Country report **Finland**

Authors: **Dr. Salla Silvola & Prof. Anna Mäki-Petäjä-Leinonen**

In the new series National Reports at the Family & Law forum (https://www.familyandlaw.eu/) a first series of national reports is published.

FL-EUR (https://fl-eur.eu/), Family Law in Europe: An Academic Network, was established at a Founding Meeting in Amsterdam on 1-2 February 2019. FL-EUR currently unites over 35 prominent experts, both academics and public officers, in the field of family & law from 32 European jurisdictions. The purpose of FL-EUR is close academic cooperation amongst the experts, and between the experts and other stakeholders in the field of family and law, aimed at:

1. accumulation and dissemination of knowledge of both family law in the books and in action;
2. promotion of comparative and multidisciplinary research and education in the field of family and law;
3. learning from one another's experiences; and finally,
4. providing up-to-date comparative data for European, supranational and national bodies.

The FL-EUR members selected 'Empowerment and Protection of Vulnerable Adults' as its first working field, since this is a highly topical field of law. Ageing societies in Europe are confronted with an many legal issues arising out of the empowerment and protection of vulnerable adults. Based on initial quick scans of all jurisdictions, FL-EUR's coordinating group has drafted a questionnaire in close cooperation with the FL-EUR's members. The coordinating group consists of Prof. Masha Antokolskaia, Prof. Nina Dethloff, Prof. Jane Mair, Prof. Maria Donata Panforti, Prof. Wendy Schrama, Dr. Katrine Kjærheim Fredwall, Prof. Frederik Swennen, Prof. Paula Távora Vítor, Dr. Velina Todorova and Prof. Michelle Cottier. They are supported by the Secretary Rieneke Stelma-Roorda.
Country reports for all jurisdictions have been produced by country reporters. The country reports have been reviewed by at least one Member of the Coordinating Group. Language and contents of the countries reports fall under the responsibility of the country reporters. The reports are representing the law as it stands in 2022.

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

FINLAND

Dr. Salla Silvola & Prof. Anna Mäki-Petäjä-Leinonen[1]

SECTION 1 - GENERAL

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

The protection and empowerment of vulnerable adults in Finland is based on several statutes.[2] The main adult protection statutes are the Guardianship Services Act,[3] according to which a representative (guardian) can be appointed to a person in need of protection, and the Act on the Continuing Power of Attorney,[4] whereby an adult can give a mandate with the purpose that it will enter into force in the future, should an adult lose their legal capacity. These are general laws meaning that in principle they cover the representation of vulnerable adults in all those situations in which decision-making powers can be

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[1] Dr. Salla Silvola works as Senior Ministerial Adviser, Legislative Affairs, in the Ministry of Justice, Finland, and Professor Anna Mäki-Petäjä-Leinonen is employed by the University of Eastern Finland. The views presented in this report are personal views of the authors and do not necessarily represent the views of their background organisations. For their assistance in providing background materials, statistics and general feed-back, the authors would like to thank especially: Dr. Katja Karjalainen from the University of Eastern Finland, Ms. Päivi Tiainen-Hyrkäs and Ms. Outi Kemppainen from the Ministry of Justice, Ms. Kirsi Ruuhonen from the Ministry of Social Affairs and Health and District Registrar Kimmo Luojus and Chief Specialist Jani Saarela from the Digital and Population Data Services Agency. Any remaining errors remain the responsibility of the authors.

[2] The following chapter I is partly based, with the consent of the author, on the still unpublished article written by Dr. Katja Karjalainen for the purposes of 22th World Congress of International Academy of Comparative Law thematic group 'Protection of Vulnerable Adults'. K. KARJALAINEN, *Empowering and Protecting Vulnerable Adults in Finland*, Intersentia, Cambridge 2022 (forthcoming). The said article has also been partly utilised in the answer to question number 4 and in the answers to chapter IV of this report.

[3] *Laki holhoustoimesta*/*Lag om förmyndarverksamhet* (442/1999). Available in Finnish and Swedish at https://www.finlex.fi/fi/laki/ajantasa/1999/19990442. Unofficial English translation is available at https://www.finlex.fi/en/laki/kaannokset/1999/en19990442.pdf (with amendments until 31.12.2000).

[4] *Laki edunvalvontavaltuutuksesta*/*Lag om intressebevakningsfullmakt* (648/2017). Available in Finnish and Swedish at https://www.finlex.fi/fi/laki/ajantasa/2007/20070648. Unofficial English translation is available at https://www.finlex.fi/en/laki/kaannokset/2007/en20070648.pdf (with amendments until 21.12.2021).

shared or transferred. However, despite their general nature, they are intended to focus on representation in financial matters.

Other statutes of note when discussing personal autonomy, self-determination and the representation of vulnerable adults are field-specific, and include the Act on the Status and Rights of Patients[5] and the Act on the Status and Rights of Social Welfare Clients[6].

The Contracts Act[7] also plays an important role in the context of the representation of vulnerable adults as it sets standards for assessing expression of one's wishes; that is, whether a person understands the matter in question and has sufficient mental capacity to decide on it.

The system is somewhat fragmentated as field-specific statutes are important in addition to representation based on guardianship and continuing powers of attorney. Additionally, the traditional rule on *negotiorum gestio* may exceptionally come into play as a complementary measure. The rule on *negotiorum gestio* is regulated in chapter 18, section 10 of the Commercial Code (*Kauppakaari/Handelsbalk*) and it means acting on behalf of another without express authorisation or other mandate, without the status of a legal representative arising directly from the law, and without an order from a court.

2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. Briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.

Attorney (*valtuutettu/fullmäktige*): representative appointed by means of a power of attorney by a competent adult.

Granter (*valtuuttaja/fullmaktsgivare*): an adult giving the power of attorney.

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5 *Laki potilaan asemasta ja oikeuksista*/*Lag om patientens ställning och rättigheter* (785/1992). Available in Finnish and Swedish at https://finlex.fi/fi/laki/ajantasa/1992/19920785. Unofficial English translation is available at https://www.finlex.fi/en/laki/kaannokset/1992/19920785 (with amendments up to 1.9.2012).

6 *Laki sosiaalihuollon asiakkaan asemasta ja oikeuksista*/*Lag om klientens ställning och rättigheter inom socialvården* (812/2000). Available in Finnish and Swedish at https://www.finlex.fi/fi/laki/ajantasa/2000/20000812. Unfortunately, no translation in English is available from this Act.

7 *Laki varallisuusoikeudellisista oikeustoimista*/*Lag om rättshandlingar på förmögenhetsrättens område* (228/1929). Available in Finnish and Swedish at https://finlex.fi/fi/laki/ajantasa/1929/19290228. English translation is available at https://www.finlex.fi/en/laki/kaannokset/1929/en19290228 (with amendments up to 31.12.1999).

Representative (*edustaja/representant*): a natural or legal person who acts on behalf of the adult.

Guardian (*edunvalvoja/intressebevakare*): a natural person who has been appointed by a court or a guardianship authority to act on behalf of the adult. The guardian is competent to represent the client in transactions pertaining to the client's property and financial affairs, unless the appointing court has otherwise ordered or unless it has been otherwise provided elsewhere in the law. If the court has so ordered, the guardian is competent to represent the client also in matters pertaining to their person, if the client cannot understand the significance of the matter. However, the guardian does not have such competence in matters subject to provisions to the contrary elsewhere in the law.

Client (*päämies/huvudman*): an adult who, by reason of an impairment or insufficiency of their personal faculties, is not in a position to protect their interests.

Incompetent person (*vajaavaltainen henkilö/omyndig person*): a natural person, who cannot self administer their property or enter into contracts or other transactions, unless otherwise provided elsewhere in the law. Unless otherwise provided, a person who has been declared incompetent may continue to self decide on matters pertaining to their person, if they understand the significance of the matter.

The Finnish law on guardianship was reformed in 1999. One of the main principles in the Finnish guardianship legislation is that when an adult person is not capable of taking care of their affairs, the least restrictive measures are explored first. Appointing a guardian or confirming a continuing power of attorney does not in itself restrict the client's own competence to enter into transactions or administer a property. Therefore, if a person has been appointed to have a guardian, the term 'guardian' no longer has the meaning that the person in need of guardianship would necessarily lack competence to make decisions themselves. A guardian may be appointed also to a person who is competent, if the person needs support in managing their affairs. If the appointment of a guardian is not sufficient in order to safeguard the person's interests, their competency can be restricted and they can be declared incompetent as a last measure.

3. Briefly provide any relevant empirical information on the current legal framework, such as statistical data (please include both annual data and trends over time). Address more general data such as the percentage of the population aged 65 and older, persons with disabilities and data on adult protection measures, elderly abuse, etc.

Table 1. Number and percentage of population according to age, based on information 31 December[8]

Year	Age 0-17	18-64	65 -	All
2011	1 081 766 (20,02 %)	3 339 861 (61,83 %)	979 640 (18,14 %)	5 401 267 (100 %)
2016	1 071 905 (19,5 %)	3 281 417 (59,6 %)	1 149 975 (20,9 %)	5 503 297 (100 %)
2021	1 035 517 (18,7 %)	3 233 688 (58,3 %)	1 279 036 (23,0 %)	5 548 241 (100 %)

In Finland, approximately 190,000 people have some form of memory disorder.[9] Statistics on persons with disabilities are slightly problematic and difficult to compare, as the information base on the statistics can vary. Information can be based for example on the number of persons receiving disability-related allowances from the state or on questionnaire data on persons' own perceptions on the prevalence and effects of disability. The following figures are based on the statistics on the recipients of disability allowances provided by the Social Insurance Institution of Finland (Kela) (end of year data).[10]

Table 2. Number and percentage of persons receiving disability allowances in 2016 and 2021.

Year	Disability allowance for persons under 16	Disability allowance for persons aged 16 or over	Care allowance for pensioners	All	Percentage of all recipients / population
2016	35 556	13 073	226 384	274 945	5 %
2021	40 089	14 770	206 704	261 538	4,7 %

Finland's official total population at the end of 2021 was 5,548,241. At the end of 2021, there were a total of 79,939 persons under guardianship in Finland, of whom 11,633 were aged 0 to 17 years, 25, 010 were aged 18 to 64, and 43,296 were over 65.[11] The reason for the appointment of a guardian for an adult is usually dementia, mental illness, intellectual disability or disability due to substance abuse. In practice, the restriction of a client's competency is rare. In 2021, 0.6 per cent (509) of those under guardianship were declared

[8] See Statistics Finland, database on population structure, <https://www.stat.fi/en/statistics/vaerak> accessed 27.8.2022

[9] Finnish Institute for Health and Welfare, Memory disorders <https://thl.fi/en/web/chronic-diseases/memory-disorders> accessed 27.8.2022

[10] See statistics by the Social Insurance Institution of Finland, <https://www.kela.fi/en/web/en/statistics-by-topic-disability-benefits-provided-by-kela> accessed 27.8.2022

[11] Digital and Population Data Services Agency: About the Agency/Open data/Open data from local register offices <www.dvv.fi/mare/> accessed 27.08.2022

incompetent and 0.7 per cent (562) had their competency restricted in another way.[12]

Table 3. Number of appointments of legal representatives by guardianship authority or by court and limitations of legal capacity by court in 2011, 2016 and 2021.

Year	Appointment of a legal representative by DVV	Appointment of a legal representative by court	Limitation of legal capacity by court	Confirmation of continuing power of attorney by DVV	All
2011	1283	5303	48	434	7068
2016	1621	6290	34	2183	10128
2021	1531	5089	15	5881	12516

Table 4. Number of terminations of the mandate of the legal representative and terminations of limitation of legal capacity in 2011, 2016 and 2021.

Year	Termination of mandate of legal representative by DVV	Termination of mandate of legal representative by court	Termination of limitation of legal capacity by court	Confirmation of revoking of continuing power of attorney by DVV	All
2011	173	130	3	4	310
2016	173	105	15	4	297
2021	252	35	16	20	323

According to the report published by the Institute of Criminology and Legal Policy at the University of Helsinki, people aged 75 years or more account for almost one tenth of the population in Finland, yet research on the elderly as victims of crime remains scarce. According to the Finnish Homicide Monitor, between 2003 and 2018 a total of 54 persons aged 75 years or more were killed in Finland. Most of the perpetrators were either partners or relatives. Almost a quarter of the victims were killed in care homes or in domiciliary care. The elderly become victims of violent crime far less often than younger age groups. Between 2010 and 2019 the victimisation rate per 1,000 persons among the elderly was 0.7 to 1.0 among men and 0.5 to 0.8 among women. The rates were 10- to 20-fold in the younger age groups. This is corroborated in the survey studies. In the 2019 National Crime Victim Survey, two percent of the respondents aged 75 to 84 years reported becoming victims of violent threats in the past year, while the proportion in the whole study pop-

[12] Ibid.

ulation was eight percent. Similarly, three percent of the elderly reported experiencing any violent crime in the past 12 months, compared to 13 percent in the whole study population. Overall, a similar pattern is found in property crimes, such as thefts from a person and fraud. However, the differences in property crimes are less pronounced than in violent crimes. Men tend to be slightly more likely victims of violence, but in recent years the gender difference has narrowed. Men are, however, notably overrepresented as victims of property crime.[13]

4. List the relevant international instruments (CRPD, Hague Convention, other) to which your jurisdiction is a party and since when. Briefly indicate whether and to what extent they have influenced the current legal framework.

The CRPD and the Additional Protocol regarding individual complaints were signed by Finland in 2007, ratified in 2015 and they entered into force on June 2016. The enactment required the national legislation to be in accordance with the requirements on the Convention, which explains why the process of ratification was prolonged. It is important to note that the Convention was not considered to push for reforms to the Finnish guardianship legislation.[14] One can argue that the main reason for this was that, as early as 2009, section 8.1 of the Guardianship Services Act was specifically clarified to contain a clause, according to which guardianship can only be used if a vulnerable adult's matters cannot be handled in any other way.[15] Hence, the adult protection system is based on the idea of gradual protection, i.e. using the least possible intervention.[16]

The Hague Convention of 2000 entered into force in Finland on March 2011.[17] Simultaneously, provisions of private international law were added to the Guardianship Services Act. Correspondingly, provisions relating to the continuing power of attorney under the Hague Convention were incorporated into the Finnish Act on the Continuing Power of Attorney. In the context of private international law adult protection, the Nordic Marriage Convention of

13 P. DANIELSSON, 'Summary' in P. DANIELSSON (ed.), *Rikollisuustilanne 2019: rikollisuuskehitys tilastojen ja tutkimusten valossa*' [Crime situation in 2019: crime trends in statistics and research findings], (2020) 42 *Katsauksia*, University of Helsinki, pp. 243-244. <https://helda.helsinki.fi/bitstream/handle/10138/320755/Katsauksia_42_Rikollisuustilanne_2019_2020.pdf?sequence=2&isAllowed=y> accessed 27.08.2022.

14 This matter is relatively widely contemplated and reasoned in the Government Proposal nr. 284/2014, pp. 41-43.

15 Government proposal nr. 45/2008, p. 17.

16 See KARJALAINEN 2022 (fn 2).

17 Finnish database of treaties (SopS) no. 11/2011.

1931[18] is another important instrument, as its Article 18 provides that guardianship may be transferred to another contracting State after consultation with the relevant ministries, if the vulnerable adult has settled there or the transfer is found to be appropriate for any other reason.

When it comes to personal autonomy and self-determination in matters of care and medical treatment, the Oviedo Convention[19] and the practice of the European Court of Human Rights have had a key impact in Finland in the development of patients' rights in Finland.[20]

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

The current framework for guardianship legislation stems from 1999. The 100 years old Guardianship Act from the year 1898 was then replaced by the new Guardianship Services Act of 1999. The content of the guardianship has dramatically changed over the past decades. At the beginning of the 20th century, guardianship was in most cases full guardianship, where the tasks of the guardian consisted not only of the management of property, but also of taking care of the person of the ward. When institutional care developed, those in need of care and protection were increasingly transferred into nursing homes. At that time, guardianship began to turn into a duty, in which the management of property had the greatest weight.

Later changes in legislation have supplemented the described development. At the beginning of 1971, the provision was repealed, according to which persons receiving psychiatric care in a psychiatric institution were *ex lege* under the guardianship of the social welfare board of their municipality of residence. After 1971, the declaration of legal incapacity has required a separate assessment independent of the need for medical care.

In 1983, the development in the tasks of the guardians were taken into account in the partial reform of the guardianship legislation. When the grounds for guardianship were reassessed, the focus on the medical and diagnostic of the person's condition was abandoned and the declaration of guardianship became a precautionary measure, which could be triggered if the person's financial status, livelihood or other important interests were in apparent danger because the ward was unable to take care of their person or their property. In

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18 Agreement between Finland, Iceland, Norway, Sweden and Denmark concerning marriage, adoption and guardianship within the scope of private international law concluded in Stockholm on 6 February 1931, and the final protocol thereto, and the exchange of notes between the Governments of Finland and Denmark on 9 June 1931.

19 Council of Europe Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164).

20 See e.g. I. PAHLMAN, *Potilaan itsemääräämisoikeus* [Patient's self-determination], Edita, Helsinki 2003, pp. 252-253.

connection with the above-mentioned reform, the declaration of incapacity was laid down as a secondary measure. No one could be declared incapacitated, if their best interests could be adequately safeguarded by appointing a trustee to take care of their affairs. Appointment of a trustee was thus made as the primary form of guardianship. The appointment of a trustee did not restrict legal capacity of the ward.

The Guardianship Services Act (442/1999) entered into force in December 1999. The purpose of the reform was to create legislation that enabled the protection of persons according to their individual needs without unnecessary restrictions to their self-determination. In addition, the terminology was modified to reduce the negative connotations. Hence, for example, the concept of 'ward' – [*holhottava/myndling*] was changed into 'client' – [*päämies/huvudman*] and the concept of 'trustee' [*uskottu mies, holhooja/god man, förmyndare*] was changed into 'guardian' – [*edunvalvoja/intressebevakare*]. Further, if the person in need of protection understood that they needed protection and made a request for a certain person to be appointed as their guardian, the matter no longer required court involvement, but the guardian could be appointed by the guardianship authority.

In 2007, the Guardianship Services Act was complemented by the Act on Continuing Powers of Attorney (648/2007). The purpose of this legislation was to enable persons to make prior arrangements in case of future incapacity and to choose a trusted person as their future attorney. In the continuing power of attorney, the mandate and the supervision of the attorney could also be iterated in more detail than under guardianship.

In 2010, Finland ratified the Hague Convention of 2000. The ratification entered in force in 2011. Finland has also ratified the CRPD and its Optional Protocol. The ratification entered in force in 2016.

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

There has been plenty of legal debate concerning legal capacity and self-determination of a client whose legal capacity has not been restricted under the law. The Guardianship Services Act provides that the mere appointment of a guardian does not affect the client's legal capacity per se. However, as the mere appointment of a guardian gives the guardian the right to decide on the client´s bank accounts as well as the reasonable amount of money that is given to the administration of the client, the act has been criticised on the basis that it does

not contain a clear formulation of guardians' apparently broad powers to make decisions regarding the clients' financial issues.[21]

This way of thinking undeniably has some justification. As Pertti Välimäki has pointed out, practical issues of everyday life favour prioritising a guardian's views in certain situations. Furthermore, the relationship between the client and a third party sometimes requires 'paternal' clarity. However, it is essential that the guardians exercise their decision-making powers in accordance with the principles laid down in the Guardianship Services Act, which require that the client's views are heard and respected.[22] On the other hand, Markku Helin has pointed out that a guardian is often appointed in the first place because the client has lost the ability to control their income. Helin also opines that the guardian needs certainty about the amount of funds that will be available to cover the client's necessary expenses.[23] It seems, therefore, that on the one hand, the provisions on the hearing of the client may seem very futile in cases where the client has already completely lost their ability to assess their situation in practice. On the other hand, the possibility to be heard is an important principle to ensure the client's right to self-determination.

Furthermore, after Finland's ratification of the CRPD in 2016, the adoption of a supported decision-making system into Finnish legislation has been increasingly demanded by numerous CSO´s and academics. Requirements have been presented especially from the point of view of social and health care clients. Thus, for example, in the draft proposal for the Disability Services Act that was sent for consultation by the Ministry of Social Affairs and Health in the spring of 2022, it was proposed that it would be possible for disabled persons to be assigned a decision-making support person regarding social and health care decisions. On the other hand, it is worth noting that, for example, it is already possible to interpret the Guardianship Services Act in such a way that the guardian must support their client in decision-making and give them opportunities to choose.[24]

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

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21 See e.g., A. MÄKI-PETÄJÄ-LEINONEN, 'Autonomy of a person under guardianship: Self-determination in the theory and practice of guardianship law in Finland' in M. DONNELLY, R. HARDING, and E. TASCIOGLU (eds.) *Supporting Legal Capacity in Socio-Legal Context,* Hart Publications, Oxford 2022 pp. 215-234.

22 P. VÄLIMÄKI, *Edunvalvontaoikeus*, Sanoma Pro, Helsinki 2013, p. 38.

23 M. HELIN, 'Yleisteos edunvalvontaoikeudesta: kirja-arvostelu teoksesta Tornberg, Johanna – Kuuliala, Matti: Suomen edunvalvontaoikeus' (2016) *Lakimies* 6 1016, 1017.

24 M. AALTO-HEINILÄ and A. MÄKI-PETÄJÄ-LEINONEN, 'Päämiehen itsemääräämisoikeuden tukeminen: filosofisesta ideaalista käytännön edunvalvontatyön tarkasteluun' in K. WECKSTRÖM, M.I. NIEMI, A. MÄKI-PETÄJÄ-LEINONEN and J. HUUHTANEN (eds.), *Modernit perhesuhteet ja oikeus*. Alma Talent, Helsinki 2021, pp. 215-241.

Although regulation on the supervision of public guardians and of the property of minor clients was already slightly relaxed in 2011, from the guardianship authority's perspective further reforms are required. The number of clients is on the rise also in Finland, and the resources used for public guardianship services and supervision are not expected to increase in a sufficient measure. Guardianship authorities have already started to campaign to ensure that all those aged 40 or over would make a continuing power of attorney and would appoint someone close to them to act as their attorney in the future. In addition, the guardianship authorities have proposed that in the future, the supervision of public guardianship and persons acting as attorneys should be made more risk-based. This would enable taking into account the circumstances related to different case groups and situations and make it easier for the guardian or the attorney to act without endangering the legal protection of the client.

Furthermore, some legislative reforms are currently under way concerning adults who are patients and clients of social welfare services. For instance, the Mental Health Act (1116/1990) contains several provisions, which address the issues of involuntary measures and deprivation of liberty. However, people with diminishing capacity, such as people with dementia, are often treated in nursing homes, where coercive measures (i.e. locking the doors or using safety belts) are regularly used. The lack of adequate legislation concerning involuntary measures in nursing homes and ordinary hospitals is considered problematic from the point of view of human rights and in need of urgent legislative measures. This is the case even if the use of restrictive measures is, under some circumstances, justified and in accordance with the patient's best interests.[25]

The partial lack of adequate legislation catering for conditions and means of involuntary measures have long been recognised by the CSO's, academics and the Ministry of Social Affairs and Health. The Ministry of Social Affairs and Health established a working group in 2010 to assemble the provisions relating to the self-determination of all patients and clients in social care and welfare. The draft Act on the strengthening of the autonomy of such patients and clients and the conditions regulating usage of restrictive measures was published both in 2014 and 2018, but the projects lapsed due to the end of the Government and Parliamentary terms.[26] In 2021, the Ministry of Social Affairs and Health launched another attempt to reform this area, but due to the Covid-19 crisis, the legislation will not come into force in this government term.

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25 A. MÄKI-PETÄJÄ-LEINONEN, 'Protecting a Person with Dementia through Restrictions of Freedom? Notions of Autonomy in the Theory and Practice of Elder Care' in A. GRIFFITHS, S. MUSTASAARI and A. MÄKI-PETÄJÄ-LEINONEN (eds.) *Subjectivity, Citizenship and Belonging in Law: Identities and Intersections*. Routledge, Milton Park, Abingdon 2016, pp. 146-170.

26 See e.g. the WORKING GROUP OF THE MINISTRY OF SOCIAL AFFAIRS AND HEALTH, 'Sosiaali- ja terveydenhuollon asiakkaan itsemääräämisoikeus' [The right of self-determination of patients in social and healthcare] (2014) *Sosiaali- ja terveysministeriön raportteja ja muistioita* 14, Ministry of Social Affairs and Health, Helsinki 2014.

In addition to legislation that would adequately support the right to personal autonomy and self-determination of people living in care homes, clear provisions regarding advance directives in the Act of the Status and Rights of the Patients are needed. These amendments were proposed for the first time already in 2003, but the project has been delayed many times. There does not seem to be widespread opposition to this objective in itself, but the delay is due to the ministry's resources and prioritisation policies. The preparation of the legislation in relation to the strengthening of the autonomy of the patient, including advance directives, is currently under way and the Government Bill will most likely be given to the Parliament during the next Parliamentary term.

SECTION II – LIMITATIONS OF LEGAL CAPACITY

8. If your system allows limitation of the legal capacity of an adult, please answer questions 8 - 13; if not proceed to question 14. All reports should address questions 14 and 15.

a. on what grounds?

Vulnerable adult´s (client's) legal capacity may be restricted in circumstances where they are clearly not fully legally capable. Section 18 of the Guardianship Services Act provides that if an adult is unable to take care of their financial affairs and their important interests are thereby endangered, a court may restrict their legal capacity by ordering that: (1) a client may enter into given transactions or administer given property only in conjunction with the guardian; (2) a client does not have the capacity to enter into given transactions or to administer given property; or (3) a client is declared incompetent.

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

The scope of the limitation of legal capacity is set out in a statute. Central provisions are Sections 18 to 28 of the Guardianship Services Act.

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

Limitation of the legal capacity is a tailor-made decision. It does not automatically affect all aspects of legal capacity. Different levels of restrictions are listed under subquestion a).

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

A court order on the restriction of someone's legal capacity is valid for the time being or for a period set in the order (Section 22). The restriction or its period of validity may be altered if changes in circumstances or other reasons so require.

According to the general provisions on guardianship (Section 17 b §), a restriction must be lifted when it is no longer necessary. The guardianship authority must on its own initiative, during the fourth calendar year after the appointment of the guardian, inquire as to the continued need for guardianship and, where necessary, file a petition with a district court for the termination of the task of the guardian. The inquiry must be repeated every fourth calendar year. These provisions apply also to persons who have been declared incompetent.

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

If a client's legal capacity is not restricted under section 18 of the Guardianship Services Act, the representative has only a supporting role in relation to the client's actions. This is also emphasised in the preparatory works for the Guardianship Services Act. The government proposal states that the appointment of a representative does not affect a person's legal capacity or ability to deal with their assets.[27] However, the reality of how a client is able to act in practice may be different. This is due to the caveat contained in section 14 of the Act where it is stated that the appointment of a guardian does not restrict the client's freedom to act, unless otherwise provided elsewhere in the law.

In this respect, the Guardianship Services Act contains one very significant exception. Namely, Paragraph 1 of Section 31 of the Guardianship Services Act provides that a receivable that belongs to property that is being managed by the guardian, may be repaid only to the guardian or an account of the client designated by the guardian. Additionally, according to paragraph 2 of the same section, the guardian must notify the credit institutions, where the client has a bank account, as to who has the right to withdraw funds from the account. The government proposal for the Act indicated that the rule applies

[27] Government proposal to reform the guardianship legislation (HE nr. 146/1998), pp. 19 and 34. See e.g. p. 19: 'the primary means … is the appointment of a guardian … *It therefore does not affect the person's capacity to decide for themselves*.' (emphasis added)

irrespective of whether the client is fully legally capable or whether their capacity is restricted under the law.[28] In practice, the appointment of a representative may therefore mean that the client loses their actual right to hold a substantial portion of their assets.[29]

f. are there any other legal instruments,[30] besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

No.

9. Briefly describe the effects of a limitation of legal capacity on:

a. property and financial matters;

It depends on the content of the decision. If a person is declared incompetent, they can only make minor decisions such as decisions concerning their assets (monthly allowance) given by a representative. According to section 24.1 of the Guardianship Services Act, an incompetent person may enter into transactions which, in view of the circumstances, are usual and of little significance. Furthermore, an incompetent person has the right to decide on the proceeds of their own work earned during the incompetency, as well as on the property given to their administration by the representative. In addition, the incompetent person may decide on the revenue arising from the property referred to above and on the property that has come as a substitute for the said property (section 25.1).

As mentioned above, it is also possible to restrict a vulnerable adult´s capacity by ordering that: (1) a client may enter into given transactions or administer given property only in conjunction with the guardian; (2) a client does not have the capacity to enter into given transactions or to administer given property. This may apply for instance client´s real estate or certain investment property.

In practice, the restriction of a client's competency is rare. In 2021, 0,6 per cent (509) of those under guardianship were declared incompetent and a further 0,7 (562) per cent had their competency restricted in another way.[31]

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28 Ibid., p. 44.

29 See MÄKI-PETÄJÄ-LEINONEN 2022 (fn 21).

30 Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of their acts.

31 Digital and Population Data Services Agency: About the Agency/Open data/Open data from local register offices <www.dvv.fi/mare> accessed 27.08.2022.

Furthermore, according to section 27 of the Guardianship Services Act, if an incompetent person has entered into a transaction without the required consent of the guardian, the counterparty has the right to renounce the transaction as long as it has not been ratified or appropriately performed. However, if the counterparty knew that the other party was incompetent, they do not have the right to renounce the transaction during the period agreed for the procurement of the consent or the reasonable time needed for the procurement of the consent. Nevertheless, the counterparty has the right to renounce the transaction in accordance with paragraph 1, if they had reason to believe that the incompetent person was competent to enter into the transaction regardless of the incompetency. The renouncement must be notified to the incompetent person or the guardian.

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

According to section 29.3 of the Guardianship Services Act, the guardian is not competent to give a consent to marriage or adoption on the behalf of the client, nor to acknowledge paternity, consent to an acknowledgement of paternity, make or revoke a will or represent the client in other matters of a comparably personal and individual nature. Thus, a person with limited legal capacity can conduct these acts themselves provided that they have sufficient capacity to understand the content and the nature of the act. However, it is notable that in the preparatory works for the Guardianship Services Act, it is stated that although the guardian cannot give consent to marriage, the guardian may file a petition for divorce on behalf of the client.[32] However, this possibility seems to be very rarely used.

c. medical matters;

According to the Guardianship Services Act, unless otherwise provided elsewhere in the law, a person who has been declared incompetent may self decide on matters pertaining to their person, if they understand the significance of the matter (section 23.2). Furthermore, if the court has so ordered, the representative must be competent to represent the client also in matters pertaining to their person (such as giving consent to treatment), if the client cannot understand the significance of the matter in a situation when such decision needs to be made (section 29.2).

d. donations and wills;

[32] Government proposal nr. 146/1998, p. 43.

If the client wishes to make a gift which, in view of the circumstances, is normal and of little financial significance, the guardian must see to it that the wish of the client can be fulfilled (section 38.2). Donations by the guardian on behalf of a client are strictly forbidden. According to section 32.1 of the Guardianship Services Act, the guardian must not donate the property of the client.

According to section 29.3, the guardian is not competent to make or revoke a will or represent the client in other matters of a comparably personal and individual nature. Thus, a person with limited legal capacity can conduct these acts themselves provided that they have sufficient capacity to understand the content and the nature of the act.

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

The provisions on the representation of a vulnerable adult in court proceedings are located in the Code of Judicial Procedure, chapter 12. According to section 1, when a person without full legal capacity is a party in a civil case or as an injured party in a criminal case, their right to be heard shall be exercised by their guardian or other legal representative. A person without full legal capacity can personally exercise their right to be heard if they are competent to administer the object of the dispute or of the offence, or if the dispute concerns a transaction into which they are competent to enter. In a case concerning their person, a person without full legal capacity can personally exercise their right to be heard if they have reached the age of eighteen years and they are able to understand the significance of the matter.

Further, according to section 1a, a guardian appointed for a person with legal capacity has the right to be heard, parallel to that of the client, in a matter within the competence of the guardian. If the guardian and the client disagree when being heard, the opinion of the client prevails, if they are able to understand the significance of the matter. If the competence of the client has been restricted in a manner other than by declaring him or her fully without legal capacity, the guardian will alone exercise the client's right to be heard in a matter where the client is without legal capacity. However, in matters to be decided jointly by the guardian and the client, they will together exercise the right to be heard.

Finally, according to section 3 of the Code of Judicial Procedure, the court may hear the guardian of a person without full legal capacity, the person responsible for their care and custody, or their other legal representative, even if the person without full legal capacity has the sole right to be heard in the matter, if this is regarded as necessary in view of their best interests.

There are no specific provisions on the application of a passport for a vulnerable adult in the Passport Act (671/2006). Applying a passport is considered as an act of a personal nature, but not as an act of such a personal nature that a guardian could not be assigned a competence to apply a passport on the client's behalf, if the client does not understand the content and the nature of the act. However, the client's presence in person may additionally be required. Persons with limited legal capacity can apply a passport themselves provided that they have sufficient capacity to understand the content and the nature of the act.

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

Yes, the guardian can bring an action to the court that the legal act be declared invalid, if the client has conducted a legal act without full understanding or if the client has been financially exploited in the course of a legal act. The applicable law in question is the Contracts Act (228/1929) and its general grounds for invalidity due to, for example, undue influence (section 31) or dishonorable and undignified conduct (section 33).

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

District Court or, if the decision is appealed, Court of Appeal or the Supreme Court.

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

A petition for the appointment of a guardian or the restriction of someone's competency may be filed by a guardianship authority, the person whose interest is to be looked after, as well as the representative (guardian), parent, spouse, child or other person close to them (section 72.1).

13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:

a. a requirement of legal representation of the adult;

According the law, the court may on its own initiative appoint a counsel or guardian for trial for the person whose guardianship is involved, if this is necessary in view of the legal safeguards due to that person (section 82). This so called procedural representation is representation of the client for the duration of the trial where the client is a party. One example is the appointment

process of a guardian. During the process, it is the duty of the representative to protect the client´s legal rights. Procedural representation is temporary, in which case the duration of the task is set a certain deadline (section 15). The order may continue to be valid as a result of an appeal to a higher court.

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

In the case of the appointment of a representative for an adult, the opportunity to be heard must be reserved for the person whose interests are to be monitored and, unless circumstances so require, for their spouse (section 73).

c. requirement of a specific medical expertise / statement;

In a matter pertaining to the appointment of a representative or the restriction of someone's competency, the court must on its own initiative procure all necessary information (such as medical statement) for a decision in the matter (section 78).

d. hearing of the adult by the competent authority;

In a matter pertaining to the restriction of someone's competency, the court must hear, in person, the person whose interest needs looking after. However, the matter can be decided without hearing the person, if the petition is at once rejected as ill-founded or if the hearing is impossible because of the condition of the person to be heard, or causes undue inconvenience to that person (section 74).

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

Everyone who has the right to bring the matter before a court under section 72 (guardianship authority, the person whose interest is to be looked after, as well as the representative (guardian), parent, spouse, child or other person close to them) have a standing to appeal against a court order on the appointment of a representative or the restriction of someone's competency (section 80).

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

a. property and financial matters;

See the answer given to Question 9(a). The validity of an act of a financial nature conducted by an adult, whose legal capacity has been restricted, depends on the nature of the act and the level of restriction that has been imposed.

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

Even a person who has been declared fully incompetent can conduct these acts themselves provided that they have sufficient capacity to understand the content and the nature of the act.

c. medical matters;

Even a person who has been declared fully incompetent can give consent to a medical procedure themselves provided that they have sufficient capacity to understand the content and the nature of the act.

d. donations and wills;

Even a person who has been declared fully incompetent can make a will themselves provided that they have sufficient capacity to understand the content and the nature of the act. Giving a donation, however, is considered a financial matter and the validity of the donation depends on the level of restriction that has been imposed.

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

Even a person who has been declared fully incompetent can participate in a civil proceeding or apply a passport themselves provided that they have sufficient capacity to understand the content and the nature of the act (see the answer to Question 9(e)).

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

As already stated in the connection to Questions 6 and 7 above, one key problem of the current Guardianship Services Act is its certain kind of ambiguity regarding the client's legal capacity and right to self-determination. Even if the client's capacity is not restricted according to law, in practice, the actions of the guardian have a great deal of influence on the client's autonomy at the level of everyday life.

In addition to the legislation currently in force, there is a Supreme Court judgment (KKO 2005:2), which concerns the need to restrict a client's capacity. In what was otherwise a high quality ruling, the Court stated that it was unnecessary to restrict the capacity of a client – who was not willing to cooperate with his guardian – because the mere appointment of a guardian bestows the necessary powers to act upon them. In practice, taking this sentence from the judgment out of context has led to a situation where a person's capacity rarely needs to be restricted because guardians can rely on the fact that they can decide on behalf of their client, even when this goes against the client's will.[33] In practice, this may therefore lead to a situation where the guardian *de facto* restricts the client's capacity, so that there is no need to restrict it *de jure*. However, such an interpretation of the law may be seen problematic in the light of the original aim of the legislation and the CRPD.[34]

SECTION III – STATE-ORDERED MEASURES

Overview

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

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

There can be one or more guardians for one person, either due to the nature of the tasks designated to the guardian (e.g. personal vs. property issues) or due to the nature of the property (e.g. extensive investments and corporate property). There can also be a mixture of state-ordered measures and voluntary measures (e.g. guardianship for property issues and continuing power of attorney for personal issues). If there is a mixture of state-ordered measures and voluntary measures, there must be a clear division between the designated tasks.

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

According to the principle of subsidiarity, the measures that reflect the client's self-determination are given priority, such as normal power of attorney or a continuing power of attorney. If such do not exist and the capacity to give a power of attorney has been lost, a guardian can be appointed. As the last measure, an order for limitation of capacity can be

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33 T. LEILAS, 'Yleisen edunvalvojan havaintoja päämiehen itsemääräämisoikeudesta' (2019) 1 *Defensor Legis* 1, pp. 69–76.

34 See MÄKI-PETÄJÄ-LEINONEN 2022 (fn 21).

issued.

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

Yes. According to section 82 of the Guardianship Services Act, the court may on its own initiative appoint a counsel or an interim guardian for trial for the person whose guardianship is involved, if this is necessary in view of the legal safeguards due to that person. Additionally, according to section 4a of the Code of Judicial Procedure, if a party is incapable of looking after their interests in court proceedings owing to illness, mental impairment, ill health or another comparable reason or if the guardian of the party is prevented from exercising their right to be heard in the case due to disqualification or another reason, the court where the case is pending may on its own motion appoint a guardian for that party for purposes of the proceedings. The provisions of the Guardianship Services Act apply to such a guardian.

Start of the measure

Legal grounds and procedure

17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.

According to section 8.1 of the Guardianship Services Act, the court may appoint a representative for an adult who, due to illness, mental disorder, medical condition or other similar reason, is unable to take care of their interests or to take care of matters concerning themselves or their property that require care, and are not properly treated in any other way.

It is customary that a guardian is appointed due to reduction of cognitive decline and dementia, developmental disorder, mental illness or substance abuse.

18. Which authority is competent to order the measure?

In most of the cases, a guardian is appointed by the court. However, in addition to a court, also a guardianship authority may appoint a guardian: (1) for a person whose competency has been restricted, if they have no guardian owing to the death of the guardian or another reason; and (2) for a person who is in need of a guardian. In such cases, it is a prerequisite for the appointment of the guardian that the person whose interests are to be looked after understands the significance of the matter and that he/she requests that a named person be appointed as the guardian (section 12 of the Guardianship Services Act).

19. Who is entitled to apply for the measure?

A petition for the appointment of a guardian may be filed by a guardianship authority, the person whose interest is to be looked after (client), as well as the representative (guardian), parent, spouse, child or other person close to them (section 72.1 of the Guardianship Services Act).

In addition, instead of making a petition for the appointment of a guardian themselves, the persons above or any person who has become aware of someone being in need of guardianship, may notify the guardianship authority of this need regardless of any duty of confidentiality. The notification is made to the guardianship authority in whose district the person concerned resides or, if the person is not resident in Finland, to the guardianship authority in whose district they normally stay. Upon receipt of the notification, the guardianship authority takes measures to determine the need of guardianship and, where necessary, files a petition with the district court for the appointment of a guardian (section 91 of the Guardianship Services Act). In practice, majority of petitions to the court are made by the guardianship authority.

20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?

The guardian may be appointed, if the person whose interests need to be looked after does not object to the appointment. If they object to the appointment of the guardian, the appointment may nonetheless be made if, taking their state and need for a guardian into account, there is no sufficient reason for the objection (section 8.2 of the Guardianship Services Act).

21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:

a. a requirement of legal representation of the adult;

According to section 82 of the Guardianship Services Act, the court may on its own initiative appoint a counsel or guardian for the judicial proceedings for the person whose guardianship is involved, if this is necessary in view of the legal safeguards due to that person. This so called procedural representation is representation of the client for the duration of the trial where the client is a party. One example is the appointment process of a guardian. During the process, it is the duty of the representative to protect the client´s legal rights. Procedural representation is temporary, in which case the duration of the task is set a certain deadline (section 15 of the Guardianship Services Act). The order may continue to be valid as a result of an appeal to a higher court.

b. availability of legal aid;

A client (or their procedural representative) may apply for state-funded legal aid. The fee of an attorney appointed under the Legal Aid Act (257/2002) is determined in accordance with the Legal Aid Act and it is paid by the state. Legal aid may be provided free of charge or the client may have to pay the partial compensation according to their financial situation.

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

In the case of the appointment of a representative for an adult, the opportunity to be heard is reserved for the person whose interests are to be monitored and, unless it is manifestly unnecessary under the circumstances, for their spouse (section 73 of the Guardianship Services Act).

d. requirement of a specific medical expertise / statement;

In a matter pertaining to the appointment of a representative or the restriction of someone's competency, the court will on its own initiative procure all necessary information (such as a medical statement) for a decision in the matter (section 78 of the Guardianship Services Act). In practice, as the majority of cases that come to court are petitions from the guardianship authority, it is the guardianship authority that compiles the necessary medical evidence for the proceedings.

e. hearing of the adult by the competent authority;

In the case of the appointment of a guardian for an adult, the opportunity to be heard shall be reserved for the person whose interests need to be looked at (section 73 of the Guardianship Services Act).

However, the opportunity to be heard need not be reserved if no information is available regarding the whereabouts of the recipient or a person empowered by them to receive the service (section 73.4 of the Guardianship Services Act and the Code of Judicial Procedure, chapter 11:9)

If, due to the client's condition, the notice cannot be served to them, a process guardian shall be appointed. However, there is no need to appoint a process guardian and the hearing may be omitted, if this is not necessary with regard to the legal protection of the person to be heard.

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

Everyone who has the right to bring the matter before a court under section 72 (guardianship authority, the person whose interest is to be looked after, as well as the representative (guardian), parent, spouse, child or other

person close to them) have a standing to appeal against a court order on the appointment of a representative or the restriction of someone's competency (section 80).

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

According to section 65 of the Guardianship Services Act, a guardianship or a restriction of competency must be entered into the register of guardianship affairs, where:

(1) a guardian is appointed for an adult;
(2) the competency of an adult is restricted;
(3) a person other than the parent of a minor is appointed as the guardian of the minor;
(4) a guardian is appointed for a minor in accordance with section 9 or the competency of a minor is restricted in accordance with section 19;
(5) a guardian is appointed for an absent person or a future owner;
(6) a person for whom a guardian has been appointed in a foreign state, moves to Finland, unless it has been decided that the supervision of the guardian is not conducted in Finland.

However, the guardianship is not entered into the register of guardianship affairs, if the task of the guardian does not involve the management of property or attending to a share in an undivided estate.

When a court issues an order, which entails entry or modification of the guardianship into the register of guardianship affairs, it must make a notification of this to the guardianship authority supervising the guardian in question. If the court order has been appealed, the court making the final decision takes care of the notification.

Appointment of representatives/support persons

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

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

Guardians are usually public guardians or private persons appointed to be a representative to their close family member. The public guardian is usually a public official employed by a public guardianship office. In 2021, 34,633 clients had a public guardian, 19,398 clients had a private person as a

guardian[35] and 4,085 clients had guardians that were private service providers acting in that capacity.

According to the Guardianship Services Act, a suitable person who consents to the appointment is eligible as a guardian. In the assessment of suitability, inter alia the skill and experience of the nominee and the nature and extent of the task are taken into account (section 5).

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

In the case of the appointment of a representative for an adult, the opportunity to be heard must be reserved for the person whose interests are to be monitored and, unless it is manifestly unnecessary under the circumstances, for their spouse (section 73 of the Guardianship Services Act).

The person's opportunity to be heard includes also the opportunity to give an opinion of the person of the prospective guardian. If the application for the appointment is made by the prospective client themselves, they can in practice choose the person of the guardian, if the prospective guardian has consented to the task.

c. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?

There is no order of priority per se, but since public guardians may have hundreds of clients, close family members are favoured, if possible, because a family member knows the client, knows their life history and attitudes, and they may have a better opportunity to take the client's wishes into account and thus promote the client's best interests. A public guardian is appointed, for example, to a person who 1) does not have a close person who could or would like to become a guardian; 2) if the property is so extensive and requires measures that the family member cannot cope with acting as a guardian; 3) if there is discord among family members and, for example, there have been suspicions that one of the family members has used the client for financial gain. In this case, it is best to appoint an impartial public guardian to act in the best interests of the client.

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

[35] The number of private persons as guardians includes also those minors, whose guardian is some other private person than a person who has custody of the child or who for some other reason have been registered in the Registry of Guardianship Affairs.

Legal counsel *ex officio* (procedural representative), hearing of the client and their spouse, right of the court to obtain evidence *ex officio*, appointment of a public guardian in disputes with family members, right to appeal and legal aid.

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

Yes. A court or guardianship authority may appoint several guardians and, where necessary, decide on the division of task among them (section 4.3 of the Guardianship Services Act).

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

Private person can always refuse appointment, but a public guardian does not have that opportunity.

During the measure

Legal effects of the measure

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

The appointment of a guardian does not disqualify the client from administering their own property or entering into transactions, unless otherwise provided elsewhere in the law (section 14 of the Guardianship Services Act).

A receivable that belongs to property that is being managed by the guardian may be repaid only to the guardian or an account of the client designated by the guardian. However, the repayment shall be effective even if made to the client, if the debtor did not know and, under the circumstances, could not be expected to know, that the repayment should have been made to the guardian. If the client has an account with a credit institution, the guardian must notify the institution as to who has the right to withdraw funds from the account (section 31 of the Guardianship Services Act).

The guardian also uses their discretion on assessing the reasonable amount of money that is given to the client for weekly use, depending on the client's funds (section 38 of the Guardianship Services Act). If the client receives municipal health and social services, the Act and Decree on Client Charges in Social Welfare and Health Care (734/1992) determines the amount of the client fees, the payment ceilings and the minimum amount of the client's income that must be left for the client's own use after the fee.

Powers and duties of the representatives/support person

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

a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:

b. property and financial matters;

General

All the above. The guardian can act in the place of the adult, act together with the adult or provide assistance in property and financial matters.

The guardian is competent to represent the client in transactions pertaining to the client's property and financial affairs, unless the appointing court has otherwise ordered or unless it has been otherwise provided elsewhere in the law (section 29.1).

Usually, a guardian is tasked with dealing with all the client's financial affairs. In some cases the guardian's task may be restricted to covering only certain transactions, matters or property.

Before the guardian makes a decision in a matter falling within their task, they must inquire the opinion of the client, if the matter is to be deemed important from the client's point of view and if the hearing can be arranged without considerable inconvenience. However, no hearing is necessary, if the client cannot understand the significance of the matter (section 43).

Property management

The guardian must manage the property of the client in a manner allowing for the property and the revenue to be used for the benefit of the client and for the satisfaction of their personal needs. In this task, the guardian must take conscientious care of the rights of the client and promote their interests.

The guardian must assume the administration of the property of the client in so far as necessary for the safeguarding of the client's interests. Where necessary, the guardian has the right for executive assistance from the police, as provided in section 1 of chapter 9 of the Police Act (872/2011). However, as regards property that the client can decide on, such property must not be taken into administration against the will of the client (section 37).

The property that the client needs for personal use must be left to them. A reasonable amount of money, in view of the needs and other circumstances of the ward, must be left to the administration of the ward. The guardian may leave also other property to the administration of the client, if this is in the best interests of the client.

If the client wishes to make a gift which, in view of the circumstances, is normal and of little financial significance, the guardian must see to it that the wish of the client can be fulfilled (section 38).

The guardian must retain the property that the client needs during the guardianship or afterwards for accommodation or business, or that is otherwise of special value to the client.

Other property, not to be used for the maintenance or other needs of the client, must be invested so that it is sufficiently safe and yields a reasonable return.

Upon the request of the client, the guardian shall explain to him or her the financial situation and the property management measures that the guardian has taken (section 39).

c. personal and family matters;

If the court has so ordered, the guardian is competent to represent the client also in matters pertaining to their person (such as giving consent to treatment for instance), if the client cannot understand the significance of the matter at the time when the decision has to be made. However, the guardian does not have such competence in matters subject to provisions to the contrary elsewhere in the law (section 29.2).

The guardian is not competent to give a consent to marriage or adoption on the behalf of the client, nor to acknowledge paternity, consent to an acknowledgement of paternity, make or revoke a will or represent the client in other matters of a comparably personal and individual nature (section 29.3).

d. care and medical matters;

A guardian appointed for an adult must see to it that the client is provided with the treatment, care and therapy that are to be deemed appropriate in view of the client's need of care and other circumstances, as well as the client's wishes (section 42).

If the court has so ordered, the guardian is competent to represent the client also in matters pertaining to their person (such as giving consent to treatment for instance), if the client cannot understand the significance of the matter at the time when the decision has to be made. However, the guardian does not have such competence in matters subject to provisions to the contrary elsewhere in the law (section 29.2).

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

According to section 1.1 of the Guardianship Services Act, the objective of guardianship services is to look after the rights and interests of persons who cannot themselves take care of their financial affairs owing to incompetency, illness, absence or another reason.

Thus, in managing the affairs of the adult, the guardian must always act in accordance to the best interests of the adult. In doing so they also have to take into account the opinion of the adult as far as possible. Respecting the client's will is a central value behind the legislation and the aim is that a person's capacity to decide on their affairs is not restricted any more than is necessary to protect the interests of that person.

The realisation of the right to self-determination of a person under guardianship is largely dependent on the way in which their guardian seeks to respect that right. In the relationship between the guardian and the client, it is essential that the guardian exercises their decision-making power in accordance with the basic principles of the Guardianship Services Act. This will happen if the guardian acts in cooperation with their client, negotiates with them in relation to key decisions, and listens to, respects and takes the opinions of the client into account. The sole objective in these situations must be the realisation of the client's interests.[36] Thus, a client's right to participate in decisions affecting their lives can be seen as part of their autonomy.[37]

The significance of the client's autonomy as a guiding principle of the Guardianship Services Act is reflected in the provisions governing the client's right to be heard on matters that the client deems important (section 43).

f. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?

A person under guardianship has access to the information on him or herself in the documents of the guardianship authority, as specifically provided in the Act of the Openness of Government Activities (621/1999). After the death of the person under guardianship, the heirs have the same access to information that could have been granted to the persons themselves (section 88).

Family

A person in the service of the state, the municipality or a provider of guardianship services, a public representative, a guardian and an expert providing guardianship advice can not without the consent of the person concerned disclose matters that they have learned in the course of their guardianship duties, if the matter is to be kept secret in order to protect the financial interests or privacy of an individual. The duty of confidentiality does

36 VÄLIMÄKI (fn 22), p. 38.

37 R. HARDING, 'Legal constructions of dementia: discourses of autonomy at the margins of capacity' (2012) 34(4) *Journal of Social Welfare & Family Law* 425, 439; MÄKI-PETÄJÄ-LEINONEN 2016 (fn 25), pp. 153–56. See also A. MCGEE, 'Best Interest Determinations and Substituted Judgement: Personhood and Precedent Autonomy' in C. FOSTER, J. HERRING and I. DORON (eds), *The Law and Ethics of Dementia,* Hart Publishing, Oxford 2014, pp. 135–47, for discussion of attenuated autonomy, which takes into account a person's wishes, values and beliefs.

not restrict the other duties of confidentiality imposed by law on public servants. The provisions above do not prevent the disclosure of the matter:

(1) to state or municipal authorities or other persons for the performance of task under this Act;
(2) to prosecutors or the police for the investigation of crime;
(3) to a court, if necessary, or
(4) to a person entitled by law to the same (section 92 of the Guardianship Services Act).

Therefore, if the client has given their consent to disclosure, information can be shared with family members. Communication with the family members is also recommended, as family members are an important source of information on the everyday status of the client.

Supervisory authority

The activities of the guardian are supervised by the guardianship authority (section 64.1)

Within three months of the commencement of their duties, the guardian must provide the guardianship authority with an inventory of the assets and liabilities of the client that are to be managed by the guardian. The inventory must indicate also the property that has been left to the administration of the client under section 38.1. If the client later acquires property that is to be managed by the guardian, an inventory of the acquired property shall be provided within one month of the acquisition. However, the duty to provide an inventory does not apply to such recurring payments that derive to the client on the basis of a right entered into the inventory (section 48 of the Guardianship Services Act).

A guardian charged with the management of property must keep accounts of the assets and liabilities of the client and of the transactions during the accounting period. A guardian appointed to a task other than the management of property must keep such notes that they can provide an account of the measures taken in the performance of their task (section 50 of the Guardianship Services Act).

A guardian referred to in section 50.1 must provide the guardianship authority with a statement of accounts every year (annual statement). The guardianship authority may decide that the accounting year is to be a year's period other than a calendar year, if this is appropriate in view of the management of the property, accounting or the auditing of the accounts (section 51 of the Guardianship Services Act).

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

A guardian appointed for an adult must see to it that the client is provided with the treatment, care and therapy that are deemed appropriate in view of the client's need of care and other circumstances, as well as the client's wishes (section 42 of the Guardianship Services Act).

In accordance with the recommendations of the working group on the development of public guardianship, the client also has the right to meet their guardian and, if necessary, to contact this guardian.

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

According to law, the guardian of an adult must have the right to compensation for their necessary expenses from the assets of the client, as well as to a fee that is reasonable in view of the nature and extent of the task and the assets of the client. The Ministry of Justice can issue more detailed guidelines on the basis for the determination of guardians' fees (section 44 of the Guardianship Services Act).

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

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

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

If a client has several guardians, they will perform the task of guardian together, unless the court has decided on a division of the task among the guardians. If a guardian cannot participate in a decision owing to a journey, illness or another reason, and a delay in the decision would be harmful, the consent of that guardian is not required. However, a decision on a matter of considerable significance to the client may be made only by the guardians together, unless the best interests of the client obviously require otherwise. If the guardians cannot agree on a matter that they must decide together, and a delay in the decision would be harmful, a guardian may request a decision from the guardianship authority as to whose opinion is to prevail. The decision must be requested from the guardianship authority, which supervises the activities of the guardian (section 30).

Safeguards and supervision

27. Describe the organisation of supervision of state-ordered measures. Pay attention to:

a. what competent authority is responsible for the supervision?

The guardian's activities are supervised by the guardianship authority (section 46). The guardianship authority is the Digital and Population Data Services Agency. However, in Aland, the guardianship authority shall be the State Provincial Office of Aland, if the person whose interests are to be safeguarded has a municipality of residence referred to in the Municipality of residence Act (201/1994) in the Aland Islands, or if the person whose interests are to be safeguarded does not have a municipality of residence in Finland, but is mainly resident in the Aland Islands (section 84).

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

After having received an annual account or a decision account, the guardianship authority must, without delay and to the extent required by good auditing practice, inspect how the property has been managed, whether the client has been given reasonable disposable funds, whether the amount of the guardian's fee is justified and whether the account has been correctly drawn up. The guardianship authority may inspect the account more generally than provided above, if there is reason to assume, on the basis of the amount or nature of the property or other circumstances, that the best interests of the client will not be compromised. However, the first account submitted by the guardian must be inspected using normal standards. On request, the guardian is obliged to provide the guardianship authority with all necessary information, receipts and documents related to their duties as well as to present the securities that they have in care (section 56).

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

A court must dismiss a guardian from their task, if the guardian proves to be unfit or unsuitable, or if there is another specific reason for the dismissal (section 16.1).

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

The guardian is liable in damages for the loss that they have deliberately or negligently caused to the client in the performance of their task. The provisions in chapters 2 and 6 of the Damages Act (412/1974) apply to the

adjustment of the liability and the division of liability among two or more liable persons. If a public guardian has caused the loss, also the provisions in chapters 3 and 4 of the Damages Act on the liability of a public body and public officials apply to the liability.

The client is not liable for loss caused by the guardian acting on the behalf of the client (section 45).

e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.

In Finland, the guardian is, in principle, not responsible for the damage that their client has caused to contractual or other third parties, unless there is a direct causal connection between the guardian's conduct and the damage caused. This could materialise, for example, if the guardian had a duty to supervise their client, which normally materialises only with regard to the relationships between a child and their parents or persons in institutional care.

According to the Damages Act, there are specific provisions on the reduced personal liability of persons under eighteen years and persons with diminished capacity, where an evaluation of reasonability is performed (chapter 2, sections 2 and 3). If the client causes financial loss to a third party and they are regarded to be liable for it, the payment of damages is dealt with by the guardian as any other issue of a financial nature, and it is paid from the funds of the client, not from the funds of the guardian.

28. Describe any safeguards related to:

a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;

According to section 34, unless otherwise provided elsewhere in the law, a guardian is not competent to do the following on the behalf of the client, unless so permitted by the guardianship authority:

(1) convey or purchase real property or a leasehold over land and buildings attached to it which can be transferred to a third party without hearing the titleholder;
(2) hand over property as a pledge or otherwise give in pledge on the property;
(3) lease out real property or other property referred to in subparagraph (1) for the use of a third person for longer than five years or for longer than one year after the client becomes an adult;
(4) take out a loan, other than a student loan guaranteed by the state, or assume liability for a bill of exchange or the debt of another person;
(5) begin to pursue a business in the name of the client;
(6) commit to the establishment of a general or limited partnership or to accession to such a partnership;

(7) renounce an inheritance or convey the share of the client in a decedent's estate;
(8) enter into an agreement on the joint administration of a decedent's estate;
(9) enter into an agreement on the separation or distribution of assets that is to be carried out without a distributor, as referred to in chapter 23 of the Code of Inheritance;
(10) convey or against payment acquire the right of occupancy referred to in the Right-of-Occupancy Housing Act (650/1990) or shares or participations entitling the holder to hold the apartment or another part of the building or real estate, with the exception of the shares or participations referred to in point 13(g);
(11) convey, for an agreed term, an apartment possessed by virtue of a right, shares or participations referred to in subparagraph (10) for the use of another person for longer than five years or for longer than one year after the client becomes an adult;
(12) sell logs or undertake logging for the purpose of sale, extract stone, gravel, sand, clay, peat or soil from the lands of the client for the purpose of sale, or convey a right of extraction, unless the same is based on a property management plan approved by the guardianship authority; nor
(13) grant a monetary loan or consideration to acquire financial instruments or participations in organisations referred to in chapter 1, section 14 of the Act on Investment Services (747/2012), with the exception of:
    a) deposit of funds to a credit institution authorised in a Member State of the European Economic area;
    b) acquisition of bonds issued by the State, the Region of Aland, a municipality or a joint municipal authority;
    c) acquisition of securities traded in a stock exchange referred to in chapter 1, section 2 of the Act on Trading in Financial Instruments (1070/2017), on a regulated market or on an MTF;
    d) acquisition of units in a common fund in accordance with the UCITS Directive referred to in chapter 1, section 2, subsection 1, paragraph 16 of the Act on Common Funds Registered in Finland or in a Foreign UCITS referred to in chapter 23, section 1, subsection 1 of the said Act that may market its units in Finland under subsection 2 of the said section;
    e) acquisition of units in an alternative fund referred to in the Act on Alternative Investment Fund Managers (162/2014) whose capital is always, under its rules, invested at least three quarters in deposits, bonds and securities referred to in subparagraphs a, b and c and whose units can be offered to non-professional customers in accordance with chapter 13 of the said Act;
    f) acquisition of financial instruments equivalent to financial instruments referred to in subparagraphs a-e to be provided for by decree of the Ministry of Justice;
    g) acquisition of shares or participations the main content of which is the right to receive a commodity or service normally used in a household, if the share does not involve personal liability for the

debts of the corporation.

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

If the client's capacity has not been limited, there are no specified 'unauthorised acts' of the adult under Finnish law over and above the general limits set for any person in, for example, criminal law.

A transaction beyond the competence of the guardian is not binding on the client. A transaction entered into by the guardian without the required permit is also not binding on the client, unless the guardianship authority from whom the permit should have been requested, grants a post facto permit on the request of the guardian. Specific provisions apply (section 27.2), if the counterparty knew that the guardian is acting beyond their competence, and it may have an effect on the right of the counterparty to renounce the transaction. If a transaction entered into by the guardian is not binding, the provisions of section 25 of the Contracts Act (228/1929) apply, in so far as appropriate, to the liability of the guardian in damages to the injured counterparty.

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

Actions committed with criminal intent are regulated in criminal law. Provisions on for example fraud or embezzlement may apply.

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

According to section 32, a guardian may not represent their client if the opposing party is the guardian himself or herself, the spouse or child of the guardian or someone represented by the guardian. If the siblings have a joint guardian, the guardian may, however, represent the siblings in the distribution of the estate, if their interests do not conflict due to the claims made in the distribution of the estate or other circumstances related to the distribution.

A guardian other than the parent who is the custodian of their minor child may also not represent their client if the opposing party is:
1) the spouse of the child of the guardian or the child of the guardian's spouse or the spouse of the guardian;
2) the grandchild, sibling, parent or grandparent of the guardian or their spouse or the spouse of such a person; or
3) a child or a parent's sibling of a sibling of a guardian.

End of the measure

29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.

According to section 17 of the Guardianship Services Act, the task of a guardian terminates when:

1) the appointment of the guardian ceases to be valid, as provided in Section 15;
2) the client dies;
3) the guardian is dismissed from the task or declared to be incompetent; or
4) when the client attains the age of 18 years, if the guardianship is based on the fact that the client is a minor.

The task of a substitute guardian terminates when, after the preventing circumstances cease to apply, the guardian and the substitute together notify the same to the guardianship authority. If the guardian and the substitute do not agree on whether the task of the substitute is terminated, a district court must rule on the matter upon a petition by either of them. Upon a petition, a court must terminate the task of a guardian when the client no longer needs one. The court may order that the duties of a guardian be terminated also if the client's place of residence has been transferred to a foreign state and the purpose for which it was appointed can no longer be pursued through guardianship.

In addition to the court, the guardianship authority may, on the grounds referred to in subsection 3, order that the duties of the guardian be terminated if the guardian has been appointed under section 8 or 9. A further condition is that the client is able to understand the significance of the case and that they, together with the guardian, request that the duties of the guardian be terminated.

Reflection

30. Provide statistical data if available.

Table 5. Number of appointments of guardians by guardianship authority or by court in 2011, 2016 and 2021.

Year	Appointment of a legal representative by DVV	Appointment of a legal representative by court	Total
2011	1283	5303	6586
2016	1621	6290	7911
2021	1531	5089	6620

Table 6. Number of terminations of the m

andate of the guardian in 2011, 2016 and 2021.

Year	Termination of mandate of legal representative by DVV	Termination of mandate of legal representative by court	Total
2011	173	130	303
2016	173	105	278
2021	252	35	287

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

As mentioned above, the main problem with the current law is the fact that the scope of the client's freedom of action remains at the guardian's discretion. In addition to decision-making power concerning bank accounts, the guardian also has discretion as to the amount of funds to be made available to the client. Section 38.1 of the Guardianship Services Act stipulates that the client must be provided with an amount of funds deemed reasonable in relation to their needs and other circumstances. Indeed, in practice, the client's autonomy is not always realised sufficiently. This can be seen, for example, in the complaints dealt with by the Finnish Parliamentary Ombudsman. In many resolutions to the complaints guardians have been considered to have

prevented their clients from using their assets or to have otherwise restricted the financial capacity of clients whose legal capacity is not restricted by law.[38]

Given the current state of the legislation, consideration should be given on how to best promote the autonomy of a client that has *de jure* legal capacity. In practice, the issue can be resolved by the guardian taking active steps to support the client's autonomy. For example, as to access to bank accounts, Helin reasons that where it is unnecessary for the guardian to decide on the use of the funds in an account, that account can – and should – be excluded from the scope of the property administered by the guardian. In this case, the client's rights in relation to the account remain unchanged.[39] Such a procedure would also be in line with the CRPD's stipulation that persons with disabilities shall have equal right to own property and to control their own financial affairs (Article 12.5). Furthermore, appropriate measures are to be taken to provide access to the support they may require in exercising their legal capacity (Article 12.3).

In interviews with public guardians and their assistants, a question was asked about their clients' ability to make decisions in practice. The aim of the interviews was to receive information about the functioning of the law and the possible different theoretical presuppositions behind the conception of autonomy. As a result, it was noted that in the Finnish guardianship practice, many different conceptions of autonomy (individual/relational, content-neutral/substantive) play a role. Furthermore, there are inconsistent practices concerning the respect of autonomy of the client between different regions, yet they do not follow any set of guidelines even within the same guardianship office. In practice, much depends on the individual guardian and on the nature of the principles they follow in their work. Some appear to be quite liberal, while others take a more paternalistic approach. However, support to the clients' right to autonomy was also evident in the interviews. The public guardians and their assistants brought up many ways to support the autonomy of the client, such as hearing and negotiating with a client and giving them the right to choose between different options available. As a conclusion, the guardians hoped for nationally uniform guidelines and recommendations on the interpretation of the law concerning the respect for autonomy of a client.[40]

Such guidelines and recommendations are already provided by the Working Group on the Development of Public Guardianship since 2009. Their recommendations are freely available to the public and to the guardianship offices for example via the internet.[41] The present working group took over the

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38 See, e.g. Parliamentary Ombudsman resolution nr. 1993/4/06, 21.12.2007 (Provision of assets to the client as goods).

39 HELIN 2016 (fn 23), p. 1017.

40 See AALTO-HEINILÄ and MÄKI-PETÄJÄ-LEINONEN 2021 (fn 24) and MÄKI-PETÄJÄ-LEINONEN 2022 (fn 21).

41 See <https://oikeus.fi/edunvalvonta/fi/index/edunvalvonnantoimintatavat/edunvalvonnantyoryhmankannanotot.html>, accessed 27.8.2022

functions of the earlier Working Group on the Development of Guardianship Services, which was set up already in 2001. The two working groups co-existed from 2009 to 2016. Therefore, it seems that the challenge is not in the lack of development work or the lack of guidelines and recommendations for different types of situations, but rather in the area of raising awareness of the existing guidelines and recommendations within the guardianship offices.

Although regulation on the supervision of public guardians and of the property of minor clients was already slightly relaxed in 2011, from the guardianship authority's perspective further reforms are required. The number of clients is on the rise also in Finland, and the resources used for public guardianship services and supervision are not expected to increase in a sufficient measure. Guardianship authorities have already started to campaign to ensure that all those aged 40 or over would make a continuing power of attorney and would appoint someone close to them to act as their attorney in the future. In addition, the guardianship authorities have proposed that in the future, the supervision of public guardianship and persons acting as attorneys should be made more risk-based. This would enable taking into account the circumstances related to different case groups and situations and make it easier for the guardian or the attorney to act without endangering the legal protection of the client.

SECTION IV – VOLUNTARY MEASURES

Overview

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

Guardian – *[edunvalvoja/intressebevakare]* under Guardianship Services Act (section 12): In addition to a court, also a guardianship authority may appoint a guardian for a person who is in need of a guardian on application by a person in need of guardianship. In these cases, it is a prerequisite for the appointment of the guardian that the person whose interests are to be looked after understands the significance of the matter and that they request that a named person be appointed as the guardian.

Power of Attorney - [*valtuutus/fullmakt*] based on the Contracts Act (228/1929). The rules on power of attorney are set out in chapter 2 of the Contracts Act. The grantor issues a mandate in which they specify the attorney's general competence. According to section 10, a grantor acquires rights directly in relation to a third person and becomes bound by way of the transactions entered into by the agent within the scope of their authority and in the granter's name. The diminished competence of the granter does not automatically terminate the mandate or provide grounds for appointing a guardian.

Continuing Power of Attorney - [*edunvalvontavaltuutus/intressebevakningsfullmakt*] based on the Act on the Continuing Power of Attorney (648/2007). The Act applies to a power of attorney that its granter has given with the purpose that it shall enter into force in the event that the granter becomes incapable of managing their affairs due to illness, mental impairment or health impairment or for another equivalent reason (continuing power of attorney), (section 1).

Advance directive - [*hoitotahto/livstestament*] based on the Act on the Status and Rights of Patients. Section 8 of the Act on the Status and Rights of Patients provides a rule for emergency situations. If an emergency occurs, a patient has to be given the necessary treatment to ward off a hazard imperilling their life or health even if it is impossible to assess the patient's wishes because of unconsciousness or other reason. However, if the patient has earlier steadfastly and competently expressed their wishes concerning treatment given to him or her, they must not be given a treatment that goes against those wishes.

33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measure. Please consider, among others:

a. the existence of specific provisions regulating voluntary measures;

Please see responses under question 32.

b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.

Please see response to question 32 and especially its reference to the powers of attorney under the (general) Contracts Act.

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

The Finnish legal system makes it possible to perform legal planning for later life by seeking a guardianship order from the guardianship authority, giving powers of attorney or continuing powers of attorney or drawing up an advance directive.

If a person applies for a guardian for himself or herself, the Guardianship Services Act and the provisions discussed under chapter III (State-ordered

measures) apply to the situation. Therefore, this chapter focuses on other types of authorisations.

As a legal institution, the continuing powers of attorney comes very close to the appointment of a guardian. It can give almost the same competence to act as the Guardianship Services Act for the attorney. However, as a system emphasising the self-determination of the client, the granter has the power to decide which powers they will grant to the attorney.

An ordinary power of attorney is also possible, but its use is more uncertain, as banks, for example, do not always accept it. In this chapter, we mainly focus on the continuing powers of attorney, as the continuing power of attorney is the best regulated and currently the preferred type of authorisation available for voluntary advance planning.

It is also possible to give an advance directive on treatment and care or to authorise a close person to give consent on behalf of the client. This kind of advance directive also binds the possible guardian or persons close to the patient who, on behalf of an incapacitated patient, express their will regarding their care. Advance directives may also be given in a continuing power of attorney or in a guidance letter accompanying the continuing powers of attorney.

35. Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?

Continuing power of attorney: According to law, by a continuing power of attorney, the granter may authorise an attorney to represent the granter in matters concerning their property and in other economic and financial matters. The attorney may also be authorised to represent the granter in matters pertaining to their person, the significance of which the granter is unable to understand when the power of attorney should be exercised. The scope of a continuing power of attorney may be limited so that it only applies to a specific legal transaction, matter or property. The attorney is not competent, on behalf of the granter, to give consent to a marriage or adoption, to acknowledge paternity, to consent to acknowledgement of paternity, to make or revoke a will, or to represent the granter in any other personal matter comparable to these.

Advance directive: Expressions in an advance directive tend to be either consent or refusal of possible future treatment. An advance directive can also be made orally, in which case it is the duty of the health care personnel to make a record of it in the patient files. An advance directive is in force immediately, but it is usually given effect only after the patient loses their capacity to make decisions or is unable to communicate.

Traditionally, an advance directive is thus understood as mainly the expression of a person's will for end-of-life care. An advance care plan can also be part of an advance directive.[42] Such is the case in the Alzheimer Society of Finland's Advance Directive form. The form consists of two main sections: the legally-binding expressions concerning care and the section for advance care planning. The first part consists of the end-of-life decisions and the possibility to appoint a healthcare proxy to make treatment decisions. For medical staff this part is legally binding. The second part should be considered as the patient's wishes for treatment and care. It should be respected as much as possible, emphasising the patient's right to individual autonomy.[43] Life with cognitive disabilities may last several years and involve different kinds of care decisions. The wider advance care planning could be more important to a person than a "traditional" advance directive. It has thus been seen as essential that various views and wishes about care could exist in an advance directive containing any wishes about specific life-values to be respected throughout the care, wishes about the future care unit, the content of the care to be given, the use of security-related technology and the views of the use of finances to obtain the best possible care and treatment.[44]

Power of attorney: Power of attorney is usually made for dealing with financial matters. However, if a person authorises a person close to him or her to make care decisions, this is usually referred to as a health care authorisation. In theory, a private mandate is not bound to any specific form and can be given orally or implicitly.[45] In practice, due to problems in proving the competence of the attorney, a written mandate is the most feasible option. Power of attorney is in force directly after its creation and they are not registered.

In the following, we will be focusing on the continuing power of attorney. The other voluntary measures will only be mentioned, if it is warranted due to the nature of the question.

Start of the measure

Legal grounds and procedure

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42 THE EUROPEAN JOINT ACTION ON DEMENTIA, *Synthesis report*, Alzheimer Cooperative Valuation in Europe (Alcove) 2013 p. 81 <https://www.alcove-project.eu/images/pdf/ALCOVE_SYNTHESIS_REPORT_VF.pdf> accessed 27.08.2022. On advance care planning, see also M. DE BOER, *Advance directives in dementia care. Perspectives of people with Alzheimer's disease, elderly care physicians and relatives*, Vrije Universiteit Amsterdam, Amsterdam 2011, pp. 65-77. See also T. GOFFIN, 'Advance Directives as an Instrument in an Ageing Europe,' (2012) 19 *European Journal of Health Law*, pp. 124-129.

43 See Alzheimer Society of Finland, 'Advance Directive', <https://www.muistiliitto.fi/en/memory-diseases/advance-directive> accessed 27.08.2022.

44 See MÄKI-PETÄJÄ-LEINONEN 2016 (fn 25)

45 See A. MÄKI-PETÄJÄ-LEINONEN, *Ikääntymisen ennakointi – Vanhuuteen varautumisen keinot*, AlmaTalent, Helsinki 2013, pp. 147-148.

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

A continuing power of attorney may be made by a person who has reached the age of 18 years and is capable of understanding the significance of the document (section 5).

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

According to section 6 of the Act on Continuing Power of Attorney, a continuing power of attorney must be made in writing. The granter must, in the simultaneous presence of two witnesses, sign the document or attest to the authenticity of their signature on it. After this, the witnesses must attest to the document by signing it. The witnesses must be aware of the document being a continuing power of attorney, but the granter may refrain from disclosing its contents to them.

The document must also indicate:
1) that it constitutes an authorisation;
2) the matters in which the attorney is authorised to represent the granter;
3) the granter and the attorney; and
4) a provision stating that the continuing power of attorney enters into force in the event that the granter becomes incapable of managing their affairs due to illness, mental impairment or health impairment or for another equivalent reason.

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

a. the circumstances under which voluntary measure enters into force;

According to section 24 of the Act on the continuing power of attorney, the guardianship authority must, upon application of the attorney, confirm a continuing power of attorney if:
1) the granter had reached the age of eighteen years when they made the power of attorney;
2) the power of attorney has been made in the manner provided (see reply to Question 37); and
3) the granter has, due to illness, mental impairment or health impairment or for some other equivalent reason, become incapable of managing the affairs covered by the power of attorney.

b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?

The attorney must present the guardianship authority with the original continuing power of attorney document and a medical certificate or other comparable reliable evidence stating that the prerequisite for confirming the power of attorney exists.

c. who is entitled to initiate the measure entering into force?

The attorney.

d. is it necessary to register, give publicity or any other kind of notice of the entry into force of the measure?

If a continuing power of attorney concerns representing the granter in economic and financial matters, the guardianship authority shall, when confirming the power of attorney, enter it in the Register of Guardianship Affairs as provided in the Act on Certain Personal Data Files of the Digital and Population Data Services Agency (1156/2019).

When a court makes a decision that results in a continuing power of attorney being entered in the Register of Guardianship Affairs or that results in a change of a state of affairs recorded in the Register, the court must notify the guardianship authority of this immediately after the decision has been issued or pronounced. If the decision is to be complied with only after it has become final, the notification must, however, be submitted only after the decision has become final. In the latter case, the notification shall be submitted by the court where the matter was last considered (section 27).

Appointment of representatives/support persons

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

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

The granter usually appoints a close, trusted person for the task. Such a person must be legally competent. According to section 3 of the Act, a legal person cannot be appointed as attorney referred to in the Act.

b. what are the safeguards as to conflicts of interests?

According to section 17 of the Act, the attorney cannot represent the granter, if the opposing party is:

(1) the attorney himself or herself, the spouse of the attorney, or someone the attorney represents;
(2) a child, grandchild, sibling, parent or grandparent of the attorney or of the attorney's spouse, or the spouse of any of the said persons; or
(3) a child of the attorney's sibling or a sibling of the attorney's parent.

In the above, the 'spouse' means a married spouse and a person living in a joint household in marriage-like circumstances or in another kind of relationship with the person concerned. The notion of relatives include half relatives. Furthermore, the attorney cannot represent the granter when the interests of the attorney and the granter may conflict in the matter for a reason other than those referred above.

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

Yes. There may be more than one attorney for the same task or the tasks may be decentralised. For example, one attorney may take care of financial matters and the other of matters related to the person. Furthermore, according to section 4 of the Act, the granter may appoint another attorney to represent him or her in case the original attorney becomes temporarily unable to exercise their mandate due to illness or disqualification or for another reason (replacement attorney) or in case the original attorney does not accept the mandate, resigns or becomes permanently unable to exercise the mandate (secondary attorney).

During the measure

Legal effects of the measure

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

According to section 16 of the Act, when acting on behalf of the granter, the attorney must conscientiously look after the rights of the granter and act in their best interests. Before the attorney makes a decision in a matter falling within the scope of their mandate, the attorney must ask the opinion of the granter, if the matter is to be deemed important for the granter and the consultation can take place without considerable difficulty. However,

consulting the granter is not necessary if the granter is not capable of understanding the significance of the matter.

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

The entry into force does not affect de jure capacity of a person.

Powers and duties of the representative/support person

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

a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:

- **property and financial matters;**
- **personal and family matters;**
- **care and medical matters?**

According to section 2 of the Act, the granter may authorise an attorney to represent the granter by a continuing power of attorney in matters concerning their property and in other economic and financial matters. The attorney may also be authorised to represent the granter in matters pertaining to their person, the significance of which the granter is unable to understand when the power of attorney should be exercised. The scope of a continuing power of attorney may be limited so that it only applies to a specific legal transaction, matter or property.

However, the attorney is not competent, on behalf of the granter, to give consent to a marriage or adoption, to acknowledge paternity, to consent to acknowledgement of paternity, to make or revoke a will, or to represent the granter in any other personal matter comparable to these.

As the idea behind the continuing power of attorney is that it only can enter into force when the granter no longer has the capacity to act him or herself, the attorney is mainly considered as acting in the place of the adult. However, as the capacity of the granter may fluctuate or depend on the nature of the action in question, the attorney's role may also be a supporting role. In any case, before the attorney makes a decision in a matter falling within the scope of their mandate, the attorney must ask the opinion of the granter, if the matter is deemed important for the granter and the consultation can take place without considerable difficulty (section 16). Consulting the granter is not necessary if the granter is not capable of understanding the significance of the matter.

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

The idea behind of the continuing power of attorney is that the granter appoints a trusted person as their attorney, who the granter believes will act in accordance to their will and preferences. The granter may also issue them with very precise instructions on how the matters should be handled. Also, when acting on behalf of the granter, the attorney must conscientiously look after the rights of the granter, asks the opinion of the granter, if applicable, and acts in their best interests.

c. is there a duty of the representative/support person to inform and consult the adult?

According to section 16 of the Act, before the attorney makes a decision in a matter falling within the scope of their mandate, the attorney must ask the opinion of the granter, if the matter is to be deemed important for the granter and the consultation can take place without considerable difficulty. However, consulting the granter is not necessary if the granter is not capable of understanding the significance of the matter.

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

According to section 22, if no agreement has been made concerning the attorney's fee and reimbursement of costs and the granter has not ordered them to be paid, the attorney has the right to receive, from the granter's funds, reimbursement for the necessary costs and a fee that is reasonable in view of the nature and scope of the mandate.

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

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

There may simultaneously be, for example, a continuing power of attorney and an advance directive for medical care. Much depends on the content of the continuing power of attorney. If the attorney is competent to deal with matters concerning the person, the advance directive is binding for the attorney. If the attorney is not competent to deal with matters concerning the person, the advance directive is binding to the person or persons authorised to make the

decisions for medical care in the directive or to the patient's family members or next of kin on the basis of their *ex lege* status.

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

The granter may appoint several attorneys. For example, the granter may order that one attorney represents the granter in financial matters and the other in matters concerning the person. In fact, this situation is considered as two separate continuing powers of attorney. In such cases, it is most practical to draw up two separate powers of attorney.

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

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

A person may have both a guardian and a continuing power of attorney. However, the continuing power of attorney cannot be confirmed if the granter has a guardian whose duties include managing the affairs covered by the power of attorney (section 24.2). The tasks of the guardian and the attorney cannot overlap.

According to section 21, if the attorney is temporarily impeded from exercising their mandate due to illness or disqualification or for some other reason and the granter has not appointed a replacement attorney, the district court or, at the request of the attorney, the guardianship authority may appoint a guardian to attend to the duties of the attorney in accordance with the provisions of the Guardianship Services Act concerning the appointment of a substitute guardian. However, the mandate of the guardian ends when the attorney and the guardian, after the termination of the impediment, together notify the guardianship authority of the termination. If the attorney and the guardian disagree on whether the mandate of the guardian has ended, the district court decides the matter upon application of either of the parties. If the attorney has not be granted competency to deal with matters concerning the person, there can also be simultaneous representation by the attorney in the financial matters and the family members acting as *ex lege* representatives for medical care.

b. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?

As the continuing power of attorney is confirmed by the guardianship authority, it is entered into the Register of Guardianship Affairs as provided in the Act on Certain Personal Data Files of the Digital and Population Data Services Agency (1156/2019). According to section 10 of the Act, the registered data, which include the mandate of the guardian and the scope of the power of attorney, is publicly available information available to third parties.

Safeguards and supervision

44. Describe the safeguards against:

a. unauthorised acts of the adult and of the representative/support person;

The Register of Guardianship Affairs has been set up in order for third parties to be able to check whether measures for the protection are in force with regard to a certain person.

According to section 14 of the Act, a legal transaction that the attorney enters into within the scope of the continuing power of attorney in the name of the granter entitles and obligates the granter immediately in their relationship to the third party. However, if the attorney has exceeded their competence or powers, a legal transaction that the attorney was not competent to enter into is not binding on the granter. If, at the time of entering into a legal transaction, the attorney acted contrary to the instructions given to him or her by the granter, the transaction shall not be binding on the granter, if the third party knew or should have known that the attorney had exceeded their powers (section 15).

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

Actions committed with criminal intent are regulated in the criminal law. Provisions on for example on fraud or embezzlement may apply.

c. conflicts of interests

According to section 17 of the Act, the attorney cannot represent the granter, if the opposing party is:

(1) the attorney himself or herself, the spouse of the attorney, or someone the attorney represents;
(2) a child, grandchild, sibling, parent or grandparent of the attorney or of the attorney’s spouse, or the spouse of any of the said persons; or
(3) a child of the attorney's sibling or a sibling of the attorney’s parent.

In the above, a 'spouse' means a married spouse and a person living in a joint household in marriage-like circumstances or in another kind of relationship with the person concerned. The notion of relatives includes also half-relatives. Furthermore, the attorney cannot represent the granter when the interests of the attorney and the granter may conflict in the matter for a reason other than those referred to above.

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

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

According to section 29 of the Act, the guardianship authorities supervise the continuing powers of attorney.

d. in each case, what is the nature of the supervision and how is it carried out?

According to section 29 of the Act, the guardianship authorities supervise the activities of the attorneys. The guardianship authority that has confirmed the continuing power of attorney is responsible for the supervision. If the continuing power of attorney has not been confirmed in Finland, the guardianship authority that would be competent to confirm the power of attorney is responsible for the supervision. The guardianship authority that is responsible for supervision may transfer the supervision to another guardianship authority, if the granter has a municipality of residence within the area of operation of the latter guardianship authority or if the transfer is otherwise necessary for the supervision. Before the supervision is transferred, the attorney and the guardianship authority to whom the supervision is to be transferred shall be heard.

According to section 32 of the Act, if a continuing power of attorney concerns representing the granter in economic and financial matters, the attorney shall keep accounts of the granter's assets and debts and the transactions made during the accounting period. If a continuing power of attorney concerns representing the granter in other than economic and financial matters, the attorney shall keep accounts that will enable him or her to report on the measures they have taken on behalf of the granter.

According to section 33 of the Act, if a continuing power of attorney concerns representing the granter in economic and financial matters, it may be provided in the power of attorney that the attorney must give a statement of accounts to the guardianship authority at regular intervals, however, at most once a year. Even if the power of attorney does not contain such a provision, the guardianship authority may request the attorney to give a statement on the

exercise of their mandate, if there is reason for this. Whenever requested to do so, the attorney must provide the guardianship authority with a statement referred to above and any other necessary information, receipts and documents related to their mandate and to present the securities being managed by him or her.

e. the existence of measures that fall outside the scope of official supervision.

Unlike guardianship and the continuing power of attorney, the general power of attorney and advance directives fall outside the scope of official supervision. The granter may have made private arrangements of supervision with, for example, family members, but there are no provisions on these kinds of arrangements.

End of the measure

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

According to section 11 of the Act, a continuing power of attorney shall cease to be in force:

1) when the power of attorney is revoked or, if the revocation is effected after the entry into force of the power of attorney, when the revocation enters into force;
2) when the granter dies; or
3) when the attorney notifies the guardianship authorities that they resign from the mandate.

If a guardian is appointed for the granter, the continuing power of attorney ceases to be in force insofar as the duties of the guardian include managing the affairs covered by the power of attorney. If the granter is declared bankrupt, a legal transaction entered into by the attorney after that will have the same effect as if the transaction had been entered into by the granter. Even if the continuing power of attorney has ceased to be in force for a reason referred to in above, the attorney has, however, before the guardian or the estate administrator can undertake the necessary measures, the right to take such measures under the power of attorney that are necessary for protecting the granter or the bankruptcy estate from any damage.

Reflection

48. Provide statistical data if available.

Table 7. Number of confirmations of a continuing power of attorney in 2011, 2016 and 2021.

Year	Confirmation of continuing power of attorney by DVV
2011	434
2016	2183
2021	5881

Table 8. Number of revocations of a continuing power of attorney in 2011, 2016 and 2021.

Year	Confirmation of revoking of continuing power of attorney by DVV	All
2011	4	310
2016	4	297
2021	20	323

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

Regarding continuing powers of attorney, there is not much case law yet and the legal literature is also relatively scarce. Tentative empirical data has been presented, which suggest, among other things, the granter´s ignorance of the content of the law. Problems have been found, for example, in compliance with formal regulations, using disabled witnesses, or drawing up the continuing power of attorney too late when the authorising person no longer understood its meaning. There have also been delays in the confirmations of the continuing powers of attorney, as it can take several months at the guardianship authority, and in the fact that the authorisation has lacked secondary and deputy attorney, which could have caused problems in managing the granters' affairs.

One of the problems with advance directives is that there is no clear legal regulation on them. Thus, there are no legal cases regarding their compliance.

SECTION V – *EX LEGE* REPRESENTATION

Overview

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

Yes. Such statutory representatives include, for example, relatives and family members operating under the Act on the Status and Rights of Patients and the Act on the Status and Rights of Social Welfare Clients, who may give consent to the treatment of a patient (Act on the Status and Rights of Patients, sections 6.2 and 6.3) or who are consulted in order to ascertain the client's opinion (Act on the Status and Rights of Patients, section 9). The Act on Disability Benefits (570/2007) and the social insurance legislation also contain special provisions on informal care. According to them, the right of a party to be heard may be exercised by a close relative approved by the national pension or insurance institution or by another person who is primarily in charge of the person, if the person, due to age, disability, illness or other reason, cannot himself or herself apply for the benefit or otherwise manage their affairs relating to the benefit and they do not have a guardian. The purpose of the provisions is to ensure that a party does not lose their right to a benefit when they are in fact unable to exercise their right to be heard.

Start of the ex-lege representation

Legal grounds and procedure

51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?

According to section 6 of the Act on the Status and Rights of Patients (785/1992), if an adult patient does not have the capacity to decide on the treatment given to him or her because of mental disturbance or mental retardation or for other reason, the legal representative or a family member or other close person of the patient has to be heard before making an important decision concerning treatment to assess what kind of treatment would be in accordance with the patient's will. In these cases, consent to the treatment must be sought from the patient's legal representatives, a close relative, or other person closely connected with the patient. In giving their consent, the patient's legal representative, close relative, or other person closely connected with the patient must respect the patient's previously expressed wishes or, if no wishes had been expressed, the best interests of the patient. If the patient's legal representatives, close relative, or other person closely connected with the patient refuse the care or treatment of the

patient, care or treatment must, as far as possible in agreement with the person who refused consent, be given in some other medically acceptable manner. If the patient's legal representatives, close relative, or other person closely connected with the patient disagree on the care or treatment to be given, the patient shall be cared for or treated in accordance with their best interests.

The social security legislation also contains special provisions on *ex lege* representation. For example, according to section 15 of the Act on Disability Benefits (570/2007), the benefit can be applied by a close relative approved by the Social Insurance Institution of Finland or by another person who is primarily in charge of the person, if the person eligible for the benefit, due to age, disability, illness or other reason, cannot himself or herself apply for the benefit or otherwise manage their affairs relating to the benefit and they do not have an appointed guardian. The purpose of the provisions is to ensure that a party does not lose their right to a benefit when they are in fact unable to exercise their right to be heard.

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

There are no specific provisions on the sufficient evidence required. In the two examples provided above, the lack of capacity and the need for the representative is either evidenced by the medical personnel itself by direct contact or by the Social Insurance Institution on the basis of the related documentation.

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

No.

Representatives/support persons

54. Who can act as *ex lege* representative and in what order? Think of a partner/spouse or other family member, or other persons.

A close relative or other person closely connected with the patient. The legislation does not establish a strict order of priority between a spouse and the children, for example. According to the Act on the Status and Rights of Patients, if the persons close to the patient disagree on the treatment, the patient must be cared for or treated in accordance with their best interests.

During the ex-lege representation

Powers and duties of the representatives/support person

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

The provisions of the Act on Disability Benefits fall under (i) property and financial matters and the provisions of the Act on the Status and Rights of Patients fall under (iii) care and medical matters.

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

Can an adult, while still mentally capable, exclude or opt out of such ex-lege representation

(a) in general or

Yes.

(b) as to certain persons and/or acts?

Yes.

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

Ex lege representation is subsidiary to other measures.

Safeguards and supervision

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

For example with regard to the Act on the Status and Rights of Patients, if the patient's legal representative, close relative, or other person closely connected with the patient refuse the care or treatment of the patient, the alternative care or treatment must, as far as possible in agreement with the person who refused consent, be given in some other medically acceptable manner. The medical personnel is not required to act according to the wishes of the *ex lege* representatives, if their wish is not medically acceptable. Also, if the patient's condition is long lasting, a legal representative can be appointed to the patient, after which *ex lege* representation is no longer required.

End of the ex-lege representation

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

If the patient regains capacity, dies or is appointed a guardian, whose competence covers the types of acts concerned.

Reflection

60. Provide statistical data if available.

No statistical data can be provided, as *ex lege* representation is not registered in publicly available registers.

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

These questions have mainly been discussed in legal literature.[46] The current situation, where decision-makers are not ranked according to the law, can cause confusion. For example, according to the Act on the Status and Rights of Patients, consent on the treatment on behalf of a disabled patient can be given by the patient's 'legal representative, next of kin or other close person'. The range of persons entitled to give consent is thus quite broad and loosely regulated. According to the provisions of the law, the patient's spouse, children, parents and siblings are considered to be the patient's next of kin. Another relative can be the patient's cohabiting partner or another person who lives permanently with the patient. Legal representative means the patient's guardian, trustee or a person authorised by the patient.[47]

No one entitled to decision-making is given priority over others according to the Act on the Status and Rights of Patients. Thus, for example, the eligibility of a legal representative (i.e. a guardian or an attorney) is not exclusive, but parallel to that of the patient's relative. This is referred to in section 6.3 of the Act, according to which: 'If the views of the legal representative, next of kin or other close person differ on the treatment, the patient must be treated in a way that can be considered in his best interests.' In this case, the doctor responsible for the patient's treatment is responsible for the weighing of the patient's interests.

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46 See, e.g., I. PAHLMAN, *Potilaan itsemääräämisoikeus*, Edita, Helsinki 2003 and A. MÄKI-PETÄJÄ-LEINONEN, *Ikääntymisen ennakointi – Vanhuuteen varautumisen keinot*, AlmaTalent, Helsinki 2013.

47 Ks. Government proposal nr. 185/1991, p. 17. Note that after the Guardianship Services Act of 1999 entered into force, the concept of a 'trustee' is no longer in use.

In the spring of 2003, a working group was appointed by the Ministry of Social Affairs and Health to prepare a proposal to amend the Act on the Status and Rights of Patients in order to clarify the interpretation of the Act. In a memorandum completed in May 2003, the working group proposed not only clearer regulation of advance directives, but also a new section 6 a, which would regulate the status of an adult incompetent patient. According to the proposal, a person appointed by the patient would primarily act on behalf of the incompetent patient. If the patient had not appointed such a person, or the appointed person was unable to participate or, if asked, did not want to participate in making decisions on the patient's care, the patient's relatives or family members would act on behalf of the patient. However, if a guardian had been appointed to the patient for matters related to care and treatment, this would supersede the others mentioned above.[48] Unfortunately, these proposed amendments have not yet been taken forward to the Parliament.

Specific cases of ex lege representation

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

62. Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then also legally bind the other spouse?

According to section 52 of the Marriage Act (234/1929), each spouse is primarily alone liable for a debt they have incurred before or during the marriage. However, both spouses are jointly and severally liable for a debt incurred by one spouse for the maintenance of the family. These kinds of expenses include liability for e.g. rent, electricity, clothing and groceries. Joint liability does not apply for a monetary loan.

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

Chapter 2 of the Marriage Act contains provisions on the government of property during marriage. In principle, the property that a spouse has when concluding marriage or acquires during marriage will remain theirs and the owner administers their own property. The principle of separate ownership is reasonably strong and there are no specific rules that permit one spouse to act on behalf of the other spouse regarding the administration of property. On the contrary, there are

[48] MINISTRY OF SOCIAL AFFAIRS AND HEALTH, *Working Group Reports* 25 (2003), p. 8.

provisions on administration on property, which restrict the competence of one spouse to act alone. These provisions focus on conveying or transferring rights to be used as the common home, common household goods, tools and movable property meant for the personal use of the other spouse or the children living in the household (e.g. sections 37 to 39 of the Marriage Act).

The spouses can also acquire joint property, which they administer together. One very common property type in this category is a joint bank account. Typically, one spouse may take care of the family's common finances via the joint bank account also in situations, where the other spouse's functional capacity has already started to deteriorate. There is no particular regulation on this practice. However, the Act on Guardianship Services was amended in 2009 with a provision, according to which a guardian may only be appointed for an individual if 'the matters cannot be handled in any other way'. This was considered as a clear message from the legislator stating that the affairs of a person with deteriorating capacity can also be managed in their best interests without a legally appointed guardian, as long as the use of the account remains within normal use. The purpose of the amendment was to ensure that appointing a guardian must always be the last resort.

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

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

The provision on the arrangement of *negotiorum gestio* is laid down in chapter 18, section 10 of the Code of Commerce, which refers to defending an absent person in court proceedings. According to the provision, "If something takes place in the absence of a person and they have not been able to appoint an attorney for it, their relative or friend shall be entitled to respond to it on their behalf, after giving security that the person absent will accept what they have done." The provision stems from the year 1734, but it is still in force and it has been interpreted to be more generally applicable to situations where the person's interests require their representation in situations where there is no time or possibility to obtain a legal representative. The provision can thus be applied, for example, to unilateral legal actions such as cutting off or terminating the statute of limitations of a debt. The provision of *negotiorum gestio* has been examined and in a recent decision on criminal law by the Supreme Court (KKO:2011:67) (expiration of a right to prosecute).

However, *negotiorum gestio* must be understood as an emergency arrangement that can only be resorted to for compelling reasons in situations where the best interests of the client require immediate action without any delay. The recommended procedure is to apply for a guardian referred to in the Guardianship

Services Act. In other words, *negotiorum gestio* is not a practical alternative to guardianship and it should not be used as a substitute for guardianship for reasons of convenience.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

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

In addition to the general rules on appointing an attorney, no.

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

According to section 9 of the Guardianship Services Act, a guardian may be appointed for a minor from the time when the minor attains the age of 17 years. In this event, the task of the guardian will begin when the minor attains the age of 18 years. This has been considered appropriate in order to prevent any gaps in the legal representation with regard to the time period when a minor child becomes an adult.

However, as the legal instruments for any other kind of advance arrangements are aimed to protect the self-determination of the client, there are no advance arrangements targeted for the use of third parties. Third parties may naturally bring the need for advance planning into discussion with their close relatives.

SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM IN TERMS OF PROTECTION AND EMPOWERMENT

67. Provide an assessment of your system in terms of empowerment of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:

a. the transition from substituted to supported decision-making;

The Guardianship Services Act provides that the mere appointment of a guardian does not affect the client's legal capacity *per se*. In practice, however, the appointment and the actions of the guardian have a great deal of influence on the client's autonomy at the level of everyday life. The guardian has decision-making power concerning the client´s bank accounts as well as discretion as to the amount

of funds to be made available to the client. Indeed, in practice, the client's autonomy may not always be realised sufficiently. This can be seen, for example, in the many complaints dealt with by the Finnish Parliamentary Ombudsman. In many resolutions given by the ombudsman, guardians have been considered to prevent their clients from using their assets or to otherwise restrict the financial capacity of clients whose legal capacity is not restricted by law.[49]

Given the current state of the legislation, consideration should be given on how to best promote the autonomy of a client that has *de jure* legal capacity. The issue could be resolved by the guardian taking active steps to support the client's autonomy. Thus, the Guardianship Services Act should be interpreted in such a way that the guardian supports their client in decision-making and gives them opportunities to choose. In practice, this aim may prove difficult to implement especially with regard to public guardianship. Given the already high number of clients per public guardian and the rising number of potential clients, the resources are not expected to increase in a sufficient measure to take into account the need for additional activity required.

b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;

According to the principle of subsidiarity, the measures that reflect the client's self-determination are given priority, such as normal power of attorney or a continuing power of attorney. If such do not exist and the capacity to give a power of attorney has been lost, a guardian can be appointed. As the last measure, an order for limitation of capacity can be issued.

c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;

According to section 8.1 of the Guardianship Services Act, the court may appoint a guardian for an adult who, due to illness, mental disorder, medical condition or other similar reason, is unable to take care of their interests or to take care of matters concerning themselves or their property that require care, and they are not appropriately taken care of in any other way.

If the client´s interest is not sufficiently protected by the appointment of a guardian, their legal capacity may be restricted. Section 18 of the Guardianship Services Act provides that if an adult is unable to take care of their financial affairs and their important interests are thereby endangered, a court may restrict their legal capacity by ordering that: (1) a client may enter into given transactions or administer given property only in conjunction with the guardian; (2) a client does not have the capacity to enter into given transactions or to administer given property; or (3) a client is declared incompetent.

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[49] See, e.g. Parliamentary Ombudsman resolution nr. 1993/4/06, 21.12.2007 (Provision of assets to the client as goods).

According to law, no one can be declared incapacitated if there are other options that are sufficient to safeguard their interests. Furthermore, the capacity of a person cannot be restricted more than what is necessary for the safeguarding of the interests of that person. The restriction shall not be extended to transactions, which an incapacitated person is by law entitled to enter into. However, for important reasons, a court may restrict the capacity of a person to decide on the proceeds of their own work earned after the order has been issued. In practise, restriction of legal capacity under the section 18 of the act is very rare.

d. effect of the measures on the legal capacity of vulnerable adults;

Since the number of people with disabilities is constantly increasing, a variety of legal measures are needed to take care of a disabled person´s affairs when they have lost a capacity to look after their affairs. The Act on the Continuing Powers of Attorney is relatively recent, the use of which is encouraged, for example, by the Ministry of Justice and the guardianship authorities. The continuing power of attorney also supports the autonomy of the granter: they have chosen the arrangement in question and given the mandate to an attorney of their choice.

e. the possibility to provide tailor-made solutions;

Continuing power of attorney offers a good opportunity to customise the authorisation as desired. It is up to the granter to decide to what kind of mandate they choose to give to the attorney and to what kind of instructions on the management of the property they decide to give to the attorney. Giving power to make care decisions can also be assigned to the attorney. Furthermore, the range of making tailor-made solutions could increase, if clear provisions regarding advance directives were included in the Act on the Status and Rights of Patients, which could also include care planning.

f. transition from the best interest principle to the will and preferences principle

According to section 1.1 of the Guardianship Services Act, the objective of guardianship services is to look after the rights and interests of persons who cannot themselves take care of their financial affairs owing to incompetency, illness, absence or another reason.

Thus, in managing the affairs of the adult, the guardian must always act in accordance to the best interests of the adult. In doing so, they also have to take into account the opinion of the adult as far as possible. Respecting the client's will is a central value behind the legislation and the aim is that a person's capacity to decide on their affairs is not restricted any more than is necessary to protect the interests of that person.

The realisation of the right to self-determination of a person under guardianship is largely dependent on the way in which their guardian seeks to respect that right. In the relationship between the guardian and the client, it is essential that the guardian exercises their decision-making power in accordance with the basic principles of the Guardianship Services Act. This will happen if the guardian acts in cooperation with their client, negotiates with them in relation to key decisions, and listens to, respects and takes the opinions of the client into account. The sole objective in these situations must be the realisation of the client's interests.[50] Thus, a client's right to participate in decisions affecting their lives can be seen as part of their autonomy.

The significance of the client's autonomy as a guiding principle of the Guardianship Services Act is reflected in the provisions governing the client's right to be heard on matters that the client deems important (section 43).

68. Provide an assessment of your system in terms of protection of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:

a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;

According to the law, the court may on its own initiative appoint a counsel or a guardian for the person whose guardianship is involved for the duration of the proceedings, if this is necessary in view of the legal safeguards due to that person (section 82). This so called procedural representation is advocacy during the trial or the appointment process. During the process, it is the duty of the representative to protect the client´s legal rights. Procedural representation is temporary, in which case the duration of the task is set a certain deadline (section 15). The order may continue to be valid as a result of an appeal to a higher court. The regulation on procedural representation is considered adequate.

b. protection during a procedure resulting in the application, alteration or termination of adult support measures;

See the answer provided to point a.

c. protection during the operation of adult support measures:

- **protection of the vulnerable adult against his/her own acts;**

[50] VÄLIMÄKI 2013 (fn 22), p. 38.

According to section 25 of the Act, an incapacitated person has the right to decide on the proceeds of their own work earned during the incapacity, as well as on property given to their administration by the guardian. In addition, the incapacitated person may decide on the revenue arising from the property referred to above and on the property that has come as a substitute for the said property.

However, if the incapacitated person exercises this right in a manner that is obviously contrary to their best interests or if there is an imminent danger of the same, the guardian may take the above mentioned property into their administration in so far as necessary in order to safeguard the interests of the incapacitated person. If the measure is directed at the proceeds of the work of the incapacitated person, the consent of the guardianship authorities is obtained for the same.

According to the Damages Act, there are specific provisions on the reduced personal liability of persons under eighteen years and persons with diminished capacity, where an evaluation of reasonability is performed (chapter 2, sections 2 and 3).

- **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**

Conflict of interests: According to section 32, a guardian may not represent the client if the opposing party is the guardian himself or herself, the spouse or child of the guardian or someone represented by the guardian. If the siblings have a joint guardian, they may, however, represent the siblings in the distribution of the estate, if their interests do not conflict due to the claims made in the distribution of the estate or other circumstances related to the distribution.

A guardian other than the parent who is the custodian of their minor child may also not represent the client if the opposing party is:

1. the spouse of the child of the guardian or the child of the guardian's spouse or the spouse of the guardian;
2. the grandchild, sibling, parent or grandparent of the guardian or their spouse or the spouse of such a person; or
3. a child or a parent's sibling of a sibling of a guardian.

The term 'spouse' refers to married persons and cohabitees. Half relatives are considered comparable to relatives. A guardian may not represent the client also in cases where the interests of the guardian and the client may be in conflict in the case for a reason other than referred above.

Provisions on conflict of interests are strictly applied, which may cause problems in smaller guardianship authorities, where it may sometimes be difficult to find substitutes for persons with a conflict of interest.

Abuse or neglect: A transaction beyond the competence of the guardian is not binding on the client. A transaction entered into by the guardian without the required permit is also not binding on the client, unless the guardianship authority from whom the permit should have been requested, grants a post facto permit on the request of the guardian. Specific provisions apply (section 27.2), if the counterparty knew that the guardian is acting beyond their competence, and it may have an effect on the right of the counterparty to renounce the transaction. If a transaction entered into by the guardian is not binding, the provisions of Section 25 of the Contracts Act (228/1929) apply, in so far as appropriate, to the liability of the guardian in damages to the injured counterparty.

The guardian is liable in damages for the loss that they have deliberately or negligently caused to the client in the performance of their task. The provisions in chapters 2 and 6 of the Damages Act (412/1974) apply to the adjustment of the liability and the division of liability among two or more liable persons. If a public guardian has caused the loss, also the provisions in chapters 3 and 4 of the Damages Act on the liability of a public body and public officials apply to the liability. The client is not liable for the loss caused by the guardian acting on behalf of the client (section 45).

A court must dismiss a guardian from their task, if the guardian proves to be unfit or unsuitable, or if there is another specific reason for the dismissal (section 16.1).

Actions committed with criminal intent are regulated in the criminal law. Provisions on for example on fraud or embezzlement may apply.

On the one hand, the regulatory framework in place to address potential abuse or neglect by the guardian has not been critised. On the other hand, the challenge lies in detecting the cases and activity in initialising the correct processes, when abuse or neglect occurs.

- **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;**

Matters concerning a client in institutional care are handled according to same regulations as above.

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

According to section 92 of the Guardianship Services Act, a person in the service of the state, the municipality or a provider of guardianship services, a public representative, a guardian and an expert providing guardianship advice cannot without the consent of the person concerned disclose matters that they have learned in the course of their guardianship duties, if the matter is to be kept secret in order to protect the financial interests or privacy of an individual. The duty of confidentiality does not restrict the other duties of confidentiality imposed by law

on public servants. The duty of confidentiality does not prevent the disclosure of the matter to state or to wellbeing services county authorities or to municipal authorities or to other persons for the performance of the tasks under the Guardianship Services Act, to prosecutors or the police for the investigation of crime, to a court, if necessary in a matter under the Guardianship Services Act, or to a person entitled by law to the same.

The privacy laws are occasionally criticised for being too strict with respect to family members, who may wish to monitor the public guardian's actions. In these cases, the consent of the client is required for disclosure. However, if the client has lost their capacity to give consent and there is no prior consent given in advance for disclosure, there is no one to give the consent required.