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

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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. In the second part of the manuscript, we described the characteristics of the institution of temporary advisor and guardian *ad litem*, as well as the material aspect of protecting the rights of a person against whom proceedings for incapacitation are pending.

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

Temporary advisor and guardian *ad litem*

The institutions of temporary advisor (Article 548 paragraph 1 of the Code of Civil Procedure) and guardian *ad litem* (Article 556 paragraph 2 of the Code of Civil Procedure) are provided to protect the interest of a person whose legal incapacitation

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is petitioned, at the transitional stage (between the initiation and the final conclusion of the proceedings for legal incapacitation). From the moment of appointment, they become legal representatives of the person against whom the proceedings for incapacitation are pending [1].

Pursuant to Article 548 paragraph 1 of the Code of Civil Procedure, if a petition for legal incapacitation concerns an adult, the court may appoint a temporary advisor for such person if the court deems it necessary to protect the person or their property. It is not necessary that both the person and the property need to be protected at the same time. The probability of threatening one of these goods is sufficient to appoint a temporary advisor [2]. As the doctrine rightly points out, the fact that a person can pursue their own affairs does not in itself mean that there are no grounds for appointing a temporary advisor. The situation may be such that the person whose legal incapacitation is petitioned may pursue their property-related affairs, but does so in such a way that there is a need to protect their property, e.g., in a situation where such a person makes a donation unjustified on important grounds [3–5]. A temporary advisor may be appointed *ex officio* or at the request of any party to the proceedings, not excluding the person against whom proceedings for legal incapacitation are pending [2].

Pursuant to Article 549 of the Code of Civil Procedure, a person for whom a temporary advisor is appointed has limited capacity to perform acts in law, the same as a person who is partially incapacitated. Provisions on guardians of partially incapacitated persons apply to temporary advisors [1]. A temporary advisor may therefore be appointed only for an adult person who has not been incapacitated. A minor has limited legal capacity to perform acts in law and is represented by a legal representative [6]. Furthermore, a person who has been totally incapacitated (guardian) or partially incapacitated person (guardian *ad litem*) has a legal representative. Therefore, the institution of temporary advisor will not apply in proceedings for the modification or revocation of incapacitation. According to Article 550 paragraph 1(2) of the Code of Civil Procedure, the appointment of a guardian or guardian *ad litem* is a prerequisite for the expiry of the provision establishing a temporary advisor [1].

Since the person for whom a temporary advisor is appointed is treated as a partially incapacitated person, any consequences of the limitation on legal capacity to act will apply to that person. A temporary advisor, who has the rights of a guardian *ad litem*, is a legal representative of the person against whom the proceedings for legal incapacitation are pending with all the consequences arising from that. Therefore, pursuant to Article 17 of the Civil Code, subject to exceptions provided for by law, the consent of the legal representative is required for the validity of a legal act by which a person with limited capacity to exercise rights incurs liabilities or dispenses with their right [7]; the temporary advisor appointed for a the person subject to proceedings for legal incapacitation may – if the court before which the proceedings for incapacitation are pending so decides – be appointed to represent him or her and to manage their property. Then, as a representative of such a person, the temporary advisor may, pursuant to Article 901 paragraph 1 of the Civil Code, cancel the donation made by the person for whom the representative was appointed [8]. The role of a temporary advisor is therefore not confined to acting on behalf of his or her representative in the course of

legal proceedings, but goes beyond the framework of those proceedings. However, the doctrine rightly assumes that a person for whom a temporary advisor is appointed has full procedural capacity in the course of proceedings for legal incapacitation in respect of procedural acts relating to them. Although a temporary advisor has been appointed for the given person, he or she may appeal against court decisions, including, among others, the decision to subject the person to observation in a medical institution or to prolong that observation [9].

The functioning of the institution of temporary advisor is questionable in view of the fact that the advisor is appointed for a person who has not yet been incapacitated and is now treated as if he or she were partially incapacitated. On the other hand, it should be taken into account that the fact of health problems justifying the initiation of proceedings for legal incapacitation is probable already at the time of filing the petition, and this state of health may threaten the person against whom or against whose property the petition has been submitted. The institution of temporary advisor is therefore, in a way, a protective measure in the course of proceedings for legal incapacitation. This ultimately supports the maintenance of this institution, but the court should make use of it with particular care and attention to ensure that a competent person is appointed as a temporary advisor. Certain limitations in this respect have already been introduced by the legislator, indicating in Article 548 paragraph 3 of the Code of Civil Procedure that a person appointed as a temporary advisor should preferably be the spouse, a relative or another close person, if this is not contrary to the welfare of the person whose legal incapacitation is petitioned [1]. This applies to the emotional bond between the closest people or family members, which usually guarantees that the interests of the person for whom a temporary advisor is to be appointed will be duly taken into account [9]. However, the court should be very cautious in its approach to the person who has submitted a petition for incapacitation as a candidate for a temporary advisor. This does not mean that such a person is legally excluded from such a role, but it should be assessed whether the applicant does not intend to use the institution of incapacitation to pursue his or her own interests [6]. The same caution should be exercised by the court when assessing whether a person who has petitioned for the appointment of a temporary advisor can become the temporary advisor [10].

The role of a guardian ad litem during proceedings for legal incapacitation is different from that of a temporary advisor. Key differences between the two institutions include the group of persons entitled to perform particular roles, the scope of powers and the effects regarding the capacity to perform legal acts by the person subject to proceedings for legal incapacitation [2].

Pursuant to Article 556 paragraphs 1 and 2 of the Code of Civil Procedure, the court may resign from serving writs on, summoning or hearing a person whose legal incapacitation is petitioned, where the court deems that to do so would be inexpedient given the person's state of health as determined in the opinions issued by an expert psychiatrist or neurologist and a psychologist after examining the person. This will not apply to the hearing referred to in Article 547 of the Code of Civil Procedure [1]. Then, in order to protect the rights of the person who is the subject of the petition for

legal incapacitation during the proceedings, the court will appoint a guardian *ad litem*, unless the person has a legal representative who is not the applicant.

The basic prerequisite for not serving court documents, summoning or hearing the person whom the petition for legal incapacitation relates to will be an opinion of an expert physician – a psychiatrist or a neurologist and a psychologist, drawn up after examination of the person whom the petition relates to. The state of health of this person must indicate the pointlessness of the above actions, which usually means that the person against whom proceedings for legal incapacitation are pending has no logical contact or is unable to understand the content and meaning of the court writings served, hence the person cannot freely express their will or communicate observations. Unlike a temporary advisor, a guardian *ad litem* may also be appointed for a minor and any other person who has a legal representative, such as partially incapacitated, if that representative is also the applicant.

The prohibition of omitting the hearing referred to in Article 547 of the Code of Civil Procedure by the court [1] means that the judge cannot confine himself or herself to medical records, testimonies of witnesses, or even the opinions of psychiatrist and psychologist experts, when it comes to the mental health of the person against whom a petition for legal incapacitation has been submitted. The judge must see for himself or herself whether logical contact with this person can be established. The hearing will take place in the presence of an expert psychologist and, depending on the health of the person to be heard, an expert psychiatrist or neurologist. Their role is not only to make a preliminary assessment of the state of health of the person against whom the petition for legal incapacitation has been submitted, but also to assist the judge in assessing whether the person is able to understand the content of court letters and summons, and provide explanations.

If the answer to this question is negative, the court presiding over the proceedings will appoint a guardian *ad litem*. With regard to the selection of a suitable person to perform this role, the legislator refers to the provisions on a temporary advisor, i.e., Article 548 paragraphs 3 and 4 of the Code of Civil Procedure. A guardian *ad litem* will not be appointed if the person subject to proceedings for legal incapacitation is represented by a legal representative (Article 556 paragraph 2 of the Code of Civil Procedure). In this case, however, unlike in the case of a temporary advisor, the legal representation held by the applicant does not release from the obligation to appoint a guardian *ad litem* [1]. As a rule, representation by a legal representative makes the activities of a guardian redundant, as it is the legal representative who is obliged to take care of the interests of the concerned person and receive correspondence addressed to them. In this case, however, the legislator held that an applicant who is at the same time the legal representative of the person whose mental condition excludes the possibility of service of pleadings, summons and submission of explanations before the court, does not constitute an adequate guarantee of protection of the rights of that person. This solution is a kind of 'safety valve', because the court, unlike in the case of a temporary advisor, does not assess at all the applicant's ability to act as a guardian *ad litem*.

The role of a guardian *ad litem* is different and narrower than that of a temporary advisor. The appointment of a guardian *ad litem* will not deprive or limit the legal

capacity of the person against whom proceedings for legal incapacitation are pending, nor will it deprive them of the ability to perform procedural activities on their own, including challenging court decisions without the guardian's consent or against their will [11]. However, these powers are illusory in practice, given that the guardian is appointed precisely because the person against whom the petition for legal incapacitation has been submitted is in such a bad state of health that it is not possible to receive correspondence from the court or perform a hearing. That is why the existence of a temporary advisor, similarly as in the case of any other legal representative, precludes the existence of a guardian. Therefore, it is not necessary to introduce additional, explicit regulations in this respect [10]. Once a temporary advisor has been appointed, the court should overrule the appointment of a guardian *ad litem*.

The role of a guardian *ad litem*, appointed pursuant to Article 556 paragraph 2 of the Code of Civil Procedure, is to exercise procedural rights on behalf of the person represented in a specific case of legal incapacitation, and only to this extent he or she is the legal representative of the person against whom proceedings for legal incapacitation are pending [6]. Their task is to collect court correspondence, participate in procedural activities, in particular in the trial, as well as initiate activities in the interest of the represented person, e.g., filing motions for evidence, appealing against decisions [2, 12]. Where the person against whom a petition for legal incapacitation has been submitted is represented by a legal representative who is at the same time the applicant, that representative's procedural rights will be restricted. He or she may do so only in their own name. The guardian *ad litem* is in charge of procedural activities on behalf of the represented person.

In conclusion, the rights of the person subject to the proceedings for legal incapacitation can be protected in three ways in the period between the institution of the proceedings for incapacitation and their conclusion: (1) by the appointment of a professional attorney *ex officio*, (2) by the appointment of a guardian *ad litem* or (3) by the appointment of a temporary advisor. It is easy to notice that the legislator has introduced gradation of the procedural measures regarding protection of the rights of the person subject to proceedings for legal incapacitation. One of these measures depends on the mental health of the person concerned. The appointment of a guardian *ad litem* or a temporary advisor will not preclude the appointment of an *ex officio* attorney without the request of the authorized person. Article 560 of the Code of Civil Procedure expressly allows for the appointment of an attorney both in the matter of legal incapacitation and in the matter of revoking or changing incapacitation, both for the person against whom the petition for incapacitation has been submitted and for the person already incapacitated. The above regulation indicates that representation by a legal representative of the person against whom court proceedings for incapacitation, change or revocation are pending is not an obstacle to the appointment of an attorney *ex officio*. This also applies to representation by a temporary advisor or by a guardian *ad litem*.

Other aspects of procedural protection

An important procedural remedy, which guarantees full access to court to the person against whom proceedings for legal incapacitation are pending, is the right to use independent legal remedies and a request for the revoking of the incapacitation, as well as its informalization.

The person against whom proceedings for legal incapacitation are pending or who has already been incapacitated will have the right to independently appeal against the decision, as well as to file a petition for revocation or change of incapacitation, which means that the person is granted limited procedural capacity (Article 560 paragraph 1 of the Code of Civil Procedure, Article 559 paragraph 3 of the Code of Civil Procedure) [13]. This right applies regardless of whether a legal representative, a temporary advisor or a guardian *ad litem* has been appointed for the person against whom the proceedings for legal incapacitation are pending or who has been incapacitated, as well as regardless of whether the person is represented by a professional attorney or not (with the exception of a cassation appeal in the case of which the party has exclusive postulation capacity at all). The solution adopted by the legislator is correct in all respects and duly protects the rights of the person who has been incapacitated or is to be incapacitated, as it allows them access to court in both instances, irrespective of the will of their legal representative. It should be remembered that the interest of the legal representative may be contrary to the interest of the person who has been or is to be incapacitated. It may be the case that the legal representative is not interested in continuing legal proceedings for incapacitation, or in instituting proceedings to have incapacitation revoked or changed, for material or convenience reasons. In practice, this would be particularly visible in the context of a case for revocation of incapacitation, where the court could, having received a signal from the incapacitated person, conduct proceedings in such a case *ex officio*, but would not do so on the basis of a negative stance of the legal representative.

The provisions of Article 368 of the Code of Civil Procedure will not apply to the legal remedies brought by the person who is the subject of a petition for incapacitation [1]. An appellate measure filed by that person will not be rejected on the grounds of the person's failure to correct formal deficiencies. This means that an appellate measure filed by the person against whom proceedings for legal incapacitation are pending may have any form and content and does not require compliance with the requirements for a pleading. The exclusion of the application of the entire Article 368 of the Code of Civil Procedure means that an appellate measure of such a person does not have to take the form of a pleading, and could also be filed verbally to the minutes. However, in the case of an appeal, it would be impossible given the fact that it is filed after the hearing has been closed, and the provisions of law do not provide separately for the possibility of filing an appeal verbally to the minutes in the competent court, as is the case with Article 466 of the Code of Civil Procedure in the case of an employee. The only requirement which should be met by an appeal of the person against whom proceedings for legal incapacitation are pending is to express their disapproval of the judgement allowing to consider that the person concerned intends to bring the appeal.

Pursuant to Article 560 paragraph 2 of the Code of Civil Procedure [1] second sentence, an appellate measure filed by a person whose legal incapacitation is petitioned will not be rejected on the grounds of the person's failure to correct formal deficiencies. The above provision seems unnecessary in view of the fact that the appellate measure of the person against whom proceedings for incapacitation are pending does not have to meet the formal requirements provided for in Article 368 of the Code of Civil Procedure. It merely emphasizes that even if such a person is called upon to rectify a formal or fiscal deficiency, failure to rectify that deficiency must not result in negative procedural consequences [2, 14]. The solution presented is correct, considering that the person who is likely to be incapacitated for some reason cannot be expected to act with full knowledge of procedural requirements and consequences.

Pursuant to Article 96 section 1 subsection 9a of the Act on Court Fees in Civil Cases, an incapacitated person is not obliged to pay court fees in cases involving revocation or change of incapacitation. This means that these costs are not recoverable from his or her property in the event of losing the case as a result of an appeal. This is not the case with a person who has been pronounced incapacitated and who files an appeal regarding the case of incapacitation. He or she is not exempt from the obligation to pay a court fee against the appeal, but if the fee is not paid, the appellate remedy cannot be rejected (Article 560 paragraph 2 of the Code of Civil Procedure, second sentence). However, if the appeal is dismissed, the court should charge the fee in the decision concluding the case in the instance, which results from the wording of Article 130 paragraph 2 of the Code of Civil Procedure

The informalization of filing appellate remedies will not apply where such remedies are lodged by an attorney or a legal representative of the person against whom proceedings for incapacitation are pending. The provisions of Article 560 paragraph 2 of the Code of Civil Procedure will apply only if the appellate remedy is lodged directly by the person concerned and not by their attorney or legal representative. On the other hand, the mere use of an attorney or the fact of being represented by a legal representative do not preclude the application of Article 560 paragraph 2 of the Code of Civil Procedure in relation to the appellate remedy lodged directly by the person to whom the petition for incapacitation refers. The privilege resulting from the said provision is a personal procedural right of that person [1].

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

The material aspect of the protection of the rights of the person subject to proceedings for incapacitation is aimed at a fair and correct assessment of their mental health and personal, material and professional situation, so as to eliminate cases of erroneous judgements of the court both considering the petition for incapacitation and rejecting it. This type of protection is reflected in the need to hear the person subject to proceedings for incapacitation, in the compulsory examination by an expert psychiatrist, neurologist and psychologist, and in the specific content of this opinion and the direction and scope of the submission and evaluation of evidence.

The consequence of a person's incapacitation is the deprivation or limitation of his or her legal capacity to exercise legal action. It therefore seriously interferes with the personal rights of the individual. Therefore, the main idea of the entire procedure for legal incapacitation is to act for the good and in the interest of the concerned person. The effect of incapacitation is to improve the personal and financial situation of a person who is not able to manage their affairs on their own. The aim, therefore, is to guarantee the care of the incapacitated person and to ensure that their personal rights are safeguarded, so that he or she operates in society in the broadest scope possible and not in isolation. The public interest in incapacitation is also important, but it should not be treated as a general directive. However, the institution of legal incapacitation should in no way serve solely the interests of the person submitting a petition for incapacitation [15–18].

The basic directive to achieve this objective is contained in Article 554 paragraphs 1 of the Code of Civil Procedure, determining the purpose of an evidentiary hearing in cases of incapacitation. In particular, it should determine the health condition, personal, professional and financial situation of the person to whom the petition for incapacitation relates, the type of matters the person is required to manage and the manner in which his or her life needs are to be satisfied. Therefore, the scope of this procedure includes two fundamental elements: (1) the state of health (the severity of the disease and its type) and (2) the life situation of the person subject to incapacitation proceedings (e.g., whether he or she works for a profit, where he or she derives his or her means of subsistence, how he or she copes with ordinary matters of everyday life, or whether he or she has a family capable of providing him or her care and actual help) [19]. The outcome of a proper evidentiary hearing will provide answers to questions about whether legal incapacitation is advisable and, if so, what kind of incapacitation is possible – total or partial legal incapacitation.

The mandatory elements of an evidentiary hearing in cases of legal incapacitation include: hearing of the person against whom a petition for incapacitation has been filed (Article 547 of the Code of Civil Procedure), examination by experts (Article 553 of the Code of Civil Procedure) and obligation to hold a trial (Article 555 of the Code of Civil Procedure) [1].

The hearing of the person against whom a petition for legal incapacitation has been filed should take place immediately after the proceedings have been instituted. This obligation is a particular clarification of the principle of directness, and the doctrine sometimes even indicates that the omission of this element leads to the annulment of proceedings [2, 20, 21]. Although this position is too far-reaching given that further evidence is still being produced in the proceedings, the failure to hear the person for whom incapacitation is petitioned constitutes a flagrant violation of procedural law.

As indicated above, the hearing referred to in Article 547 of the Code of Civil Procedure is to enable the judge to directly ascertain the psychological condition of the person against whom a petition for legal incapacitation has been filed, whether this person may actively participate in the proceedings, or whether it is necessary to appoint a guardian *ad litem* or a temporary advisor for them, or to appoint a professional attorney *ex officio* [22]. The hearing of the individual should be conducted with the

assistance of an expert psychologist and, depending on the individual's mental health, with the assistance of an expert psychiatrist or neurologist, in order to facilitate the court's decision. Moreover, an expert physician and a psychologist must express their opinion on the possibility of communicating with the person undergoing proceedings of legal incapacitation, and the fact that this possibility is lacking should be stated in the minutes of the meeting (Article 547 paragraph 3 of the Code of Civil Procedure) [1].

The hearing of the person against whom a petition for legal incapacitation has been filed is such an important step that the legislator allowed the court to issue a warrant to bring the person for trial (Article 547 paragraph 2 of the Code of Civil Procedure). This may be the case if the person who has been summoned to be heard does not voluntarily appear before the court. However, the doctrine indicates that the court should use this measure with a great deal of caution, i.e., after two unsuccessful attempts to summon the person under pain of issuing a warrant to bring the person for trial [2]. However, in not every case of failure to appear, the court may issue a warrant to bring the person for trial. In practice, it is quite common for the person against whom a petition for incapacitation has been submitted to be unable to appear before the court to be heard. In such cases, a procedural step must be taken by a delegated judge (Article 547 paragraph 2 of the Code of Civil Procedure). Often, the hearing takes place in a hospital, a care institution or in the place of residence. The hearing by a delegated judge is determined not so much by the physical condition which makes it impossible for the person to appear, but by the mental condition which makes the person summoned to the hearing act without proper knowledge of his or her situation and it would be unacceptable to issue a warrant to bring the person for trial [1].

The emphatic wording of Article 547 paragraph 2 of the Code of Civil Procedure, and the purpose of hearing the person against whom incapacitation has been petitioned, preclude the possibility of such hearing being conducted by the delegated court [23]. The purpose of the hearing referred to in that provision is, as already indicated, to ensure direct contact between the court and the person whose legal incapacitation is petitioned. The said provision allows for a certain derogation from that rule in favor of the hearing by a judge delegate. This is a special rule in relation to Article 235 paragraph 1 of the Code of Civil Procedure, which allows the court of trial to delegate the taking of evidence to one of its members (delegated judge) or another court (delegated court). Article 547 paragraph 2 of the Code of Civil Procedure, as a special provision, is not subject to an extension and at the same time excludes the application of the general rule of Article 235 paragraph 1 of the Code of Civil Procedure [1].

A person whose legal incapacitation is petitioned must be examined by an expert psychiatrist or neurologist, as well as by a psychologist (Article 553 paragraph 1 of the Code of Civil Procedure) [1]. This is compulsory proof in the sense that adjudicating incapacitation is not possible without it. However, the petition may be rejected without such proof if the evidence gathered in the case clearly indicates that there is no need for legal incapacitation [2, 24, 25].

The expert opinion referred to in Article 553 of the Code of Civil Procedure may not be replaced by medical documentation, a medical certificate or an expert opinion issued for the purpose of other proceedings. Gudowski takes a partially different stance,

believing that an opinion issued by experts, e.g., in criminal proceedings, may be used in the case of legal incapacitation, provided that it is not contested by the parties and that it is supplemented with the necessary elements mentioned in Article 553 [2, p. 196. It results not only from the purpose and uniqueness of proceedings for legal incapacitation, but also from the wording of Article 553 of the Code of Civil Procedure, which requires examination by experts of the person whose legal incapacitation is petitioned. The sequence should therefore be such that a petition is made first and then an expert examination takes place. The examination must result in an opinion, of which the mandatory elements are:

a) an assessment of the mental condition, mental disorders or development of the person subject to proceedings for incapacitation;
b) a reasoned assessment of the extent to which the person concerned is capable of managing his or her actions and conducting his or her affairs independently, taking into account the conduct and behavior of the person concerned.

It is obvious that the opinion should demonstrate the existence of a causal link between the state of health and the ability to manage one's own actions and affairs [26, 27]. No such link precludes the possibility of incapacitation.

Currently, in the case of a petition for incapacitation, the expert psychiatrist is usually consulted. The opinion of an expert neurologist is used in exceptional clinical situations (e.g., head injuries, rare neurological diseases). The wording of Article 553 of the Code of Civil Procedure indicates that by using the word 'or', the legislator allows the use of both opinions (appointment of an expert psychiatrist or neurologist / appointment of an expert psychiatrist and neurologist).

Apart from the obligatory elements of the evidentiary hearing mentioned above, the court may and should, as the purpose of possible incapacitation so requires, also gather other evidence on the grounds of the health condition, property and personal situation of the person whose legal incapacitation is petitioned, not excluding obliging members of the household of the person whose legal incapacitation is petitioned to submit a list of the person's estate (Article 554 paragraph 2 of the Code of Civil Procedure) and observation in a medical institution (Article 554 of the Code of Civil Procedure) [28].

The first of these measures is aimed not only at establishing the financial situation of the person subject to proceedings for incapacitation in the context of determining the living conditions and possibilities of providing care to that person, but also at clarifying whether the applicant's intention is to take charge of the unjustified supervision of the property of the person against whom the petition was filed.

The use of observation in a medical institution, which is in principle contrary to human freedom, requires absolute compliance with the following statutory conditions:

a) the necessity of applying this measure must be based on the opinions of two expert medical doctors (Article 554 paragraph 1 of the Code of Civil Procedure);
b) issuing a decision on placing under observation must be preceded by a hearing of the parties to the proceedings (Article 554 paragraph 2 of the Code of Civil Procedure);

c) the period of observation may not exceed six weeks, and in exceptional cases the court may extend this period to three months (Article 554 paragraph 1 of the Code of Civil Procedure).

Moreover, observation should be used in exceptional cases, i.e., when the evidence of the case indicates that the health condition of the person subject to proceedings for legal incapacitation is worrying, but the mental disorders found by the experts need to be confirmed in a medical institution, as it is not possible to draw clear conclusions after the examination under outpatient conditions [29, 30].

Only a proper and comprehensive investigation of the evidence can provide a true and unequivocal indication of whether or not legal incapacitation of the person concerned is necessary and, if so, whether partial incapacitation is sufficient, or whether total legal incapacitation is necessary.

Recapitulation

The analysis of the legal issues presented above leads to the conclusion that in the current legal situation the rights of a person against whom proceedings for legal incapacitation are pending are, in principle, properly secured both in procedural and material terms.

The legislator has limited the number of people who can apply for incapacitation, as well as defined the number of people who are legally involved in this procedure. This measure must be rectified by explicitly limiting the parties to the proceedings in matters of 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, i.e., to the closest relatives. It does not seem right that anyone who demonstrates a legal interest in such participation should be able to participate in proceedings concerning the most sensitive area of human life.

At the beginning of court proceedings, the protection of the rights of a person whose incapacitation has been petitioned is also ensured by the obligation to submit an appropriate certificate of mental health of the person concerned before the petition is served (Article 552 paragraph 1 of the Code of Civil Procedure). On the other hand, the construction of Article 552 paragraph 2 of the Code of Civil Procedure raises concerns, which – *a contrario* – does not allow to reject a petition if the legitimacy of initiating proceedings for legal incapacitation results solely from the content of the petition itself.

During the period between the commencement of proceedings in matters of incapacitation and their conclusion, the rights of the person against whom those proceedings are pending will be fully safeguarded by the possibility of appointing a professional attorney *ex officio*, a guardian *ad litem* or a temporary advisor. The application of each of these measures depends on the mental health of the person whose incapacitation is petitioned, while the appointment of a guardian *ad litem* or a temporary advisor does not preclude the appointment of an attorney *ex officio*.

Another important procedural remedy, which guarantees full access to court to a person against whom proceedings for incapacitation are pending, is the right to file appellate remedies independently and a petition to revoke or change incapacitation,

as well as to informalize the remedies. This solution serves the purpose of making the actions of the person against whom a petition for incapacitation has been submitted independent of the decision of the legal representative or attorney, which strengthens the control of courts of both instances over the correctness of the decision.

The material aspect of protection of the rights of the person against whom proceedings for incapacitation are pending has also been properly shaped in the current regulations. It is expressed in the obligation of the judge to make personal contact with the concerned person, with the support of a psychiatrist or neurologist and a psychologist, for a specific purpose and scope of the evidentiary hearing, expressed in the mandatory establishment of specific facts, such as the state of mental health, personal, professional and property situation, and in the mandatory examination by an expert psychiatrist or neurologist and a psychologist during the proceedings for incapacitation.

If the provisions referred to above are interpreted correctly and the principles indicated are implemented by the court, there should be no infringement of the rights of the person concerned in the course of proceedings for legal incapacitation.

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