de la tutelle, le tuteur fait procéder, en présence du subrogé tuteur s'il a été désigné, à un inventaire des biens de la personne protégée et le transmet au juge. Il en assure l'actualisation au cours de la mesure.

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Il peut obtenir communication de tous renseignements et documents nécessaires à l'établissement de l'inventaire auprès de toute personne publique ou privée, sans que puisse lui être opposé le secret professionnel ou le secret bancaire.

Si l'inventaire n'a pas été établi ou se révèle incomplet ou inexact, la personne protégée et, après son décès, ses héritiers peuvent faire la preuve de la valeur et de la consistance de ses biens par tous moyens.

Art. 504

Le tuteur accomplit seul les actes conservatoires et, sous réserve des dispositions du second alinéa de l'article 473, les actes d'administration nécessaires à la gestion du patrimoine de la personne protégée.

Il agit seul en justice pour faire valoir les droits patrimoniaux de la personne protégée.

Les baux consentis par le tuteur ne confèrent au preneur, à l'encontre de la personne protégée devenue capable, aucun droit de renouvellement et aucun droit à se maintenir dans les lieux à l'expiration du bail, quand bien même il existerait des dispositions légales contraires. Ces dispositions ne sont toutefois pas applicables aux baux consentis avant l'ouverture de la tutelle et renouvelés par le tuteur.

Art. 505

Le tuteur ne peut, sans y être autorisé par le conseil de famille ou, à défaut, le juge, faire des actes de disposition au nom de la personne protégée.

L'autorisation détermine les stipulations et, le cas échéant, le prix ou la mise à prix pour lequel l'acte est passé. L'autorisation n'est pas exigée en cas de vente forcée sur décision judiciaire ou en cas de vente amiable sur autorisation du juge.

L'autorisation de vendre ou d'apporter en société un immeuble, un fonds de commerce ou des instruments financiers non admis à la négociation sur un marché réglementé ne peut être donnée qu'après la réalisation d'une mesure d'instruction exécutée par un technicien ou le recueil de l'avis d'au moins deux professionnels qualifiés.

En cas d'urgence, le juge peut, par décision spécialement motivée prise à la requête du tuteur, autoriser, en lieu et place du conseil de famille, la vente d'instruments financiers à charge qu'il en soit rendu compte sans délai au conseil qui décide du emploi.

Art. 506

Le tuteur ne peut transiger ou compromettre au nom de la personne protégée qu'après avoir fait approuver par le conseil de famille ou, à défaut, par le juge les clauses de la transaction ou du compromis et, le cas échéant, la clause compromissoire.

Art. 507

Le partage à l'égard d'une personne protégée peut être fait à l'amiable sur autorisation du conseil de famille ou, à défaut, du juge, qui désigne, s'il y a lieu, un notaire pour y procéder. Il peut n'être que partiel.

L'état liquidatif est soumis à l'approbation du conseil de famille ou, à défaut, du juge.

Le partage peut également être fait en justice conformément aux articles 840 et 842.

Tout autre partage est considéré comme provisionnel.

Art. 507-1

Par dérogation à l'article 768, le tuteur ne peut accepter une succession échue à la personne protégée qu'à concurrence de l'actif net. Toutefois, le conseil de famille ou, à défaut, le juge peut, par une délibération ou une décision spéciale, l'autoriser à accepter purement et simplement si l'actif dépasse manifestement le passif.

Le tuteur ne peut renoncer à une succession échue à la personne protégée sans une autorisation du conseil de famille ou, à défaut, du juge.

Art. 507-2

Dans le cas où la succession à laquelle il a été renoncé au nom de la personne protégée n'a pas été acceptée par un autre héritier et tant que l'Etat n'a pas été envoyé en possession, la renonciation peut être révoquée soit par le tuteur autorisé à cet effet par une nouvelle délibération du conseil de famille ou, à défaut, une nouvelle décision du juge, soit par la personne protégée devenue capable. Le second alinéa de l'article 807 est applicable.

Art. 508

A titre exceptionnel et dans l'intérêt de la personne protégée, le tuteur qui n'est pas mandataire judiciaire à la protection des majeurs peut, sur autorisation du conseil de famille ou, à défaut, du juge, acheter les biens de celle-ci ou les prendre à bail ou à ferme.

Pour la conclusion de l'acte, le tuteur est réputé être en opposition d'intérêts avec la personne protégée.

Art. 509

Le tuteur ne peut, même avec une autorisation :

1° Accomplir des actes qui emportent une aliénation gratuite des biens ou des droits de la personne protégée sauf ce qui est dit à propos des donations, tels que la remise de dette, la renonciation gratuite à un droit acquis, la renonciation anticipée à l'action en réduction visée aux articles 929 à 930-5, la mainlevée d'hypothèque ou de sûreté sans paiement ou la constitution gratuite d'une servitude ou d'une sûreté pour garantir la dette d'un tiers ;

2° Acquérir d'un tiers un droit ou une créance que ce dernier détient contre la personne protégée ;

3° Exercer le commerce ou une profession libérale au nom de la personne protégée ;

4° Acheter les biens de la personne protégée ainsi que les prendre à bail ou à ferme, sous réserve des dispositions de l'article 508.

Art. 510

Le tuteur établit chaque année un compte de sa gestion auquel sont annexées toutes les pièces justificatives utiles.

A cette fin, il sollicite des établissements auprès desquels un ou plusieurs comptes sont ouverts au nom de la personne protégée un relevé annuel de ceux-ci, sans que puisse lui être opposé le secret professionnel ou le secret bancaire.

Le tuteur est tenu d'assurer la confidentialité du compte de gestion. Toutefois, une copie du compte et des pièces justificatives est remise chaque année par le tuteur à la personne protégée lorsqu'elle est âgée d'au

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moins seize ans, ainsi qu'au subrogé tuteur s'il a été nommé et, si le tuteur l'estime utile, aux autres personnes chargées de la protection de l'intéressé.

En outre, le juge peut, après avoir entendu la personne protégée et recueilli son accord, si elle a atteint l'âge précité et si son état le permet, autoriser le conjoint, le partenaire du pacte civil de solidarité qu'elle a conclu, un parent, un allié de celle-ci ou un de ses proches, s'ils justifient d'un intérêt légitime, à se faire communiquer à leur charge par le tuteur une copie du compte et des pièces justificatives ou une partie de ces documents.

Art. 511

Le tuteur soumet chaque année le compte de gestion, accompagné des pièces justificatives, au greffier en chef du tribunal d'instance en vue de sa vérification.

Lorsqu'un subrogé tuteur a été nommé, il vérifie le compte avant de le transmettre avec ses observations au greffier en chef.

Pour la vérification du compte, le greffier en chef peut faire usage du droit de communication prévu au deuxième alinéa de l'article 510. Il peut être assisté dans sa mission de contrôle des comptes dans les conditions fixées par le code de procédure civile.

S'il refuse d'approuver le compte, le greffier en chef dresse un rapport des difficultés rencontrées qu'il transmet au juge. Celui-ci statue sur la conformité du compte.

Le juge peut décider que la mission de vérification et d'approbation des comptes dévolue au greffier en chef sera exercée par le subrogé tuteur s'il en a été nommé un.

Lorsqu'il est fait application de l'article 457, le juge peut décider que le conseil de famille vérifiera et approuvera les comptes en lieu et place du greffier en chef.

Art. 512

Lorsque la tutelle n'a pas été confiée à un mandataire judiciaire à la protection des majeurs, le juge peut, par dérogation aux articles 510 et 511 et en considération de la modicité des revenus et du patrimoine de la personne protégée, dispenser le tuteur d'établir le compte de gestion et de soumettre celui-ci à l'approbation du greffier en chef.

Art. 513

Si les ressources de la personne protégée le permettent et si l'importance et la composition de son patrimoine le justifient, le juge peut décider, en considération de l'intérêt patrimonial en cause, que la mission de vérification et d'approbation du compte de gestion sera exercée, aux frais de l'intéressée et selon les modalités qu'il fixe, par un technicien.

Art. 514

Lorsque sa mission prend fin pour quelque cause que ce soit, le tuteur établit un compte de gestion des opérations intervenues depuis l'établissement du dernier compte annuel et le soumet à la vérification et à l'approbation prévues aux articles 511 et 513.

En outre, dans les trois mois qui suivent la fin de sa mission, le tuteur ou ses héritiers s'il est décédé remettent une copie des cinq derniers comptes de gestion et du compte mentionné au premier alinéa du présent article, selon le cas, à la personne devenue capable si elle n'en a pas déjà été destinataire, à la personne nouvellement chargée de la mesure de gestion ou aux héritiers de la personne protégée.

Les alinéas précédents ne sont pas applicables dans le cas prévu à l'article 512.

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Dans tous les cas, le tuteur remet aux personnes mentionnées au deuxième alinéa du présent article les pièces nécessaires pour continuer la gestion ou assurer la liquidation de la succession, ainsi que l'inventaire initial et les actualisations auxquelles il a donné lieu.

Art. 515

L'action en reddition de comptes, en revendication ou en paiement diligentée par la personne protégée ou ayant été protégée ou par ses héritiers relativement aux faits de la tutelle se prescrit par cinq ans à compter de la fin de la mesure, alors même que la gestion aurait continué au-delà.

Art. L. 271-1

Toute personne majeure qui perçoit des prestations sociales et dont la santé ou la sécurité est menacée par les difficultés qu'elle éprouve à gérer ses ressources peut bénéficier d'une mesure d'accompagnement social personnalisé qui comporte une aide à la gestion de ses prestations sociales et un accompagnement social individualisé.

Cette mesure prend la forme d'un contrat conclu entre l'intéressé et le département et repose sur des engagements réciproques.

La mesure d'accompagnement social personnalisé peut également être ouverte à l'issue d'une mesure d'accompagnement judiciaire arrivée à échéance, au bénéfice d'une personne répondant aux conditions prévues par le premier alinéa.

Art. L. 271-2

Le contrat prévoit des actions en faveur de l'insertion sociale et tendant à rétablir les conditions d'une gestion autonome des prestations sociales. Les services sociaux qui sont chargés de ces actions s'assurent de leur coordination avec les mesures d'action sociale qui pourraient être déjà mises en œuvre.

Le bénéficiaire du contrat peut autoriser le département à percevoir et à gérer pour son compte tout ou partie des prestations sociales qu'il perçoit, en les affectant en priorité au paiement du loyer et des charges locatives en cours.

Le contrat est conclu pour une durée de six mois à deux ans et peut être modifié par avenant. Il peut être renouvelé, après avoir fait l'objet d'une évaluation préalable, sans que la durée totale de la mesure d'accompagnement social personnalisé puisse excéder quatre ans.

Art. L. 271-3

Le département peut déléguer, par convention, la mise en œuvre de la mesure d'accompagnement social personnalisé à une autre collectivité territoriale ou à un centre communal ou intercommunal d'action sociale, une association ou un organisme à but non lucratif ou un organisme débiteur de prestations sociales.

Art. L. 271-4

Une contribution peut être demandée à la personne ayant conclu un contrat d'accompagnement social personnalisé. Son montant est arrêté par le président du conseil général en fonction des ressources de l'intéressé et dans la limite d'un plafond fixé par décret, dans les conditions prévues par le règlement départemental d'aide sociale.

Art. L. 271-5

En cas de refus par l'intéressé du contrat d'accompagnement social personnalisé ou de non-respect de ses clauses, le président du conseil général peut demander au juge d'instance que soit procédé au versement

Appendices France (F)

direct, chaque mois, au bailleur, des prestations sociales dont l'intéressé est bénéficiaire à hauteur du montant du loyer et des charges locatives dont il est redevable.

Cette procédure ne peut être mise en œuvre que si l'intéressé ne s'est pas acquitté de ses obligations locatives depuis au moins deux mois.

Elle ne peut avoir pour effet de le priver des ressources nécessaires à sa subsistance et à celle des personnes dont il assume la charge effective et permanente.

Le juge fixe la durée du prélèvement dans la limite de deux ans renouvelables sans que la durée totale de celui-ci puisse excéder quatre ans.

Le président du conseil général peut à tout moment saisir le juge pour mettre fin à la mesure.

Art. L. 271-6

Lorsque les actions prévues au présent chapitre n'ont pas permis à leur bénéficiaire de surmonter ses difficultés à gérer les prestations sociales qui en ont fait l'objet et que sa santé ou sa sécurité en est compromise, le président du conseil général transmet au procureur de la République un rapport comportant une évaluation de la situation sociale et pécuniaire de la personne ainsi qu'un bilan des actions personnalisées menées auprès d'elle en application des articles L. 271-1 à L. 271-5. Il joint à ce rapport, sous pli cacheté, les informations dont il dispose sur la situation médicale du bénéficiaire.

Si, au vu de ces éléments, le procureur de la République saisit le juge des tutelles aux fins du prononcé d'une sauvegarde de justice ou de l'ouverture d'une curatelle, d'une tutelle ou d'une mesure d'accompagnement judiciaire, il en informe le président du conseil général.

Art. L. 271-7

Chaque département transmet à l'Etat les données agrégées portant sur la mise en œuvre des dispositions du présent chapitre.

Un arrêté conjoint des ministres chargés de l'action sociale et des collectivités territoriales fixe la liste de ces données ainsi que les modalités de leur transmission.

Les résultats de l'exploitation des données recueillies sont transmis aux départements et font l'objet de publications régulières.

Art. L. 271-8

Les modalités d'application du présent chapitre sont fixées par décret en Conseil d'Etat.

Toutefois, le plafond de la contribution mentionnée à l'article L. 271-4 et la liste des prestations sociales susceptibles de faire l'objet des mesures prévues aux articles L. 271-1 et L. 271-5 sont fixés par décret.

APPENDICES

GERMANY

Appendices Germany (D)

Bundesamt für Justiz
Referat III 3
3004/c-B7 162/2008
Table 1 Germany

Overview First Instance Courts (1995 – 2007)

GÜ-Nr.	GÜ 2	Sp.-Nr.	1995	1996	1997	1998	1999	2000	2001	2002	Sp.-Nr. ab 2003	2003	2004	2005	2006	2007
D.	Matters submitted to the court of protection															
1.	Guardianships, curatory and similar measures still pending at the end of the enquiry period															
	a) Guardianships	15	600'023	661'056	713'142	768'201	826'520	886'265	949'733	1'009'134	17	1'060'731	1'116'782	1'154'560	1'182'780	1'195'863
	b) Tutorships (minors)	16	105'769	108'067	107'958	94'104	79'069	73'094	71'759	70'054	18	67'028	65'213	63'111	60'974	56'419
	c) Curatory (minors/in case of absence/ for the proceedings)	17	678'561	704'573	729'936	282'455	119'612	93'866	86'034	84'143	19	79'461	76'148	73'178	71'821	62'093
	d) Curatory (esp. in proceedings for declaration of paternity, alimony, etc.)	18	99'493	103'981	105'831	33'888										
	Total	19	#####	#####	1'656'867	1'178'648	1'025'201	1'053'225	1'107'526	1'163'331	20	1'207'220	1'258'143	1'290'849	1'315'575	1'314'375
	Where part of the guardianship, tutorship, curatory measurees not terminated at the end of the enquiry period															
	measures with formal accounting (§§ 1840, 1915, 1908i BGB)	20a	167'396	169'937	206'110	192'655	203'867	210'833	226'502	234'670						
	others	20b	#####	#####	1'455'228	985'993	821'334	842'392	881'024	928'661						
2.	Pending proceedings concerning the court authorisation of placement measures															
	a) pursuant to § 70 al. 1 phr. 2 Nr. 1a FGG	21a	3'509	3'488	3'962	3'342	2'575	2'601	3'260	3'156	21	5'183	4'757	4'527	2'692	2'775
	proceedings concerning prolongation	21aa					315	378	501	478	22	806	702	424	287	298
	b) pursuant to § 70 al. 1 phr 2 Nr. 1b, Nr. 2 FGG	21b	54'824	61'581	65'744	72'871	81'469	89'407	100'199	110'914	23	118'240	127'470	130'218	133'928	134'588
	proceedings concerning prolongation	21bb					18'085	19'894	21'042	22'066	24	24'306	25'538	27'728	28'319	28'626
	c) pursuant to § 70 al. 1 phr. 2 Nr. 3 FGG	21c	56'633	56'866	59'605	57'559	54'745	57'057	57'558	58'420	25	59'524	62'981	63'155	62'410	66'294
	d) pursuant to § 1846 BGB	21d	9'648	10'810	12'094	13'266	14'520	15'974	16'454	16'491	26	15'971	17'240	15'406	15'294	14'540
	proceedings concerning prolongation	21dd					1'138	1'419	1'157	1'037	27	914	1'010	1'023	957	995
3.	Other proceedings in matters submitted to the court of protection	22	153'464	158'497	172'209	104'000	34'036	17'222	14'548	14'692	28	13'659	15'020	14'115	15'405	15'729
4.	Pending proceedings for guardianship	23	184'606	219'426	214'732	245'035	265'070	289'085	314'866	334'162	29	350'112	363'595	369'245	370'585	380'022
	still pending at the end of the enquiry period	23a	125'364	160'792	159'568	173'750	189'602	200'370	220'799	228'070	30	239'261	242'565	253'120	279'500	246'739
5.	Pending proceedings for adoption	24	12'525	12'185	12'142	12'003	11'687	11'882	11'521	12'177	31	11'753	11'997	11'547	10'979	11'544

Appendices Germany (D)

Table 2 Germany

Overview Guardianships (*Betreuungsrecht*)

		1)	1992	1993	1994	1995	1996	1997	1998	1999	2000 2)	2001 2)	2002 2)	2003 2)	2004 2)	2005 2)	2006 2)	2007 2)
1.	Guardianship, proceedings for																	
	1.1. Appointment (first)	G A S	75'170 4'369 13'868	104'511 8'960 21'505	113'106 7'365 22'490	123'316 7'857 21'831	141'997 9'027 24'970	147'851 9'262 36'277	159'665 10'501 27'671	177'252 11'254 30'027	192'281 11'984 32'991	205'266 12'793 37'281	208'491 16'182 40'262	215'914 17'426 44'883	218'254 20'612 47'608	223'365 20'698 48'558	222'843	224'432
	1.2. Termination	G A S	7'178 377 1'887	9'335 606 2'134	9'165 570 2'653	11'651 837 3'103	11'225 498 3'244	11'517 613 3'516	12'956 447 3'930	14'399 764 3'869	16'206 658 4'615	17'703 637 4'635	18'151 755 5'909	19'391 678 6'582	21'440 997 7'813	22'534 1'168 6'795	27'326	28'819
	1.3 Extension	G A S	7'743 178 229	13'302 264 240	16'151 205 235	17'067 232 214	26'332 285 199	28'242 319 200	31'294 219 189	34'699 390 410	38'240 343 436	42'143 327 438	44'091 417 570	48'464 485 410	51'937 572 401	52'106 573 240	51'060	52'368
	1.4 Restriction	G A S	3'748 34 65	5'629 36 61	6'664 40 81	6'294 39 30	8'030 83 29	7'082 63 37	7'406 38 32	7'579 63 61	8'316 95 92	9'744 76 92	10'774 163 503	10'572 197 185	13'115 93 167	13'352 100 186	14'135	15'212
	1.5 Prolongation	G A S	12'535 65 1'034	19'477 258 1'257	23'579 110 921	30'215 114 850	51'502 259 1'167	61'528 228 1'104	72'932 191 1'310	77'698 144 1'104	85'070 158 1'141	106'514 187 1'114						
2.	Guardianship of:																	
	2.1 Individuals	E T N	62'127 2'230 7'567	86'483 5'069 13'106	93'503 3'986 14'953	102'958 4'691 17'201	121'975 5'018 18'087	130'613 5'076 17'948	143'508 5'115 19'494	166'529 5'867 21'812	183'254 6'190 23'036	199'740 5'750 25'051						
	From 1999 to 2001 classification in:																	
	Family members	E T N								112'914 3'312 9'091	125'658 3'012 8'238	138'472 2'801 8'933						
	Other honorary guardians	E T N								16'562 961 4'948	15'105 1'046 5'220	15'208 978 5'482						
	Professional guardians	E T N								37'053 1'594 7'773	42'491 2'132 9'578	46'060 1'971 10'636						
	Since 2002 classification in:																	
	Family members	E N V											138'773 8'122	144'095 8'769	142'006 8'512	145'021 8'620	142'468 8'865 1'989	143'750 9'169 2'384
	Other honorary guardians	E N V											15'143 5'920	14'665 6'283	14'295 6'498	13'494 6'037	13'418 5'313 896	12'650 5'209 1'556
	Lawyers as professional guardians	E N											6'847 1'420	7'301 1'466	8'094 1'708	8'485 1'683	9'844 2'074	10'313 2'255
	Other professional guardians	E N											39'539 10'311	43'582 11'555	47'427 13'182	49'977 13'701	50'206 11'932	51'240 11'572
	2.2 Guardians of associations	E T N	2'391 113 3'461	7'136 482 5'787	12'098 515 6'386	13'747 759 6'256	14'892 1'102 6'108	15'294 843 4'943	14'951 819 4'500	12'804 1'112 5'390	14'251 1'401 5'658	13'353 1'246 5'660	13'468 5'075	13'236 5'772	13'621 5'942	13'314 5'970	12'725 5'149	12'445 5'090
		E	5'452	5'508	4'208	3'650	3'650	3'161	2'931	2'030	1'776	2'288	1'196	930	784	714	547	630

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2.3 Guardians of Authorities	T	124	784	532	331	282	167	179	194	176	112						
	N	1'119	1'309	922	711	721	729	628	574	295	239	274	248	135	136	157	203
	E	771	965	1'007	807	725	677	835	602	395	470	366	294	382	339	352	299
2.4 Association	T	427	662	284	363	298	115	78	90	57	24						
	N	236	460	243	262	201	180	179	213	113	153	213	100	129	155	117	174
	E	5'968	7'359	5'169	4'710	4'163	3'494	2'905	2'156	1'966	1'818	1'303	1'115	1'035	753	673	622
2.5 Authority	T	373	1'126	1'099	968	668	522	372	340	296	159						
	N	699	1'329	913	726	582	461	444	264	232	171	132	137	121	107	80	45
	E	5'968	7'359	5'169	4'710	4'163	3'494	2'905	2'156	1'966	1'818	1'303	1'115	1'035	753	673	622
3.	Authorisation requirements: Proceedings for																
3.1 Appointment (first)	G	4'735	4'528	4'781	4'881	5'159	6'551	6'623	7'279	7'970	8'572	10'214	9'810	10'843	11'652	11'371	12'050
	A	255	652	912	785	871	697	706	620	456	735	656	902	848	769	746	722
	S	182	184	163	121	127	161	124	203	231	232						
3.2 Termination	G	1'067	3'251	3'388	2'462	3'656	2'562	1'659	1'426	1'447	1'774						
	A	26	37	14	10	13	20	30	37	26	12						
	S	58	43	19	15	9	12	26	20	16	14						
3.3 Extension	G	306	472	337	447	477	604	594	533	602	555						
	A	11	12	3	4	9	18	16	8	3	8						
	S	17	9	11	10	1	5	1	2	4	5						
3.4 Restriction	G	208	382	478	366	461	336	351	249	269	240						
	A	2	14	6	1	6	7	1	2	1	2						
	S	10	5	2	2	0	2	0	2	1	2						
3.5 Prolongation	G	1'007	1'262	933	1'446	2'449	2'452	2'315	2'340	2'457	2'969						
	A	110	156	152	138	228	112	122	38	54	93						
	S	41	30	28	22	66	19	12	12	45	35						
4. Proceedings for medical treatment § 1904 BGB	G	2'003	2'316	2'057	2'577	2'388	2'179	2'551	2'526	2'799	3'070	3'877	2'824	2'646	3'016	3'693	3'513
	A	61	272	174	92	56	147	72	157	89	140	250	250	224	210	254	232
	S	158	470	294	222	220	190	278	177	246	271						
5. Sterilisation § 1905 BGB	G	65	87	87	78	203	113	70	101	46	61	88	80	154	262	60	55
	A	7	22	12	13	31	21	29	29	16	8	15	26	33	34	21	19
	S	14	25	23	15	21	19	14	22	23	12						
6. Proceedings for measures comparable to placement § 1906 IV BGB	G	9'923	13'095	17'898	23'305	27'314	31'478	38'849	48'030	54'060	61'611	66'888	74'783	79'391	83'781	82'904	84'466
	A	605	1'169	1'080	1'081	1'376	1'457	1'491	1'982	2'174	2'553	5'026	6'056	6'614	6'876	6'057	5'969
	S	1'445	1'977	2'012	1'846	2'596	2'310	2'816	4'307	4'955	5'643						
7.	Placement pursuant to § 1906 I, II BGB: proceedings for																
7.1 Authorisation	G	19'650	21'085	22'922	23'611	26'365	28'627	31'328	34'055	35'107	39'119	40'320	43'383	46'381	45'778	46'557	48'909
	A	483	681	589	472	579	623	528	729	633	831	1'891	1'902	1'923	2'005	1'711	1'698
	S	1'154	1'632	1'572	1'174	1'381	1'362	1'653	2'274	2'532	2'757						
7.2 Termination	G	3'389	4'580	4'381	3'462	4'535	4'659	4'857	5'138	5'271	5'816						
	A	37	39	33	28	31	37	12	28	45	53						
	S	225	382	357	251	237	241	197	244	305	198						
7.3 Prolongation	G	11'394	10'879	11'981	10'809	11'607	10'919	11'035	10'597	11'022	10'865						
	A	182	164	161	119	80	74	189	78	81	63						
	S	336	456	459	301	325	426	312	187	251	158						
8. Appointment of curator for proceedings		37'814	49'496	56'321	59'020	71'084	74'371	80'078	77'562	84'820	91'088	87'916	91'483	92'073	93'493	90'350	89'576

Appendices Germany (D)

Statistics 2006/2007

**Sources: Bundesamt für Justiz,
Sozialministerien der Bundesländer,
überörtliche Betreuungsbehörden,
Bundesnotarkammer sowie
Statistisches Bundesamt**

Prepared by Horst Deinert

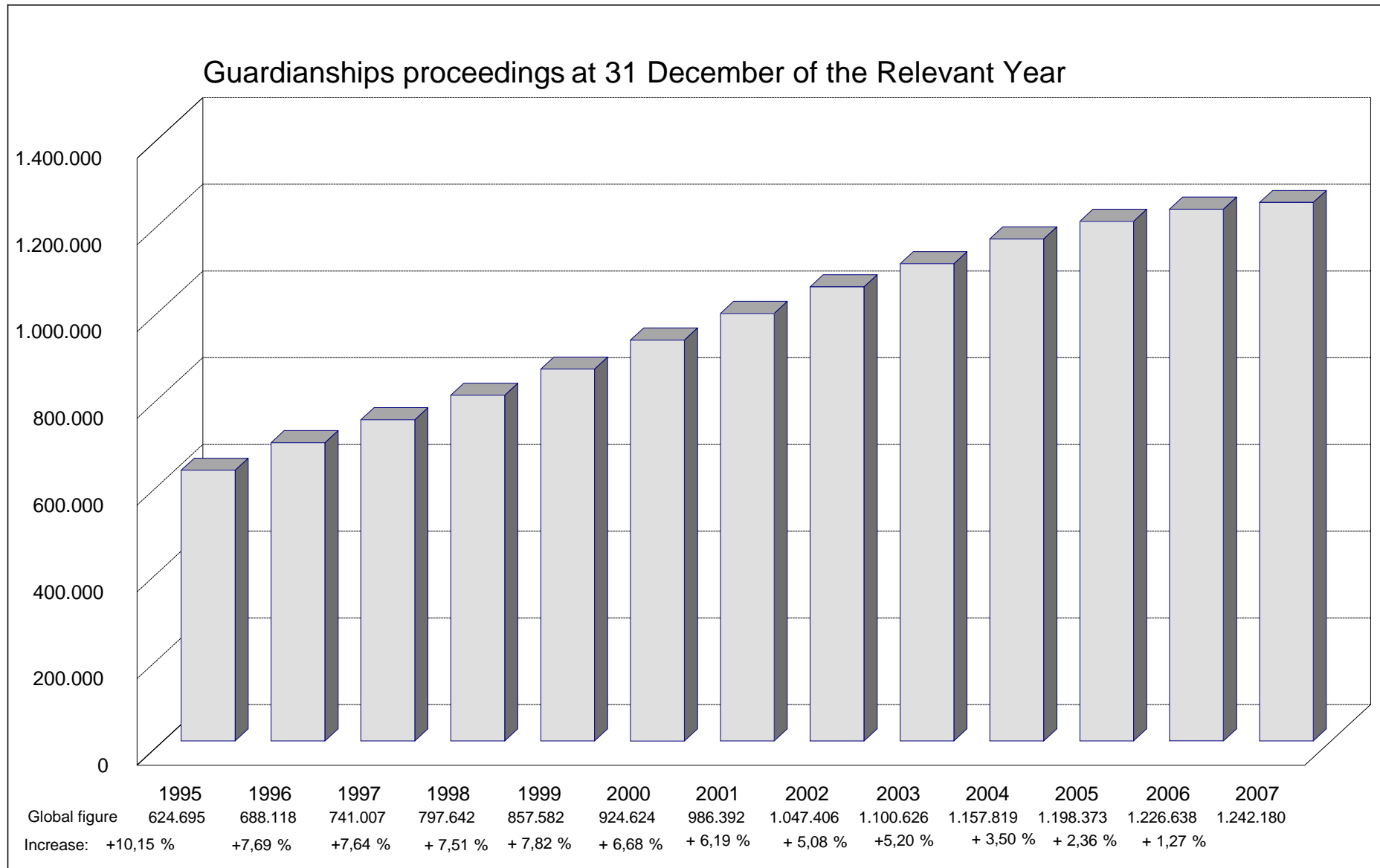
updated 15.10.2008

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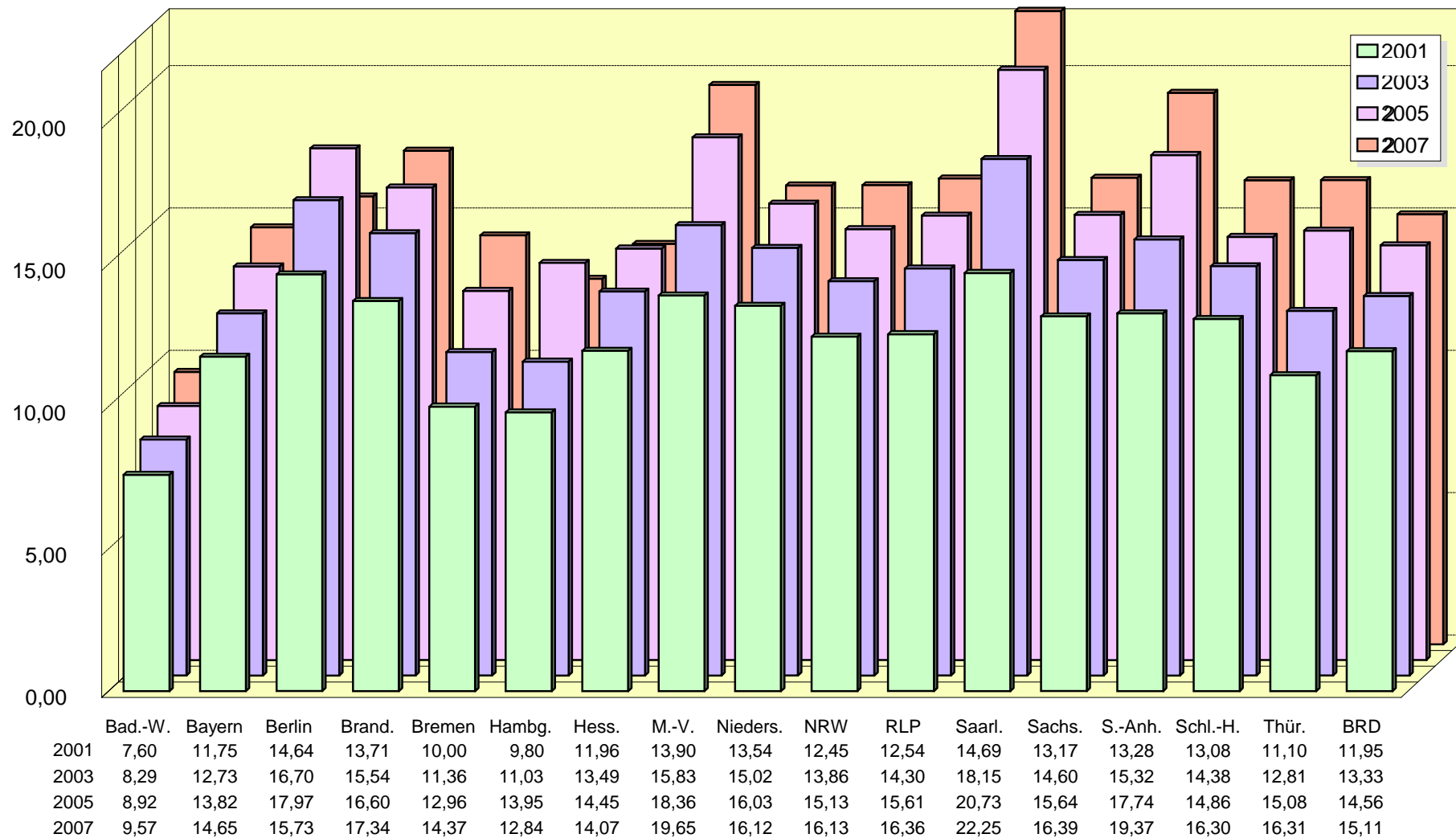
Guardianships 2003 - 2007

Bundesland	Inhabitants 31.12.2007	Guardianship 31.12.2003	Prot. Pers every 1000 inhabitants 31.12.2003	Guardianship 31.12.2004	Prot. Pers every 1000 inhabitants 31.12.2004	Guardianship 31.12.2005	Prot. Pers every 1000 inhabitants 31.12.2005	Guardianship 31.12.2006	Prot. Pers every 1000 inhabitants 31.12.2006	Guardianship 31.12.2007	Prot. Pers every 1000 inhabitants 31.12.2007
Baden - Württ.	10.749.755	88.345	8,26	89.671	8,37	95.737	8,92	98.760	9,20	102.842	9,57
Bayern	12.520.332	157.688	12,69	165.422	13,29	172.323	13,82	177.983	14,25	183.479	14,65
Berlin	3.416.255	56.638	16,71	58.621	17,30	61.028	17,97	59.741	17,55	53.728	15,73
Brandenburg	2.535.737	40.130	15,59	41.409	16,13	42.479	16,60	43.218	16,96	43.964	17,34
Bremen	663.082	7.520	11,34	8.185	12,34	8.597	12,96	9.206	13,86	9.529	14,37
Hamburg	1.770.629	19.065	10,99	22.281	12,84	24.321	13,95	23.737	13,53	22.733	12,84
Hessen	6.072.555	82.189	13,50	85.119	13,96	88.016	14,45	84.965	13,99	85.417	14,07
Mecklenb.-V.	1.679.682	27.619	15,94	29.466	17,13	31.347	18,36	32.414	19,14	32.999	19,65
Niedersachsen	7.971.684	119.872	15,00	128.926	16,11	128.174	16,03	129.138	16,18	128.531	16,12
NRW	17.996.621	250.516	13,86	264.911	14,66	273.232	15,13	282.829	15,69	290.207	16,13
Rheinland-Pf.	4.045.643	58.012	14,29	60.798	14,97	63.349	15,61	65.953	16,27	66.194	16,36
Saarland	1.036.598	19.331	18,21	20.602	19,50	21.768	20,73	22.613	21,68	23.066	22,25
Sachsen	4.220.200	63.509	14,70	65.325	15,21	66.857	15,64	69.213	16,29	69.183	16,39
Sachsen-Anh.	2.412.472	39.056	15,48	40.910	16,40	43.823	17,74	46.501	19,04	46.720	19,37
Schl.-Holst.	2.837.373	40.504	14,35	42.560	15,05	42.105	14,86	44.143	15,57	46.256	16,30
Thüringen	2.289.219	30.632	12,91	33.613	14,27	35.217	15,08	36.224	15,67	37.332	16,31
Bundesgebiet	82.217.837	1.100.626	13,34	1.157.819	14,03	1.198.373	14,54	1.226.638	14,90	1.242.180	15,11
Increase		53.220	5,08%	57.193	5,20%	40.554	3,50%	28.265	2,36%	15.542	1,27%

Tabelle 1



Guardianship Proceedings Every 1000 Inhabitants



Sources Bundesministerium der Justiz: Justizstatistik (GÜ 2 der Amtsgerichte 2001, 2003, 2005); ergänzende Infos der württ, Notariate; Statistisches Bundesamt

Appendices Germany (D)

New Guardianships (First Appointment) in Year 2006

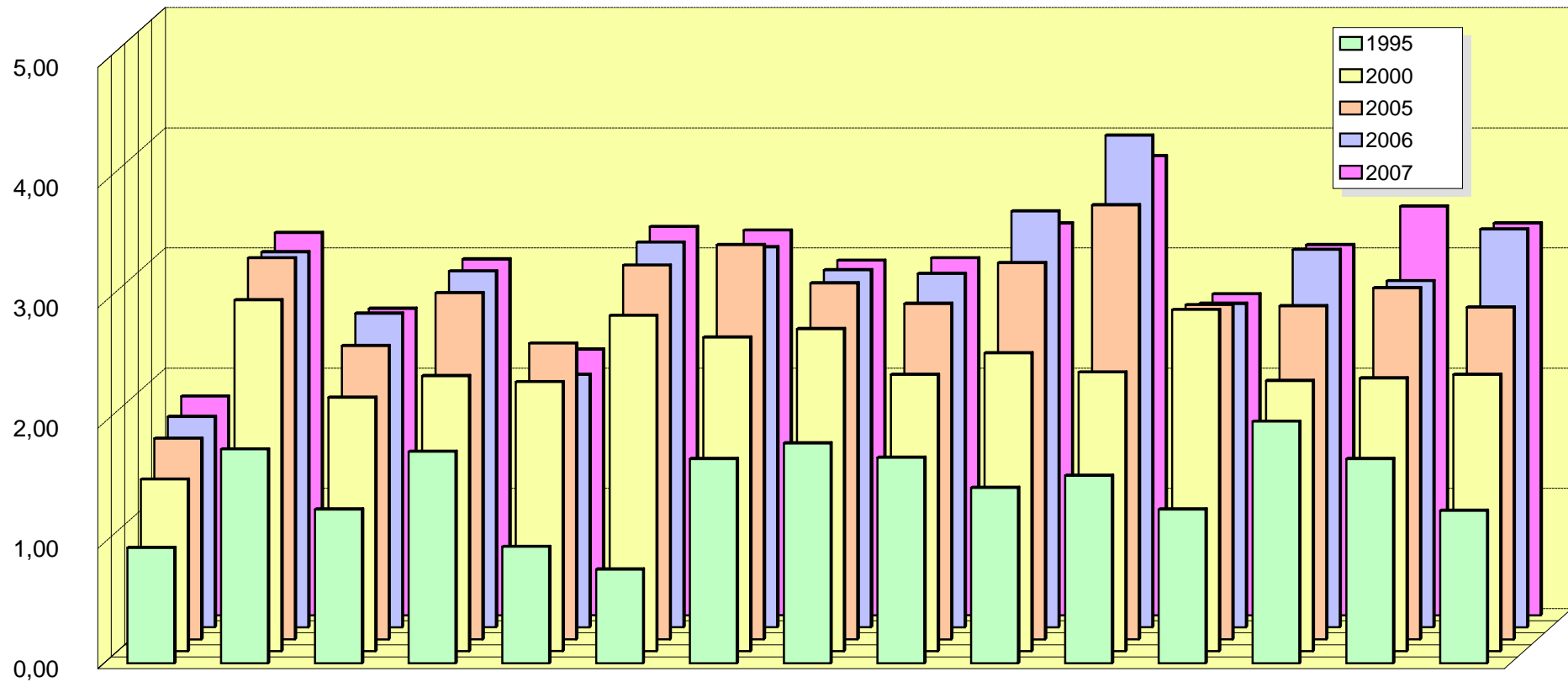
Bundesland	Bad-W	Bayern	Berlin	Brand.	Bremen	Hessen	Meck-V.	Nds.	NRW	RLP	Saarl.	Sachs.	S.-A.	Schl.-H.	Thür.	BRD
Family member	11.135	26.180	3.426	4.510	628	13.056	3.319	14.999	31.654	8.930	3.181	7.066	4.866	4.763	4.755	142.468
in %	59,40%	67,24%	38,59%	59,79%	44,99%	67,19%	61,97%	63,26%	59,70%	63,65%	74,50%	61,85%	63,52%	58,29%	62,12%	61,88%
Other hon. guardian	1.591	1.969	850	373	89	921	333	1.782	1.999	929	226	630	487	858	381	13.418
in %	8,49%	5,06%	9,57%	4,94%	6,38%	4,74%	6,22%	7,52%	3,77%	6,62%	5,29%	5,51%	6,36%	10,50%	4,98%	5,83%
Total	12.726	28.149	4.276	4.883	717	13.977	3.652	16.781	33.653	9.859	3.407	7.696	962	5.621	5.136	155.886
in %	67,89%	72,30%	48,16%	64,74%	51,36%	71,93%	68,19%	70,77%	63,47%	70,28%	79,79%	67,37%	12,56%	68,79%	67,09%	67,71%
Professional Guardians other than Lawyers	4.245	7.206	2.900	1.614	203	4.153	1.145	4.785	12.933	2.417	642	2.450	1.571	1.876	2.066	50.206
in %	22,64%	18,51%	32,66%	21,40%	14,54%	21,37%	21,38%	20,18%	24,39%	17,23%	15,04%	21,45%	20,51%	22,96%	26,99%	21,81%
Lawyers als Guardians	964	2.017	1.130	188	295	937	56	785	2.087	566	119	84	53	478	85	9.844
in %	5,14%	5,18%	12,73%	2,49%	21,13%	4,82%	1,05%	3,31%	3,94%	4,03%	2,79%	0,74%	0,69%	5,85%	1,11%	4,28%
Total	5.209	9.223	4.030	1.802	498	5.090	1.201	5.570	15.020	2.983	761	2.534	1.624	2.354	2.151	60.050
in %	27,79%	23,69%	45,39%	23,89%	35,67%	26,19%	22,42%	23,49%	28,33%	21,26%	17,82%	22,18%	21,20%	28,81%	28,10%	26,08%
Guard. Ass. (§ 1897 II)	680	1.362	338	780	163	307	486	1.264	3.867	1.163	100	1.056	652	177	330	12.725
Guard Ass. (§ 1900)	13	58	38	24	9	12	11	44	84	4	2	14	25	14	352	
Total	693	1.420	376	804	172	319	497	1.308	3.951	1.167	102	1.070	677	177	344	13.077
in %	3,70%	3,65%	4,23%	10,66%	12,32%	1,64%	9,28%	5,52%	7,45%	8,32%	2,39%	9,37%	8,84%	2,17%	4,49%	5,68%
Guard. Authority (§ 1897 III)	36	56	82	22	4	33	5	36	199	16		26	6	11	15	547
Guard. Authority (§ 1900)	82	87	115	32	5	13	1	16	202	4		98	1	8	9	673
Total	118	143	197	54	9	46	6	52	401	20	0	124	7	19	24	1.220
in %	0,63%	0,37%	2,22%	0,72%	0,64%	0,24%	0,11%	0,22%	0,76%	0,14%	0,00%	1,09%	0,09%	0,23%	0,31%	0,53%
Total Professional Guardianship	6.020	10.786	4.603	2.660	679	5.455	1.704	6.930	19.372	4.170	863	3.728	2.308	2.550	2.519	74.347
in %	32,11%	27,70%	51,84%	35,26%	48,64%	28,07%	31,81%	29,23%	36,53%	29,72%	20,21%	32,63%	30,13%	31,21%	32,91%	32,29%
Total New Guardianship	18.746	38.935	8.879	7.543	1.396	19.432	5.356	23.711	53.025	14.029	4.270	11.424	7.661	8.171	7.655	230.233

Appendices Germany (D)

New Guardianships (First Appointment) in Year 2007

Bundesland	Bad-W	Bayern	Berlin	Brand.	Bremen	Hessen	Meck-V.	Nds.	NRW	RLP	Saarl.	Sachs.	S.-A.	Schl.-H.	Thür.	BRD
Family member	11.548	26.812	3.506	4.524	672	13.349	3.335	14.902	32.169	8.511	2.882	6.776	4.697	5.652	4.415	143.750
in %	58,93%	67,33%	40,26%	60,35%	45,90%	68,03%	62,10%	63,32%	60,28%	64,51%	72,72%	60,07%	63,18%	58,59%	59,23%	61,97%
Other guardian hon.	1.597	2.117	565	342	82	957	309	1.742	1.768	611	184	666	374	949	387	12.650
in %	8,15%	5,32%	6,49%	4,56%	5,60%	4,88%	5,75%	7,40%	3,31%	4,63%	4,64%	5,90%	5,03%	9,84%	5,19%	5,45%
Total	13.145	28.929	4.071	4.866	754	14.306	3.644	16.644	33.937	9.122	3.066	7.442	962	6.601	4.802	156.400
in %	67,08%	72,65%	46,75%	64,91%	51,50%	72,91%	67,86%	70,72%	63,59%	69,14%	77,37%	65,97%	12,94%	68,43%	64,42%	67,43%
Professional Guardians other than Lawyers	4.524	7.459	2.834	1.697	184	4.022	1.116	4.937	12.998	2.360	624	2.559	1.520	2.189	2.217	51.240
in %	23,09%	18,73%	32,54%	22,64%	12,57%	20,50%	20,78%	20,98%	24,36%	17,89%	15,75%	22,68%	20,45%	22,69%	29,74%	22,09%
Lawyers as Guardians	1.010	1.975	1.110	187	336	941	60	736	2.282	599	152	103	62	685	75	10.313
in %	5,15%	4,96%	12,75%	2,49%	22,95%	4,80%	1,12%	3,13%	4,28%	4,54%	3,84%	0,91%	0,83%	7,10%	1,01%	4,45%
Total	5.534	9.434	3.944	1.884	520	4.963	1.176	5.673	15.280	2.959	776	2.662	1.582	2.874	2.292	61.553
in %	28,24%	23,69%	45,29%	25,13%	35,52%	25,29%	21,90%	24,11%	28,63%	22,43%	19,58%	23,60%	21,28%	29,79%	30,75%	26,54%
Guard. Ass. (§ 1897 II)	731	1.270	428	686	154	324	538	1.123	3.716	1.082	117	1.071	716	146	343	12.445
Guard. Ass. (§ 1900)	24	32	54	8	12	4	3	46	58	3	4	2	41	1	7	299
Total	755	1.302	482	694	166	328	541	1.169	3.774	1.085	121	1.073	757	147	350	12.744
in %	3,85%	3,27%	5,54%	9,26%	11,34%	1,67%	10,07%	4,97%	7,07%	8,22%	3,05%	9,51%	10,18%	1,52%	4,70%	5,49%
Guard. authority (§ 1897 III)	81	91	82	17	23	19	9	41	189	18		24	24	7	5	630
Guard. authority (§ 1900)	81	66	129	35	1	5		7	187	9		80		17	5	622
Total	162	157	211	52	24	24	9	48	376	27	0	104	24	24	10	1.252
in %	0,83%	0,39%	2,42%	0,69%	1,64%	0,12%	0,17%	0,20%	0,70%	0,20%	0,00%	0,92%	0,32%	0,25%	0,13%	0,54%
Total Professional Guardians	6.451	10.893	4.637	2.630	710	5.315	1.726	6.890	19.430	4.071	897	3.839	2.363	3.045	2.652	75.549
in %	32,92%	27,35%	53,25%	35,09%	48,50%	27,09%	32,14%	29,28%	36,41%	30,86%	22,63%	34,03%	31,79%	31,57%	35,58%	32,57%
Total New Guardianships	19.596	39.822	8.708	7.496	1.464	19.621	5.370	23.534	53.367	13.193	3.963	11.281	7.434	9.646	7.454	231.949

New Guardianships (Fist Appointment) every 1000 Inhabitants

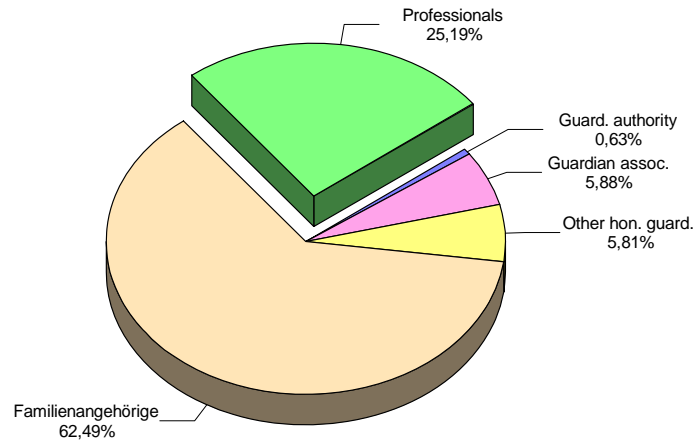


	Bad.-W.	Bayern	Berlin	Brand.	Bremen	Hessen	Meckl.-V.	Nieders.	NRW	Rhld.-Pf.	Saarl.	Sachs.	Sach.-A.	Schl.-H.	Thür.
1995	0,96	1,78	1,28	1,76	0,97	0,78	1,70	1,83	1,71	1,46	1,56	1,28	2,01	1,70	1,27
2000	1,43	2,92	2,11	2,29	2,24	2,79	2,61	2,68	2,30	2,48	2,32	2,84	2,25	2,27	2,30
2005	1,67	3,17	2,44	2,88	2,46	3,11	3,28	2,96	2,79	3,13	3,61	2,78	2,77	2,92	2,76
2006	1,75	3,12	2,61	2,96	2,10	3,20	3,16	2,97	2,94	3,46	4,09	2,69	3,14	2,88	3,31
2007	1,82	3,18	2,55	2,96	2,21	3,23	3,20	2,95	2,97	3,26	3,82	2,67	3,08	3,40	3,26

Sources: Bundesministerium der Justiz: Sondererhebung Verfahren nach dem Betreuungsgesetz 1995, 2000, 2005; Stat. Bundesamt; Auswertung: Deinert

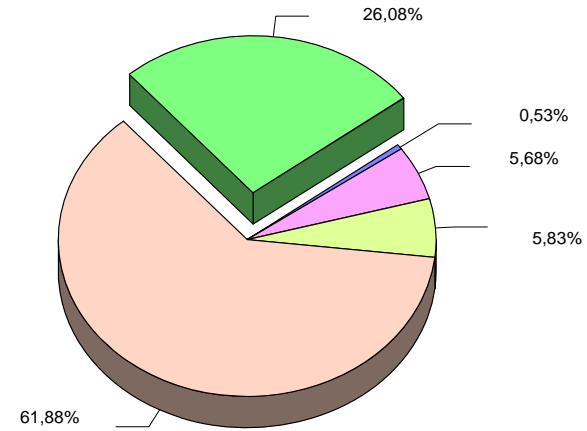
Tabelle 6

New Guardianships 2005

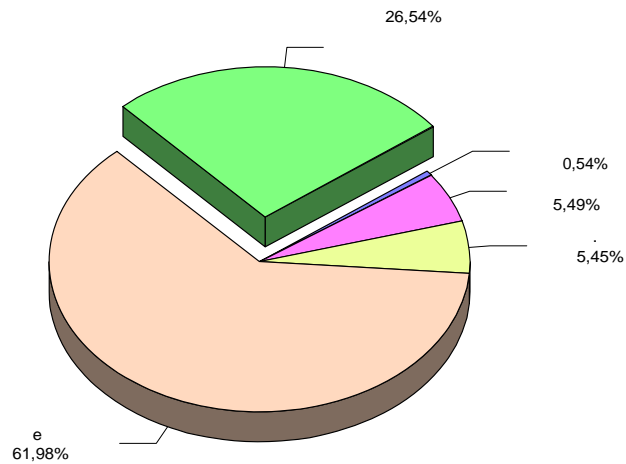


New Guardianships 2006

Anteile nach Betreuungsart (bei Erstbestellungen)



New Guardianships 2007



Source: Bundesministerium der Justiz: Sondererhebung Verfahren nach dem Betreuungsgesetz 2005 (Hamburg not included)

Tabelle 7

Appointment of New Guardians (First Appointment) in %

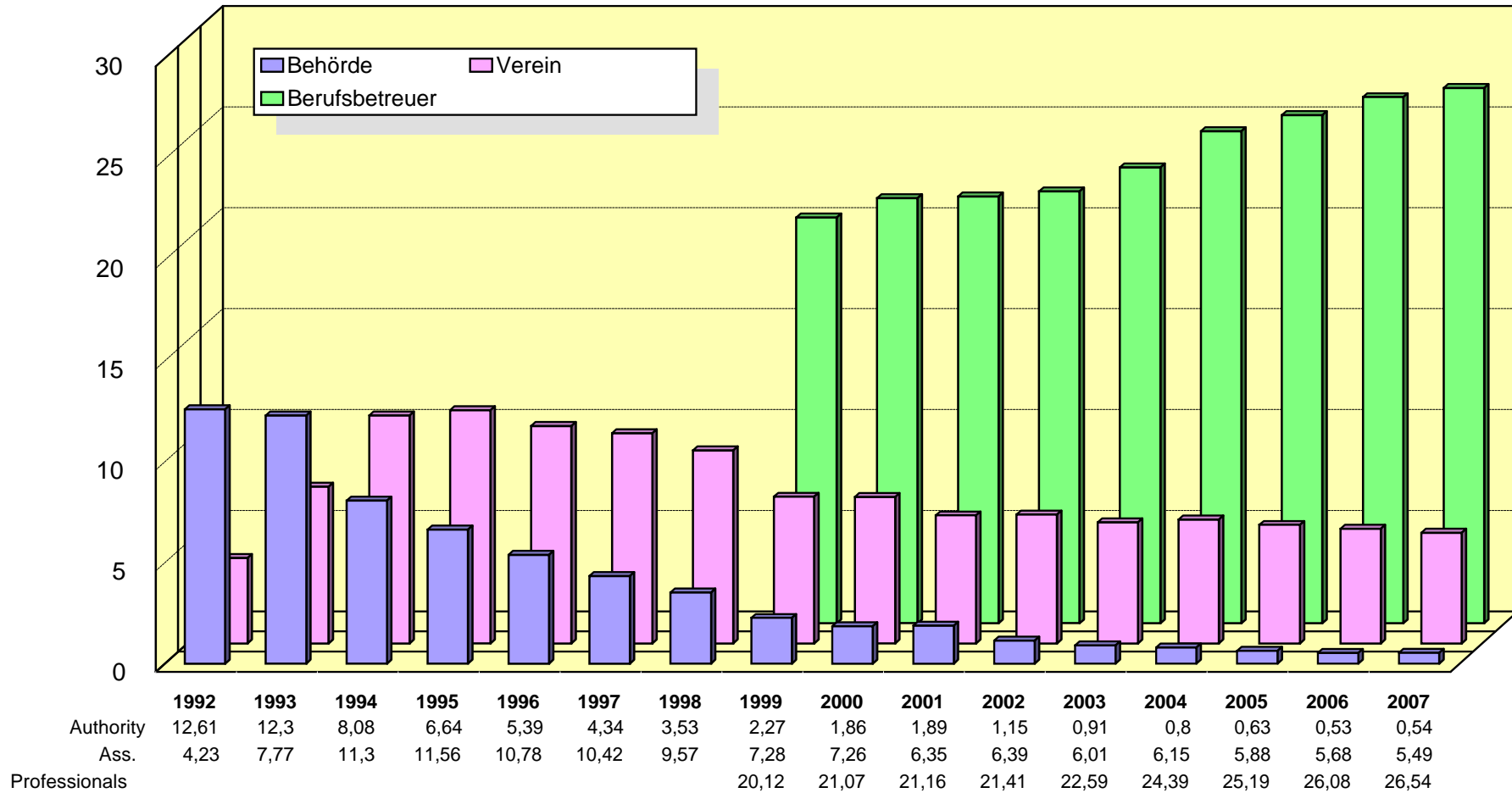


Tabelle 8

New Guardianships 1999 - 2007

in

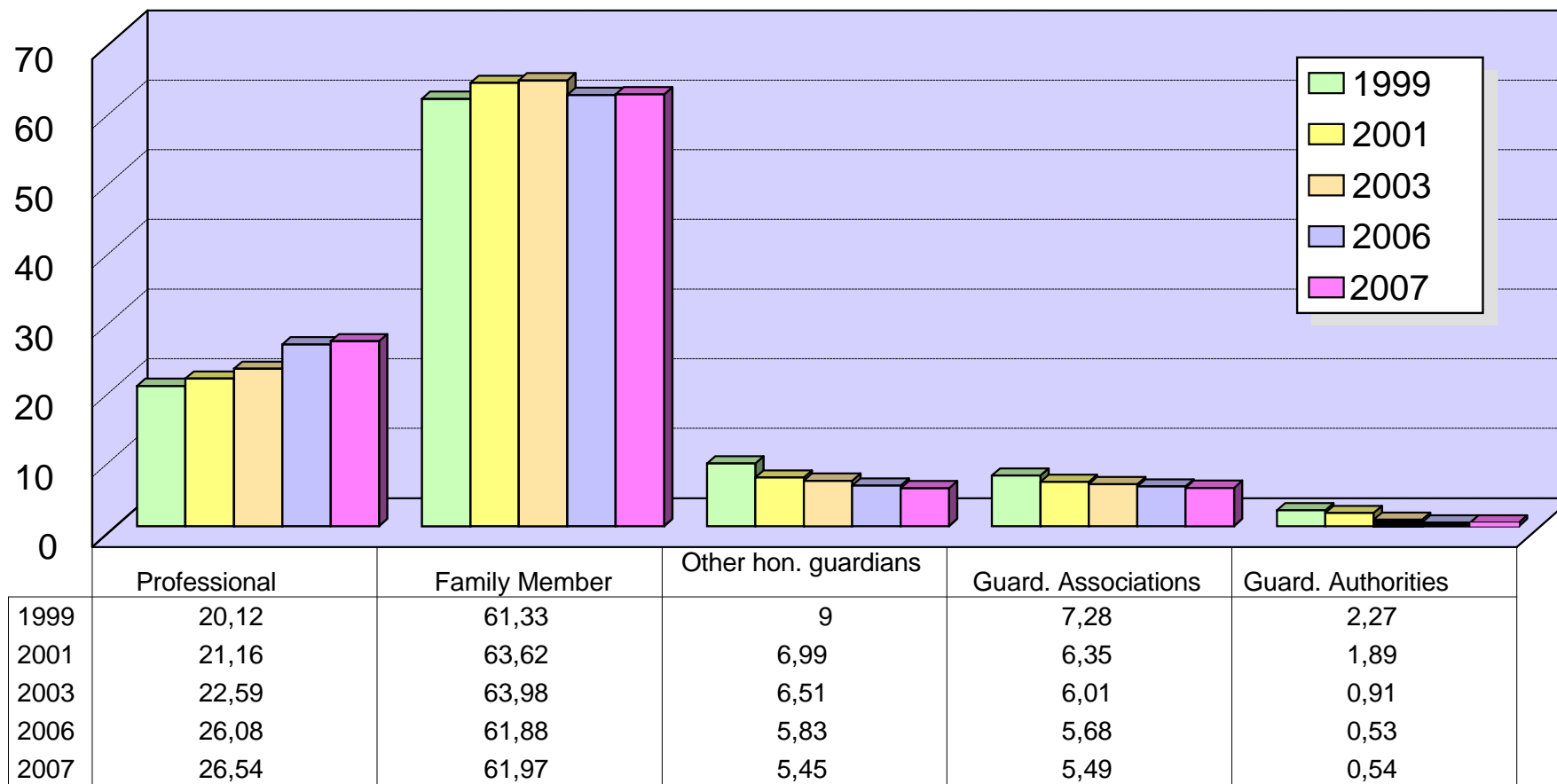
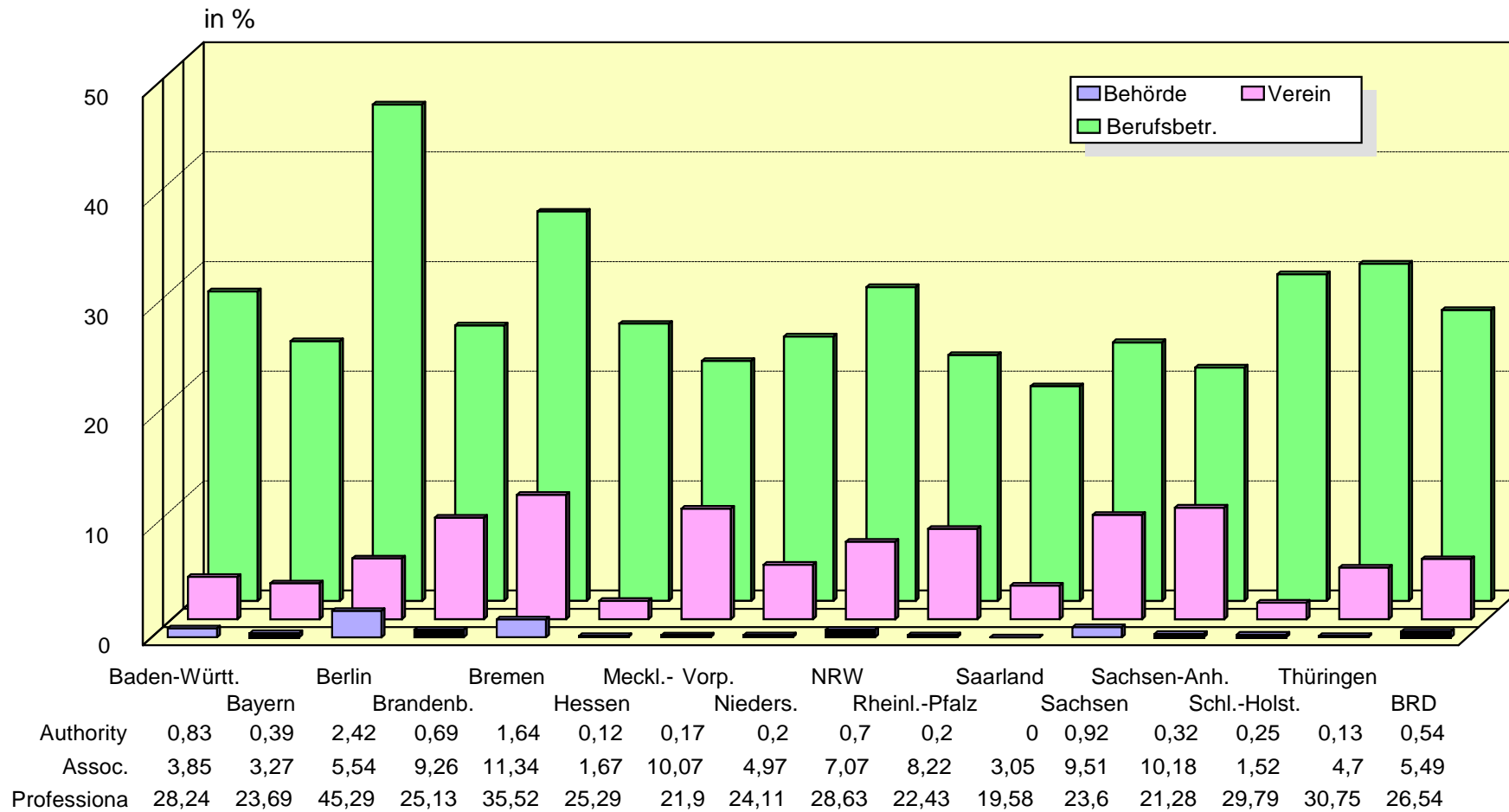


Tabelle 9

New Appontment of Guardians 2007 (in %)



Appendices Germany (D)

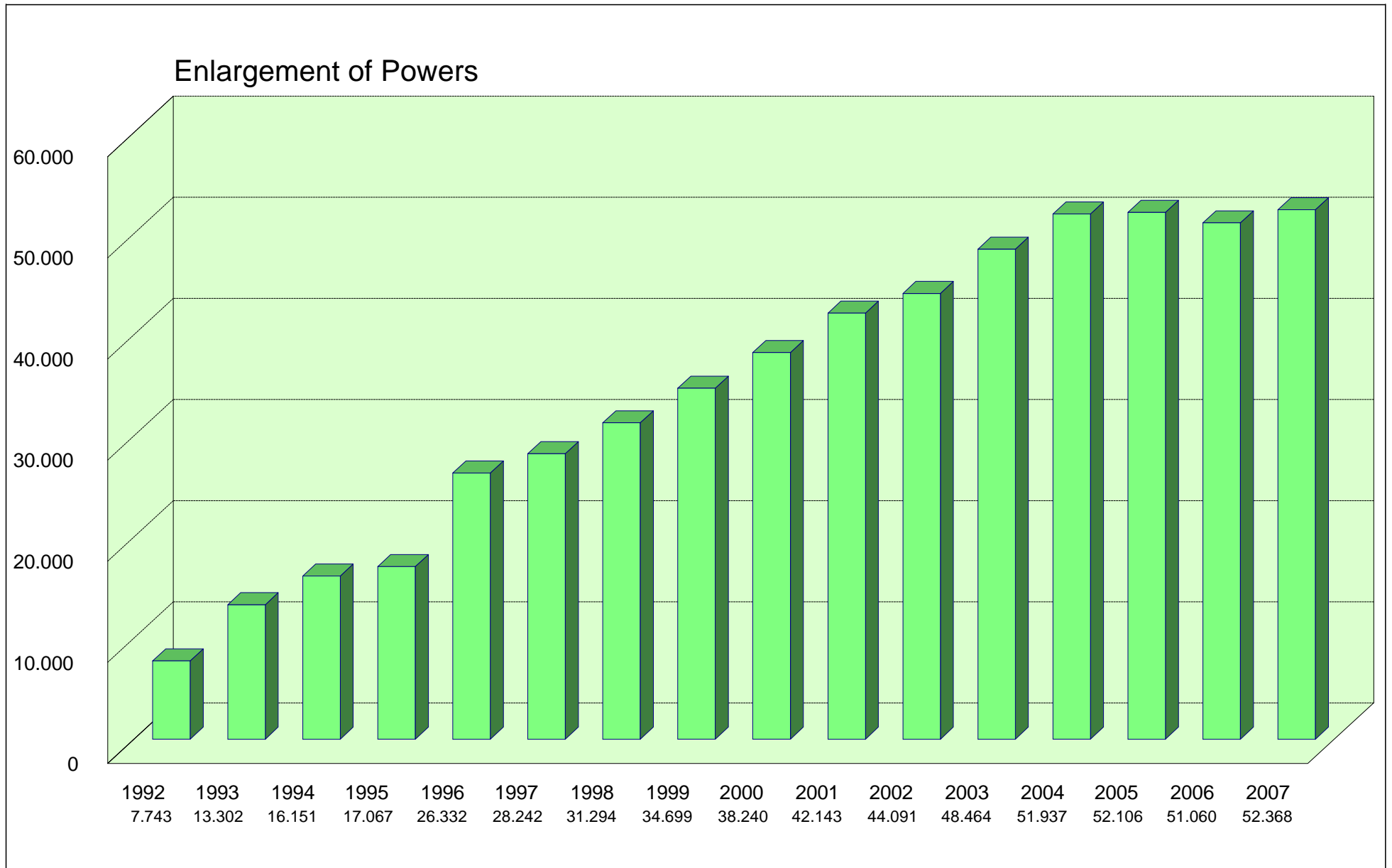
Change of Guardian (§ 1908c BGB) 2006

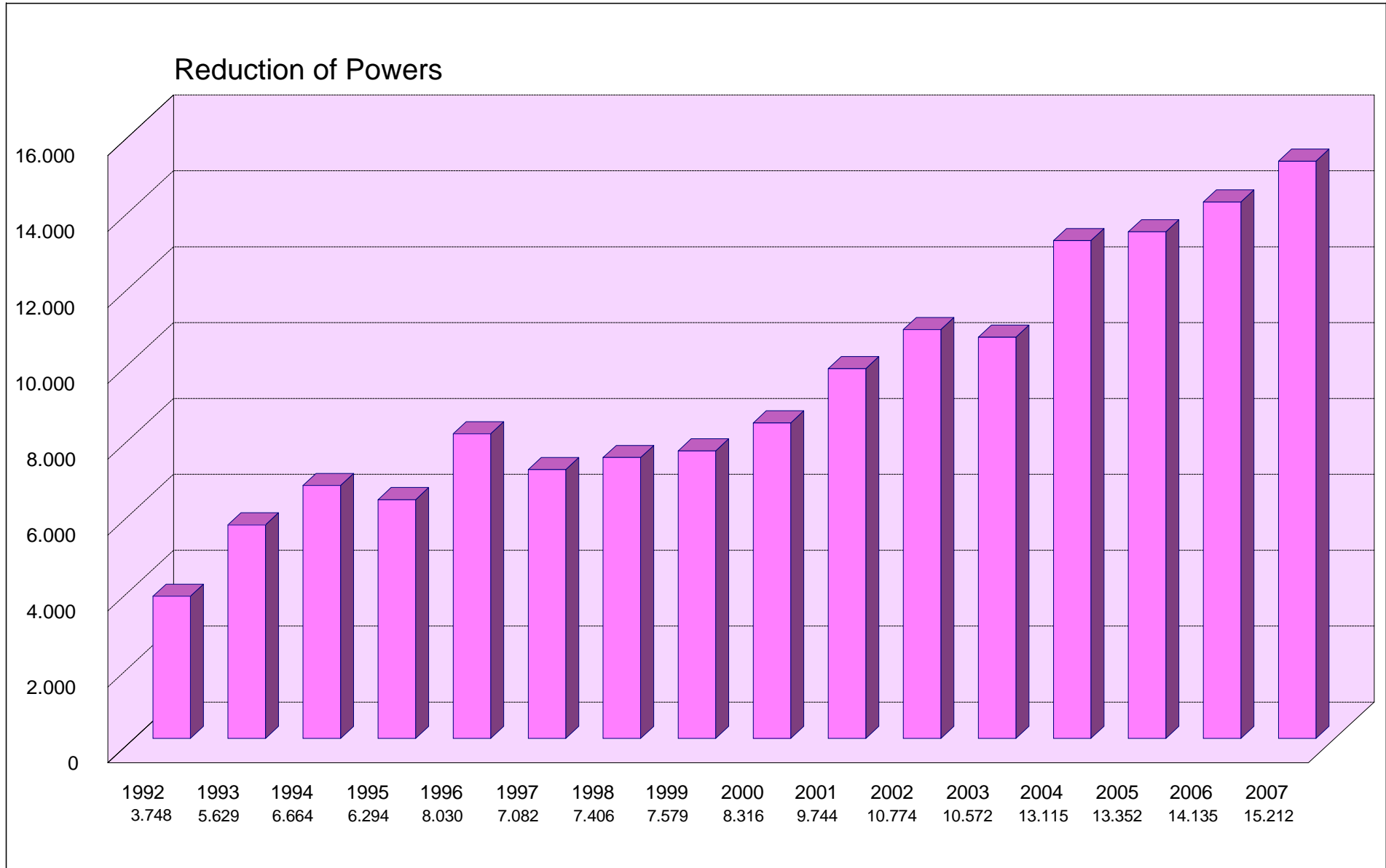
Bundesland	Bad-W	Bayern	Berlin	Brand.	Bremen	Hessen	Meck-V.	Nds.	NRW	RLP	Saarl.	Sachs.	S.-A.	Schl.-H.	Thür.	BRD
Family member	779	1.664	205	278	50	685	225	1.168	1.989	458	157	516	248	269	174	8.865
in %	30,25%	34,78%	19,36%	23,01%	18,32%	24,75%	29,61%	23,36%	26,44%	26,28%	33,48%	24,51%	18,37%	18,68%	27,66%	26,32%
Other guardian hon.	520	625	116	179	78	440	121	1.135	601	270	153	313	269	421	72	5.313
in %	20,19%	13,06%	10,95%	14,82%	28,57%	15,90%	15,92%	22,70%	7,99%	15,49%	32,62%	14,87%	19,93%	29,24%	11,45%	15,77%
Total	1.299	2.289	321	457	128	1.125	346	2.303	2.590	728	310	829	962	690	246	14.178
in %	50,45%	47,85%	30,31%	37,83%	46,89%	40,64%	45,53%	46,06%	34,42%	41,77%	66,10%	39,38%	71,26%	47,92%	39,11%	42,09%
Professional Guardians other than Lawyers	764	1.681	433	429	34	1.162	227	1.742	2.901	439	123	816	380	527	274	11.932
in %	29,67%	35,14%	40,89%	35,51%	12,45%	41,98%	29,87%	34,84%	38,56%	25,19%	26,23%	38,76%	28,15%	36,60%	43,56%	35,42%
Lawyers as Guardian	230	303	168	52	50	287	2	225	436	135	17	23	6	133	7	2.074
in %	8,93%	6,33%	15,86%	4,30%	18,32%	10,37%	0,26%	4,50%	5,79%	7,75%	3,62%	1,09%	0,44%	9,24%	1,11%	6,16%
Total	994	1.984	601	481	84	1.449	229	1.967	3.337	574	140	839	386	660	281	14.006
in %	38,60%	41,47%	56,75%	39,82%	30,77%	52,35%	30,13%	39,34%	44,35%	32,93%	29,85%	39,86%	28,59%	45,83%	44,67%	41,58%
Guard. Ass. (§ 1897 II)	268	473	94	259	52	166	174	681	1.486	421	19	426	442	88	100	5.149
Guard. Ass. (§ 1900)	5	10	13	5	5	12	3	29	28	1	0	2	2	0	2	117
Total	273	483	107	264	57	178	177	710	1.514	422	19	428	444	88	102	5.266
in %	10,60%	10,10%	10,10%	21,85%	20,88%	6,43%	23,29%	14,20%	20,12%	24,21%	4,05%	20,33%	32,89%	6,11%	16,22%	15,63%
Guard. Auth. (§ 1897 II)	6	24	9	6	2	13	8	12	49	16	0	8	3	1	0	157
Guard. Auth. (§ 1900)	3	4	21	0	2	3	0	8	34	3	0	1	0	1	0	80
Total	9	28	30	6	4	16	8	20	83	19	0	9	3	2	0	237
in %	0,35%	0,59%	2,83%	0,50%	1,47%	0,58%	1,05%	0,40%	1,10%	1,09%	0,00%	0,43%	0,22%	0,14%	0,00%	0,70%
Total Professional Guardianship	1.276	2.495	738	751	145	1.643	414	2.697	4.934	1.015	159	1.276	833	750	383	19.509
in %	49,55%	52,15%	69,69%	62,17%	53,11%	59,36%	54,47%	53,94%	65,58%	58,23%	33,90%	60,62%	61,70%	52,08%	60,89%	57,91%
Total Change of Guardianships	2.575	4.784	1.059	1.208	273	2.768	760	5.000	7.524	1.743	469	2.105	1.350	1.440	629	33.687

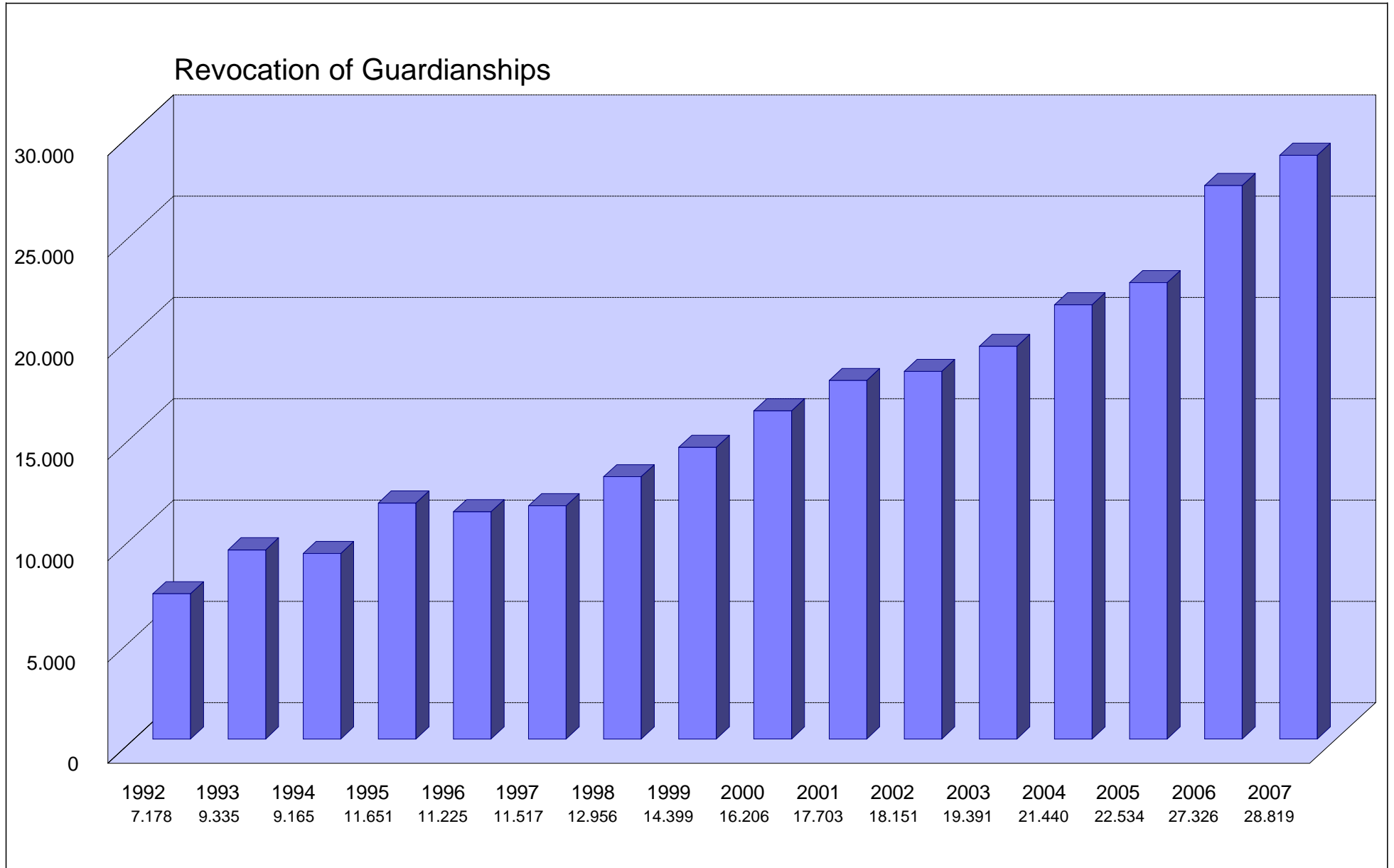
Appendices Germany (D)

Change of Guardian (§ 1908c BGB) 2007

Bundesland	Bad-W	Bayern	Berlin	Brand.	Bremen	Hessen	Meck-V.	Nds.	NRW	RLP	Saarl.	Sachs.	S.-A.	Schl.-H.	Thür.	BRD
Family Member	785	1.372	192	216	64	1.023	236	1.297	2.105	576	221	405	299	230	148	9.169
in %	29,02%	32,76%	14,66%	17,14%	21,55%	33,05%	24,76%	25,56%	28,50%	31,88%	34,75%	24,08%	25,08%	15,09%	24,34%	27,19%
Other guardian hon.	612	606	88	210	43	400	181	1.083	564	280	129	298	166	462	87	5.209
in %	22,62%	14,47%	6,72%	16,67%	14,48%	12,92%	18,99%	21,34%	7,64%	15,50%	20,28%	17,72%	13,93%	30,31%	14,31%	15,45%
Total	1.397	1.978	280	426	107	1.423	417	2.380	2.669	856	350	703	962	692	235	14.378
in %	51,65%	47,23%	21,37%	33,81%	36,03%	45,98%	43,76%	46,90%	36,14%	47,37%	55,03%	41,80%	80,70%	45,41%	38,65%	42,64%
Professional Guardians other than Lawyers	822	1.481	634	492	59	1.202	268	1.793	2.558	355	196	551	356	567	238	11.572
in %	30,39%	35,36%	48,40%	39,05%	19,87%	38,84%	28,12%	35,33%	34,64%	19,65%	30,82%	32,76%	29,87%	37,20%	39,14%	34,32%
Lawyers as Guardian	192	302	183	41	59	278	39	240	446	134	51	23	14	148	105	2.255
in %	7,10%	7,21%	13,97%	3,25%	19,87%	8,98%	4,09%	4,73%	6,04%	7,42%	8,02%	1,37%	1,17%	9,71%	17,27%	6,69%
Total	1.014	1.783	817	533	118	1.480	307	2.033	3.004	489	247	574	370	715	343	13.827
in %	37,49%	42,57%	62,37%	42,30%	39,73%	47,82%	32,21%	40,06%	40,68%	27,06%	38,84%	34,13%	31,04%	46,92%	56,41%	41,01%
Guard. Ass. (§ 1897 II)	274	415	174	290	65	167	223	606	1.576	453	35	380	308	94	30	5.090
Guard. Ass. (§ 1900)	3	2	10	10	7	13	0	33	26	3	2		48	17	0	174
Total	277	417	184	300	72	180	223	639	1.602	456	37	380	356	111	30	5.264
in %	10,24%	9,96%	14,05%	23,81%	24,24%	5,82%	23,40%	12,59%	21,69%	25,24%	5,82%	22,59%	29,87%	7,28%	4,93%	15,61%
Guard. Auth. (§ 1897 II)	15	6	19	0	0	12	6	17	96	4	0	25	1	2	0	203
Guard. Auth. (§ 1900)	2	4	10	1	0	0	0	6	14	2	2			4	0	45
Total	17	10	29	1	0	12	6	23	110	6	2	25	1	6	0	248
in %	0,63%	0,24%	2,21%	0,08%	0,00%	0,39%	0,63%	0,45%	1,49%	0,33%	0,31%	1,49%	0,08%	0,39%	0,00%	0,74%
Total Professional Guardianship	1.308	2.210	1.030	834	190	1.672	536	2.695	4.716	951	286	979	727	832	373	19.339
in %	48,35%	52,77%	78,63%	66,19%	63,97%	54,02%	56,24%	53,10%	63,86%	52,63%	44,97%	58,20%	60,99%	54,59%	61,35%	57,36%
Total Change of Guardianship	2.705	4.188	1.310	1.260	297	3.095	953	5.075	7.385	1.807	636	1.682	1.192	1.524	608	33.717







Guard. Assoc. 2003 - 2007

Global Figures Guardianship Associations 2003 in Euro

Bundesland	Inhabitants 31.12.2003	Guardianship s 31.12.2003	Guard. Ass. 31.12.2003	Inhabitants per Guard. Ass. 2003	Prot. Pers per Guard. Ass. 2003	Funded Guard. Ass. 2003	Public funds awarded to Guard. Ass. 2003	Public funds awarded on average	Public funds awarded on every 1000 inhab. 2003	Public funds awarded on every prot. pers. 2003
Baden - Württemberg	10.661.320	88.345	82	130.016	1.077	60	1.132.013 €	18.866,88 €	1,77 €	12,81 €
Bayern	12.387.351	157.688	143	86.625	1.103	108	365.000 €	3.379,63 €	0,27 €	2,31 €
Berlin	3.392.425	56.638	13	260.956	4.357	9	777.037 €	86.337,44 €	25,45 €	13,72 €
Brandenburg	2.582.379	40.130	40	64.559	1.003	0	0 €	0,00 €	0,00 €	0,00 €
Bremen	662.098	7.520	5	132.420	1.504	4	170.820 €	42.705,00 €	64,50 €	22,72 €
Hamburg	1.728.806	19.065	8	216.101	2.383	8	891.000 €	111.375,00 €	64,42 €	46,73 €
Hessen	6.091.618	82.189	60	101.527	1.370	56	724.894 €	12.944,54 €	2,12 €	8,82 €
Mecklenburg - Vorp.	1.744.624	27.619	21	83.077	1.315	17	203.682 €	11.981,29 €	6,87 €	7,37 €
Niedersachsen	7.980.472	119.872	61	130.827	1.965	44	792.740 €	18.016,82 €	2,26 €	6,61 €
Nordrhein - Westfalen	18.076.355	250.516	241	75.006	1.039	0	0 €	0,00 €	0,00 €	0,00 €
Rheinland - Pfalz	4.057.727	58.012	112	36.230	518	103	4.620.580 €	44.860,00 €	11,06 €	79,65 €
Saarland	1.064.988	19.331	13	81.922	1.487	11	236.000 €	21.454,55 €	20,15 €	12,21 €
Sachsen	4.349.059	63.509	35	124.259	1.815	34	430.000 €	12.647,06 €	2,91 €	6,77 €
Sachsen - Anhalt	2.548.911	39.056	29	87.893	1.347	25	96.134 €	3.845,36 €	1,51 €	2,46 €
Schleswig - Holstein	2.816.507	40.504	20	140.825	2.025	20	582.736 €	29.136,80 €	10,35 €	14,39 €
Thüringen	2.392.040	30.632	19	125.897	1.612	16	230.000 €	14.375,00 €	6,01 €	7,51 €
Bundesgebiet	82.536.680	1.100.626	902	91.504	1.220	515	11.252.636 €	21.849,78 €	0,26 €	10,22 €

Global Figures Guardianship Associations 2004

Bundesland	Inhabitants 31.12.2004	Guardianship s 31.12.2004	Guard. Ass. 31.12.2004	Inhabitants per Guard. Ass. 2004	Prot. Pers per Guard Ass. 2004	Funded Guard. Ass. 2004	Public funds awarded to Guard. Ass. 2004	Public funds awarded on average	Public funds every 1000 inhab. 2004	Public funds every prot. pers. 2004
Baden - Württemberg	10 717 419	89.671	82	130.700	1.094	69	1.133.738 €	16.430,99 €	105,78 €	12,64 €
Bayern	12 443 893	165.422	132	94.272	1.253	0	0 €	0,00 €	0,00 €	0,00 €
Berlin	3 387 828	58.621	12	282.319	4.885	12	777.037 €	64.753,08 €	229,36 €	13,26 €
Brandenburg	2 567 704	41.409	38	67.571	1.090	0	0 €	0,00 €	0,00 €	0,00 €
Bremen	663 213	8.185	5	132.643	1.637	5	155.000 €	31.000,00 €	233,71 €	18,94 €
Hamburg	1 734 830	22.281	6	289.138	3.714	6	919.000 €	153.166,67 €	529,73 €	41,25 €
Hessen	6 097 765	85.119	57	106.978	1.493	53	650.774 €	12.278,75 €	106,72 €	7,65 €
Mecklenburg - Vorp.	1 719 653	29.466	21	81.888	1.403	17	191.733 €	11.278,40 €	111,50 €	6,51 €
Niedersachsen	8 000 909	128.926	60	133.348	2.149	48	933.534 €	19.448,63 €	116,68 €	7,24 €
Nordrhein - Westfalen	18 075 352	264.911	218	82.914	1.215	146	782.150 €	5.357,19 €	43,27 €	2,95 €
Rheinland - Pfalz	4 061 105	60.798	114	35.624	533	102	2.342.940 €	22.970,00 €	576,92 €	38,54 €
Saarland	1 056 417	20.602	13	81.263	1.585	11	241.000 €	21.909,09 €	228,13 €	11,70 €
Sachsen	4 296 284	65.325	33	130.190	1.980	29	407.158 €	14.039,93 €	94,77 €	6,23 €
Sachsen - Anhalt	2 494 437	40.910	23	108.454	1.779	14	65.521 €	4.680,07 €	26,27 €	1,60 €
Schleswig - Holstein	2 828 760	42.560	20	141.438	2.128	20	601.500 €	30.075,00 €	212,64 €	14,13 €
Thüringen	2 355 280	33.613	19	123.962	1.769	16	219.369 €	13.710,56 €	93,14 €	6,53 €
Bundesgebiet	82.500.849	1.157.819	853	96.718	1.357	548	9.420.454 €	17.190,61 €	0,21 €	8,14 €

Global Figures Guardianship Associations 2005

Bundesland	Inhabitants 31.12.2005	Guardianship s 31.12.2005	Guard. Ass. 31.12.2005	Inhabitants per Guard. Ass. 2005	Prot. Pers per Guard. Ass. 2005	Funded Guard. Ass. 2005	Public funds awarded to Guard. Ass. 2005	Public funds awarded on average	Public funds awarded on every 1000 inhab. 2005	Public funds awarded on every prot. pers. 2005
Baden - Württemberg	10.735.701	95.737	75	143.143	1.276	68	1.096.862 €	16.130,32 €	102,17 €	11,46 €
Bayern	12.468.726	172.323	132	94.460	1.305	103	152.000 €	0,00 €	12,19 €	0,88 €
Berlin	3.395.189	61.028	13	261.168	4.694	12	777.000 €	64.750,00 €	228,85 €	12,73 €
Brandenburg	2.559.483	42.479	38	67.355	1.118	0	0 €	0,00 €	0,00 €	0,00 €
Bremen	663.467	8.597	5	132.693	1.719	4	155.000 €	38.750,00 €	233,62 €	18,03 €
Hamburg	1.743.627	24.321	8	217.953	3.040	8	919.000 €	114.875,00 €	527,06 €	37,79 €
Hessen	6.092.354	88.016	57	106.883	1.544	52	650.774 €	12.514,88 €	106,82 €	7,39 €
Mecklenburg - Vorp.	1.707.266	31.347	21	81.298	1.493	18	203.996 €	11.333,11 €	119,49 €	6,51 €
Niedersachsen	7.993.946	128.174	58	137.827	2.210	50	869.941 €	17.398,82 €	108,82 €	6,79 €
Nordrhein - Westfalen	18.058.105	273.232	209	86.402	1.307	135	584.800 €	4.331,85 €	32,38 €	2,14 €
Rheinland - Pfalz	4.058.843	63.349	112	36.240	566	102	2.366.430 €	23.200,29 €	583,03 €	37,36 €
Saarland	1.050.293	21.768	12	87.524	1.814	11	245.908 €	22.355,27 €	234,13 €	11,30 €
Sachsen	4.273.754	66.857	33	129.508	2.026	29	399.989 €	13.792,72 €	93,59 €	5,98 €
Sachsen - Anhalt	2.469.716	43.823	24	102.905	1.826	15	41.092 €	2.739,47 €	16,64 €	0,94 €
Schleswig - Holstein	2.832.950	42.105	20	141.648	2.105	20	601.999 €	30.099,95 €	212,50 €	14,30 €
Thüringen	2.334.575	35.217	17	137.328	2.072	15	117.318 €	7.821,20 €	50,25 €	3,33 €
Bundesgebiet	82.437.995	1.198.373	834	98.847	1.437	642	9.182.109 €	14.302,35 €	111,38 €	7,66 €

Global Figures Guardianship Associations 2006

Bundesland	Inhabitants 31.12.2006	Guardianship s 31.12.2006	Guard. Ass. 31.12.2006	Inhabitants per Guard. Ass. 2006	Prot. Pers per Guard. Ass. 2006	Funded Guard. Ass. 2006	Public funds awarded to Guard. Ass. 2006	Public funds awarded on average	Public funds awarded on every 1000 inhab. 2006	Public funds awarded on every prot. pers. 2006
Baden - Württemberg	10.738.753	98.760	78	137.676	1.266	70	1.119.077 €	15.986,81 €	104,21 €	11,33 €
Bayern	12.492.658	177.983	133	93.930	1.338	101	150.000 €	0,00 €	12,01 €	0,84 €
Berlin	3.404.037	59.741	12	283.670	4.978	12	777.000 €	64.750,00 €	228,26 €	13,01 €
Brandenburg	2.547.772	43.218	38	67.047	1.137	0	0 €	0,00 €	0,00 €	0,00 €
Bremen	663.979	9.206	6	110.663	1.534	4	147.000 €	36.750,00 €	221,39 €	15,97 €
Hamburg	1.754.182	23.737	6	292.364	3.956	6	919.000 €	153.166,67 €	523,89 €	38,72 €
Hessen	6.075.359	84.965	55	110.461	1.545	55	712.563 €	12.955,69 €	117,29 €	8,39 €
Mecklenburg - Vorp.	1.693.754	32.414	19	89.145	1.706	14	162.452 €	11.603,71 €	95,91 €	5,01 €
Niedersachsen	7.982.685	129.138	56	142.548	2.306	53	855.947 €	16.149,94 €	107,23 €	6,63 €
Nordrhein - Westfalen	18.028.745	282.829	196	91.983	1.443	125	577.270 €	4.618,16 €	32,02 €	2,04 €
Rheinland - Pfalz	4.052.860	65.953	112	36.186	589	102	2.389.860 €	23.430,00 €	589,67 €	36,24 €
Saarland	1.043.167	22.613	12	86.931	1.884	11	231.230 €	21.020,91 €	221,66 €	10,23 €
Sachsen	4.249.774	69.213	32	132.805	2.163	27	379.730 €	14.064,07 €	89,35 €	5,49 €
Sachsen - Anhalt	2.441.787	46.501	23	106.165	2.022	19	285.000 €	15.000,00 €	116,72 €	6,13 €
Schleswig - Holstein	2.834.254	44.143	20	141.713	2.207	20	595.000 €	29.750,00 €	209,93 €	13,48 €
Thüringen	2.311.140	36.224	14	165.081	2.587	13	111.600 €	8.584,62 €	48,29 €	3,08 €
Bundesgebiet	82.314.906	1.226.638	812	101.373	1.511	632	9.412.729 €	14.893,56 €	114,35 €	7,67 €

Global Figures Guardianship Associations 2007

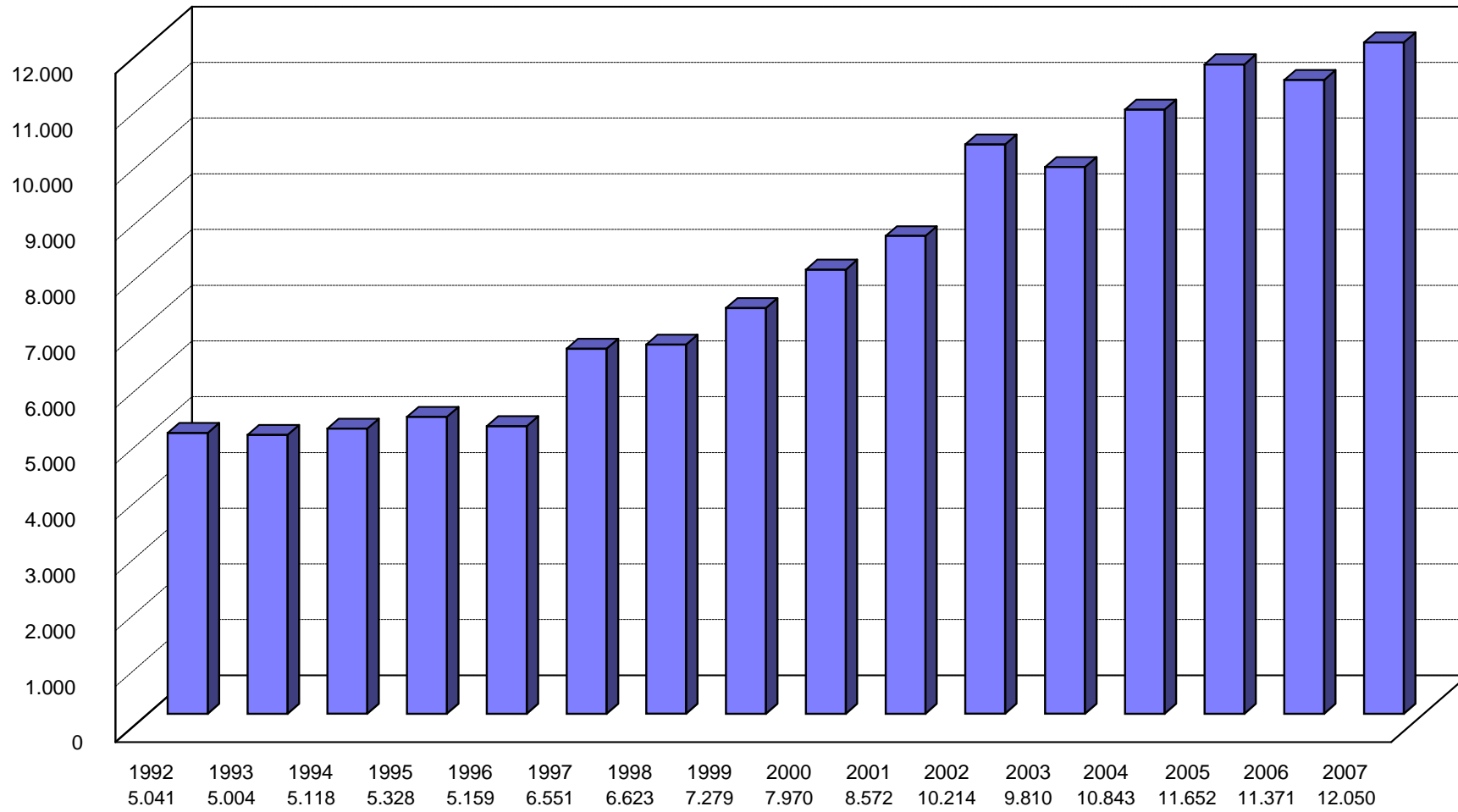
Bundesland	Inhabitants 31.12.2007	Guardianship s 31.12.2007	Guard. Ass. 31.12.2007	Inhabitants per Guard. Ass. 2007	Prot. Pers per Guard Ass. 2007	Funded Guard. Ass. 2007	Public funds awarded to Guard. Ass. 2007	Public funds awarded on average	Public funds awarded on every 1000 inhab. 2007	Public funds awarded on every prot. pers. 2007
Baden - Württemberg	10.749.755	102.842	79	136.073	1.302	70	1.123.928 €	16.056,11 €	104,55 €	10,93 €
Bayern	12.520.332	183.479	130	96.310	1.411	99	150.000 €	0,00 €	11,98 €	0,82 €
Berlin	3.416.255	53.728	12	284.688	4.477	12	777.000 €	64.750,00 €	227,44 €	14,46 €
Brandenburg	2.535.737	43.964	38	66.730	1.157	0	0 €	0,00 €	0,00 €	0,00 €
Bremen	663.082	9.529	5	132.616	1.906	5	136.262 €	27.252,40 €	205,50 €	14,30 €
Hamburg	1.770.629	22.733	6	295.105	3.789	6	919.000 €	153.166,67 €	519,02 €	40,43 €
Hessen	6.072.555	85.417	57	106.536	1.499	57	738.344 €	12.953,40 €	121,59 €	8,64 €
Mecklenburg - Vorp.	1.679.682	32.999	19	88.404	1.737	18	209.725 €	11.651,39 €	124,86 €	6,36 €
Niedersachsen	7.971.684	128.531	55	144.940	2.337	50	802.780 €	16.055,60 €	100,70 €	6,25 €
Nordrhein - Westfalen	17.996.621	290.207	191	94.223	1.519	127	698.180 €	5.497,48 €	38,80 €	2,41 €
Rheinland - Pfalz	4.045.643	66.194	116	34.876	571	102	2.389.860 €	23.430,00 €	590,72 €	36,10 €
Saarland	1.036.598	23.066	12	86.383	1.922	11	238.446 €	21.676,91 €	230,03 €	10,34 €
Sachsen	4.220.200	69.183	32	131.881	2.162	26	382.829 €	14.724,19 €	90,71 €	5,53 €
Sachsen - Anhalt	2.412.472	46.720	23	104.890	2.031	19	285.000 €	15.000,00 €	118,14 €	6,10 €
Schleswig - Holstein	2.837.373	46.256	20	141.869	2.313	20	595.000 €	29.750,00 €	209,70 €	12,86 €
Thüringen	2.289.219	37.332	14	163.516	2.667	12	97.670 €	8.139,17 €	42,67 €	2,62 €
Bundesgebiet	82.217.837	1.242.180	809	101.629	1.535	634	9.544.024 €	15.053,67 €	116,08 €	7,68 €

Verfahrenspflegschaften 2005 - 2007 in Relation zu Einwohner- und Betreuzahlen

Bundesland	Verfahrenspflegschaften 2005	Verfahrenspflegschaften 2006	Verfahrenspflegschaften 2007	Verfahrenspfleger 2005 je 10.000 Einwohner	Verfahrenspfleger 2006 je 10.000 Einwohner	Verfahrenspfleger 2007 je 10.000 Einwohner	Verfahrenspfleger 2005 je 100 Betreute	Verfahrenspfleger 2006 je 100 Betreute	Public funds every pers. 2007	funds prot.
Baden - Württ.	6760	5680	6575	6,30	5,29	6,12	7,06	5,75	6,39	
Bayern	14329	13000	12017	11,49	10,41	9,60	8,32	7,30	6,55	
Berlin	1250	1325	1252	3,68	3,89	3,66	2,05	2,22	2,33	
Brandenburg	2125	2010	2640	8,30	7,89	10,41	5,00	4,65	6,00	
Bremen	418	359	376	6,30	5,41	5,67	4,86	3,90	3,95	
Hessen	6588	6471	6692	10,81	10,65	11,02	7,49	7,62	7,83	
Mecklenb.-V.	2736	2394	1724	16,03	14,13	10,26	8,73	7,39	5,22	
Niedersachsen	10683	9204	9199	13,36	11,53	11,54	8,33	7,13	7,16	
NRW	26246	27441	27597	14,53	15,22	15,33	9,61	9,70	9,51	
Rheinland-Pf.	3107	3291	2826	7,65	8,12	6,99	4,90	4,99	4,27	
Saarland	931	1436	988	8,86	13,77	9,53	4,28	6,35	4,28	
Sachsen	9973	9186	8873	23,34	21,62	21,03	14,92	13,27	12,83	
Sachsen-Anh.	2775	3566	2833	11,24	14,60	11,74	6,33	7,67	6,06	
Schl.-Holst.	4064	3870	4850	14,35	13,65	17,09	9,65	8,77	10,49	
Thüringen	1508	1117	1134	6,46	4,83	4,95	4,28	3,08	3,04	
Bundesgebiet*	93.493	90.350	89.576	11,59	11,22	11,13	7,96	7,51	7,35	

*Hamburg not included

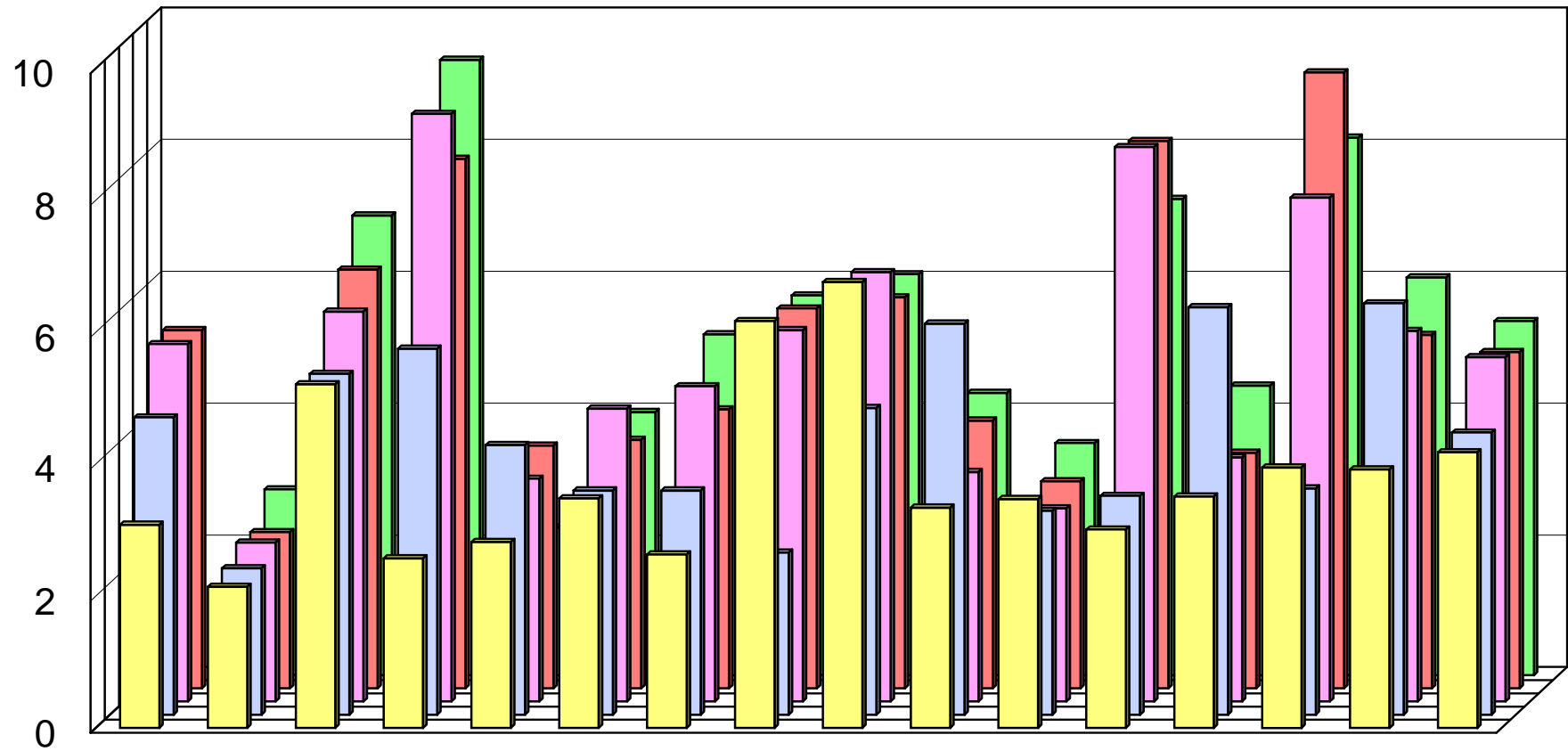
Guard. Requir. Author



Guardianships Requiring Authorisations (Einwilligungsvorbehalte) 2005 - 2007
 Betreuerbestellungen

Bundesland	New Guardianship 2005	New Guardianship 2006	New Guardianship 2007	Einwilligungsvorbehalte 2005	Einwilligungsvorbehalte 2006	Einwilligungsvorbehalte 2007	Percentage 2005	Percentage 2006	Percentage 2007
Baden - Württ.	17.909	18.060	18.373	971	980	1.144	5,42	5,43	6,23
Bayern	39.586	37.917	37.756	954	897	1.065	2,41	2,37	2,82
Berlin	8.279	8.645	8.690	489	549	606	5,91	6,35	6,97
Brandenburg	7.383	7.098	6.948	658	570	648	8,91	8,03	9,33
Bremen	1.629	1.332	1.472	55	49	33	3,38	3,68	2,24
Hessen	18.969	18.456	18.743	842	696	747	4,44	3,77	3,99
Mecklenb.-V.	5.606	5.125	5.237	268	217	271	4,78	4,23	5,17
Niedersachsen	23.632	22.654	23.224	1.330	1.306	1.337	5,63	5,76	5,76
NRW	50.437	52.361	52.868	3.283	3.106	3.215	6,51	5,93	6,08
Rheinland-Pf.	12.697	13.017	12.533	442	529	536	3,48	4,06	4,28
Saarland	3.790	4.203	3.890	111	132	137	2,93	3,14	3,52
Sachsen	11.896	11.205	11.239	1.001	930	812	8,41	8,30	7,22
Sachsen-Anh.	6.829	7.564	7.274	253	270	319	3,70	3,57	4,39
Schl.-Holst.	8.282	8.171	9.604	633	763	783	7,64	9,34	8,15
Thüringen	6.441	7.035	6.581	362	377	397	5,62	5,36	6,03
Bundesgebiet*	223.365	222.843	224.432	11.652	11.371	12.050	5,22	5,10	5,37

Guard. Requiring Authorisations 2001 - 2007



	Bad.-W.	Bayern	Berlin	Brand.	Bremen	Hessen	Meckl.-V.	Nieders.	NRW	Rind- Pf.	Saarl.	Sachsen	Sachs-A.	Schl.- H.	Thür.	BRD
2001 (%)	3,08	2,14	5,21	2,57	2,82	3,48	2,63	6,17	6,76	3,34	3,47	3,01	3,51	3,95	3,92	4,18
2003 (%)	4,51	2,22	5,17	5,55	4,09	3,4	3,4	2,46	4,65	5,93	3,09	3,32	6,18	3,43	6,24	4,28
2005 (%)	5,42	2,41	5,91	8,91	3,38	4,44	4,78	5,63	6,51	3,48	2,93	8,41	3,7	7,64	5,62	5,22
2006 (%)	5,43	2,37	6,35	8,03	3,68	3,77	4,23	5,76	5,93	4,06	3,14	8,3	3,57	9,34	5,36	5,1
2007 (%)		2,82	6,97	9,33	2,24	3,99	5,17	5,76	6,08	4,28	3,52	7,22	4,39	8,15	6,03	5,37

Appendices Germany (D)

Total

Amount

Year	Amount	Increase/Decrease
1992	5.041	
1993	5.004	-0,73%
1994	5.118	2,28%
1995	5.328	4,10%
1996	5.159	-3,17%
1997	6.551	26,98%
1998	6.623	1,10%
1999	7.279	9,90%
2000*	7.970	9,49%
2001	8.572	7,55%
2002	10.214	19,16%
2003	9.810	-3,96%
2004	10.843	10,53%
2005	11.652	7,46%
2006	11.371	-2,41%
2007	12.050	5,97%

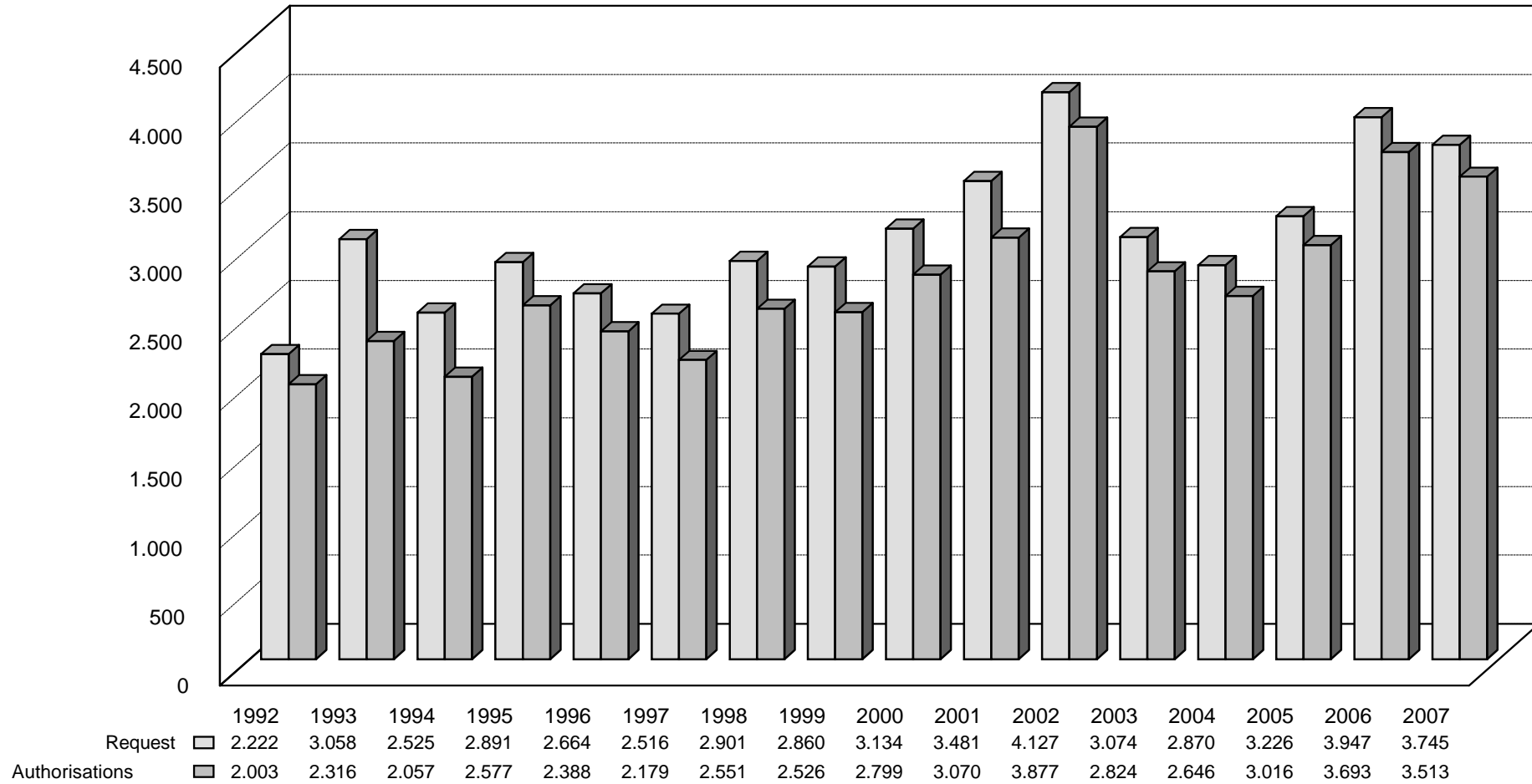
*ab 2000 ohne Hamburg

Appendices Germany (D)

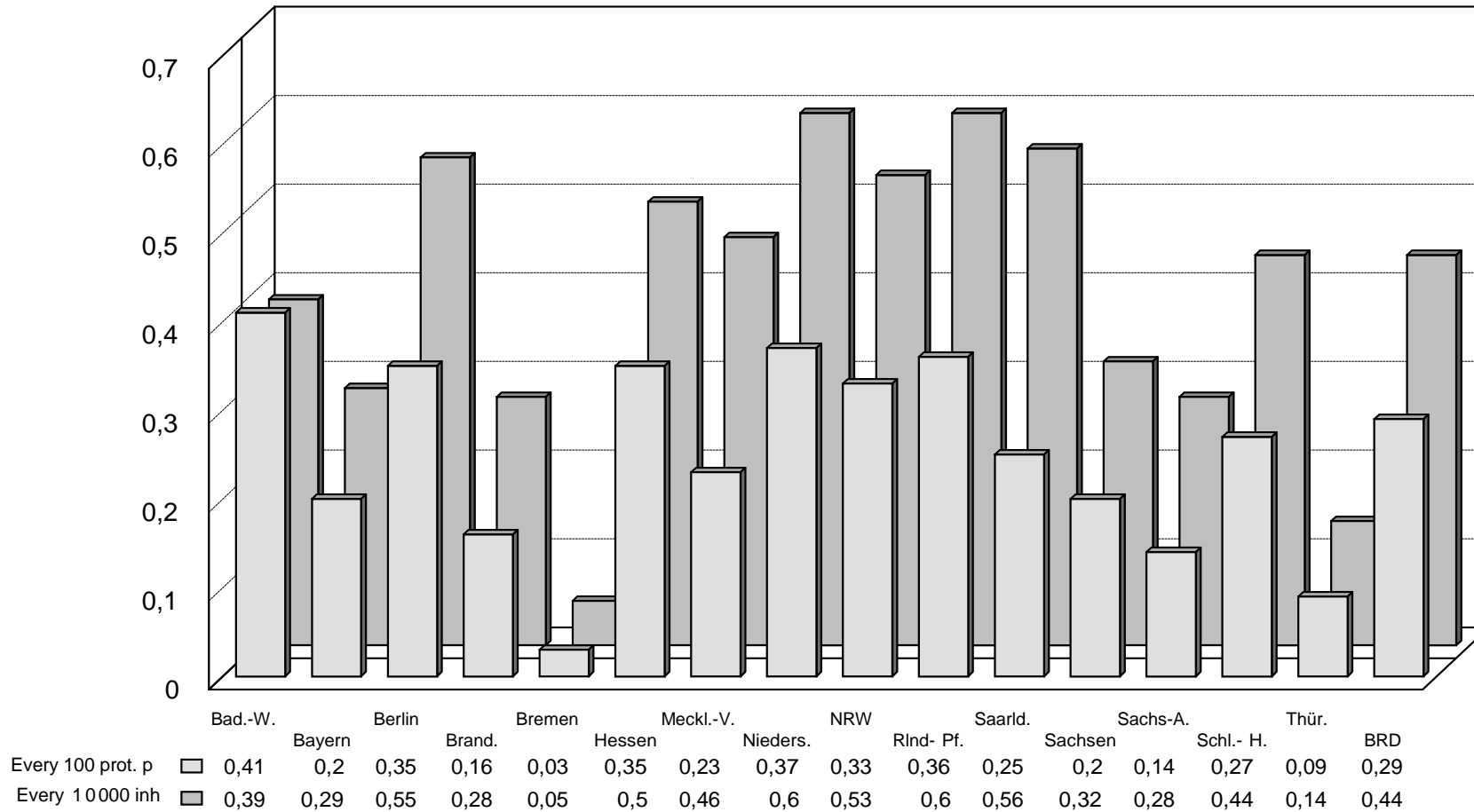
Authorisations as per § 1904 BGB

Bundesland	Inhabitants 31.12.2006	Inhabitants 31.12.2007	Guardianship s 31.12.2006	Guardianship s 31.12.2007	Authorisation s § 1904 BGB 2006	Authorisation s 1904 BGB 2007	Authorisat ions every 10.000 inhabitants 2006	Authorisat inos 10.000 inhabitants 2007	Authorisat ions every 100 prot pers. 2006	Authorisat ions every 100 prot pers 2007
Baden - Württ.	10.738.753	10.749.755	98.760	102.842	282	421	0,26	0,39	0,29	0,41
Bayern	12.492.658	12.520.332	177.983	183.479	324	360	0,26	0,29	0,18	0,20
Berlin	3.404.037	3.416.255	59.741	53.728	144	187	0,42	0,55	0,24	0,35
Brandenburg	2.547.772	2.535.737	43.218	43.964	133	70	0,52	0,28	0,31	0,16
Bremen	663.979	663.082	9.206	9.529	9	3	0,14	0,05	0,10	0,03
Hessen	6.075.359	6.072.555	84.965	85.417	336	301	0,55	0,50	0,40	0,35
Mecklenb.-V.	1.693.754	1.679.682	32.414	32.999	79	77	0,47	0,46	0,24	0,23
Niedersachsen	7.982.685	7.971.684	129.138	128.531	494	479	0,62	0,60	0,38	0,37
NRW	18.028.745	17.996.621	282.829	290.207	733	954	0,41	0,53	0,26	0,33
Rheinland-Pf.	4.052.860	4.045.643	65.953	66.194	492	241	1,21	0,60	0,75	0,36
Saarland	1.043.167	1.036.598	22.613	23.066	54	58	0,52	0,56	0,24	0,25
Sachsen	4.249.774	4.220.200	69.213	69.183	211	137	0,50	0,32	0,30	0,20
Sachsen-Anh.	2.441.787	2.412.472	46.501	46.720	94	67	0,38	0,28	0,20	0,14
Schl.-Holst.	2.834.254	2.837.373	44.143	46.256	260	126	0,92	0,44	0,59	0,27
Thüringen	2.311.140	2.289.219	36.224	37.332	48	32	0,21	0,14	0,13	0,09
Bundesweit*	80.560.724	80.447.208	1.202.901	1.219.447	3693	3513	0,46	0,44	0,31	0,29

Authorisations Proceedings (§ 1904 BGB)



Authorised Health Operations Year 2007



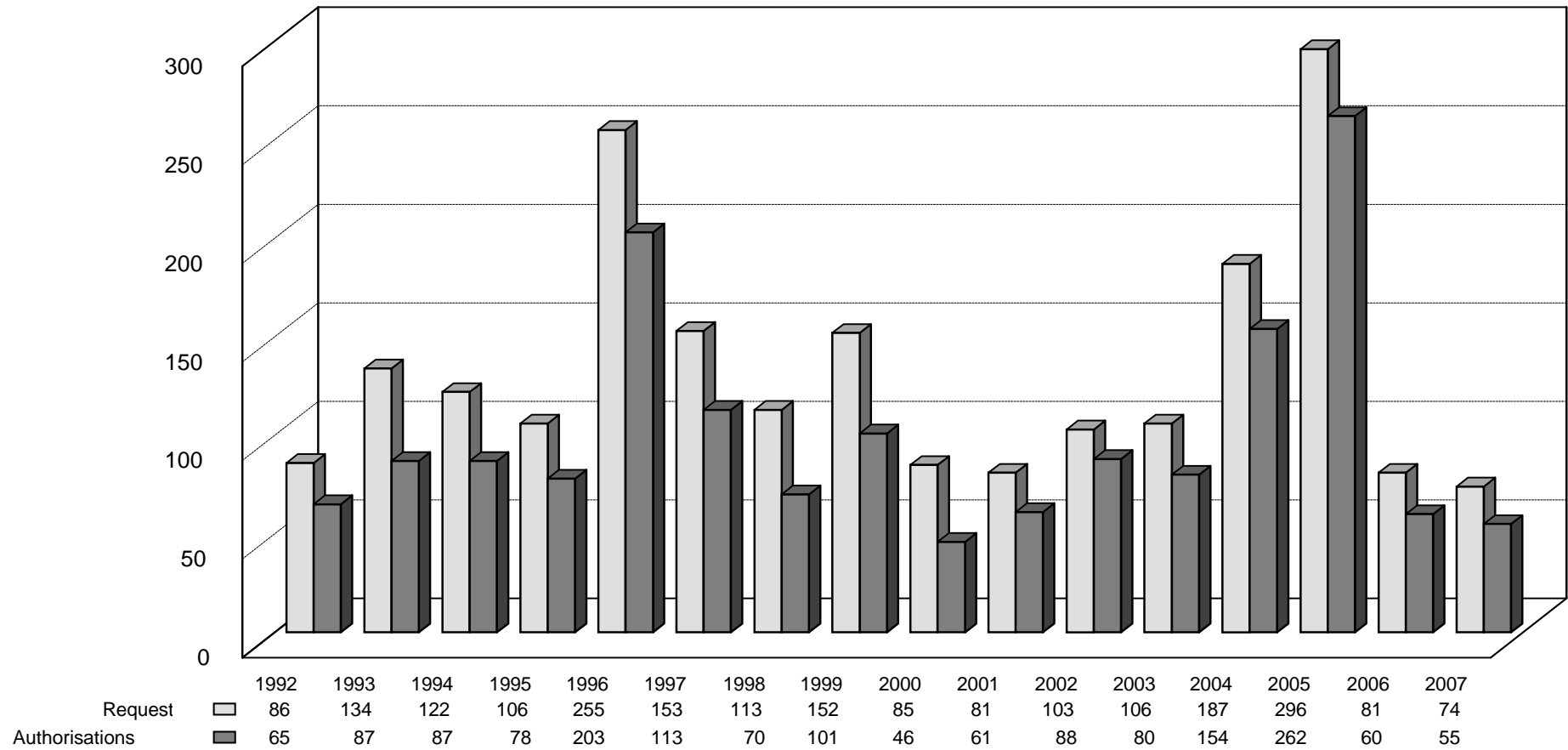
Appendices Germany (D)

Authorisations as per § 1905 BGB

Bundesland	Inhabitants 31.12.2006	Inhabitants 31.12.2007	Guardianship s 31.12.2006	Guardianship s 31.12.2007	Authorisation s as per § 1905 BGB 2006	Authorisation s as per § 1905 BGB 2007	Authorisat ions every 100.000 Inhab. 2006	Authorisat ions every 100.000 Inhab. 2007	Authorisat ions every 1.000 Prot. Pers. 2006	Authorisat ions every 1.000 Prot. Pers. 2007
Baden - Württ.	10.738.753	10.749.755	98.760	102.842	16	11	0,15	0,10	0,16	0,11
Bayern	12.492.658	12.520.332	177.983	183.479	5	8	0,04	0,06	0,03	0,04
Berlin	3.404.037	3.416.255	59.741	53.728	3	0	0,09	0,00	0,05	0,00
Brandenburg	2.547.772	2.535.737	43.218	43.964	1	1	0,04	0,04	0,02	0,02
Bremen	663.979	663.082	9.206	9.529	0	0	0,00	0,00	0,00	0,00
Hessen	6.075.359	6.072.555	84.965	85.417	5	4	0,08	0,07	0,06	0,05
Mecklenb.-V.	1.693.754	1.679.682	32.414	32.999	5	2	0,30	0,12	0,15	0,06
Niedersachs en	7.982.685	7.971.684	129.138	128.531	1	5	0,01	0,06	0,01	0,04
NRW	18.028.745	17.996.621	282.829	290.207	9	15	0,05	0,08	0,03	0,05
Rheinland- Pf.	4.052.860	4.045.643	65.953	66.194	7	2	0,17	0,05	0,11	0,03
Saarland	1.043.167	1.036.598	22.613	23.066	1		0,10	0,00	0,04	0,00
Sachsen	4.249.774	4.220.200	69.213	69.183	1	3	0,02	0,07	0,01	0,04
Sachsen- Anh.	2.441.787	2.412.472	46.501	46.720	0	1	0,00	0,04	0,00	0,02
Schl.-Holst.	2.834.254	2.837.373	44.143	46.256	5		0,18	0,00	0,11	0,00
Thüringen	2.311.140	2.289.219	36.224	37.332	1	3	0,04	0,13	0,03	0,08
Bundesweit*	80.560.724	80.447.208	1.202.901	1.219.447	60	55	0,07	0,07	0,05	0,05

*ohne Hamburg

Authorisations as to Sterilisations (§ 1905 BGB)



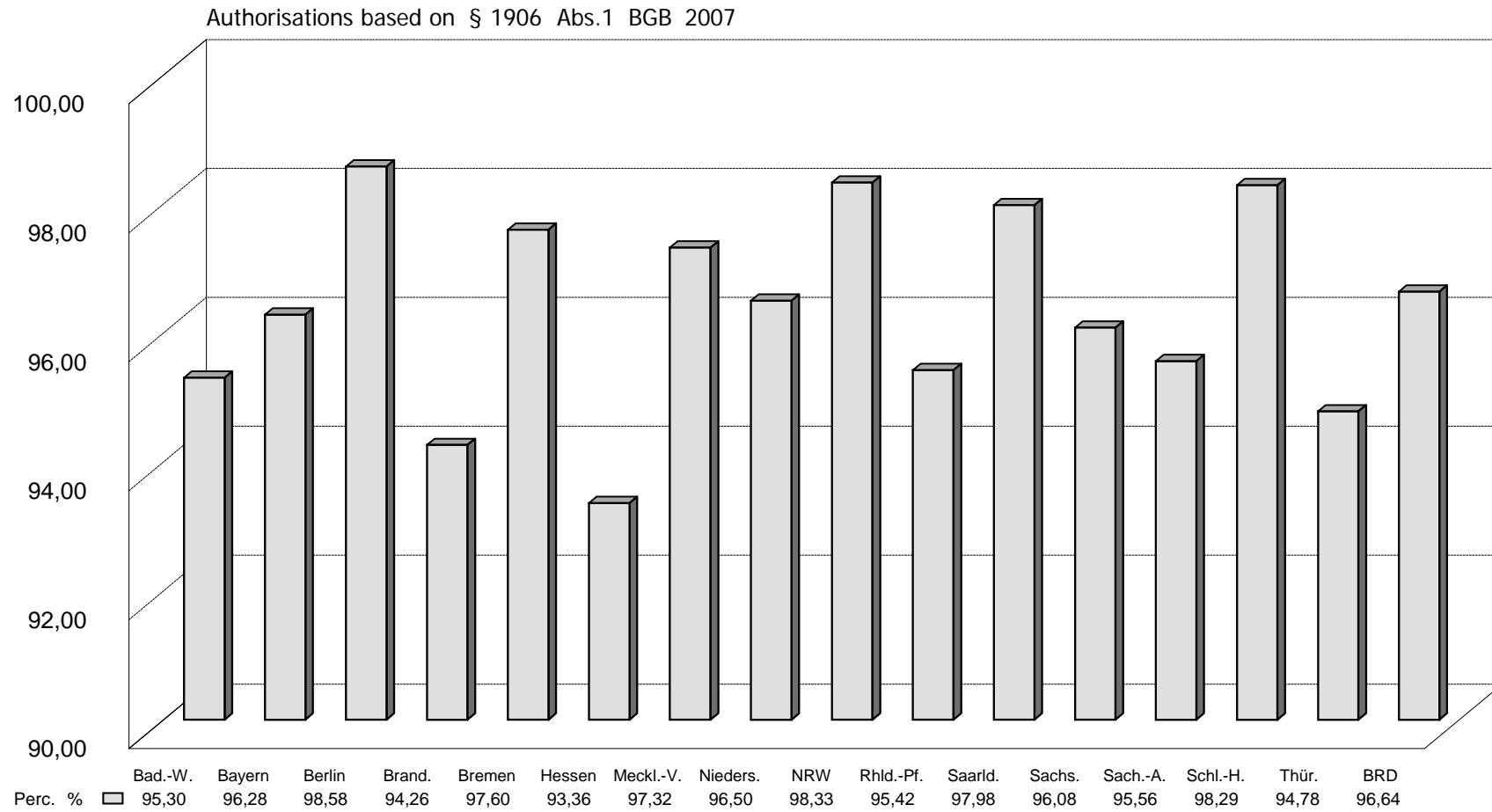
Appendices Germany (D)

Authorisations as to § 1906 Abs. 1 BGB

Bundesland	Inhabitants 31.12.2006	Inhabitants 31.12.2007	Guardianship s 31.12.2006	Guardianship s 31.12.2007	Authorisation s as per § 1906 Abs. 1 BGB 2006	Authorisation s as per § 1906 Abs. 1 BGB 2007	Authorisat ions every 100.000 Inhab. 2006	Authorisat ions every 100.000 Inhab. 2007	Authorisat ions every 1.000 Prot. Pers. 2007	Authorisat ions every 1.000 Prot. Pers. 2007
Baden - Württ.	10.738.753	10.749.755	98.760	102.842	3721	3893	3,47	3,62	3,77	3,79
Bayern	12.492.658	12.520.332	177.983	183.479	13766	15203	11,02	12,14	7,73	8,29
Berlin	3.404.037	3.416.255	59.741	53.728	1510	1799	4,44	5,27	2,53	3,35
Brandenburg	2.547.772	2.535.737	43.218	43.964	340	427	1,33	1,68	0,79	0,97
Bremen	663.979	663.082	9.206	9.529	276	203	4,16	3,06	3,00	2,13
Hessen	6.075.359	6.072.555	84.965	85.417	3190	3516	5,25	5,79	3,75	4,12
Mecklenb.-V.	1.693.754	1.679.682	32.414	32.999	575	581	3,39	3,46	1,77	1,76
Niedersachs en	7.982.685	7.971.684	129.138	128.531	4779	4571	5,99	5,73	3,70	3,56
NRW	18.028.745	17.996.621	282.829	290.207	11655	11709	6,46	6,51	4,12	4,03
Rheinland- Pf.	4.052.860	4.045.643	65.953	66.194	1737	1582	4,29	3,91	2,63	2,39
Saarland	1.043.167	1.036.598	22.613	23.066	454	534	4,35	5,15	2,01	2,32
Sachsen	4.249.774	4.220.200	69.213	69.183	1327	1396	3,12	3,31	1,92	2,02
Sachsen- Anh.	2.441.787	2.412.472	46.501	46.720	529	474	2,17	1,96	1,14	1,01
Schl.-Holst.	2.834.254	2.837.373	44.143	46.256	2429	2694	8,57	9,49	5,50	5,82
Thüringen	2.311.140	2.289.219	36.224	37.332	269	327	1,16	1,43	0,74	0,88
Bundesweit*	80.560.724	80.447.208	1.202.901	1.219.447	46557	48909	5,78	6,08	3,87	4,01

*ohne Hamburg

Appendices Germany (D)



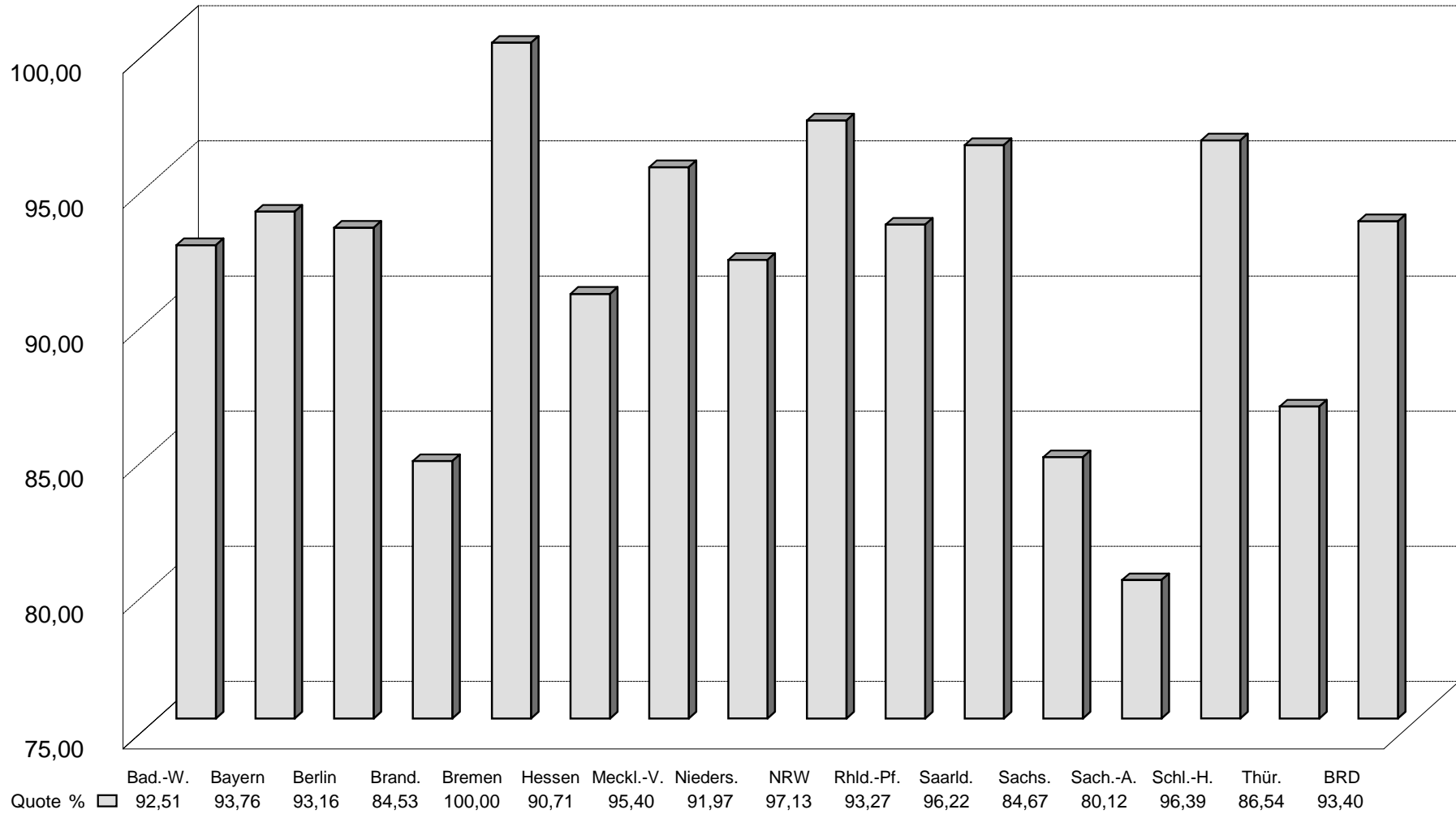
Appendices Germany (D)

Authorisations according to § 1906 Abs.4 BGE

Bundesland	Inhabitants 31.12.2007	Inhabitants 31.12.2007	Guardianship s 31.12.2007	Guardianship s 31.12.2007	Authorisations as per § 1906 Abs. 1 BGB 2006	Authorisations as per § 1906 Abs. 1 BGB 2007	Authorisations every 100.000 Inhab. 2006	Authorisations every 100.000 Inhab. 2007	Authorisations every 1.000 Prot. Pers. 2007	Authorisations every 1.000 Prot. Pers. 2007
Baden - Württ.	10.738.753	10.749.755	98.760	102.842	8892	9097	8,28	8,46	9,00	8,85
Bayern	12.492.658	12.520.332	177.983	183.479	21305	22773	17,05	18,19	11,97	12,41
Berlin	3.404.037	3.416.255	59.741	53.728	340	477	1,00	1,40	0,57	0,89
Brandenburg	2.547.772	2.535.737	43.218	43.964	961	896	3,77	3,53	2,22	2,04
Bremen	663.979	663.082	9.206	9.529	113	107	1,70	1,61	1,23	1,12
Hessen	6.075.359	6.072.555	84.965	85.417	6077	6653	10,00	10,96	7,15	7,79
Mecklenb.-V.	1.693.754	1.679.682	32.414	32.999	953	1016	5,63	6,05	2,94	3,08
Niedersachs en	7.982.685	7.971.684	129.138	128.531	10289	9315	12,89	11,69	7,97	7,25
NRW	18.028.745	17.996.621	282.829	290.207	19568	19933	10,85	11,08	6,92	6,87
Rheinland- Pf.	4.052.860	4.045.643	65.953	66.194	4377	4266	10,80	10,54	6,64	6,44
Saarland	1.043.167	1.036.598	22.613	23.066	1725	1808	16,54	17,44	7,63	7,84
Sachsen	4.249.774	4.220.200	69.213	69.183	2708	2882	6,37	6,83	3,91	4,17
Sachsen- Anh.	2.441.787	2.412.472	46.501	46.720	921	814	3,77	3,37	1,98	1,74
Schl.-Holst.	2.834.254	2.837.373	44.143	46.256	3614	3445	12,75	12,14	8,19	7,45
Thüringen	2.311.140	2.289.219	36.224	37.332	1061	984	4,59	4,30	2,93	2,64
Bundesweit*	80.560.724	80.447.208	1.202.901	1.219.447	82904	84466	10,29	10,50	6,89	6,93

*ohne Hamburg

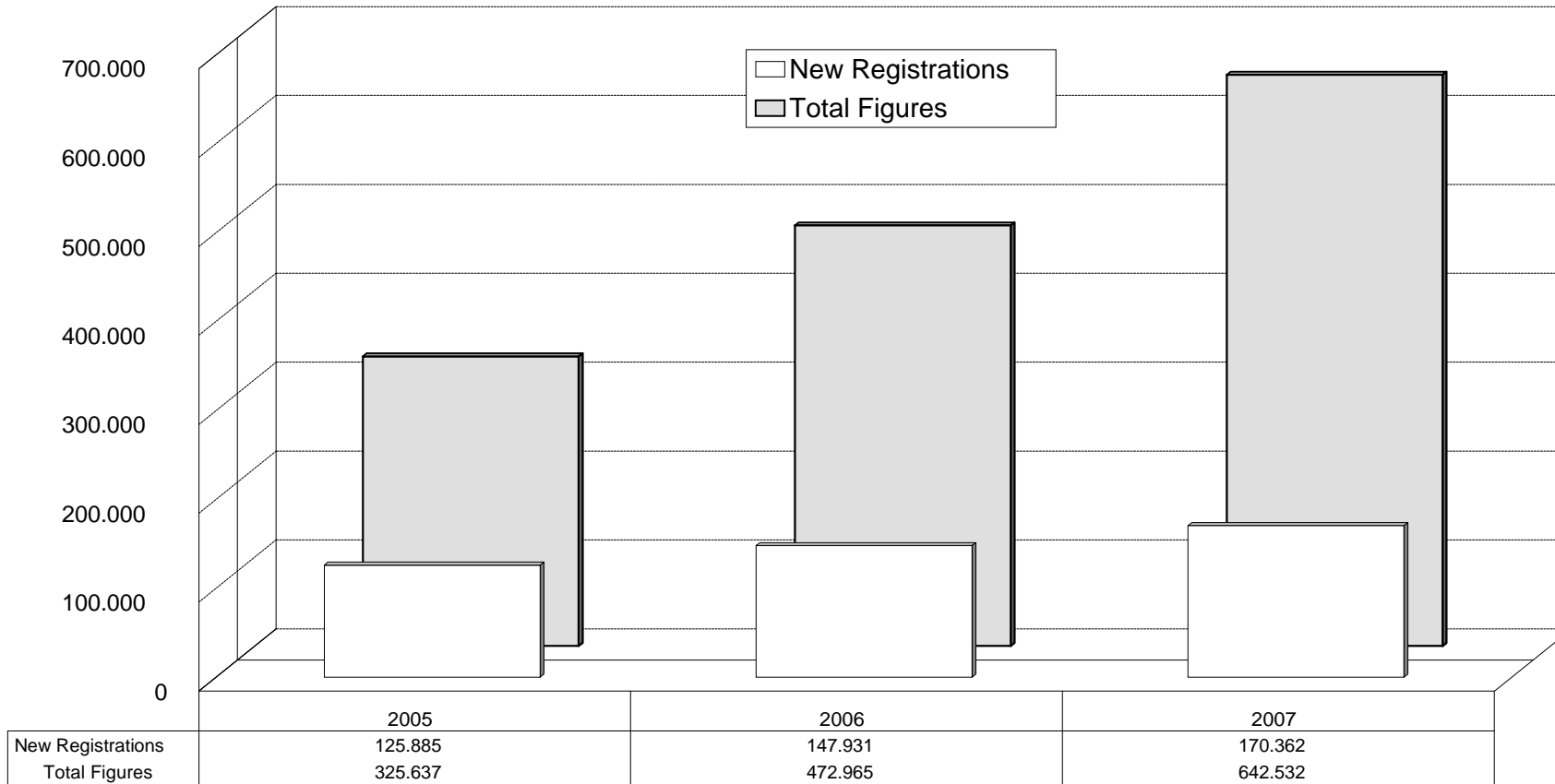
Authorisations based on § 1906 Abs. 4 BGB 2007



ohne Hamburg

Powers of Attorney 2007

Amount of Registered Power of Att.



Registered Powers of Attorney at the End of Relevant Year

Year	Amount	Increase	in %
2005	325.637		
2006	472.965	147.328	45,24%
2007	642.532	169.567	35,85%

Registrations in the Relevant Register

Year	Amount	Increase	in %	Data regarding appointed person (in %)					in %	Betreuungs- verfügungen	Patienten- verfügungen
				none	1	2	3	More than 3			
2005	125.885			28,12%	32,51%	26,05%	11,12%	2,21%	76,89%	74,54%	
2006	147.931	22.046	17,51%	20,21%	32,00%	30,68%	14,42%	2,69%	82,84%	76,06%	
2007	170.362	22.431	15,16%	13,97%	33,12%	33,63%	16,07%	3,21%	83,87%	74,87%	

Procedures for Registrations in the ‘Vorsorgeregister’

Year	Through Notaries	Through Lawyers	Through other Institutions	Through Private Persons	Through on-line procedures
2005	94,70%	0,43%	0,01%	4,86%	68,59%
2006	93,02%	1,90%	0,01%	5,07%	81,14%
2007	91,62%	1,53%	0,03%	6,82%	83,79%

Transmission of data to Courts

Year	Amount	Increase	in %	Positive Reply	in %	Increase	in %
2005	38.620			2.542	6,58%		
2006	92.784	54.164	140,25%	4.823	5,20%	2.281	89,73%
2007	124.834	32.050	34,54%	7.177	5,75%	2.354	48,81%

Quelle: Zentrales Vorsorgeregister der Bundesnotarkammer; Auswertung: Deinert

Detail Reports of the Central Register in Internet:

- * http://www.elrv.info/_downloads/zvr/ZVR_Jahresbericht_2005.pdf Jahresbericht 2005 des Vorsorgeregisters (PDF)
- * http://www.elrv.info/_downloads/zvr/ZVR_Jahresbericht_2006.pdf Jahresbericht 2006 des Vorsorgeregisters (PDF)
- * http://www.elrv.info/_downloads/zvr/ZVR_Jahresbericht_2007.pdf Jahresbericht 2007 des Vorsorgeregisters (PDF)

APPENDICES

SWEDEN

Compilation of information from the annual report of the chief-guardians for 2006

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
District	Community	Annual work-capacity for the chief-guardians activity	Annual estimate for chief-guardian activity in budget	Hour/week chief-guardian office is manned	Number of matters: man-of-confidence	Number of matters: guardians for adults	Number of matters: guardians for minors	Number of matters: guardians with liability to account	Total asset	Population 31/12 2006 (SCB)	Inhabitants 80+ 31/12 2006 (SCB)	Inhabitants 0-17 31/12 2006 (SCB)	Number of (1) per thousand matters with liability to account (6+7+9)	Number of (1) per hundredthousand inhabitants (11)	Number of (1) per thousand inhabitants 80+ (12)	Number of matters with liability to account (6+7+9) per thousand inhabitants (11)	Number of mans-of-confidence and guardians (7+8) per thousand 80+ inhabitants (12)	Number of guardians (for minors) (8) per thousand inhabitants 0-17 (13)	Number of guardians (for minors) with liability to account (9) per thousand inhabitants 0-17 (13)
AB	Botkyrka	4.40	4647'000	40	459	46	84	58	101'033'000	77'553	1'885	19352	7.82	5.67	2.33	7.26	267.90	4.34	3.00
AB	Danderyd	1.00	1'160'000	36	117	20	135	63	313'000'000	30'492	2'047	7968	5.00	3.28	0.49	6.56	66.93	16.94	7.91
AB	Ekerö	0.75	785'000	30	160	4	87	36	48'000'000	24'301	727	6830	3.75	3.09	1.03	8.23	225.58	12.74	5.27
AB	Haninge	3.25	2'986'000	40	439	42	166	41	141'000'000	72'956	1'856	17657	6.23	4.45	1.75	7.15	259.16	9.40	2.32
AB	Huddinge	2.75	2'980'000	40	408	66	135	72	183'000'000	90'182	2'522	22836	5.04	3.05	1.09	6.05	187.95	5.91	3.15
AB	Järfälla	2.00	2'546'000	40	333	33	750	33	133'000'000	62'342	2'210	14369	5.01	3.21	0.90	6.40	165.61	52.20	2.30
AB	Lidingö	1.00	1'153'000	39	244	30	103	51	184'000'000	42'321	2'839	10054	3.08	2.36	0.35	7.68	96.51	10.24	5.07
AB	Nacka	2.50	1'605'000	39	370	54	136	119	51'452'000	82'421	3'161	21038	4.60	3.03	0.79	6.59	134.13	6.46	5.66
AB	Norrtälje	1.00	1'800'000	20	449	28	59	27	196'000'000	54'836	3'151	11497	1.98	1.82	0.32	9.19	151.38	5.13	2.35
AB	Nykvarn		200'000	10	36	1	10	8	8'609	8'609	181	2351				5.23	204.42	4.25	3.40
AB	Nynäshamn	0.65	800'000	25	118	5	0	0	21'000'000	24'992	1'130	5678	5.28	2.60	0.58	4.92	108.85	0.00	0.00
AB	Salem	1.00	452'000	38	81	14	17	7	26'835'000	14'715	383	4182	9.80	6.80	2.61	6.93	248.04	4.07	1.67
AB	Sigtuna	1.20	771'000	40	217	19	40	34	47'393'000	36'976	1'073	8907	4.44	3.25	1.12	7.30	219.94	4.49	3.82
AB	Sollentuna	3.50	2'828'000	40	285	38	613	83	167'909'000	60'528	2'265	15705	8.62	5.78	1.55	6.71	142.60	39.03	5.28
AB	Solna	2.50	1'732'000	40	381	51	49		61'717	61'717	3'761	9630	5.79	4.05	0.66	7.00	114.86	5.09	
AB	Stockholm	23.00	26'000'000	40	4'380	676	3'634		782'885	782'885	42'492	148451	4.55	2.94	0.54	6.46	118.99	24.48	
AB	Sundbyberg	2.00	2'400'000	39	241	29	29	16	64'000'000	34'529	1'745	6326	6.99	5.79	1.15	8.28	154.73	4.58	2.53
AB	Södertälje	3.00	3'589'000	39	585	136	98	29	103'000'000	81'791	3'175	18650	4.00	3.67	0.94	9.17	227.09	5.25	1.55
AB	Tyresö	0.75	795'000	30	200	10	170	35	41'476	41'476	1'051	11160	3.06	1.81	0.71	5.91	199.81	15.23	3.14
AB	Täby	2.13	1'520'000	40	227	27	120	46	275'000'000	61'006	2'613	15195	7.10	3.49	0.82	4.92	97.21	7.90	3.03

AB	Upplands Väsby	1.30	1'609'000	40	268	26	144	32	76'741'000	37'848	1'156	8712	3.99	3.43	1.12	8.61	254.33	16.53	3.67
AB	Upplands-Bro	0.70	569'000	30	145	11	124	3	46'000'000	21'638	565	5208	4.40	3.24	1.24	7.35	276.11	23.81	0.58
AB	Vallentuna	0.50		20	130	19	21	17		27'868	812	7554	3.01	1.79	0.62	5.96	183.50	2.78	2.25
AB	Vaxholm	0.75	500'000	30	41	4	11	11	22'000'000	10'440	415	2813	13.39	7.18	1.81	5.36	108.43	3.91	3.91
AB	Värmdö	1.75	894'000	40	160	10	66	24	40'000'000	35'803	920	9949	9.02	4.89	1.90	5.42	184.78	6.63	2.41
AB	Österåker	1.60	1'393'000	40	170	21	35	34	95'000'000	37'879	989	9936	7.11	4.22	1.62	5.94	193.12	3.52	3.42
C	Enköping	2.00	968'000	40	175	26	46	24	73'400'682	38'486	2'105	8699	8.89	5.20	0.95	5.85	95.49	5.29	2.76
C	Heby	1.00	1'655'000	20	141	19	48	10	51'000'000	13'530	826	2997	5.88	7.39	1.21	12.56	193.70	16.02	3.34
C	Håbo	0.50	330'000	40	58	7	35	13	24'839'543	18'637	396	5008	6.41	2.68	1.26	4.19	164.14	6.99	2.60
C	Tierp	0.50	569'000	3	133	9	6	5	33'000'000	19'943	1'331	4281	3.40	2.51	0.38	7.37	106.69	1.40	1.17
C	Uppsala + Knivsta	7.75	7'340'000	40	1'278	129	181	138	750'000'000	198'784	8'246	42363	5.02	3.90	0.94	7.77	170.63	4.27	3.26
C	Älvkarleby	0.55	430'000	18	63	10	80	12	19'000'000	9'110	576	1956	6.47	6.04	0.95	9.33	126.74	40.90	6.13
C	Östhammar	0.80	1'330'000	32	160	9	26	10		21'435	1'285	4549	4.47	3.73	0.62	8.35	131.52	5.72	2.20
D	Eskilstuna	3.00	3'083'000	40	677	50	159	30	152'900'000	92'250	5'148	19309	3.96	3.25	0.58	8.21	141.22	8.23	1.55
D	Flen	1.00	1'317'000	40	183	14	35	12	62'700'000	16'222	1'017	3458	4.78	6.16	0.98	12.88	193.71	10.12	3.47
D	Gnesta	0.38	530'000	5	53	4	3	2	12'500'000	9'981	519	2331	6.36	3.76	0.72	5.91	109.83	1.29	0.86
D	Katrineholm	2.00	2'100'000	40	270	29	10	2	47'000'000	32'029	2'178	6787	6.64	6.24	0.92	9.40	137.28	1.47	0.29
D	Nyköping	2.25	2'400'000	40	264	40	185	38	106'000'000	50'191	2'960	10476	6.58	4.48	0.76	6.81	102.70	17.66	3.63
D	Oxelösund	0.50	369'000	20	53	24		5		11'111	597	2049	6.10	4.50	0.84	7.38	128.98	0.00	2.44
D	Strängnäs	1.10	958'000	40	133	7	35	17	136'000'000	31'152	1'579	7204	7.01	3.53	0.70	5.04	88.66	4.86	2.36
D	Trosa	0.25	238'000	15	34	1	5	0	16'000'000	10'951	495	2635	7.14	2.28	0.51	3.20	70.71	1.90	0.00
D	Vingåker	0.75	523'000	40	89	14	27	21	31'600'000	9'212	567	2114	6.05	8.14	1.32	13.46	181.66	12.77	9.93
E	Boxholm	0.20	113'000	40	30	2	3	0		5'226	346	1099	6.25	3.83	0.58	6.12	92.49	2.73	0.00
E	Finspång	0.75	786'000	40	156	22	21	10	41'000'000	20'812	1'318	4234	3.99	3.60	0.57	9.03	135.05	4.96	2.36
E	Kinda	0.25	476'000	4	84	1	28	3		9'918	634	2201	2.84	2.52	0.39	8.87	134.07	12.72	1.36
E	Linköping	5.00	7'425'740	46	887	30	592	30	231'631'134	138'580	7'240	28557	5.28	3.61	0.69	6.83	126.66	20.73	1.05
E	Mjölby		1'157'000	5	213	6	15			25'348	1'502	5551				8.64	145.81	2.70	
E	Motala	1.50	1'646'000	40	273	56	38	17	70'575'447	41'959	2'526	9015	4.34	3.57	0.59	8.25	130.25	4.22	1.89
E	Norrköping	3.50	8'217'000	40	1'399	127	400	78	20'000'000	125'463	6'772	26558	2.18	2.79	0.52	12.78	225.34	15.06	2.94
E	Söderköping		550'000	2	120					14'051	717	3216				8.54	167.36		
E	Vadstena	0.55	290'000	5	55	5	0	0	11'700'000	7'541	588	1504	9.17	7.29	0.94	7.96	102.04	0.00	0.00
E	Valdemarsvik	0.20	282'000	4	58	2	3	3		8'038	536	1572	3.17	2.49	0.37	7.84	111.94	1.91	1.91
E	Ydre	0.08	100'000	2	17	1	2	2	5'500'000	3'822	280	791	3.75	1.96	0.27	5.23	64.29	2.53	2.53
E	Åtvidaberg	0.33	200'000	40	82	7	11	11	32'000'000	11'775	721	2670	3.30	2.80	0.46	8.49	123.44	4.12	4.12

E	Ödeshög		231'000	3	36	2	3	3	8'000'000	5'433	382	1202					7.55	99.48	2.50	2.50
F	Aneby	0.30	117'000		48	2	8	4	17'000'000	6'551	416	1491	5.56	4.58	0.72	8.24	120.19	5.37	2.68	
F	Eksjö	1.15	863'000	16	166	14	11	6	50'000'000	16'516	1'178	3441	6.18	6.96	0.98	11.26	152.80	3.20	1.74	
F	Gislaved	0.40	650'000	43	158	3	48	0		29'327	1'534	6949	2.48	1.36	0.26	5.49	104.95	6.91	0.00	
F	Gnosjö	0.35	190'000	2	55	3	25	0	20'000'000	9'598	464	2322	6.03	3.65	0.75	6.04	125.00	10.77	0.00	
F	Habo	0.20	307'000	1	35	6		1		10'122	348	2648	4.76	1.98	0.57	4.15	117.82		0.38	
F	Jönköping	4.00	2'957'000	40	772	120	759	108	294'600'000	122'194	6'784	26236	4.00	3.27	0.59	8.18	131.49	28.93	4.12	
F	Mullsjö	0.20	220'000	1	36	4	5	1	6'000'000	7'075	356	1684	4.88	2.83	0.56	5.80	112.36	2.97	0.59	
F	Nässjö	0.50	952'000	3	222	14	61	21	127'800'000	29'369	2'151	6398	1.95	1.70	0.23	8.75	109.72	9.53	3.28	
F	Sävsjö	0.40	700'000	16	131	12	15	9	45'700'000	10'985	765	2529	2.63	3.64	0.52	13.84	186.93	5.93	3.56	
F	Tranås	0.58	1'100'000	20	180	13	25	6	40'000'000	17'765	1'270	3837	2.91	3.26	0.46	11.20	151.97	6.52	1.56	
F	Vaggeryd	0.55	310'000	30	102	9	17	2	35'000'000	12'816	768	2994	4.87	4.29	0.72	8.82	144.53	5.68	0.67	
F	Vetlanda	0.80	800'000	32	170	16	57	10	120'000'000	26'380	1'736	5748	4.08	3.03	0.46	7.43	107.14	9.92	1.74	
F	Värnamo	1.05	1'573'000	30	260	23	37	17	75'000'000	32'841	1'938	7393	3.50	3.20	0.54	9.13	146.03	5.00	2.30	
G	Alvesta	0.40	1'354'000	12	170	15	25	20	10'000'000	18'741	1'180	4101	1.95	2.13	0.34	10.94	156.78	6.10	4.88	
G	Lessebo	0.50	654'000	7	80	4	2		15'000'000	8'099	553	1801	5.95	6.17	0.90	10.37	151.90	1.11		
G	Ljungby	0.55	417'000	18	208	12	4	4	189'915'942	27'121	1'710	5785	2.46	2.03	0.32	8.26	128.65	0.69	0.69	
G	Markaryd	0.40	360'000	35	84	1	9			9'613	682	1900	4.71	4.16	0.59	8.84	124.63	4.74		
G	Tingsryd	0.75	688'100	30	125	16	14	11	37'289'000	12'712	1'081	2502	4.93	5.90	0.69	11.96	130.43	5.60	4.40	
G	Uppvidinge	0.30		20	64	2	6			9'508	741	1997	4.55	3.16	0.40	6.94	89.07	3.00		
G	Växjö	1.70	1'757'000	40	500	60	300	40	112'060'000	78'473	3'814	16347	2.83	2.17	0.45	7.65	146.83	18.35	2.45	
G	Älmhult	0.50	478'000	40	91	3	13	9		15'368	1'060	3275	4.85	3.25	0.47	6.70	88.68	3.97	2.75	
H	Borgholm	0.75	450'000	12	116	12	8	3	30'000'000	10'983	895	2003	5.73	6.83	0.84	11.93	143.02	3.99	1.50	
H	Emmaboda	0.50	475'000	8	62	16	13	11		9'436	703	1873	5.62	5.30	0.71	9.43	110.95	6.94	5.87	
H	Hultsfred	1.60	1'060'000	40	166	20	41	4	52'000'000	14'306	1'041	2819	8.42	11.18	1.54	13.28	178.67	14.54	1.42	
H	Högsby	0.40	374'000	10	54	4	13	2	23'000'000	6'033	484	1204	6.67	6.63	0.83	9.95	119.83	10.80	1.66	
H	Kalmar	2.75	3'000'000	40	550	74	60	28	77'000'000	61'321	3'431	12164	4.22	4.48	0.80	10.63	181.87	4.93	2.30	
H	Mönsterås	0.50	600'000	40	89	12	5	5	20'000'000	13'111	811	2810	4.72	3.81	0.62	8.08	124.54	1.78	1.78	
H	Mörbylånga	0.25	450'000	8	110	5	35	5	31'000'000	13'520	808	2974	2.08	1.85	0.31	8.88	142.33	11.77	1.68	
H	Nybro	0.90	925'000	40	163	20	26	11		19'680	1'332	3907	4.64	4.57	0.68	9.86	137.39	6.65	2.82	
H	Oskarshamn	0.75	990'000	16	175	15	22	12	80'000'000	26'244	1'572	5423	3.71	2.86	0.48	7.70	120.87	4.06	2.21	
H	Torsås	0.25		8	50	3				7'154	543	1453	4.72	3.49	0.46	7.41	97.61			
H	Vimmerby	1.10	878'000	30	136	5	88	6	27'000'000	15'588	996	3370	7.48	7.06	1.10	9.43	141.57	26.11	1.78	
H	Västervik	1.00	1'287'000	40	305	22	24	10	69'000'000	36'400	2'501	7119	2.97	2.75	0.40	9.26	130.75	3.37	1.40	

I	Gotland	2.25	3'431'000	40	641	56	500	33	114'600'000	57'297	3'210	11762	3.08	3.93	0.70	12.74	217.13	42.51	2.81
K	Karlshamn	1.50	1'762'000	26	371	19	32	5		31'179	1'881	6087	3.80	4.81	0.80	12.67	207.34	5.26	0.82
K	Karlskrona	3.00	2'200'000	40	539	69	113	10		61'844	3'709	12867	4.85	4.85	0.81	9.99	163.93	8.78	0.78
K	Olofström	0.50	500'000	6	113	7	21	6		13'355	847	2737	3.97	3.74	0.59	9.43	141.68	7.67	2.19
K	Ronneby	0.50	1'173'000	32	182	21	39	25		28'443	1'683	5542	2.19	1.76	0.30	8.02	120.62	7.04	4.51
K	Sölvesborg	0.80	1'005'000	40	95	8	41	14		16'615	1'024	3320	6.84	4.81	0.78	7.04	100.59	12.35	4.22
M	Bjuv	0.60	548'000	3	109	9	20	10		14'199	647	3374	4.69	4.23	0.93	9.01	182.38	5.93	2.96
M	Bromölla	0.50	200'000	20	91	6	39	6	9'900'000	12'145	703	2601	4.85	4.12	0.71	8.48	137.98	14.99	2.31
M	Burlöv		490'000	3	98	11	17	9	44'000'000	15'662	648	3601				7.53	168.21	4.72	2.50
M	Båstad		300'000	12	56	8	9	5	23'000'000	14'170	1'120	2635				4.87	57.14	3.42	1.90
M	Eslöv	0.50	1'527'000	15	255	41	39	4	96'000'000	30'437	1'564	7058	1.67	1.64	0.32	9.86	189.26	5.53	0.57
M	Helsingborg	4.50	6'400'000	40	674	148	630	100	500'000'000	123'389	6'855	25126	4.88	3.65	0.66	7.47	119.91	25.07	3.98
M	Hässleholm	1.15	2'073'800	15	412	51	26	13	170'000'000	49'381	3'221	10412	2.42	2.33	0.36	9.64	143.74	2.50	1.25
M	Höganäs	1.00	580'000	40	155	22	57	22	25'000'000	23'857	1'511	5196	5.03	4.19	0.66	8.34	117.14	10.97	4.23
M	Hörby	0.20	480'000	4	100	19		25		14'540	902	3094	1.39	1.38	0.22	9.90	131.93	0.00	8.08
M	Höör	1.00		40	122	7	5	14		14'777	789	3418	6.99	6.77	1.27	9.68	163.50	1.46	4.10
M	Klippan	0.40		12	83	35	6	13	25'000'000	16'106	979	3416	3.05	2.48	0.41	8.13	120.53	1.76	3.81
M	Kristianstad	2.00		40	630	78	86		200'000'000	76'540	4'490	16141	2.82	2.61	0.45	9.25	157.68	5.33	
M	Kävlinge	0.30	420'000	40	95	8	25	10	34'000'000	27'369	1'036	6820	2.65	1.10	0.29	4.13	99.42	3.67	1.47
M	Landskrona	1.00	1'554'000	40	300	24	96	11	61'000'000	40'018	2'322	8202	2.99	2.50	0.43	8.37	139.53	11.70	1.34
M	Lomma	0.40	275'000		60	9		25	230'000'000	19'434	840	4861	4.26	2.06	0.48	4.84	82.14		5.14
M	Lund	3.80	4'300'000	40	780	90		190		103'286	4'256	20047	3.58	3.68	0.89	10.26	204.42		9.48
M	Malmö	8.00	11'712'000	40	2'887	279	519	122	514'000'000	276'244	15'769	52817	2.43	2.90	0.51	11.90	200.77	9.83	2.31
M	Osby		342'000	2	99	10	47			12'634	889	2659				8.63	122.61	17.68	0.00
M	Perstorp	0.40	379'000	20	41	15	6	9	21'700'000	6'898	367	1515	6.15	5.80	1.09	9.42	152.59	3.96	5.94
M	Simrishamn	0.80	1'150'000	40	140	34	11	16	53'000'000	19'418	1'574	3633	4.21	4.12	0.51	9.78	110.55	3.03	4.40
M	Sjöbo	0.75	280'000	30	102	15	37	10	20'000'000	17'721	935	3772	5.91	4.23	0.80	7.17	125.13	9.81	2.65
M	Skurup	0.10	100'000	40	37	1	9	8	12'600'000	14'703	687	3476	2.17	0.68	0.15	3.13	55.31	2.59	2.30
M	Staffanstorps	0.40	244'000	7	90	3	5	20	53'000'000	20'840	593	5338	3.54	1.92	0.67	5.42	156.83	0.94	3.75
M	Svalöv	0.30	270'000	40	82	8	91	1	15'100'000	13'055	680	3092	3.30	2.30	0.44	6.97	132.35	29.43	0.32
M	Svedala	0.55	466'000	3	82	8	3	17	39'000'000	18'988	628	4781	5.14	2.90	0.88	5.64	143.31	0.63	3.56
M	Tomelilla			40	71	7	25	10		12'719	805	2534				6.92	96.89	9.87	3.95
M	Trelleborg	2.00	3'124'000	40	207	38	27	31	27'400'000	40'320	2'223	8694	7.25	4.96	0.90	6.85	110.21	3.11	3.57
M	Vellinge	1.00	700'000	5	125	2		20	20'000'000	32'270	1'286	7961	6.80	3.10	0.78	4.56	98.76		2.51

M	Ystad	0.70	790'000	40	170	15	19	12	69'600'000	27'398	1'871	5165	3.55	2.55	0.37	7.19	98.88	3.68	2.32
M	Åstorp	0.50	321'000	10	73	11	25		20'000'000	13'885	621	3382	5.95	3.60	0.81	6.05	135.27	7.39	
M	Ängelholm	1.00	1'297'000	25	234	40	23	93	120'000'000	38'682	2'541	8039	2.72	2.59	0.39	9.49	107.83	2.86	11.57
M	Örkelljunga	0.40		4	85	3		1		9'529	635	2035	4.49	4.20	0.63	9.34	138.58		0.49
M	Östra Göinge	0.20	385'000	2	85	5		7	18'000'000	13'886	869	3139	2.06	1.44	0.23	6.99	103.57		2.23
N	Falkenberg	1.70	1'758'000	40	242	21	150	0	70'000'000	39'874	2'552	8761	6.46	4.26	0.67	6.60	103.06	17.12	0.00
N	Halmstad	3.00	3'594'000	40	529	69	222	52	175'812'967	88'958	5'098	18334	4.62	3.37	0.59	7.31	117.30	12.11	2.84
N	Hylte	0.15	195'000	3	63	6	19	0	25'000'000	10'371	684	2394	2.17	1.45	0.22	6.65	100.88	7.94	0.00
N	Kungsbacka	0.50	1'712'000	30	221	23	192	39	124'188'088	71'044	2'827	18580	1.77	0.70	0.18	3.98	86.31	10.33	2.10
N	Laholm	0.50	450'000	40	159	6	26	9	135'900'000	23'153	1'514	4960	2.87	2.16	0.33	7.52	108.98	5.24	1.81
N	Varberg	0.30	1'145'000	40	206	29	63	63		55'459	3'229	12079	1.01	0.54	0.09	5.37	72.78	5.22	5.22
O	Ale	1.00	938'000	40	139	15	49	19	30'000'000	26'800	975	6686	5.78	3.73	1.03	6.46	157.95	7.33	2.84
O	Alingsås	1.75	2'400'000	32	338	17	127	6	350'000'000	36'481	2'084	8096	4.85	4.80	0.84	9.90	170.35	15.69	0.74
O	Bengtstors	0.25	249'000	8	60	1	8	4	25'300'000	10'080	821	1866	3.85	2.48	0.30	6.45	74.30	4.29	2.14
O	Bollebygd	0.20			33	1	10	10	24'000'000	8'179	341	1946	4.55	2.45	0.59	5.38	99.71	5.14	5.14
O	Borås	5.80	3'500'000	40	487	44	160	153	221'000'000	100'221	5'811	21221	8.48	5.79	1.00	6.82	91.38	7.54	7.21
O	Dals-Ed	0.10		2	49	2	3		11'800'000	4'900	311	1035	1.96	2.04	0.32	10.41	163.99	2.90	
O	Essunga	0.20	104'000	2	30	0	12	10	16'000'000	5'651	345	1208	5.00	3.54	0.58	7.08	86.96	9.93	8.28
O	Falköping	0.90		36	250	20	37			31'240	2'136	6738	3.33	2.88	0.42	8.64	126.40	5.49	
O	Färgelanda	0.20	251'000	5	40	4	16			6'779	404	1464	4.55	2.95	0.50	6.49	108.91	10.93	
O	Grästorps	0.15	234'000	10	75	2	6	6	28'000'000	5'809	380	1258	1.81	2.58	0.39	14.29	202.63	4.77	4.77
O	Gullspång	0.10	120'000	2	38	4	15		6'000'000	5'506	379	1044	2.38	1.82	0.26	7.63	110.82	14.37	
O	Göteborg	16.50	20'573'000	33	2'036	309	4'300	350	1'700'000'000	489'757	24'624	93487	6.12	3.37	0.67	5.50	95.23	46.00	3.74
O	Götene	0.30	377'000	12	56	5	89	11	29'000'000	12'959	708	2950	4.17	2.31	0.42	5.56	86.16	30.17	3.73
O	Herrljunga	0.25	175'000	2	78	6	9	1	18'000'000	9'243	602	2007	2.94	2.70	0.42	9.20	139.53	4.48	0.50
O	Hjo	0.20	368'000	8	70	10	12			8'853	558	1862	2.50	2.26	0.36	9.04	143.37	6.44	
O	Härnyda	1.50	398'000	40	149	16	51	32	13'500'000	32'395	1'033	8737	7.61	4.63	1.45	6.08	159.73	5.84	3.66
O	Karlsborg	0.10	160'000	3	38	4	9		50'000'000	6'880	560	1316	2.38	1.45	0.18	6.10	75.00	6.84	
O	Kungälv	1.50	1'900'000	40	180	28	500	24	80'000'000	38'899	1'711	9063	6.47	3.86	0.88	5.96	121.57	55.17	2.65
O	Lerum	0.75	643'000	30	168	5	171	27	39'500'000	37'092	1'284	9937	3.75	2.02	0.58	5.39	134.74	17.21	2.72
O	Lidköping	1.50	585'000	40	551	8	15	7	90'000'000	37'526	2'240	8158	2.65	4.00	0.67	15.08	249.55	1.84	0.86
O	Lilla Edet	0.50		40	119	4	8			12'836	566	2930	4.07	3.90	0.88	9.58	217.31	2.73	
O	Lysekil	1.00	864'000	40	89	7	12	12	40'000'000	14'631	1'008	2838	9.26	6.83	0.99	7.38	95.24	4.23	4.23
O	Mariestad	1.25	650'000	35	230	19	29	6	33'620'000	23'933	1'454	4974	4.90	5.22	0.86	10.65	171.25	5.83	1.21

O	Mark	1.25	1'500'000	15	162	15	156	20	46'000'000	33'594	2'144	7648	6.35	3.72	0.58	5.86	82.56	20.40	2.62
O	Mellerud	0.20	430'000	40	94	3		6	18'300'000	9'623	681	1934	1.94	2.08	0.29	10.70	142.44		3.10
O	Munkedal	2.00	332'000	40	76	2	14	10	19'000'000	10'246	629	2133	22.73	19.52	3.18	8.59	124.01	6.56	4.69
O	Mölnidal	2.80	2'800'000	40	294	28	1'001	58	94'500'000	58'938	2'575	13809	7.37	4.75	1.09	6.45	125.05	72.49	4.20
O	Orust	0.50	575'000	40	88	8	15	15	24'000'000	15'185	866	3103	4.50	3.29	0.58	7.31	110.85	4.83	4.83
O	Partille	1.40	1'100'000	18	142	27	57	46	55'000'000	33'614	1'419	8523	6.51	4.16	0.99	6.40	119.10	6.69	5.40
O	Skara	0.25	485'000	3	111	3		20	15'000'000	18'595	1'137	4042	1.87	1.34	0.22	7.21	100.26		4.95
O	Skövde	1.30	1'425'000	40	429	52		91	64'200'000	50'153	2'636	10356	2.27	2.59	0.49	11.41	182.47		8.79
O	Sotenäs	0.33	370'000	40	77	6	6	4	22'600'000	9'283	770	1674	3.79	3.55	0.43	9.37	107.79	3.58	2.39
O	Stenungsund	0.50	528'000	40	66	14	25	9	41'500'000	23'190	835	5754	5.62	2.16	0.60	3.84	95.81	4.34	1.56
O	Strömstad	0.50	350'000	15	86	3	5	5		11'569	730	2336	5.32	4.32	0.68	8.13	121.92	2.14	2.14
O	Svenljunga	0.40	346'000	40	77	5	10	5	37'734'459	10'405	707	2292	4.60	3.84	0.57	8.36	115.98	4.36	2.18
O	Tanum	0.20	370'000	18	78	4	18	9	24'000'000	12'253	855	2435	2.20	1.63	0.23	7.43	95.91	7.39	3.70
O	Tibro	0.80	545'000	10	96	4	16		17'000'000	10'671	643	2328	8.00	7.50	1.24	9.37	155.52	6.87	
O	Tidaholm	0.20	380'000	40	90	7			18'900'000	12'653	780	2763	2.06	1.58	0.26	7.67	124.36		
O	Tjörn	0.20			44	2	13			14'954	760	3204	4.35	1.34	0.26	3.08	60.53	4.06	
O	Tranemo	0.25	207'000	40	58	2	36	21	100'000'000	11'742	766	2607	3.09	2.13	0.33	6.90	78.33	13.81	8.06
O	Trollhättan	2.00	1'600'000	40	255	23	48	15	88'701'278	53'830	3'022	11947	6.83	3.72	0.66	5.44	91.99	4.02	1.26
O	Töreboda	0.20		6	71	5	5	5	15'243'600	9'368	633	1981	2.47	2.13	0.32	8.65	120.06	2.52	2.52
O	Uddevalla	2.00	3'200'000	40	344	32	86	35	119'275'412	50'507	3'042	10819	4.87	3.96	0.66	8.14	123.60	7.95	3.24
O	Ulricehamn	0.65	802'000	16	171	12	28	14	40'000'000	22'436	1'485	4924	3.30	2.90	0.44	8.78	123.23	5.69	2.84
O	Vara	0.20	394'000	3	114	7	20		394'000	15'961	1'101	3351	1.65	1.25	0.18	7.58	109.90	5.97	
O	Vårgårda	0.40	391'000	16	50	6	31	3	7'200'000	10'896	526	2608	6.78	3.67	0.76	5.41	106.46	11.89	1.15
O	Vänersborg	1.20	1'525'000	40	344	54	75	74	81'399'427	37'023	2'029	8047	2.54	3.24	0.59	12.75	196.16	9.32	9.20
O	Åmål	0.25	245'000	10	95	1	70	2		12'716	959	2611	2.55	1.97	0.26	7.71	100.10	26.81	0.77
O	Öckerö	0.40	390'000	40	50	5				12'229	635	2981	7.27	3.27	0.63	4.50	86.61		
S	Arvika	0.80	876'000	35	257	10	43	8	125'995'626	26'131	1'797	5164	2.91	3.06	0.45	10.52	148.58	8.33	1.55
S	Eda	0.20	85'000	35	43	3	10	1	19'779'282	8'670	583	1713	4.26	2.31	0.34	5.42	78.90	5.84	0.58
S	Filipstad	0.50	450'000	18	146	4	13	10	27'800'000	10'952	909	2075	3.13	4.57	0.55	14.61	165.02	6.27	4.82
S	Forshaga	0.50	800'000	20	80	9	82	0	32'752'970	11'466	537	2721	5.62	4.36	0.93	7.76	165.74	30.14	0.00
S	Grums	0.50	290'000	11	61	0	86	2	15'553'388	9'332	531	1918	7.94	5.36	0.94	6.75	114.88	44.84	1.04
S	Hagfors		300'000	3	86	2	99			13'127	1'001	2327				6.70	87.91	42.54	
S	Hammarö	3.75	6'695'000	15	141	1	40	22	36'000'000	14'489	574	3648	22.87	25.88	6.53	11.32	247.39	10.96	6.03
S	Karlstad	3.75	6'695'000	15	636	49	229	98	221'000'000	82'878	4'341	15933	4.79	4.52	0.86	9.45	157.80	14.37	6.15

S	Kil	0.50	352'466	40	60	7	44	9	34'000'000	11'803	601	2763	6.58	4.24	0.83	6.44	111.48	15.92	3.26
S	Kristinehamn	1.50	1'308'600	40	269	11	92	22	73'000'000	23'848	1'624	4627	4.97	6.29	0.92	12.66	172.41	19.88	4.75
S	Munkfors	0.25	230'000	10	37	0	11	0	6'934'400	3'936	312	719	6.76	6.35	0.80	9.40	118.59	15.30	0.00
S	Storfors	0.25	203'000		22	0	13	13	1'500'000	4'526	299	940	7.14	5.52	0.84	7.73	73.58	13.83	13.83
S	Sunne	0.50	600'000	20	148	1	35	14	60'000'000	13'591	933	2923	3.07	3.68	0.54	11.99	159.70	11.97	4.79
S	Säffle	0.33	401'000	11	238	3	53	30	8'200'000	15'973	1'113	3237	1.22	2.07	0.30	16.97	216.53	16.37	9.27
S	Torsby	0.60	600'000	24	138	2	30	1	52'290'547	12'946	1'050	2388	4.26	4.63	0.57	10.89	133.33	12.56	0.42
S	Årjäng	0.25	139'000	10	93	2	17	10	ca 6-10 MKR	9'821	665	2039	2.38	2.55	0.38	10.69	142.86	8.34	4.90
T	Askersund	0.50	350'000	4	130	6	10	6	20'000'000	11'470	758	2299	3.52	4.36	0.66	12.38	179.42	4.35	2.61
T	Degerfors	0.25	430'000	2	91	8	15	5	23'000'000	10'014	655	2052	2.40	2.50	0.38	10.39	151.15	7.31	2.44
T	Hallsberg	0.80	925'000	40	94	10	104	11	31'000'000	15'287	903	3319	6.96	5.23	0.89	7.52	115.17	31.33	3.31
T	Hällefors	0.20	420'000	8	139	3	22			7'539	557	1393	1.41	2.65	0.36	18.84	254.94	15.79	
T	Karlskoga	0.85	885'000	25	281	34	18	6	24'000'000	30'159	2'132	5921	2.65	2.82	0.40	10.64	147.75	3.04	1.01
T	Kumla	0.75	1'056'000	30	138	17	1	0	27'000'000	19'643	1'052	4704	4.84	3.82	0.71	7.89	147.34	0.21	0.00
T	Laxå	0.50	554'000	40	57	3	3	2	14'000'000	6'046	432	1159	8.06	8.27	1.16	10.25	138.89	2.59	1.73
T	Lekeberg	0.20		3	64	0	16	0	22'000'000	7'096	386	1573	3.13	2.82	0.52	9.02	165.80	10.17	0.00
T	Lindesberg		615'000	15	170	20	10	2		23'074	1'469	4833				8.32	129.34	2.07	0.41
T	Ljusnarsberg	0.10	201'000	2	114	3	10	3	10'000'000	5'243	400	992	0.83	1.91	0.25	22.89	292.50	10.08	3.02
T	Nora	0.16	410'000	20	73	10	9	0	21'000'000	10'482	604	2289	1.93	1.53	0.26	7.92	137.42	3.93	0.00
T	Örebro	4.00	4'721'000	40	669	92	900	74	380'000'000	128'977	7'003	27203	4.79	3.10	0.57	6.47	108.67	33.08	2.72
U	Arboga	0.43	611'000	10	99	10	9		30'000'000	13'391	892	2797	3.94	3.21	0.48	8.14	122.20	3.22	
U	Fagersta	0.50	654'000	7	179	19	24	15	40'000'000	12'202	849	2337	2.35	4.10	0.59	17.46	233.22	10.27	6.42
U	Hallstahammar	1.00	646'000	20	113	11	63	4	29'000'000	15'042	898	3189	7.81	6.65	1.11	8.51	138.08	19.76	1.25
U	Kungsör	0.40	460'000	16	109	6	28	3		8'211	446	1791	3.39	4.87	0.90	14.37	257.85	15.63	1.68
U	Köping	0.60	731'000	40	190	34	32	17	38'500'000	24'659	1'558	4911	2.49	2.43	0.39	9.77	143.77	6.52	3.46
U	Norberg	0.15	214'000	2	34	6	1	1	7'000'000	5'843	391	1206	3.66	2.57	0.38	7.02	102.30	0.83	0.83
U	Sala	1.50	2'130'000	40	255	44	70	61	35'500'000	21'360	1'330	4425	4.17	7.02	1.13	16.85	224.81	15.82	13.79
U	Skinnskatteberg	0.20	200'000	8	25	2	8	6	10'000'000	4'752	277	944	6.06	4.21	0.72	6.94	97.47	8.47	6.36
U	Surahammar	0.50	310'000	40	74	6	0	0	27'000'000	10'109	473	2298	6.25	4.95	1.06	7.91	169.13	0.00	0.00
U	Västerås	6.50	7'500'000	40	892	163	271	91	544'000'000	132'920	6'666	28345	5.67	4.89	0.98	8.62	158.27	9.56	3.21
W	Avesta	0.33	67'000	3	208	20	64	3	43'880'337	21'963	1'437	4133	1.43	1.50	0.23	10.52	158.66	15.49	0.73
W	Borlänge	2.00	2'500'000	40	264	34	131	84	54'000'000	47'399	2'509	9959	5.24	4.22	0.80	8.06	118.77	13.15	8.43
W	Falun	1.50	1'091'000	30	337	20	356	30	172'000'000	55'267	3'035	11960	3.88	2.71	0.49	7.00	117.63	29.77	2.51
W	Gagnef	0.30	384'000	8	51	4	4	3	19'520'000	10'080	575	2385	5.17	2.98	0.52	5.75	95.65	1.68	1.26

W	Hedemora	0.88	926'900	40	139	43	36	11	49'466'475	15'380	983	3141	4.56	5.72	0.90	12.55	185.15	11.46	3.50
W	Leksand	0.55	556'000	20	139	14	36	0	49'858'311	15'450	1'096	3227	3.59	3.56	0.50	9.90	139.60	11.16	0.00
W	Ludvika	0.50	300'000	40	110	14	25	0	22'240'000	25'477	1'996	4880	4.03	1.96	0.25	4.87	62.12	5.12	0.00
W	Malung	0.55	600'000	13	70	14	70	7	25'000'000	10'518	701	2043	6.04	5.23	0.78	8.65	119.83	34.26	3.43
W	Mora	0.80	1'365'000	18	205	14	50	30	91'000'000	20'159	1'314	4136	3.21	3.97	0.61	12.35	166.67	12.09	7.25
W	Orsa	0.30	265'000	10	40	2	43	9	11'800'000	7'026	447	1463	5.88	4.27	0.67	7.26	93.96	29.39	6.15
W	Rättvik	0.70	680'000	20	109	30	189	20	35'207'000	10'884	963	2072	4.40	6.43	0.73	14.61	144.34	91.22	9.65
W	Smedjebacken	0.20	225'000	40	40	5	10	10	13'182'000	10'715	602	2060	3.64	1.87	0.33	5.13	74.75	4.85	4.85
W	Säter	0.50	561'000	40	87	6	3	3	25'000'000	10'991	643	2395	5.21	4.55	0.78	8.73	144.63	1.25	1.25
W	Vansbro	0.30	273'000	8	60	3	5	4	10'000'000	6'983	500	1418	4.48	4.30	0.60	9.59	126.00	3.53	2.82
W	Älvdalen	0.40	485'000	3	57	7	25	5	15'000'000	7'419	567	1433	5.80	5.39	0.71	9.30	112.87	17.45	3.49
X	Bollnäs	0.75	193'000	30	313	32	62	8	59'426'458	26'278	1'801	5219	2.12	2.85	0.42	13.43	191.56	11.88	1.53
X	Gävle	3.50		40	829	103	106	82	280'328'849	92'416	4'824	18816	3.45	3.79	0.73	10.97	193.20	5.63	4.36
X	Hofors	0.40	600'000	16	107	8	26	2	21'000'000	10'091	741	2006	3.42	3.96	0.54	11.59	155.20	12.96	1.00
X	Hudiksvall	1.00	1'300'000	20	330	13	100	0	20'000'000	36'956	2'166	7654	2.92	2.71	0.46	9.28	158.36	13.07	0.00
X	Ljusdal	0.50	671'800	40	145	6	60	4		19'243	1'403	3737	3.23	2.60	0.36	8.05	107.63	16.06	1.07
X	Nordanstig		720'000	40	82	4	18	2		9'810	622	2004				8.97	138.26	8.98	1.00
X	Ockelbo	0.10	420'000	8	75	4	15	3	15'902'300	6'038	428	1196	1.22	1.66	0.23	13.58	184.58	12.54	2.51
X	Ovanåker	0.40	415'000		61	4	18	3	16'997'011	11'816	835	2351	5.88	3.39	0.48	5.75	77.84	7.66	1.28
X	Sandviken	1.00	1'250'000	40	342	45	101	47	118'575'456	36'748	2'240	7465	2.30	2.72	0.45	11.81	172.77	13.53	6.30
X	Söderhamn	0.80	1'415'000	40	236	46	27	23	70'000'000	26'257	1'775	5141	2.62	3.05	0.45	11.62	158.87	5.25	4.47
Y	Härnösand	3.00	3'200'000	40	473	148	134	46	75'364'045	25'080	1'561	5036	4.50	11.96	1.92	26.59	397.82	26.61	9.13
Y	Kramfors	1.00	964'000	40	133	43	54	6	59'518'086	19'816	1'490	3700	5.49	5.05	0.67	9.18	118.12	14.59	1.62
Y	Sollefteå	2.00	1'281'200	40	168	25	94	6	47'300'000	20'849	1'672	3897	10.05	9.59	1.20	9.54	115.43	24.12	1.54
Y	Sundsvall	5.80	6'550'000	40	664	56	160	13		94'516	4'934	19262	7.91	6.14	1.18	7.76	145.93	8.31	0.67
Y	Timrå		505'000	40	137	19	30	3		17'870	918	3990				8.90	169.93	7.52	0.75
Y	Ånge	0.50	358'000	40	105	15	15	3	19'769'437	10'604	848	2113	4.07	4.72	0.59	11.60	141.51	7.10	1.42
Y	Örnsköldsvik	3.00	2'876'300	41	386	71	48	37	130'652'762	55'243	3'378	11336	6.07	5.43	0.89	8.94	135.29	4.23	3.26
Z	Berg	0.50	435'000	20	76	11	19	11	22'000'000	7'592	623	1570	5.10	6.59	0.80	12.91	139.65	12.10	7.01
Z	Bräcke	0.50	950'000	30	94	23	18	7	35'280'136	7'202	535	1515	4.03	6.94	0.93	17.22	218.69	11.88	4.62
Z	Härjedalen	0.50	370'000	40	72	11	0	0	12'900'000	10'764	936	2011	6.02	4.65	0.53	7.71	88.68	0.00	0.00
Z	Krokoms	0.70	782'000	28	125	12	87	27	40'000'000	14'270	768	3360	4.27	4.91	0.91	11.49	178.39	25.89	8.04
Z	Ragunda	0.50	564'400	4	52	13	26	3		5'806	488	1122	7.35	8.61	1.02	11.71	133.20	23.17	2.67
Z	Strömsund	1.00	1'104'000	10	124	15	53	9	4'624'639	12'782	1'042	2423	6.76	7.82	0.96	11.58	133.40	21.87	3.71

Z	Åre	0.70	911'000	20	94	6	92	1		10'021	536	2151	6.93	6.99	1.31	10.08	186.57	42.77	0.46	
Z	Östersund	3.25	4'800'000	40	747	67	256	35	350'000'000	58'583	3'323	11555	3.83	5.55	0.98	14.49	244.96	22.15	3.03	
AC	Bjurholm	0.25	70'000	4	21	0	4	0	10'200'000	2'541	221	529	11.90	9.84	1.13	8.26	95.02	7.56	0.00	
AC	Dorotea	0.25	116'000	3	50	3	5	1	8'809'000	3'069	317	557	4.63	8.15	0.79	17.60	167.19	8.98	1.80	
AC	Lycksele	1.25	520'000	40	188	11	43	5	37'754'933	12'612	817	2561	6.13	9.91	1.53	16.18	243.57	16.79	1.95	
AC	Malå	0.10	157'000	4	33	3	4	2	8'000'000	3'348	214	687	2.63	2.99	0.47	11.35	168.22	5.82	2.91	
AC	Nordmaling	0.40	484'000	10	56	4	15	0	18'000'000	7'426	498	1556	6.67	5.39	0.80	8.08	120.48	9.64	0.00	
AC	Norsjö	0.25		10	33	2	18	1	10'100'000	4'437	307	902	6.94	5.63	0.81	8.11	114.01	19.96	1.11	
AC	Robertsfors	0.25	258'000	40	49	4	13	6	25'000'000	6'996	483	1509	4.24	3.57	0.52	8.43	109.73	8.61	3.98	
AC	Skellefteå	4.00		40	783	122	613	38	172'000'000	71'966	4'046	15146	4.24	5.56	0.99	13.10	223.68	40.47	2.51	
AC	Sorsele	0.20	184'000	40	68	0	28	0	15'000'000	2'867	244	547	2.94	6.98	0.82	23.72	278.69	51.19	0.00	
AC	Storuman	0.25	283'500	40	65	5	8	1	9'000'000	6'432	432	1209	3.52	3.89	0.58	11.04	162.04	6.62	0.83	
AC	Umeå	4.00	4'200'000	40	556	109	321	63	232'700'000	111'235	3'949	22703	5.49	3.60	1.01	6.54	168.40	14.14	2.77	
AC	Vilhelmina	0.25	200'000	20	58	5	17	8	16'200'000	7'280	487	1552	3.52	3.43	0.51	9.75	129.36	10.95	5.15	
AC	Vindeln	0.20	150'000	15	54	4	1	1	6'000'000	5'665	482	1100	3.39	3.53	0.41	10.41	120.33	0.91	0.91	
AC	Vännäs	0.10	400'000	3	126	2	3	2	5'000'000	8'436	503	2036	0.77	1.19	0.20	15.41	254.47	1.47	0.98	
AC	Åsele	0.25	160'000	4	40	1	0	0	8'500'000	3'271	310	630	6.10	7.64	0.81	12.53	132.26	0.00	0.00	
BD	Arjeplog	0.40	99'000	3	21	1	1	0	5'600'000	3'151	240	553	18.18	12.69	1.67	6.98	91.67	1.81	0.00	
BD	Arvidsjaur	0.25	346'000	2	70	4	7	3	17'900'000	6'791	510	1271	3.25	3.68	0.49	11.34	145.10	5.51	2.36	
BD	Boden	2.00	2'700'000	40	345	65	98	8	16'200'000	28'002	1'585	5836	4.78	7.14	1.26	14.93	258.68	16.79	1.37	
BD	Gällivare	1.50	628'000	40	109	35	8	1	59'000'000	18'959	963	3653	10.34	7.91	1.56	7.65	149.53	2.19	0.27	
BD	Haparanda		560'000	25	136	18	59	160	43'000'000	10'214	544	2029				30.74	283.09	29.08	78.86	
BD	Jokkmokk		320'000	2	68	4	33	15		5'491	356	1027				15.84	202.25	32.13	14.61	
BD	Kalix	1.00	933'000	3	140	36	36	16	90'000'000	17'396	998	3427	5.21	5.75	1.00	11.04	176.35	10.50	4.67	
BD	Kiruna	1.75	1'600'000	40	179	12	127	5	50'000'000	23'258	942	5005	8.93	7.52	1.86	8.43	202.76	25.37	1.00	
BD	Luleå	3.75	5'600'000	40	465	130	134	65	227'800'000	73'313	2'968	14714	5.68	5.12	1.26	9.00	200.47	9.11	4.42	
BD	Pajala		200'000	1	75	2	2	1	20'000'000	6'688	527	1216				11.66	146.11	1.64	0.82	
BD	Piteå	1.75	1'700'000	40	174	58	120	23	49'000'000	40'943	1'889	8684	6.86	4.27	0.93	6.23	122.82	13.82	2.65	
BD	Älvsbyn	0.50	280'000	20	89	7	4	3	11'200'000	8'653	523	1796	5.05	5.78	0.96	11.44	183.56	2.23	1.67	
BD	Övertorneå	0.50	200'000	1	43	2			5'000'000	3'859	296	662	11.11	12.96	1.69	11.66	152.03	0.00	0.00	
BD	Övertorneå		300'000	1	63	14	2	0	2'000'000	5'168	376	994				14.90	204.79	2.01	0.00	
					62'795		7'192													

APPENDICES

CZECH REPUBLIC

Annex 1

Judicial decisions in incapacitation and curatorship proceedings

District courts (*okresní soudy*)

Type of Decision	2002	2003	2004	2005	2006
Judgments where full incapacity was found	1,314	1,312	1,508	1,594	1,459
Other decision in full incapacity proceedings	426	461	521	473	580
Judgments where partial incapacity was found	254	281	314	312	357
Other decision in partial incapacity proceedings	67	68	90	91	62
Judgments where legal capacity was restored	48	45	33	49	52
Other decision to restore legal capacity	108	95	115	113	139
Judgments enforcing agreements or other legal acts on behalf of persons under full or partial incapacity	1,039	1,086	1,193	1,332	1,283
Refusals to enforce agreements or other legal acts on behalf of persons under full or partial incapacity	37	38	34	35	35
Other decisions about agreements or legal acts on behalf of person under plenary or partial incapacity	113	118	157	180	168
Judgments appointing curators according to §29 of Civil Code	462	378	543	529	434
Other decisions where curators were appointed					93

According to recent information, released in November 2008 by the Czech Ministry of Justice, 2'139 decisions on full incapacitation, 472 decisions on limited capacity and 68 decisions returning capacity were in force in the Czech Republic in 2007. In the first half of 2008 (until 30.6.2008), the authorities made 1'155 decisions of full incapacitation, 314 decisions on limited capacity and 28 decisions returning capacity. No data is available about the number of foreign citizens or about the residence of incapacitated persons.

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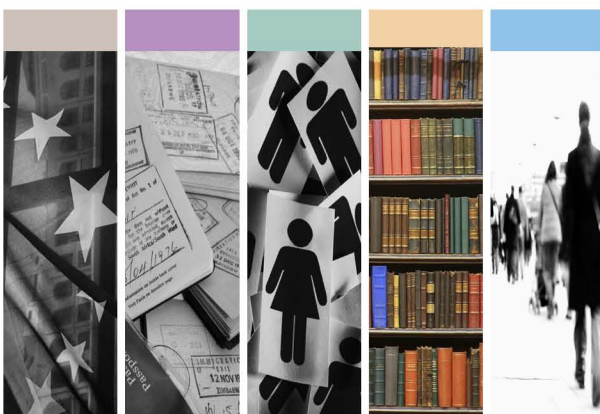
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