

Procedural and material aspects of the protection of the rights of a person subject to proceedings for legal incapacitation – Part I

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Summary

The aim and effect of the procedure for legal incapacitation is to ensure the widest possible social integration and the widest possible autonomy of the incapacitated person; the procedure should provide the disabled person with full procedural guarantees enabling him or her to have a fair hearing and to make an equitable decision, not only regarding the issue of incapacitation, but also on the revocation of the incapacitation or on a change in the type of incapacitation. In the first part of the paper, we presented the problem of legal incapacitation, answered questions about who could initiate the proceedings for legal incapacitation, who could be a participant of such proceedings, whether issuing a certificate of health condition is a necessity, and we presented the procedural aspect of protecting the rights of a person against whom proceedings for incapacitation are pending.

Key words: legal incapacitation, protection of rights, mental health

Introduction

The institution of legal incapacitation is, in addition to adoption, a means that significantly interferes with the human right to self-determination and freedom, which has far-reaching legal consequences for the individual. For these reasons, irrespective of the type of legal incapacitation (partial or total), the treatment of these cases should be characterized by particular care to ensure that the person who is to be incapacitated

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is provided with adequate procedural guarantees. The measures to be applied in this regard must take account of the fact that the person subject to proceedings for incapacitation may have limited possibilities of defending themselves and of exercising their procedural rights. These can be restrictions due to both physical and mental health deficits. Therefore, the legal measures to ensure due procedural guarantees for persons subject to proceedings for legal incapacitation should be adapted to their particular health situation.

The manner in which legal measures are designed to protect the rights of the person subject to proceedings for legal incapacitation should take into account the principles and guidelines expressed in the Convention on the Rights of Persons with Disabilities [1]. This Convention, in Article 1, includes as persons with disabilities persons with 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. The Convention's very important principles (from the point of view of proceedings for legal incapacitation) guarantee respect for personal dignity, individual autonomy (including freedom to make one's own choices), respect for individual independence, the right to full and effective participation in society and social inclusion (Articles 3, 13), the right to recognition everywhere as persons before the law, the right to enjoy legal capacity on an equal basis with others in all aspects of life (Article 12(1) and (2)).

The most important of these principles is that States Parties must provide safeguards to ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards need to be proportional to the degree to which such measures affect the person's rights and interests (Article 12). Under the Convention, States Parties have also undertaken to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural accommodations (Article 13).

Legal safeguards to protect the rights of the person subject to proceedings for legal incapacitation will be applied at every stage of the proceedings. Some modifications were made as a result of the amendment introduced in 2007 as a response to the objections raised by the Ombudsman regarding the development of the procedure in cases of legal incapacitation [2].

Who can institute proceedings for legal incapacitation?

Protection at the first stage of proceedings for legal incapacitation includes the moment of their initiation and is expressed in the limitation of the number of persons entitled to submit a petition for legal incapacitation, as well as in the need to present to the court an appropriate medical certificate issued by a psychiatrist or an opinion of a psychologist, or a certificate of an alcohol counseling center or a certificate of an addiction treatment facility.

The list of persons entitled to initiate proceedings for legal incapacitation depends on whether the person who is to be incapacitated has a legal representative or not. In the first case, a legal representative, excluding relatives (Article 545, paragraph 2 of the Code of Civil Procedure), is entitled to file a petition for legal incapacitation [3]. This may be the case for a minor or for a person who is partially incapacitated, and the petition covers total legal incapacitation.

Among the relatives entitled to submit a petition for legal incapacitation, the legislator included the spouse of the person whose legal incapacitation is petitioned, and the person's lineal relatives and siblings (Article 545, paragraph 1(1) and (2) of the Code of Civil Procedure) [3]. In any case, the prosecutor and the Ombudsman may be the applicant for a case of legal incapacitation.

The only person who has 'priority' in filing a petition for incapacitation is the legal representative. In the case of other entitled persons, there is no hierarchy in this respect (excluding the prosecutor and the Ombudsman).

The regulation presented herein constitutes a significant deviation from the rule laid down in Article 510 paragraph 1 of the Code of Civil Procedure, which states that the interested person will be each person whose rights are affected by the outcome of proceedings [3]. By contrast, the definition of 'interested person' also covers the person who lodges the petition for the initiation of a non-trial procedure. In the case of proceedings for legal incapacitation, the legal interest in bringing proceedings is therefore not sufficient in itself [4]. On the other hand, the list of persons who are to participate in proceedings for legal incapacitation that have already been instituted is defined *ex lege* in Article 546 of the Code of Civil Procedure. These are: the person petitioned to be legally incapacitated; the person's legal representative; the spouse of the person whose legal incapacitation is petitioned; the prosecutor and the person who initiated the proceedings [3]. Evaluating the above regulations, it is easy to notice that Article 545 of the Code of Civil Procedure does not take into account the person who is to be incapacitated, and again the list of participants of the proceedings referred to in Article 546 of the Code of Civil Procedure is narrower than the list of potential applicants referred to in Article 545 of the Code of Civil Procedure.

This raises two questions. Firstly, can a person who is to be incapacitated lodge a petition to initiate proceedings for legal incapacitation themselves? Secondly, can the parties to the proceedings for incapacitation be persons other than those mentioned in Article 546 of the Code of Civil Procedure?

As regards the first issue, it has not been clearly established in the case-law. This view was supported by the Supreme Court in its decision of 20 October 1965 [5], the Court of Appeals in Lodz in its decision of 25 March 2014 [6], and the Constitutional Tribunal in its justification of the judgement of 7 March 2007 [7]. A contrary view was expressed in the justification of the resolution of seven judges of the Supreme Court of 10 November 1969 [8] and in the judgement of the Court of Appeals in Katowice of 15 February 2008 [9]. In the doctrine, on the other hand, the prevailing position is that a person who is to be incapacitated has the right to initiate proceedings for legal incapacitation [10–21]. Staniszewski [22], Górski [23] and Rybski [24] expressed an opposite view.

This view is not strongly supported by logical interpretation. Since Article 545 of the Code of Civil Procedure does not specify the person who is to be incapacitated as a person entitled to file a petition, but he or she is indicated in Article 546 among the participants of the proceedings, the provision of Article 545 of the Code of Civil Procedure should not be interpreted in a broad manner. However, the interpretation of purposefulness should be the determining factor in this case, since if the person who is to be incapacitated sees the need to initiate proceedings in this matter, he or she should be granted that right in full, that is to say, also with the risk of a fine being imposed if he or she makes such a petition recklessly or in bad faith.

The wording of Article 559 paragraph 3 of the Code of Civil Procedure is not contrary to the above purposeful interpretation [3]. This provision explicitly entitles a person who has previously been incapacitated to apply independently for the revocation or change of legal incapacitation, without which such a person (as being incapable of acting in a procedural capacity) could act only through a legal representative. However, such a restriction does not apply, as a rule, to a person who submits a petition for legal incapacitation only. It is more problematic whether a person who already has a legal representative (a minor or partially incapacitated) can also apply to the court on their own for a verdict of total legal incapacitation. In view of the above, this possibility has to be rejected. Such a person will not have a general capacity for procedural acts and there will be no specific provision conferring such capacity to a precise extent. The legislator assumed that the change from partial to total legal incapacitation did not serve to improve the situation of the incapacitated person, and therefore the decision on this issue was left to the legal representative. In special cases, where the lack of total legal incapacitation would endanger the security of the partially incapacitated person and the legal representative of that person would remain passive, the guardianship court or the public prosecutor should be notified.

Who can be a party to proceedings for legal incapacitation?

In the jurisprudence of the Supreme Court, the issue of whether participants of proceedings for legal incapacitation, after initiation, can only be the entities specified in Article 546 of the Code of Civil Procedure, or whether this group is wider, was not explicitly resolved. According to the first position, in addition to the persons listed in Article 546 paragraph 1 of the Code of Civil Procedure who, by virtue of law, are parties to the proceedings for legal incapacitation, every interested party, within the meaning of Article 510 paragraph 1 of the Code of Civil Procedure, may be a party to such proceedings, i.e., each person whose rights are affected by the outcome of proceedings. Representatives of the doctrine agreed with this interpretation [11–13, 15, 24–28].

This position broadly defines the group of entities that may participate in the proceedings, as long as they demonstrate that (within the meaning of Article 510 of the Code of Civil Procedure) the outcome of that proceedings affects their legal position. According to a different (isolated) view, the participants of the proceedings for legal incapacitation may be, apart from the persons mentioned in Article 546 paragraph 1 of

the Code of Civil Procedure, who are participants by virtue of the law itself, only the persons listed in Article 545 paragraph 1(2) of the Code of Civil Procedure, considered by the legislator to be interested parties within the meaning of Article 510 of the Code of Civil Procedure [3, 29].

This view does not limit the group of participants of the proceedings to only those persons explicitly mentioned in Article 546 of the Code of Civil Procedure, but extends this group to only those persons mentioned in Article 545 of the Code of Civil Procedure, i.e., de facto extends this group only to relatives in a straight line and siblings of the person whose legal incapacitation is petitioned (provided that one of them is not the applicant and demonstrates a legal interest in proceeding with the case).

Undoubtedly, the provisions of Article 546 paragraph 1 of the Code of Civil Procedure, which indicate that the persons specified therein are participants in proceedings for legal incapacitation by virtue of the law itself, should be understood as meaning that such persons do not have to demonstrate a legal interest in proceeding with the case. Nor may they waive their participation in those proceedings on the ground that their rights are not affected by the outcome of those proceedings. On the other hand, it cannot, by logical interpretation, be understood as a rule which restricts the scope of the parties to the proceedings to the entities listed therein. Therefore, only a purposeful interpretation could lead to the effect of limiting the group of participants in proceedings in cases of legal incapacitation to the persons referred to in Article 546 paragraph 1 of the Code of Civil Procedure and Article 545 paragraph 1(2) of the Code of Civil Procedure [3]. However, such an interpretation is not accepted in the doctrine, which seems to be to the detriment of the protection of the rights of the person subject to proceedings for legal incapacitation. The procedure for legal incapacitation concerns the most sensitive area of human life and should be absolutely aimed at protecting the interests of the person who is to be incapacitated, and not at protecting the interests of third parties or offices [30]. Therefore, the decision as to who is to participate in these proceedings should not be left to the discretion of the court, even assuming that the assessment of the court must take into account the premise set forth in Article 510 of the Code of Civil Procedure.

Health certificate

Another measure protecting the rights of the person under proceedings for legal incapacitation, at the stage of instituting such proceedings, is the need to present the court with an appropriate certificate of mental health at an early stage of the proceedings (i.e., before the petition is served on the persons concerned).

Pursuant to Article 552 paragraph 1 of the Code of Civil Procedure, if, according to the petition, a given person's incapacitation is petitioned for on the grounds of a mental illness or mental deficiency, the court, prior to ordering the service of the petition, will request (within a specified time limit) a medical certificate of mental health of the person concerned issued by a psychiatrist or a psychologist's opinion on the degree of the person's mental deficiency [3]. If legal incapacitation is petitioned for on the grounds of alcohol dependence, the court will also ask for a certificate from

an alcohol counseling center, and if legal incapacitation is petitioned for on the grounds of drug addiction – a certificate from an addiction treatment facility. Presentation of the above-mentioned certificates is important in the proceedings, because – according to Article 552 paragraph 2 of the Code of Civil Procedure – the court rejects a petition for legal incapacitation if the content of the petition or the documents attached to the petition do not substantiate the existence of a mental illness, mental retardation or any other type of mental disorder of the person covered by the petition for legal incapacitation or if the requested certificate or opinion has not been submitted, unless it is impossible to submit such documents [3].

The certificate referred to in Article 552 paragraph 1 of the Code of Civil Procedure does not need to meet any special formal requirements [31]. A psychiatrist, neurologist or psychologist does not have to be a court expert. Since such a certificate cannot replace the expert opinion to be issued in the course of the proceedings, there are no obstacles to the submission of certificates issued by foreign doctors to the court, if justified by the circumstances [31]. However, the certificate should be up to date and should not, therefore, cover a distant period in the life of the person against whom a petition for legal incapacitation has been submitted. This period is not specified, as it depends on the type of disease which is the reason for the petition for legal incapacitation. While the medical examination, which is carried out at the stage of further proceedings, must be related to the proceedings for incapacitation, the medical certificate which is submitted at the beginning of the proceedings and is only to substantiate the legitimacy of the application may be issued for the purpose of other court or administrative proceedings [32].

Submission of the medical certificate referred to in Article 552 of the Code of Civil Procedure does not replace the judicial and medical examination provided for in Article 553 of the Code of Civil Procedure, and the right to reject a petition for legal incapacitation due to the lack of an appropriate certificate may be exercised by the court only at the preliminary stage of proceedings, i.e., prior to delivery of a copy of the petition to the persons concerned [33–35]. As a rule, it is obligatory to attach a certificate to the petition. Pursuant to Article 552 paragraph 1 of the Code of Civil Procedure, the court is obliged to demand submission of the certificate by the applicant.

When is there no obligation to submit a health certificate?

The provision of Article 552 paragraph 2 of the Code of Civil Procedure introduces an exception to the obligation to submit a certificate attesting to the existence of a mental illness, mental retardation or any other type of mental disorder [3]. The court may not refuse a petition for legal incapacitation due to the lack of this certificate if it is not possible for the applicant to obtain such a certificate, e.g., if the person against whom the petition has been submitted does not wish to undergo an appropriate examination [11]. This does not mean, however, that in such a case the applicant is not obliged to prove the need to institute court proceedings at all [36]. This likelihood does not have to be formalized and be in line with process rules. For example, written statements from third parties may be provided instead of witness statements. The provision of Article 552

paragraph 2 of the Code of Civil Procedure requires, furthermore, that the probability of the existence of the prerequisites leading to legal incapacitation will result from the application or the documents attached thereto. It would not have been possible to use witness statements in such a situation. Circumstances which make it probable that proceedings for legal incapacitation will be instituted may also result, for example, from protocols from other court or administrative proceedings or documents issued by various institutions. It should be remembered that the circumstances referred to in Article 552 paragraph 2 of the Code of Civil Procedure are only to make probable the existence of premises justifying incapacitation. It is not required at this stage of the procedure to prove the existence of those conditions. Although this provision uses a joint alternative (“if the content of the petition or the documents attached to the petition”), it cannot be assumed that the grounds justifying the incapacitation could be substantiated only by the content of the petition [11]. Although substantiation is an informal institution, which does not need to follow rules appropriate for evidence proceedings, it cannot limit itself to claims of an interested person based on the *prima facie* evidence. A different interpretation of Article 552 paragraph 2 of the Code of Civil Procedure would weaken the protection of the rights of the person against whom proceedings for legal incapacitation are pending, and would also contradict the purpose of the institution of legal incapacitation, which is to serve not the applicant, but the person who is to be incapacitated.

The procedural aspect of the protection of the rights of a person subject to proceedings for legal incapacitation

The protection of the rights of the person who is the subject of a petition for legal incapacitation, at a later stage of the judicial procedure, covers two areas: the procedural aspect and the material aspect. Procedural protection consists in providing the person subject to proceedings for legal incapacitation with specific procedural guarantees ensuring full access to court and preventing cases of incapacitation without due consideration of the case. These include: the special jurisdiction and composition of the court, facilitating access to legal aid *ex officio*, the possibility of appointing a temporary advisor or guardian *ad litem*, and ensuring that the person subject to proceedings for legal incapacitation can use legal remedies (such as a petition or an appeal) independently in an informal manner.

Pursuant to Article 544 paragraph 1 of the Code of Civil Procedure, cases of legal incapacitation fall under the jurisdiction of district courts, which examine them in a panel of three professional judges. This is an exception to ensure that a case is heard at first instance by persons with appropriate professional experience. Protection of the rights of the person covered by the petition for legal incapacitation is also to be ensured through the mandatory participation of the prosecutor in court proceedings (Article 546 paragraph 2 of the Code of Civil Procedure) [3].

Another procedural means of protecting the rights of a person under proceedings for legal incapacitation is to provide appropriate legal assistance through the possibility of appointing a temporary advisor or a guardian *ad litem* and to facilitate access to legal assistance *ex officio*.

Parties to and participants of judicial proceedings in civil proceedings may avail themselves of legal assistance provided *ex officio*. With regard to the general rule that natural persons may avail themselves of legal aid *ex officio*, pursuant to Article 117 paragraphs 1, 2 and 5 of the Code of Civil Procedure, such aid is granted to a person exempted from the obligation to bear court costs, as well as to a person whose statements indicate that he or she is unable to bear the costs of attorney's or legal counsel's fees without prejudice to their and their family's necessary subsistence (provided that in each of these cases the court deems the participation of a lawyer to be necessary). Therefore, the poor financial situation of a party is not sufficient on its own [3]. Such a person must also file an application with the court to appoint an attorney *ex officio*. As a rule, the participation of a professional attorney in the case will be necessary if the participant is incapable of taking up procedural activities on their own or if the case is complex in factual and legal terms, or if the participant is unable to use the legal possibilities of conducting the case correctly, or if the capability of bringing proceedings of the party is excluded in relation to certain procedural activities (e.g., filing a cassation appeal) [37–39].

Different rules of appointment of an attorney *ex officio* exist in proceedings for legal incapacitation. Pursuant to Article 560 of the Code of Civil Procedure, in cases for legal incapacitation, revocation or modification of incapacitation, the court may establish a lawyer or a legal counsel *ex officio* for a person whose legal incapacitation is petitioned or for an incapacitated person, even without his or her petition, if the person is not able to file the petition due to their mental health condition and the court deems the participation of a lawyer or a legal counsel necessary [3]. Granting legal aid *ex officio* is therefore dependent on the psychological condition of the person under proceedings for incapacitation, not on the submission of a petition by such a person. The court, on the basis of the evidence available at the given time, must come to a conclusion that the mental health condition of the participant makes it impossible for that participant to submit an appropriate petition or does not submit it, because he or she indisputably considers that he or she does not need legal assistance of a professional attorney.

In the proceedings for legal incapacitation, the condition of the necessity for the court to consider that participation in the case of a professional attorney was kept. In particular, it is appropriate to take into account the course of the proceedings, the evidence carried out at the request or *ex officio*, the participant's activity and their actual knowledge of the course of the case, i.e., whether any significant circumstances of the case could be omitted or not sufficiently explained due to lack of professional representation [40]. On the other hand, there is no requirement to prove the participant's poor financial situation, which means that the participant is not able to pay the lawyer's fees, without prejudice to their own or their family's necessary income [11]. The opposite view would lead to the illogical conclusion that a person with good financial standing may be deprived of legal aid, although due to their mental health they are not able to appoint a professional attorney of their choice. The institution referred to in Article 560 of the Code of Civil Procedure serves to protect the rights of the person subject to proceedings for legal incapacitation, regardless of their financial standing. The possibility of appointing an attorney *ex officio* is undoubtedly a guarantee of ensuring a fair trial and maintaining equality of arms [41].

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