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DOI: 10.46793/LawPG.451P

ABILITY OF PERSONS DEPRIVED OF LEGAL CAPACITY TO EXERCISE THEIR PERSONAL RIGHTS

Abstract

In spite of ratified international documents, the protection of persons with mental health problems, intellectual or physical disabilities in the legal system of the Republic of Serbia is still enforced by legal institutes such as deprivation of the legal capacity and a placing of these persons under guardianship. These legal solutions especially does not resolve a question of exercising personal rights that can be done by their holders exclusively in case they are capable of it. Since the guardian is not entitled to enforce them, it emerges that these rights do not exist for persons deprived of legal capacity. This paper endeavors to address an issue on abilities of these persons to make legally binding decisions concerning these rights. Possible solutions to the matter can be found in establishing natural capacity of these persons and through their participation in decision making to the extent that their mental and psychical condition allows. In case that these persons do not have even a minimum of capacity for decision making, the guardian must take a legally binding decision on behalf of a person deprived of legal capacity either on his own or upon the consent of a guardianship authority. Thereby certain criteria have to be taken into account so that the decision is in the best interest of the person represented.

***Key words**: Legal incapacity, personal rights, guardianship, natural capacity.*

1. INTRODUCTION

In law exists confusion between two legal terms: legal incapacity and personal rights. Each person gets them by birth, but certain part of the world population is deprived of ability to exercise them. This sort of inability is related to two categories of persons usually called legally incapable persons: minors under the age of 18 and adults that are deprived of legal capacity due to illness or disorders of psychophysical development. Generally, in such cases adults are equated with minors in terms of legal status.

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It is generally known that the second half of the last century and the begging of the new one are dedicated to affirmation of children`s rights. At the same time, in the last several years the interest in problems related to legal status of legally incapable persons has abruptly increased. An inspiration has also been found in strengthening children`s autonomy that has received its confirmation in the United Nations Convention on the Rights of the Child. At a certain point it became anachronistic to preclude adults deprived of legal capacity from using children`s achievement.

Adults deprived of legal capacity automatically lose human rights and any further ability to shape their own life.[1] Some of personal rights, like right to marry and to found a family become meaningless this way.[2] Legal doctrine, legislations, NGOs, encouraged by the idea of human rights established in international documents, endeavor to promote the legal status of these categories of people.

When one is deprived of legal capacity, his or her will is not legally binding any more. Decisions are now made on his behalf, usually by his guardian who is entitled to undertake legal actions.[3] Apart from the duty to represent the person deprived of legal capacity in the field of protection to the person's property, the guardian is also obliged to take care of the personality of the represented, which is not usually fulfilled by the representative in civil law. It is mostly done by undertaking legal actions that do not have any economic effect on the property and financial matters of the ward.[4] In this manner, legal representative's powers are also expanded to the field of representing a person for personal matters. Conceptually this goes far beyond his primarily duty of taking care of persons deprived of legal capacity.[5] However, legal representative is not entitled to undertake some legal actions concerning strictly personal rights. Only a person to whom the

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[1] This has also been pointed out in Issue Paper of the Commissioner for Human rights of Council of Europe (Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities), available at https://www.coe.int/t/commissioner/source/prems/IP_LegalCapacity_serb.pdf, 13.03.2016.

[2] *Ibid.*, 12.

[3] See more, Z. Ponjavić, *Staralac kao zakonski zastupnik (Guardian as a legal representative)*, u: Reforma porodičnog zakonodavstva (ur. L. Todorović), Beograd, 1996, 312-331.

[4] See more, A. Gams, *Uvod u građansko pravo-opšti deo,* Beograd, 1974, 168. Due to this fact it is not possible to accept the definition of guardianship as undertaking legal actions on the behalf and for the account of someone else. It would be more suitable to talk about undertaking legal acts on someone else's behalf. See also, O. Stanković, *O pojmu i vrstama zastupništva,* Anali Pravnog fakulteta u Beogradu, 1-4/1983, 631.

[5] See more: Z. Ponjavić *op.cit.*, 314.

guardian is appointed can take this action, if capable of them. In today's system of representation and guardianship no one can undertake the aforementioned actions. Because of that it is necessary to answer the question whether and in what manner these persons can participate in making decision related to strictly private rights, to the extent that their condition allows.

The idea of minimum of personal rights for everyone, regardless of intellectual and other disabilities, is not something new.[6] If we accept the fact that exercising these rights implies the participation of the holder himself and excludes them being exercised by the guardian, there are two possible solutions. Either the person possesses enough of the natural capacity to exercise this minimum of personal rights in that particular case or he does not have one and these rights cannot be exercised at all. It has to be noted that in cases when other personal right are exercised, protection provided by the third person, the guardian, is not the negation of the autonomy of these persons. This stands under the condition, that representation also implies the participation of the persons represented to the extent that their condition allows. In the end, when the guardian has to make a decision, on his own or upon the consent of the guardianship authority due to health condition of the holder, it is necessary to establish criteria for making these decision in the best interest of the represented.

2. HISTORICAL DEVELOPMENT AND COMPARATIVE LAW

Deprivation of legal capacity due to adult's intellectual, mental or any other disabilities and his or her incapacity to take care of himself or herself, which requires the placing under guardianship, is a traditional approach to the matter that can be traced back in Roman law.[7] From the historical point of view, the institutes of guardianship and legal capacity were fatefully

[6] J. Hauser, *Incapables et/ou protégés? Sur le projet de réforme du droit des incapacités,* Informations sociales 2/2007 (n° 138), 6-19, www.cairn.info/revue-informations-sociales-2007-2-page-6.htm, 25. 01.2016.

[7] In Roman law adults incapable of taking care of themselves were appointed curatorship. There were three groups of people: persons with mental health problems, wastrels, property of absent persons.

connected¸ though some authors claim that an institute of legal capacity is older than guardianship.[8]

It is known that according to the Law of Twelve Tables persons with mental health problems and wastrels were placed under special kind of guardianship (*cura*). This sort of guardianship was prescribed as a form of protection for persons that exceeded the time limit foreseen for marital maturity. Mostly their close relatives were taking care of them. When there were no relatives, some other persons could be taken into consideration. However, this way only the property of an ill person was managed. Curators did not take any legal actions on behalf of the represented as tutors, but they would only give their consent to the legal action already taken by the person under the *cura*. Care about the personality was in the background and usually mother, wife or some of the closest male agnates would dedicate themselves to it.[9] Therefore the main aim of the guardianship in Roman law was the maintenance of the property and its inheritance by the new generations. Since no organized order of succession was established, very often it was the only way to secure the existence and family security of family members. Guardian was supposed to administer the property so that it remains in the possession of the family. Speaking in the terms of law, an attitude towards the protection of these persons has changed essentially over the time, especially at the international level. Besides, some of the circumstances beyond law related to the issue have also changed and these demanded to be taken into account when discussing this matter.

Firstly, development in scientific fields of psychiatry and psychology has considerably changed point of view on the persons with mental disabilities. Let us mention, among others, the theory in modern psychiatry according to which participation of these persons in decision making process can have therapeutic effect on them.[10] Moreover, structure of these persons has

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[8] M. Bajić, *Poslovna nesposobnost i počeci starateljstva u rimskom pravu,* Godišnjak PFS, 1, 1953, 21 - 39. This statement could be accepted only conditionally, as an attempt to better understand institutes of Roman law. This especially because the other authors claim that Roman law was not familiar with the notion of legal incapacity and that it was not developed not until the 1930s. See more, M. Mitić, *Fizičko lice,* Enciklopedija imovinskog prava I, 1978, 359, and M. Vedriš, *Čovjek u građanskom pravu, Civilno-pravni status i problemi zaštite psihijatrijskih bolesnika,* Zagreb, 1966, 9-18.

[9] On historical reason for separating taking care of the personaliy and taking care of property affairs, see more, M. Bajić, *op.cit.*, 22.

[10] J. Carbonnier, *Préface,* in: Massip J, Les incapacités. Paris : Répertoire Defrénois,1969, according to B. Eyraud, *Les protections de la personne à demi capable. Suivis ethnographiques*

changed tremendously. Back in the days only the persons with certain mental health problems and other disorders since their birth were listed. On the other hand, today a whole new category of these persons has been appeared and their mental and health state cannot be described just be using traditional categories of incapable persons. Primarily, due to life extension there are more and more old people with certain mental, intellectual and physical disorders.[11] Legal issues arising in both of these cases are not that similar. Last-mentioned elderly people have their own „legal past" to the effect that they were capable of having and maintaining their own property, which would not be the case with those handling mental and intellectual issues since their birth.

Main abetment to the new approach to rights of adults with intellectual or mental disorder or disability came from the Council of Europe documents, especially Recommendation R (99) of the 4th February 1999.[12] Its main principle is that in establishing or implementing a measure of protection for an incapable adult „the interests and welfare of that person should be the paramount consideration" and „the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect". And one of the most important principle is that a measure of protection should not result automatically in a complete removal of legal capacity (...) „or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so."

Most important document dedicated to this field of law is the UN Convention on the Rights of Persons with Disabilities.[13] Starting point of the Convention is individual autonomy and independence, including the

d'une autonomie scindée, https://tel.archives-ouvertes.fr/tel-00585538/document, 12.06.2016.

[11] See more J. Hauser, *op.cit.*, 6-19.

[12] Recommendation No. R (99) 4` of the Committee of Ministers to Member States of Principles Concerning the Legal Protection of Incapable Adults, adopted on 23 February 1999.

[13] The Convention on the Rights of Persons with Disabilities (UN CRPD); The Convention and its Optional Protocol were adopted by the General Assembly by its Resolution 61/106 of 13 December 2006. Both the Convention and the Protocol were ratified in the Republic of Serbia, Zakon o ratifikaciji konvencije o pravima osoba sa invaliditetom (Law on Ratification of the Convention the Rights of Persons with Disabilities), Official Gazette of the Republic of Serbia– International Agreements (Službeni glasnik RS – Međunarodni ugovori), No. 42/09. According to Art. 1, para. 2 of the UN CRPD: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

freedom to make own choices, by the promotion of ''the full enjoyment by persons with disabilities of their human rights and fundamental freedoms", with minimum of limitations in all matters relating to personal rights, e.g. right to marriage, parenthood, etc., and by promoting ''respect for their inherent dignity", ''full and effective participation and inclusion in society" and also by recognizing the legal capacity.[14]

The authors of the Convention have also taken into account the fact that mental disabilities and disorders are very different and evolutionary, that medical condition can change during the period of time, and therefore have foreseen that measures need to be individualized and appropriately adjusted in order to be effective. Protection appointed cannot be imposed as an undue and disproportional burden to a person. Especially an article 12 of the Convention is dedicated to legal capacity and equal recognition of a person deprived of it before the law. Paragraph 1 of this article declares right to everyone to be recognized everywhere before the law and paragraph 2 recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. The Convention insists on absolute respect for autonomy of persons with psychosocial and intellectual disabilities. Paragraph 4 of the same article obliges State Parties to ensure that all the adopted measures related to the exercise of legal capacity will provide

[14] See Art. 1, para. 1 and Art. 3 (a, c, e) UN CRPD. Due to the terms used in UN CRPD, a confusion occured while translating it to Serbian. UN CRPD uses the term „legal capacity" and Serbian legal systems recognizes two terms related to the capacity of natural persons: capacity to be right-holders and capacity to exercise rights. The first one literally translated to Serbian is called „legal capacity- pravna sposobnost", while the second one literally translated to Serbian is „business capacity-poslovna sposobnost". The confusion arouse since the term used in UN CRPD („legal capacity") when literally translated to Serbian sounded like pravni kapacitet or pravna sposobnost (the capacity to be right-holder), which was incorrect. The term from UN CRPD was meant to describe the notion of „business capacity-poslovna sposobnost" in Serbian legal system. According to Cambridge Dictionary (Online), legal capacity is the legal right of a person or a company to make particular decisions, have particular responsabilities, http://dictionary.cambridge.org/dictionary/english/legal-capacity?a=business-english. In Serbian literature it is considered that it is necessary to trasnslate the term from the UN CRPD (legal capacity) as poslovna sposobnost (buisness capacity), see more M. Draškić, Novi standardi za postupak lišenja poslovne sposobnosti: aktuelna praksa Evropskog suda za ljudska prava, Anali Pravnog fakulteta u Beogradu, 2/2010, 336-7. One should not also lose out of the sight that UN Committee on the Rights of Persons with Disabilities has also tried, but not succeeded, at their 8th session to take a unique stand on this matter, see http://www.noois.rs/vesti/162-izvestaj-sa-8-zasedanja-komiteta-un-za-prava-osi, 24.04.2016.

for appropriate and effective safeguards that will ''respect the rights, will and preferences" of a person. The presumption is that everyone owns legal capacity and those deprived of it will be offered appropriate forms of assistance and support as well as possibility to be involved in decision making process. Now the basic model introduced is a so-called ''supported decision-making" instead of the previous one, substituted decision-making (by guardian). The aim is to help these persons make their own decision related to their personal matter or at least to participate in it.[15] Common idea of all international documents in this field is focusing on personal rights of these persons and ensuring their participation in exercising them.

Ratification of the Convention led to adoption or to changes of national legislations, which was also indubitably inspired by the new concept of legal treatment of these persons. In the United Kingdom Mental Health Act was adopted, regulating also the presumption that persons with mental health issues have legal capacity. In the case of need, this person will be supported in making decision. Only if this fails, person will be considered as incapable of decision making in that particular case. In French law (Loi n° 2007□308) it is regulates the position of ''adult protected persons". This protection is based on full respect of personal freedoms, basic rights, dignity and autonomy of these persons.[16] German law ((Zweites Gesetz zur Änderung des Betreuungsrechts (2. BtÄndG) von 21. April 2005 (BGBl. I 1073)) insists on taking into consideration the will of an adult, while also respecting the principles of subsidiarity and proportionality when establishing measures of protection. Will of the protected has to be ascertained in each phase of placing a person under the guardianship and its duration.

Solutions from French and UK legislations accept the model of protection which aims to minimize all the limitations of one person`s capacity to take care of oneself. On the other hand, German system is based on complete elimination of deprivation of legal capacity and on acceptance of simple, but flexible model adjustable to each individual situation and circumstances. This model of the protection provided for persons with mental disorders, who due to ''psychic illness or physical, mental or emotional disorders" are not fully or partially capable of taking care of his or her own affairs, is less based on the notion of ''mental incapability" and is more focused on its causes and

[15] Basically it is the realization of idea from the Recommendation R (99) 4, Principle 3 stating: "Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative consent, to undertake specific acts or acts in specific area".

[16] Art. 414 of the French Civil Code.

different fields of acting that require protection. Lack of capability is differently defined depending on the sphere in matter. For example, if an adult is permanently or temporarily incapable of judging and it prevents him or her to take care of his or her own interests and affairs due to physical, mental or emotional disability, court can *ex officio* or on a request of a person appoint a tutor.[17] It is important to emphasize that an appointment of a tutor does not mean that a person is deprived of legal capacity and that he or she is not allowed to take other legal actions.

3. THE LEGISLATION OF THE REPUBLIC OF SERBIA

The protection of persons deprived of legal capacity in the Republic of Serbia is accomplished through the institute of guardianship, regulated in the Family Law Act.[18] Apart from the ''advance healthcare directives'' from the Act on Patients` Rights, no other models of protection can be found in Serbian legislation.[19] The foundation set for an institute of guardianship has not been changed for more than seven decades, even though there is an obvious need for a certain change. Various external and internal factors had a formative influence on this institute. External ones originate from a requirement to harmonize national system of the protection of these persons with adopted international standards and legislation, while the internal ones concern the deficiencies in their application in practice, incurred as a result of changes in the structure of these persons.

The fact that regulation has not been essentially changed for a long period of time can lead to two different conclusions: either the concept of guardianship established in Basic Law on Guardianship (1946) was very good and stood the test of time or no one has paid close attention to these rules. Lack of thorough analyzes and theoretical interpretation of this issue made it impossible to perceive all of its shortcomings (or advantages).[20] Over the period of time all the other institutes of family law have been developed and customized in accordance with the changes in the society and in the structure of the family. These changes and development had a great

[17] Para.1896 section 1 of the German Civil Code.

[18] Sixth Section of Family Law Act (Porodični zakon), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 18/05.

[19] Article 16. paragraph 5. of Act on Patients` Rights (Zakon o pravima pacijenata), Official Gazette of the Republic of Serbia (Službeni glasnik), No. 45/13.

[20] For example, only several papers relating to this issues can be found, which is far less compared to other fields of family law and which can be found in COBISS Database.

influence on legislation, which merely indicates that the sphere of guardianship was unduly neglected, and the voice of persons under guardianship, forgotten and neglected not only by the State but also by their own family, could not be heard, which *per se* says a lot about their legal status.

In Serbian legal system (Family Law Act from 2005) it is possible to place an adult under guardianship if the court reaches the decision to deprive this person of his or her legal capacity (either fully or partially). Legal capacity of an adult deprived of it is then equal to the legal capacity of a minor of a certain age. It is similar to the case when parental rights can be extended beyond the point that a child reaches the legal age of majority, when his status is equated to the legal status of a minor below or over the age of 14. However, guardianship should neither be anticipated as a renaissance of parental right after reaching the legal age of majority nor as an extension of guardianship over minors.[21] Therefore, there is no reason to understand deprivation of legal capacity as a sanction, but rather as a form of protection in overcoming natural incapability to exercise rights.[22] Full deprivation of legal capacity means that a person has no rights and no possibility to participate in decision making process, even when related to his own life. All decisions are made by the guardian himself or upon the consent of guardianship authority.

Scope and extent of the guardian`s authority does not depend on the health condition or on the preserved capabilities of the ward. It is exclusively determined by the importance of legal actions that have to be undertaken. When the legal capacity is deprived only partially, a person can still make certain decisions pursuant to the court`s decision, which means that the guardianship in this case only is adjusted to the needs and capabilities of the ward. More precisely, capacity of the person partially deprived of legal capacity is more defined by the reasons for guardianship and less by the nature and importance of the decision that has to be made. Apart from the legal actions determined by the court, a person partially deprived of legal capacity should also be able undertake some of the strictly personal acts that could not be undertaken by the guardian on behalf of the ward (conclusion of marriage, making a will, acknowledgment of paternity)[23] Capacity to

[21] C. Geffroy, *La protection tutélaire des majeurs en matière personnelle,* 209, http://www.persee.fr/doc/juro_0990-1027_1993_num_6_2_2064, 13.05.2016.
[22] J. - M. Plazy, *Droits de l'enfant et incapacité juridique de l'enfant*, https://www.cairn.info/revue-informations-sociales-2007-4-page-28.htm, 14. 05.2016.
[23] M. Popović, *Porodično pravo*, Belgrade, 1982, 433.

undertake them is determined in accordance with relevant provisions of legislation of the Republic of Serbia. For example, a male person can acknowledge paternity if he is over the age of 16 and capable of reasoning. Despite the fact that in practice the courts do not determine, in the decisions on partially deprivations, precise legal actions that can be taken by oneself or it is done in a general manner,[24] the main question to be set is how to individualize guardianship over persons fully deprived of legal capacity in accordance with their mental state, especially when it comes to personal legal actions. Besides, this approach, set in international documents, guides to abolishment of full deprivation of legal capacity.[25]

Even a superficial analysis of the legislation of the Republic Serbia demonstrates that the legal solutions in Serbia are outdated and that they contrast to a great deal with the principles from the analyzed international documents since the rights of the person under guardianship are not respected at all. Their consent or its refusal, autonomy in decision making, is far from being respected. What is crucially necessary is to reconcile contradictory demand of respecting freedom and rights of these persons, on one side, and the need to protect them, without setting any limitations to their rights.[26] It is possible only if the measures of protection are understood not as a limitation of the capacity of the person, but as a certain compensation of the existing disability. This approach also demands changes in the role and function of the guardian who is supposed to help in decision making and not to make decisions on the behalf of a ward. Wards are not deprived of their rights, but they just exercise them to the extent that their capacity permits them to do so. When the role of guardian is perceived this way, then there is

[24] Decree of the High Court in Požarevac, 2 Gž 1398/15 (2013) from 06.11.2015., Bulletin of High Court in Požarevac, No. 2/2015, and Decree High Court of Šabac, 5 Gž 525/2013 from 23. 09. 2013. Both decisions can be found in Intermex Database, Belgrade.

[25] For example, the Family Law Act of the Republic of Croatia has completely abolished full deprivation of legal capacity, Art. 234 of the Family Law Act (obiteljski zakon), Official Gazette of the Republic of Croatia (Narodne novine), No. 103/2015.

[26] T. Fossier, *L` objectif de la reforme du droit des incapacites: proteger sans jamais diminuer,* Def. 2005, No. 1, 3-34. According to: J. Hauser, J.-M. Plazy, *L'usager incapable*, Gérontologie et société 4/2005 (n° 115), 101-115, www.cairn.info/revue-gerontologie-et-societe1-2005-4-page-101.htm, 10.06.2016. General Comment no. 1 of the Committee on the Rights of Persons with Disabilities, related to Art. 12 of the Convention, warns of possible misunderstanding of the concept of disability based on human rights because it implies the transformation from a model of substituted decision-making for persons with intellectual and psycho-social disabilities to one in which supported decision-making is the default model. See more, General Comment, para. 16-22.

no contradiction between autonomy and protection. This approach demands the spread of technical help and assistance, with reference to existence of alternative methods of protection of incapable persons (Article 29 of the Convention) and better role allocation between the wards and their guardians. The assistance provided has to be tailored to the individual circumstances and has to evolve together with the ward.[27]

4. INCAPABLE, VULNERABLE OR PROTECTED PERSONS

Notions and terms used in Serbian Family Law Act are also outdated. It still refers to incapable persons, while this term in comparative law is not that widely used anymore due to its pejorative. In literature and national legislation terms ''vulnerable person" and ''protected person" can be detected.[28] Even though the usage of the term ''vulnerable person", defined as a person incapable of exercising his or her rights and freedoms correctly, eliminates the stigmatization of these persons, it can provoke certain general and specific difficulties related to the main subject of this paper. Firstly, these are two different types of persons. It can be even stated that in general anthropological sense, every human being is vulnerable. However, national legal systems acknowledge vulnerability only to certain categories of human population, to children and to adults with certain disabilities. This blurs the difference between adult deprived of legal capacity and other groups of adult vulnerable persons and support they require in order to satisfy their needs.[29] Vulnerable person is not always deprived of legal capacity.

Main legal presumption concerning children is that they are vulnerable, while the situation is completely opposite when it comes to adults. There are also groups of vulnerable adults deprived of legal capacity and of those still not deprived. First group is legally presumed to be incapable of reasoning, whilst the second group is considered capable of it. [30]

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[27] Recommendation R (99) in the Principle no. 5 prescribes that measures have to be based on the interference with the legal capacity of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention and on the least restrictive alternative.

[28] Art. 459 of the French Civil Code.

[29] B. Eyraud, *op.cit.*, (fn. 38).

[30] But this difference is not that easily determinable. According to professor Ozer "incapacity certainly seems more like termination of rights in order to provide protection, while modern protection of vulnerable persons consists of recognition of more rights, but with a very fluid borderline," J. Hauser, *op.cit.*, 10.

From the legal point of view, the second group of vulnerable adults is almost invisible, or better rephrased, established system of protection does not recognize their natural incapacity as a category.[31] Permanent increase of rates of mental disabilities brought by different causes, including wars and economical situation, emphasizes the problem additionally. Due to life extension number of older persons is constantly growing, while their age, social context, diseases, health condition and economical situation contribute to their vulnerability. Their protection is to be considered not only as a ''family issue'', but also as a duty of the State to establish an appropriate legal framework. Our legal system does not provide any special kind of protection for these persons. Moreover, there is no legal presumption that mental and physical weakness in correlation with certain age is the cause of incapacity to take care of oneself. Accepting this legal solution would provide an appropriate safeguard to prevent possible abuse of the persons concerned, especially when it comes to giving their consent to personal decisions on health, place of residence, etc. Older persons are somewhere in between those capable and those incapable of reasoning in civil law. They are not deprived of will, but it is weakened to a certain point. Their vulnerability is reflected in diminished decision-making autonomy. Since this condition differs from mental health problems and disorders, introducing special forms of protection would be justifiable, when the incapacity is based on an expert medical examination of a person's particular circumstances.

Difference between vulnerability of children and adults is not that slight by virtue of their different causes. Besides, they have different perspectives, or to be more precise, their perspectives are completely opposite.[32] Minors are each day closer to reaching full capacity, while the adults' capacity stagnates or it declines and demands more protection. Within the first category of vulnerable persons there are significant differences among newborns, children of school age and adolescents. Serbian legislation knows the difference between younger and older minors and also recognizes the capacity of children of certain age to express his or her personal view,[33]

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[31] Z. Ponjavić, *Autonomija punoletnih lica (ne)sposobnih za rasuđivanje u ostvarivanju prava na zaštitu zdravlja,* u: Pravna zaštita odraslih osoba (ur. Suzana Bubić), Pravni fakultet Univerziteta „Džemal Bijedić" u Mostaru, Mostar, 2016, paper received positive reviews and soon will be published.

[32] J. Hauser, *Le consentement aux soins des majeurs protégés*, *Les petites affiches*, 19 mars 2002, according to: S. Moracchini-Zeidenberg, *L`acte personnel de la personne vulnérable,* Revue trimestrielle de droit civil, 1, 2012, 22.

[33] Art. 65 of Family Law Act.

whilst there are no legal categorization of older person. Namely, differences between adults due to their vulnerability are also very serious and for that reason, legal status of persons whose vulnerability is increasing with aging cannot be equated with people, who were never capable of reasoning. However, Serbian Family Law Act does not take into account all the aforementioned facts and keeps a traditional approach to the matter. In accordance to this approach, each adult can be fully or partially deprived of legal capacity. Difference between them is based on quantity of the protection required. Causes of deprivation of legal capacity, personal past or predictable future are not paramount consideration. Protection of these persons, especially of those fully deprived of legal capacity, is not tailored to the individual circumstances and needs, which is one of main standards set in international legal documents. Bearing in mind everything aforesaid, particularly different situations and legal statuses of different persons, a term ''protected persons'' can be used to describe all these different categories.

5. ESTABLISHING NATURAL CAPACITY

According to the provisions of the Serbian Family Law Act, duties and responsibilities of the guardian are completely the same, whether it comes to administering property of the ward or to taking care of their personal matters. In both cases guardian is entitled to represent the ward. Guardian's competence to represent the person deprived of legal capacity in administering property is considered to be natural and welcome,[34] because it also protects financial and property assets of other family members. But when it comes to taking care of the personal interest of the ŧ ward, representation is less convenient for several reasons: first of all, no one has a better perception of himself or herself and of personal needs than the person concerned, if capable of expressing his or her own will. Also, protection of these rights can be accomplished only *ex ante* and not *a posteriori*, like other civil rights, which also makes a good reason to reconsider the concept of "capacity" of persons deprived of legal capacity for exercising it. In the sphere of personal rights wrong decision can neither be subsequently

[34] Z. Ponjavić, *Pravni značaj volje punoletnih poslovno nesposobnih lica*, u: Zaštita ljudskih i manjinskih prava u evropskom pravnom prostoru, (ur. P. Dimitrijević), knjiga 3, Pravni fakultet Univerziteta u Nišu, Niš, 2013, 223-241.

corrected nor the damage inflicted to that person or the third party, to whom he or she, for example, exercises parental rights, compensated.[35]

Besides, the Family Law Act does not provide autonomy of the person represented by extending his abilities to participate in decision-making. Furthermore, there are no legal provisions on ability of a ward to make his/her own decisions while exercising personal rights or to express his or her opinion on personal issues when his or her capacity permits him or her to do so.[36] It is a clear sign that our legal system pursues neither general ideas established in international legal acts nor the jurisprudence of the European Court of Human Rights.[37] Preliminary Draft Civil Code of the Republic of Serbia also did not make some strides in this field.[38] So Article 2375 regulates the duty of the guardian to ''obtain the opinion of the ward and to take into account his opinion, point of view and wishes'' before undertaking any ''measures of great significance'' concerning personal and property matters of the ward, if he or she is over the age of 10 and is capable of expressing them.[39] Thus no further distinction between different levels of taking into account the wishes of the ward is made.[40] This provision also does not

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[35] In civil rights this can be accomplished a posteriori by annulment of legal actions when sufficient evidence of incapacity of reasoning in the moment of undertaking these actions are assembled.

[36] Apart from the Art. 127 of the Draft Civil Code, that states: "Person represented that is over the age of 10 and capable of reasoning has the right to suggest a person who can be appointed as his or her guardian." Quoted provision should be interpreted in a way that this right to expressing opinion in the process of choosing a guardian belongs to all persons capable of reasoning, over the age of 10, both minors and adults. See more, Z. Ponjavić, *Pravni značaj volje punoletnih poslovno nesposobnih lica,* 232.

[37] For example, Decision of the Court in Strasbourg Krušković vs. Croatia (Application no. 46185/08, Judgment 21 of June 2011). The Court stated that, in principle, limitations on rights of persons deprived of personal capacity, even when related to their personal or private life, are not in collision with the Art. 8 of the European Convention on Human Rights. At the same time, Court pointed out that the applicant was not given any opportunity to make a statement on acknowledgment of paternity, which is an infringement of the Art. 8 of the Convention.

[38] http://www.propisi.com/assets/files/gradjanski_zakonik_RS-prednacrt.pdf

[39] Draft Civil Code offers two alternatives to this matter. Apart from the one given in the text above, there is also another one: words from the previous paragraph "over the age of 10 and is capable of expressing them" are replaced with the words "capable of understanding their significance and expressing them".

[40] As it is done in the Art. 458 and 459 of the French Civil Code. Personal legal actions can be undertaken by the person protected or by his guardian (tutor), depending on his

provide any kind of solution for the situations concerning exercising strictly personal rights, e.g. acknowledgment of paternity, which cannot be exercised by the guardian with the consent of the guardianship authority. In the final score it means that a ward will not have an opportunity to express personal views about an issue.

Therefore it seems inevitable to reconsider the concept of ''capacity'' of persons deprived of legal capacity to undertake personal legal actions directly and primarily related to physical or psychic intimacy. These rights are inherent to their holders and they exist irrespective of the state of their will. Their protection has to be provided by the affirmation of natural capacity of each person. Natural capacity is of great importance in the sphere of exercising personal rights, because neither one can be deprived of exercising them nor the guardian can exercise them on behalf of the represented. It can be defined as a capacity of a person to express his or her personal will in a certain situation irrespective of his or her legal status.[41] In this respect, giving certain statements and exercising certain rights are of great importance: e.g. consent to medical treatments, abortion, right of a woman to keep a child, consent to biomedical research, sterilization and in the sphere of family law: acknowledgment of paternity, consent to adoption, decisions from the area of exercising parental rights, giving and changing the name of the child. It seems imminent to enable at least taking into account the will of these persons, which would be in accordance with nature of undertaken legal actions and natural capacity of all persons, even of those deprived of capacity. Of course, taking someone`s will into account can take various forms, starting with regular preliminary hearing before guardian makes a final decision or requesting help and support and ending with full capacity of decision-making. The prevailing approach in our legal theory is that something similar should not be allowed due to principal of legal certainty and protection of the third parties` interests,[42] whilst this is widely spread in comparative law. For example, French Civil Code presumes that protected person can undertake personal legal actions to the extent that their condition permits him or her to do so, while the person in charge of the

consciousness. Strictly personal acts can be undertaken exclusively by the person represented.

[41] Z. Ponjavić, *Pravni značaj volje punoletnih poslovno nesposobnih lica,* 227.

[42] See more, D. Živojinović, *Sposobnost za davanje informisanog pristanka na učešće u medicinskom istraživanju,* Zbornik radova Pravnog fakulteta u Nišu, 67, 2014, 132.

protection of an adult will take necessary protection measures.[43] The powers of guardian are reaffirmed this way in such a manner that he can act contrary to the will of person represented but in his interest, which is characterized as a paradigm of paradox of protection and broad scope of guardian's powers.[44]

Finally, it can be concluded that, despite their vulnerability, ''natural capacity'' of persons has to be respected always when possible. Preserving autonomy in the sphere of exercising personal rights has to be a high-priority legal and political goal, because these persons in current legal system of protection do not have all the rights guaranteed by the Constitution. Affirmation of the principle of autonomy also includes defining more precisely guardian's role and powers, because he would be supposed to act on behalf of a ward only when a lack of natural capacity precludes him or her from doing it on his or her own. An idea to be pursued by our legislator is favoring of autonomy consisting of maintaining and increasing of natural capacity despite legal incapacity, as long as it is in compliance with the protection of the personality. Its basis can be found in constitutional protection of dignity. In this respect, the degrees of autonomy have to be a main criterion for tailoring measures of protection to the individual circumstances.[45]

6. TYPES OF PERSONAL ACTS

In the sphere of personality rights, two types of measures can be distinguished, ordinary ones and those that make significant impact on the life of a person, or so-called ''measures of great significance'' from the Preliminary Draft Civil Code. Apart from these types, acts can be divided into ordinary (daily) acts and more important act. An example of a more important act would be, e.g. undergoing medical treatments, such as invasive diagnostic and therapeutic method, which can be undertaken upon the consent of a patient or his legal representative due to possible, sever health

[43] Art. 459 al. 1: «La personne protégée prend seule les décisions relatives à sa personne dans la mesure où son état le permet».

[44] B. Eyraud, *op.cit.*, 52.

[45] M. Rebourg, *L'autonomie en matière personnelle à l'épreuve du grand âge. Analyse de pratiques judiciaires à l'aune de la loi du 5 mars 2007 réformant la protection juridique,* Retraite et société 2, 2014 (n° 68), 63-77, www.cairn.info/revue-retraite-et-societe-2014-2-page-63.htm, 12.06.2016.

consequences.[46] Finally, the division of personal acts into strictly personal and ordinary personal acts can be taken over from the comparative law.[47]

Strictly personal acts are those most intimately attached to the personality of a holder. Irrespective of the legal status of the adults, these rights are supposed to be undertaken exclusively by their holders, if they have natural capacity. Introducing this provision into Serbian legislation requires the following three preconditions:

1. Defining and determining what strictly personal acts are. In this regard, Act could enumerate several of them *exempli causa*, while the court would determine the rest of them by using analogy and intuition.

2. Capacity assessment of each person, *in concreto*, to undertake strictly personal act has to be based on the opinion of medical experts with suitable knowledge, skills and experience.

3. Determing the consequences of a person`s natural capacity to undertake strictly personal acts.

One of possible legal solutions for undertaking daily, ordinary personal acts would be *mutatis mutandis* provisions of Family Law Act concerning legal capacity of minors below the age of 14 that are entitled to untertake legal transactions aimed at the acquisitions of exclusive rights, legal actions where the child does not acquire either rights or obligations and legal actions of minor significance (Art. 64, para.1). In this case they would be independent in a manner consistent with their natural capacity.

7. GUARDIANSHIP DECISION-MAKING MODELS

Even though new possibilities for participation of protected persons in decision-making concerning their personal rights are introduced, need for guardian assisting or decision-making on behalf of them still remains. Primarily, it would occur when natural incapacity for decision-making is determined in a particular case. How will the guardian make decisions on behalf of a ward, while taking into account demands set in the Convention? Modern legal systems recognize legal guide norms related to this matter.

In this concern, there are two prevailing models: a) substituted decision-making model, b) model of determing best interests of a ward.

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[46] Art. 16 para. 2 of Act on Patients` Rights (Zakon o pravima pacijenata), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 45/13. See more Z. Ponjavić, *Pravo pacijenta da pristane na medicinsku meru ili da je odbije*, Teme, 1/2016, 15 and further.

[47] Art. 459 of the French Civil Code recognizes strictly personal and ordinary personal acts.

Substituted decision-making implies that guardian makes decision exactly the same way a ward himself or herself would do if he was not incapable of it or under the guardianship.[48] The aim of this model is that the guardian do in a way that the ward would do.

Model of determining best interests of a ward demands, that a guardian makes a decision that is most suitable for the ward. The aim of this model is that a guardian chooses a decision from which the ward would benefit most, without taking into consideration what the ward would do in that certain case.

Decision-making in accordance with ward's best interest is a prevailing model, though in some countries this model also includes some aspects of substituted decision-making model.[49] Substituted decision-making demands that a guardian predicts how the ward would act in a certain case, which is sometimes impossible. In such a situation some other source of information needs to be found in order to disclose ward's wishes. Examination of his previous decisions, for example, would provide a good guidance for the guardian. This particularly emphasizes a demand for establishing different categories of protected persons. Persons that used to have legal capacity cannot be equated with persons that never had legal capacity. In the first case, their legally relevant will could be determined, there used to be their ''personal pattern'' of behavior that makes it possible to make a decision on their behalf in similar situation. Main objection would be that this person in the meantime can change his or her opinion or attitude towards something. But, the same objection can be raised when a person has given consent for, e.g. organ donation or when he or she has appointed a representative with the future powers For that reason, this model is most applicable in the case of the decision making on the way of exercising parental rights.

When no clues of ward's wishes and will found, model of determining best interests of a ward should be applied, which has its origins in common law.[50] A case to be mentioned, *Strunk vs. Strunk*, comes from the USA, 1969, when court was demanded to give consent for kidney donation from a ward to his brother with kidney failure.[51] Substituted decision-making could not be applied because the ward had intellectual disability and was not able to express his opinion. Finally, the court based its decision to give the consent to

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[48] L. Frolik, *Standards for Decision Making*, in: Comparative Perspectives on Adult Guardianship (ed. A. Kimberley Dayton), Durham, 2014, 48.

[49] *Ibid.*

[50] *Ibid,* 49.

[51] http://www.lawandbioethics.com/demo/Main/Media/Resources/Strunk.htm.

transplantation on the assessment that the death of a brother would get the ward emotionally destroyed. For this reason, donation was in the best interest of the ward. Although applying model of determining best interests enables avoiding some of the obstacles inherent to substituted decision-making model, the guardian still has to deal with some issues and difficulties, especially when trying to define what the ward's best interest is.

These two approaches are usually combined. Decision whether to apply the first or the second model depends on the nature of the decision to be made. In many countries when the guardian has to make a decision on financial matters, the standard of best interest is to be applied, while decisions on personal matters, e.g. health issues, demand the substituted decision-making model.

8. CONCLUSION

Protection of adults with certain mental, intellectual or physical disabilites requests, on one side, tailoring measures in accordance with individual circumstances and health condition of a person, while, on the other side, it also demands establishing protective measures for persons not deprived of legal capacity if they do not have natural capacity to undertake certain legal actions.

Legal status of these persons is as unfavorable as the legal status of persons deprived of legal capacity, since their incapacity is legally invisible.[52] This leads to a conclusion that protection measures must be unified irrespective of the category of persons protected. When necessary, court would establish appropriate personalized measure *ex ante* and that would be a true sense and aim of protection of these persons, while respecting their rights at the same time.

In the sphere of exercising personal rights main principles are primacy of the consent of a person represented and subsidiarity of their incapacity. Emphasizing the primacy of a consent a person represented eliminates the presumption of the person`s incapacity contained in the decision on full deprivation of legal capacity. In this context, protection of these persons does not the only aim to limit exercising their rights. It also prevents extensive reduction of these rights, it actually limits the presumption of incapacity, which has a double consequence. First of all, regular medical examinations of the person`s health condition are required, which is supposed to alleviate the

[52] See more, Z. Ponjavić, *Autonomija punoletnih lica (ne)sposobnih za rasuđivanje u ostvarivanju prava na zaštitu zdravlja.*

termination of measures when possible. Secondly, consent can be required in those fields that do not exist at this moment. Of course, their autonomy can be never be complete but will always be under the supervision of a guardian or a guardianship authority. Achieving balance when possible, between autonomy and protection, especially in the sphere of personal rights, should be the core of the new approach to the protection of these persons. Certain inversion in the logic of protection occurs. Aim of the protection is not to compensate for the loss of capacity, but to limit the powers of the representative (guardian).

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