

## Country report **Switzerland**

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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 Kjørheim 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

## SWITZERLAND

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### SECTION 1 - GENERAL

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

Swiss adult protection law can mainly be found in the Swiss Civil Code in Part two (“Family Law”), Division Three (“The Protection of Adults”; articles 360 to 456 of the Swiss Civil Code SCC). The general norms on legal capacity are laid down in articles 11 to 19d SCC. The organization of the adult protection authorities as well as procedural law are regulated by cantonal legislation. The current state of Swiss legislation dates back to 1 January 2013, when a completely revised adult protection law entered into force.

#### **State-ordered measures:**

The core of the 2013 reform was undoubtedly the introduction of tailor-made adult protection measures, in the form of different flexibly adaptable curatorships, which replaced three standardised adult protection measures. The supporting curatorship (article 393 SCC) is restricted to giving support especially in handling financial affairs, without limiting the person’s legal capacity. The representation curatorship (articles 394 and 395 SCC) can be adapted in a tailor-made way to the vulnerable adult’s needs, by giving more or less powers of representation to the curator, while maintaining parallel powers of the vulnerable adult. If needed, it is also possible to limit the person’s own legal capacity for certain areas or objects, thereby giving exclusive powers to the curator. The cooperation curatorship (article 396 SCC) means that certain acts of the person need the consent of the curator to be valid. These three first curatorships can be combined (article 397 SCC). The comprehensive curatorship (article 398 SCC) finally is the most far-reaching measure, excluding the vulnerable adult’s own legal capacity and giving far-reaching powers of representation to the curator.

**Voluntary measures:** The 2013 reform introduced the following two instruments with the aim of encouraging self-determination for the case of legal incapacity: 1. Lasting power of attorney (*Vorsorgeauftrag/mandat pour cause d’inaptitude/mandato precauzionale*, articles 360 to 369 SCC), which allows for granting decision-making powers concerning personal and medical care and/or financial issues to a person of one’s own choice. 2. Advance medical directive (*Patientenverfügung/directive anticipée du patient/direttive del paziente*, articles 370 to 373 SCC), which aims at taking advance decisions concerning medical treatment for the case of incapacity, and aims at designating a representative for medical decision-making.

**Ex-lege representation/ ex lege measures:** In line with the reform’s aim of strengthening the role of the family in adult protection, the Swiss Civil Code designates certain family members as representatives *ex lege* in the case of incapacity. If a person has not granted a lasting power of attorney to a particular person, and no curatorship is in place, the spouse or registered partner<sup>1</sup> represents the incapable adult for matters concerning everyday life (articles 374 SCC). For decisions regarding medical treatment, the spouse or registered partner and, subsidiarily, the cohabitant, descendants, parents and siblings (in this order) are eligible for representation in medical matters if they regularly and personally assist the person lacking capacity (article 378 SCC).

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<sup>1</sup> Since 1 July 2022 marriage is open for all couples, independently of their sex (article 94 SCC). Registered partnerships were only available for same-sex couples. As of 1 July 2022, no new registered partnerships can be concluded, and existing ones may (but do not have to) be transformed into a marriage (article 35 Law on registered partnerships, SR 211.231).

**2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets)<sup>2</sup>**

- Active legal capacity (*Handlungsfähigkeit/exercice des droits civils/esercizio dei diritti civili*, article 12 SCC)
- Capacity of judgement (*Urteilsfähigkeit/capacité de discernement/capacità di discernimento*, article 16 CC)
- Supporting curatorship (*Begleitbeistandschaft/curatelle d'accompagnement/amministrazione di sostegno*, article 393 SCC)
- Representation curatorship (*Vertretungsbeistandschaft/curatelle de représentation/curatela di rappresentanza*, articles 394 and 395 SCC)
- Cooperation curatorship (*Mitwirkungsbeistandschaft/curatelle de cooperation/curatela di cooperazione*, article 396 SCC)
- Comprehensive curatorship (*umfassende Beistandschaft/curatelle de portée générale/curatela generale*, article 398 SCC)
- Lasting power of attorney (*Vorsorgeauftrag/mandat pour cause d'incapacité/mandato precauzionale*, articles 360 to 369 SCC)
- Advance medical directive (*Patientenverfügung/directive anticipée du patient/direttive del paziente*, articles 370 to 373 SCC)

**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.**

The Swiss Conference of Child and Adult Protection Authorities publishes statistics every year.<sup>3</sup> The latest available statistics are from 2022. At that time a total of 90'493 adults were concerned by at least one adult protection measure, which makes 14,24 cases in 1000 adults in the overall adult population of Switzerland (6'353'298). The most frequent measures are the tailor-made measures of the representation and the cooperation curatorship (articles 394, 395 and 396 SCC), with a total of 78'968 adults concerned. The frequency of these measures is higher for the age-group of 80+ compared to the other age groups: 29.52 in 1000 adults of over 80 years have been concerned by such a measure, compared to 12.93 in 1000 adults of the overall population. The most far-reaching measure, the comprehensive curatorship (article 398 SCC), was in place for 10'863 adults in 2022 (1,71 adults in 1000 in the overall adult population, with similar frequencies in all age groups). The evaluation of the 2013 reform has further shown that 46 % of curators are non-professional curators (the proportion of family members among them is unknown), and that 54 % are professional curators.<sup>4</sup> Sociology of law observes big differences regarding the likelihood of the appointment of a curator due to immense local and regional differences in legal culture.<sup>5</sup>

**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.**

Switzerland has ratified the *Hague Convention of 13 January 2000 on the International Protection of Adults* in 2009, and the *UN Convention on the Rights of Persons with Disabilities (CRPD)* in 2014. The Swiss Federal Council, Switzerland's government, declared in 2012 that it didn't envisage the ratification of the Optional Protocol to the CRPD before Switzerland has gained some experience with the periodic reports and the practice

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<sup>2</sup> The most important legal concepts are cited here in all three official language versions of the Swiss Civil Code, i.e. German, French and Italian. See the links below.

<sup>3</sup> <https://www.kokes.ch/de/dokumentation/statistik/aktuellste-zahlen>.

<sup>4</sup> INTERFACE Politikstudien Forschung Beratung, Evaluation Kindes- und Erwachsenenschutzrecht, Bericht zu Händen des Bundesamtes für Justiz vom 5. April 2016, Lucerne, p. 58 <https://www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/kesr.html>.

<sup>5</sup> J. ESTERMANN, W. FUCHS, 'Zu Häufigkeit und Determinanten rechtlicher Betreuung - Eine vergleichende Analyse von Daten aus Deutschland, Österreich und der Schweiz' *Zeitschrift für Rechtssoziologie* 36.1 (2016): 154-186.

of the CRPD Committee.<sup>6</sup> Switzerland is a monist State and the CRPD didn't need to be transposed into Swiss law to have effect in the Swiss legal order. Switzerland has submitted its initial report in 2016, and the NGO shadow report has been published in 2017.<sup>7</sup> In 2020 Switzerland has given written replies<sup>8</sup> to the list of issues prepared by the Committee.<sup>9</sup> The CRPD Committee has issued its concluding observations on 13 April 2022.<sup>10</sup>

The influence of the CRPD on Swiss legislation has been limited up to date: The process leading up to the reform of adult protection law had already started in 1993<sup>11</sup>, and was thus not a reaction to the adoption of the CRPD. According to the Swiss Federal Council, the new adult protection law corresponds to the requirements of the Convention<sup>12</sup>. The CRPD Committee is of a different opinion: in its concluding observations on the initial report of Switzerland it recalls its general comment No. 1 (2014)<sup>13</sup>, and recommends that Switzerland amends the Civil Code and the Act on the Protection of Adults in line with the Committee's recommendations.<sup>14</sup>

## 5. **Shortly address the historical milestones in the coming into existence of the current framework.**

On 1 January 2013, the completely revised Swiss adult protection law entered into force. Before that, and since the Swiss Civil Code first came into force in 1912, adult protection law had only undergone one small revision in 1981, adapting the law on deprivation of liberty to the requirements of article 5 of the European Convention on Human Rights.<sup>15</sup> The guardianship law which was in force during one century, from 1912 until 2012, provided for adult protection measures with a precisely defined legal content. The rigidity of the legal catalogue of measures didn't permit for adaptation to the individual case, meaning that the principle of proportionality could not always be respected. Also, various terms used by the law, especially in relation to cognitive impairments or mental illness, were recognised as having a discriminatory and stigmatising effect<sup>16</sup>.

The aims of the total revision of 2013 were namely: the *encouragement of self-determination* through the introduction of instruments of the lasting power of attorney and the advance medical directive; the strengthening of the role of the *family* in the legal representation of vulnerable adults; the introduction of *tailor-made measures* of adult protection; and the introduction of *professional and interdisciplinary child and adult protection authorities*.<sup>17</sup>

## 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). Please elaborate on evaluations, where available.**

Following the entry into force of the reform of adult protection law in 2013, there has been a fierce political controversy and media campaign around the functioning of the new child and adult protection authorities, accusing them of taking child and adult protection measures too quickly and of appointing too frequently a professional curator instead of a family member to the position of curator. As a reaction to the critique, which was translated into four parliamentary requests, and based on an expert evaluation<sup>18</sup>, the Federal Council has published in 2017 a rather limited list of reform issues, among them the goal of improving the position of family members in child and adult protection.<sup>19</sup>

Also, the question of conformity of Swiss adult protection law with article 12 CRPD is discussed controversially in the political arena and the legal literature. Whereas some authors call for a reform in line with the CRPD's paradigm shift from substituted decision-making towards supported decision-making, others are of

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<sup>6</sup> See Swiss Federal Council, Message of 12 December 2012, BBl 2013 661, 666 [https://www.admin.ch/opc/de/federal-gazette/2013/index\\_4.html](https://www.admin.ch/opc/de/federal-gazette/2013/index_4.html) (French and Italian versions of the Messages are accessible by clicking on the button at the top of the page).

<sup>7</sup> [https://www.inclusion-handicap.ch/de/themen/uno-brk/schattenbericht\\_0-257.html](https://www.inclusion-handicap.ch/de/themen/uno-brk/schattenbericht_0-257.html).

<sup>8</sup> CRPD/C/CHE/RQ/1.

<sup>9</sup> CRPD/C/CHE/Q/1.

<sup>10</sup> CRPD/C/CHE/CO/1.

<sup>11</sup> See Message of 28 June 2006, BBl 2006 7001, 7008.

<sup>12</sup> See Message of 12 December 2012, BBl 2013 661,690. As for the controversy in legal literature see below.

<sup>13</sup> General Comment No. 1 - Article 12 : Equal recognition before the law (Adopted 11 April 2014), CRPD/C/GC/1.

<sup>14</sup> Para. 26 Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

<sup>15</sup> See Message of 17 August 1977, BBl 1977 III 1, [https://www.admin.ch/opc/de/federal-gazette/1977/index\\_39.html](https://www.admin.ch/opc/de/federal-gazette/1977/index_39.html).

<sup>16</sup> Message of 28 June 2006, BBl 2006 7001, 7008.

<sup>17</sup> See Message of 28 June 2006, BBl 2006 7001.

<sup>18</sup> French version of the different reports: <https://www.bj.admin.ch/bj/fr/home/gesellschaft/gesetzgebung/kesr.html>; German version: <https://www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/kesr.html>.

<sup>19</sup> See below 7.

the opinion that an interpretation of the existing legal instruments which is compatible with the new paradigm is possible.<sup>20</sup>

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

The Federal Council has announced already in 2017 that it will make reform proposals following the CRPD Committee's concluding observations<sup>21</sup>, but has not as yet announced any concrete projects. In an answer to a question raised in National Parliament, the Federal Council has stated its plan to implement the concluding observations in the framework of the general national policy on rights of persons with disabilities.<sup>22</sup> CSOs representing the rights of disabled persons have expressed their dissatisfaction with the slow progress of the implementation process in Switzerland.<sup>23</sup>

The reform proposal improving the position of family members in child and adult protection which had been announced in 2017<sup>24</sup> has been prepared by a legal expert opinion<sup>25</sup> and a survey among cantonal authorities and curators.<sup>26</sup> A draft law has been published in February 2023 and submitted to a public consultation procedure. Against the recommendation of the legal expert opinion, which did not see the need for change, the proposal aims at improving the position of family members and other persons close to the adult in adult protection, on the one hand through the selective expansion of *ex-lege* representation and on the other hand by strengthening their position in the procedure leading up to the adoption of a measure<sup>27</sup>.

## **SECTION II – LIMITATION OF LEGAL CAPACITY**

### **8. Does your system allow limitation of the legal capacity of an adult?**

Yes.

#### **a. on what grounds?**

According to article 11 para. 1 SCC, every person has passive legal capacity in the sense of the ability to hold rights and duties. However, the law allows for the limitation of active legal capacity (*Handlungsfähigkeit/exercice des droits civils/esercizio dei diritti civili*), which is defined as a person's capacity to create rights and obligations through his or her actions (article 12 SCC). The main ground for limiting active legal capacity according to Swiss law is a person's incapacity of judgement (*Urteilsunfähigkeit/incapacité de discernement/incapacità di discernimento*). If a person is deemed incapable of judgement in relation to a particular act, he or she loses his or her active capacity *ex lege* (article 17 and 18 SCC), but only in relation to the act in question. The act is therefore void with effect *ex tunc*, and its voidness can be invoked by anyone, anytime, in any procedure.<sup>28</sup>

The concept of (in)capacity of judgement is defined as follows by statute and case law: According to article 16 SCC a person is capable of judgement within the meaning of the law if he or she does not lack the capacity to act rationally (*Fähigkeit, vernunftgemäss zu handeln/faculté d'agir raisonnablement/capacità di agire ragionevolmente*)<sup>29</sup>, by virtue of being under age or because of a mental disability (*geistige Behinderung/déficience mentale/disabilità mentale*), mental disorder (*psychische Störung/troubles*

<sup>20</sup> See in detail below question 31.

<sup>21</sup> Report of the Swiss Federal Council of 29 March 2017, p. 76 (German version), p. 69 French version (see links in note 9).

<sup>22</sup> See the Federal Council's answer to Interpellation Franziska Roth 20.4455, Umgang mit den Empfehlungen des Ausschusses zur UNO-Behindertenrechtskonvention <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20203657>.

<sup>23</sup> See <https://www.inclusion-handicap.ch/de/themen/un-brk/pruefverfahren/concluding-observations-674.html>.

<sup>24</sup> See above 6.

<sup>25</sup> R. FANKHAUSER, *Die Stellung nahestehender Personen im Kindes- und Erwachsenenschutzrecht*, 2019 <<https://www.bj.admin.ch/dam/bj/de/data/gesellschaft/gesetzgebung/kesr/gutachten-kesr-d.pdf.download.pdf/gutachten-kesr-d.pdf> > accessed 17.6.2022.

<sup>26</sup> ECOPLAN FORSCHUNG UND BERATUNG IN WIRTSCHAFT UND POLITIK (eds), Bericht zur Umfrage Kindes- und Erwachsenenschutzrecht, Erhebungen zum Einbezug nahestehender Personen allgemein und zum Umgang mit privaten Beiständen im Besonderen, 28.8.2019, <https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/externe/2019-08-28.html> accessed 14.06.2022.

<sup>27</sup> See the draft law and report of February 2023 <https://www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/kesr.html> accessed 3.1.2024.

<sup>28</sup> See R. FANKHAUSER, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 18 N 6-8.

<sup>29</sup> For further discussion of the concept see question 14 below.

*psychiques/turba psichica*), intoxication or similar circumstances (*Rausch oder ähnliche Zustände/ivresse ou d'autres causes semblables/ ebbrezza o stato consimile*).

Capacity of judgement is a *relative* concept: it needs to be evaluated at a particular point in time, in relation to a particular act, according to the difficulty of this act.<sup>30</sup> Capacity of judgement is *presumed by law*; anyone who pleads a person's incapacity of judgement must prove one of the states of weakness described in article 16 SCC (in relation to adults: mental disability, mental disorder, intoxication or similar circumstances) and the resulting impairment of the capacity to act rationally.<sup>31</sup>

Curatorships also limit legal capacity, but their establishment does not necessarily require an incapacity of judgement. The legal ground for establishing a curatorship is the inability of a person to manage his or her own affairs, which can be due to mental disability, mental disorder or similar inherent weakness, temporary loss of capacity of judgement or temporary absence (art. 390 para. 1 SCC).<sup>32</sup>

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

An adult person who is deemed incapable of judgement in relation to a certain act loses his or her full active capacity *ex lege* concerning this particular act (article 17 and 18 SCC).

As explained in more detail below,<sup>33</sup> the different curatorships limit legal capacity to a stronger or lesser degree (article 19d SCC). The comprehensive curatorship has the strongest effect: active legal capacity of the adult is completely revoked by law if this measure is established (article 298 para. 3 SCC). The adult protection authority can also restrict active legal capacity in the framework of a representative curatorship (articles 394 and 395 SCC) or a cooperation curatorship (article 396 SCC).

However, according to the general rules on legal capacity, a person whose active legal capacity is restricted under a curatorship still has some capacity to act concerning certain acts, if he or she is deemed capable of judgement in relation to the act in question: According to article 19 SCC, this person may enter into obligations or give up rights with the consent of their curator (para. 1), may accept advantages that are free of charge or carry out minor everyday transactions without consent of their curator (para. 2), and is liable in damages for unpermitted acts (para. 3). Also, and importantly, persons whose active legal capacity is limited by a curatorship, exercise their so called strictly personal rights independently if they are capable of judgement in relation to these rights (article 19c para. 1 first sentence SCC). Strictly personal rights are rights with a strong connection with a person's personality, or his or her affective and emotional life, such as the right to consent to a medical procedure, rights in connection with family relations, or religious rights.<sup>34</sup> In the case of comprehensive curatorship however, the consent of the curator is required by statutory law in order to exercise some strictly personal rights even if the adult is capable of judgement (article 19c para. 1 second sentence SCC). This is the case namely for the change of legal sex (article 30b para. 4 SCC), the recognition of a child (article 260 para. 2 SCC), or the decision to have a sterilization (article 6 para. 1 Law on sterilizations<sup>35</sup>).

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

The limitation of legal capacity in the framework of a curatorship affects only the aspects of legal capacity designated by the decision of the adult protection authority, with the exception of the comprehensive curatorship.<sup>36</sup>

In the case of the loss of legal capacity *ex lege* according to the general rules on legal capacity (articles 11 et seq. SCC), the establishment of incapacity of judgement is a tailor-made decision taken for each act in question. Disputes before Swiss courts in which the question of (in)capacity of judgement needed to be assessed have for

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<sup>30</sup> BGE 144 III 264, 271; 134 II 235, 239; 124 III 5, 8.

<sup>31</sup> BGE 144 III 264, 271 and 272.

<sup>32</sup> For details see question 17 below.

<sup>33</sup> See below III. State-ordered measures, question 24.

<sup>34</sup> R. FANKHAUSER in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 19c N 2, 5, 7.

<sup>35</sup> SR 211.111.1.

<sup>36</sup> See below e.

example concerned the validity of a sales contract<sup>37</sup>, decisions taken by the donator of a foundation<sup>38</sup>, the settlement of an estate<sup>39</sup>, or the establishment of a will<sup>40</sup>.

**d. can the limited legal capacity be restored and on what grounds?**

In the case of *ex lege* loss of legal capacity, as incapacity of judgement is a relative concept, and is always only evaluated in relation to a certain act, there is no need to restore it. Or in other words: legal capacity is evaluated anew in relation to every act of the person.

This is different in the case of the limitation of legal capacity by a curatorship. In this case, the adult protection authority who limited the legal capacity of the person needs to restore it. According to article 399 para. 2 SCC, the adult protection authority shall terminate a curatorship at the request of the adult or of a closely associated person or *ex officio* as soon as there is no reason for it to continue. There is no reason to continue the curatorship if the adult has regained his or her ability to manage his or her personal and financial affairs.<sup>41</sup>

**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 the adult protection authority installs a comprehensive curatorship, the active legal capacity of the adult is automatically and completely revoked (article 298 para. 3 SCC). The other curatorships only limit legal capacity if the adult protection authority decides so.

**f. are there any other legal instruments,<sup>42</sup> besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

Certain legal provisions limit the acts of a spouse or partner in order to protect the interests of the other spouse or partner. This is the case for acts concerning the family home (article 266m Swiss Code of Obligations SCO, article 169 SCC and article 14 Law on registered partnerships) and for the establishment of a debt guarantee (article 494 SCO).

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

**a. property and financial matters;**

In the case where legal capacity is limited *ex lege* because an adult is considered incapable of judgement in relation to a particular property or financial matter, he or she needs to be represented. The representative can be the one appointed by the adult him- or herself through a lasting power of attorney, or a regular mandate contract, if its validity even in case of incapacity to act has been agreed upon (article 405 para. 1 SCO).<sup>43</sup> In the absence of such voluntary measures, the curator appointed by the adult protection authority acts on behalf of the adult, or the adult protection authority can act directly based on article 392 SCC. If there is no lasting power of attorney and no curator has been appointed, the person who as spouse or registered partner cohabits with a person who is no longer capable of judgement or who regularly and personally provides that person with support has a statutory right to act as that person's representative (article 374 SCC). However, this *ex lege* representation is restricted to certain property and financial matters.<sup>44</sup>

If an adult person's active legal capacity is limited by a curatorship, he or she is in principle represented by the curator in property and financial matters. If the person is capable of judgement in relation to certain matters, he or she may him- or herself enter into obligations or give up rights but needs the consent of their curator for

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<sup>37</sup> Federal Supreme Court, unpublished decision from 22.7.2020, 4A\_254/2020.

<sup>38</sup> BGE 144 III 264.

<sup>39</sup> Federal Supreme Court, unpublished decision from 7.11.2017, 5A\_272/2017.

<sup>40</sup> BGE 124 III 5.

<sup>41</sup> Y. BIDERBOST in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 399 N 5.

<sup>42</sup> 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 his/her acts.

<sup>43</sup> See below question 32 et seq.

<sup>44</sup> See below question 50 et seq.

their acts to be valid (article 19 SCC para. 1), with the exception of the acceptance of advantages that are free of charge and of minor everyday transactions, which both do not need consent of the curator (para. 2).

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

If an adult person is deemed incapable of judgement regarding certain family matters or personal rights, he or she is deprived of legal capacity *ex lege* in relation to these rights and a representative needs to exercise their rights. The representative can be the one appointed by the adult him- or herself through a lasting power of attorney.<sup>45</sup> In the absence of such a voluntary measure, the curator appointed by the adult protection authority acts on behalf of the adult, or the adult protection authority can act directly based on article 392 SCC. Differently than in property and financial matters, as well as in relation to medical decisions, no *ex-lege* representation exists for family matters and personal rights.<sup>46</sup>

Representation in family matters and personal rights is however only possible to a limited extent, as they are “strictly personal rights”.<sup>47</sup> Article 19c SCC is applicable: The legal representative acts for a person lacking capacity of judgement in relation to a certain right unless that right is so strictly personal that any form of representation is excluded. Strictly personal rights which are considered to exclude representation are namely the change of legal sex (article 30b para. 4 SCC), marriage (94 SCC), divorce<sup>48</sup> or the recognition of a child (article 260 para. 2 SCC).<sup>49</sup> As these rights cannot be exercised if the person is considered incapable of judgement, the exigences towards a person’s capacity to act rationally (mental capacity) in relation to strictly personal rights should not be too high, especially if the exercise of fundamental rights are at stake.<sup>50</sup> Strictly personal rights that allow for representation are namely the request for a change of name (article 30 SCC), a paternity suit (article 261 SCC) or the continuation of divorce proceedings if they had been started while the person was still capable of judgement.<sup>51</sup>

Persons whose active legal capacity is limited by a curatorship, but who are capable of judgement in relation to particular family matters and personal rights, exercise these rights independently (article 19c para. 1 first sentence SCC: “strictly personal rights”) and intervention of the curator is not necessary. In some matters however, the consent of the legal representative is required by statutory law.<sup>52</sup> This is namely the case for persons under comprehensive curatorship for the following family matters and personal rights: the change of legal sex (article 30b para. 4 SCC), the recognition of a child (article 260 para. 2 SCC) and the conclusion of a prenuptial agreement (article 183 para. 2 SCC).<sup>53</sup>

**c. medical matters;**

To give consent to a medical treatment is considered to be a strictly personal right and the rules of article 19c SCC apply here as well.<sup>54</sup>

This implies that an adult person, who is deemed *incapable of judgement* in relation to a particular medical matter, cannot consent to the medical procedure or refuse it, but must be represented in the exercise of this right. The representative can be the one appointed by the adult him- or herself through a lasting power of attorney or an advance medical directive<sup>55</sup>. In the absence of a voluntary measure, the curator appointed by the adult protection authority<sup>56</sup> acts on behalf of the adult, or the adult protection authority can give consent directly based on article

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<sup>45</sup> See below question 32 et seq.

<sup>46</sup> See below question 55.

<sup>47</sup> See above question 8 b).

<sup>48</sup> BGE 116 II 385, 388.

<sup>49</sup> R. FANKHAUSER in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 19c N 5.

<sup>50</sup> For marriage see BGE 109 II 273.

<sup>51</sup> R. FANKHAUSER in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 19c N 7.

<sup>52</sup> See above question 8 b).

<sup>53</sup> R. FANKHAUSER in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 19c N 3.

<sup>54</sup> See above b).

<sup>55</sup> See below question 32 et seq.

<sup>56</sup> See below question 16 et seq.



392 SCC. Finally, if none of these representatives have been appointed, the rules of *ex-lege* representation of article 378 SCC come into play.<sup>57</sup>

As for family and personal matters, the distinction between strictly personal rights which are subject to representation and those who are not (article 19c SCC)<sup>58</sup>, is of importance here: the representative can only consent to medical treatments which are medically indicated and necessary.<sup>59</sup> The law on sterilizations<sup>60</sup> seems to admit that a sterilization is a strictly personal right subject to representation and admits the sterilization of an adult person (and a minor over 16 years of age) who is permanently incapable of judgement, under certain strict conditions and with the assent of the adult protection authority (articles 7, 8 and 9 law on sterilizations). The CRPD Committee in its concluding observations concerning Switzerland criticizes this legislation and recommends, in relation to article 17 CRPD (Protecting the integrity of the person), that Switzerland prohibits the sterilization of persons with disabilities without their consent.<sup>61</sup>

Another area of concern is forced medical treatment in the case of the placement of a patient in a psychiatric institution for the treatment of a mental disorder. The law allows for forced medical treatment if failure to carry it out could lead to serious damage to the patient's health or seriously endanger the life or the physical integrity of third parties, if the patient is incapable of judgement in relation to his or her need for treatment and if no appropriate measure is available that is less invasive (article 434 SCC). The measure can be initiated by the head physician of the psychiatric institution and can be appealed against before a judge (article 439 SCC). Based on the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (article 15 CRPD), the CRPD Committee recommends that Switzerland eliminates in law, policy and practice all forms of forced medical procedures and treatment.<sup>62</sup>

An adult person who is deemed *capable of judgement* in relation to medical matters is competent to give their consent to a medical treatment, without the need of the consent of their curator. In the case of comprehensive curatorship however, the consent of the curator is required by statutory law in order to exercise some medical decisions even if the adult is capable of judgement (article 19c para. 1 second sentence SCC). This is the case namely for the decision to have a sterilization (article 6 para. 1 Law on sterilizations).

#### **d. donation and wills;**

**Donation:** An adult person who is deemed incapable of judgement in the sense of article 16 SCC<sup>63</sup> cannot validly make a donation (article 240 para. 1 SCO), a person who is deemed capable of judgement can only make donations if his or her legal capacity has not been limited by the adult protection authority in this respect.<sup>64</sup> In the case of an adult person under curatorship, and as far as the legal capacity of the adult person has been limited, the curator can prohibit a concrete donation or revoke it (article 241 para. 2 SCO). The curator or other representative can only represent the adult person in relation to customary occasional gifts (article 240 para. 2 SCO, article 412 para. 1 SCC).

**Wills:** An adult person needs to be capable of judgement to make a will, without the need for the curator or the adult protection authority to consent (article 467 SCC). This is different for the establishment of a contract of succession: The adult person who is capable of judgement may conclude a contract of succession as a testator, but needs the consent of the curator if the curatorship covers this type of contract (article 468 SCC). The curator cannot represent the adult person in the establishment of a will.

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<sup>57</sup> See below question 50 et seq.

<sup>58</sup> See above question 8 b).

<sup>59</sup> A. BÜCHLER and M. MICHEL, *Medizin – Mensch – Recht*, Schulthess Juristische Medien, 2nd edition, Zurich 2020, p. 97.

<sup>60</sup> SR 211.111.1.

<sup>61</sup> Para. 35(a) and 36(b) Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

<sup>62</sup> Para. 32(a) Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

<sup>63</sup> See above question 8 a).

<sup>64</sup> P. FASSBIND, *ZGB Kommentar*, Orell Füssli Verlag, 4th edition, Zürich 2021, Art. 412 ZGB N 2 1.

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

Article 67 Swiss civil procedure code (SCPC) refers to the general rules on legal capacity: A person without full legal capacity, i.e. an adult person whose legal capacity has been limited by a curatorship or who is deemed incapable of judgement may act through their legal representative (article 67 para. 2 SCPC). An adult person whose legal capacity is limited by a curatorship but who is capable of judgement can independently exercise strictly personal rights and temporarily take the acts necessary in cases of imminent danger (article 67 para. 3 SCPC). In administrative proceedings the same rules apply according to the general rules of articles 12 et seq. SCC.<sup>65</sup>

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

As the capacity of judgement as a prerequisite of legal capacity is evaluated in relation to concrete acts, this evaluation takes place in retrospect in the case of a legal dispute on the validity of a certain act, for example a sales contract<sup>66</sup>, decisions taken by the donator of a foundation<sup>67</sup>, or the settlement of an estate<sup>68</sup>.

The limitation of legal capacity by a curatorship does not have a retroactive effect.

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

Every authority or court which decides on a matter which involves the question of capacity of judgement decides on the matter in the framework of their competences. The adult protection authority is competent for the limitation or restoration of legal capacity in the framework of a curatorship (article 390 para. 1 SCC).

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

Limitation or restoration of legal capacity is taking place in the context of the ordering of curatorships. See therefore the answer to question 19.

**13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity.**

As limitation or restoration of legal capacity is taking place in the context of the ordering of curatorships, the procedure is described in detail below under question 21.

**Please address the procedural safeguards such as:**

**a. a requirement of legal representation of the adult;**

See answer to question 21a.

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

See answer to question 21c.

**c. requirement of a specific medical expertise / statement;**

See answer to question 21d.

**d. hearing of the adult by the competent authority;**

See answer to question 21e.

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

See answer to question 21f.

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<sup>65</sup> R. WIEDERKEHR, C. MEYER and A. BÖHME, *VwVG Kommentar*, Orell Füssli Verlag, Zürich 2022, Art. 6 VwVG, N 15.

<sup>66</sup> Federal Supreme Court, unpublished decision from 22.07.2020, 4A\_254/2020.

<sup>67</sup> BGE 144 III 264.

<sup>68</sup> Federal Supreme Court, unpublished decision from 7.11.2017, 5A\_272/2017.

- 14. Give a brief account of the general legal rules with regard to mental capacity in respect of:**
- a. property and financial matters;**
  - b. personal and family matters;**
  - c. care and medical matters.**

Mental capacity being defined by the CRPD Committee as “the *de facto* decision-making and decision-communication skills of a person” it finds its equivalent in the Swiss legal term *capacity to act rationally*. According to article 16 SCC a person is capable of judgement within the meaning of the law if he or she does not lack the capacity to act rationally (*Fähigkeit, vernunftgemäss zu handeln/faculté d’agir raisonnablement/capacità di agire ragionevolmente*) by virtue of being under age or because of a mental disability, mental disorder, intoxication or similar circumstances.

*Capacity to act rationally* as a prerequisite of the capacity of judgement contains according to case law two elements: on the one hand, an intellectual element, namely the ability to recognise the meaning, expediency and effects of a particular action; on the other hand, a volitional or character element, namely the ability to act according one’s free will and on the basis of this reasonable knowledge<sup>69</sup>.

In practice, the capacity of a person to act rationally is assessed by the competent authority (namely the adult protection authority), or by a court in the context of a conflict concerning the validity of a concrete act (for example of a will). Legal authorities and courts in many cases mandate medical professionals with the concrete evaluation of the person’s capacity. The Swiss Academy of Medical Sciences has issued medical-ethical guidelines according to which incapacity is ascribed to a patient on the basis of the weighing of relevant information, taking into consideration the moral principles of respect for autonomy and beneficence, and based on ethical/normative considerations as to whether the patient should be denied responsibility for decision-making.<sup>70</sup>

- 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?**

The adoption of the CRPD has brought important impulses for the evaluation of the Swiss system on legal capacity. As outlined above, the CRPD Committee recommends in its concluding observations on the initial report of Switzerland, in relation to article 17 CRPD (Protecting the integrity of the person), that Switzerland prohibits the sterilization of persons with disabilities without their consent.<sup>71</sup> Based on the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (article 15 CRPD), it recommends that Switzerland eliminates in law, policy and practice all forms of forced medical procedures and treatment.<sup>72</sup>

The CRPD Committee in its concluding observations concerning Switzerland in relation to article 13 CRPD (Access to justice) notes with concern barriers to access to justice for persons with disabilities, who, if they are deemed “incapable of discernment” [in the terms of this report: incapable of judgement], are not provided with procedural and reasonable accommodation in order to facilitate their effective role as participants in legal proceedings on an equal basis with others.<sup>73</sup> The Committee recommends that Switzerland takes different measures in order to ensure access to judicial and administrative facilities, to strengthen federal and cantonal procedural regulations to ensure the provision of procedural and age-appropriate accommodation at all levels of the justice system; to develop professional development programmes for the judiciary, judicial and administrative professionals and other relevant government officials on the provisions of the Convention and the human rights model of disability and their implementation in domestic law; and repeal legislation that restricts the legal capacity of persons with disabilities, and guarantee their access to justice on an equal basis with others, including throughout judicial proceedings.<sup>74</sup>

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<sup>69</sup> BGE 144 III 264, 271; 134 II 235, 239; 124 III 5, 7 and 8.

<sup>70</sup> SWISS ACADEMY OF MEDICAL SCIENCES (SAMS), *Medical-ethical guidelines: Assessment of capacity in medical practice*, SAMS, Bern 2019, p. 7; download: <https://www.samw.ch/en/Publications/Medical-ethical-Guidelines.html>, accessed 13 December 2022.

<sup>71</sup> Para. 35(a) and 36(b) Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

<sup>72</sup> Para. 32(a) Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

<sup>73</sup> Para. 27 Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

<sup>74</sup> Para. 28 Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

## **SECTION III – STATE-ORDERED MEASURES**

### *Overview*

#### **16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.**

Adult protection law provides four types of curatorships with different facets.

A **supporting curatorship** (*Begleitbeistandschaft/curatelle d'accompagnement/amministrazione di sostegno*, article 393 SCC) is the least intrusive form of curatorship. It is ordered in cases where the adult needs accompanying support to deal with certain matters (e.g., advice on legal transactions, assistance and control in taking medication) and can only be appointed with the consent of the adult. It is important to note that a supporting curatorship does not limit or impair the adult's active legal capacity in any way. Thus, the curator is an advisor and not a legal representative. This measure allows supported decision-making as defined by the CRPD.<sup>75</sup>

A **representative curatorship** (*Vertretungsbeistandschaft/curatelle de représentation/curatela di rappresentanza*, articles 394 and 395 SCC) can be established if an adult is unable to manage his or her personal and financial affairs and therefore requires representation. Within the framework of the curatorship, the authority may restrict the adult's active legal capacity (para. 2).<sup>76</sup> Even if the adult's active legal capacity has not been restricted, he or she is bound by the curator's actions (para. 3). As legal representative, the curator acts on behalf of the adult, with the exception of some specific legal acts. These require the consent of the adult or the authorisation of the authority (e.g. the termination of a house rental contract, article 416 SCC).<sup>77</sup>

A **cooperation curatorship** (*Mitwirkungsbeistandschaft/curatelle de cooperation/curatela di cooperazione*, article 396 SCC) is established if the protection of the adult requires that certain acts be made dependent on the consent of the curator. The active legal capacity of the adult is thus restricted accordingly by law (para. 2). It is up to the authority to determine for which acts the curator's consent is required. Within the defined scope, the adult can act individually, but only with the consent of the curator.<sup>78</sup> In this case, the curator has no rights of representation.

A **comprehensive curatorship** (*umfassende Beistandschaft/curatelle de portée générale/curatela generale*, article 398 SCC) can only be ordered as *ultima ratio* if a person is in great need of assistance, namely due to a permanent loss of capacity of judgement (article 398 para. 1 SCC).<sup>79</sup> It covers all aspects of personal care, management of assets and legal matters (para. 2). In the case of a comprehensive curatorship, the active legal capacity of the adult is completely revoked by law (para. 3).<sup>80</sup> In addition, the comprehensive curatorship leads to an entry in the civil registry<sup>81</sup>, loss of child custody<sup>82</sup>, no longer having an independent residential address<sup>83</sup> and finally the loss of political rights on the federal level.<sup>84</sup> In relation to the right to vote, the canton of Geneva has

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<sup>75</sup> D. ROSCH, 'Erwachsenenschutz zwischen Selbstbestimmung, Supported Decision Making und Substitute Decision Making' (2019) *Die Praxis des Familienrechts* 105, 113.

<sup>76</sup> The active legal capacity is not generally affected, see Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7016; BGE 140 III 49 ff.

<sup>77</sup> See below question 28.

<sup>78</sup> Capacity of judgement is a requirement see Y. BIDERBOST in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7<sup>th</sup> edition, Basel 2022, Art. 396 N 9.

<sup>79</sup> Cf. also below question 16 b).

<sup>80</sup> The comprehensive measure restricts the rights of the affected person to the maximum extent possible, BGE 140 III 97 et seq. Cf. in this respect also question 31.

<sup>81</sup> Art. 8 lit. k para. 2 Civil Registry Ordinance (*Zivilstandsverordnung/Ordonnance sur l'état civil/Ordinanza sullo stato civile*, SR 211.112.2).

<sup>82</sup> Art. 296 para. 3 SCC.

<sup>83</sup> Art. 26 SCC.

<sup>84</sup> Art. 2 Federal Act on Political Rights (*Bundesgesetz über die politischen Rechte/Loi fédérale sur les droits politiques/Legge federale sui diritti politici*, SR 161.1).

abolished the aforementioned automatism. In other cantons and at the federal level, corresponding efforts have also been announced or are under way.<sup>85</sup>

In its Concluding observations, the CRPD Committee recommends that Switzerland repeals all legal provisions at the federal and cantonal levels that result in persons with disabilities, in particular those with intellectual or psychosocial disabilities, being denied their right to vote.<sup>86</sup>

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

Supporting, representative and cooperation curatorships may be combined if necessary (article 397 SCC). The authority must not only determine which type of curatorship is required, but also define the curator's tasks and responsibilities related to personal care, the management of his or her assets or legal matters, tailoring the measure to the adult's needs (article 391 para. 1 and 2 SCC).

This does not apply to the comprehensive curatorship, as this measure covers all personal, financial and legal needs of an adult (article 398 para. 2 SCC) and does not leave room for combination with other measures or tailoring.

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

According to article 389 SCC, any adult protection measure must comply with the constitutional principles of subsidiarity and proportionality: Subsidiarity means that the authority may only order a measure if the support offered to the adult by the family, other close persons or private or public services is or proves to be insufficient, or if the adult is incapable of judgement<sup>87</sup> and has made no or insufficient arrangements for his or her own care (voluntary measures) and the statutory measures (representation by the spouse or registered partner, article 374 SCC) are not sufficient. If the support provided by cantonal social welfare legislation and private social services is well developed and organised, it is often not necessary to establish a curatorship.

According to the principle of proportionality, any public measure must be necessary and appropriate. This means that the authority can only order a measure that is tailored to the needs of the adult. The guiding principle is "as much state care as necessary, as little state intervention as possible".<sup>88</sup> Although curatorships in the SCC are not ranked according to the degree of intervention, it can be said that the supporting curatorship is the most lenient, followed by cooperative and representative curatorship, as these are more interventionist. Comprehensive curatorship is the most far-reaching curatorship.

However, as Swiss adult protection law is still built on the system of substitute decision making<sup>89</sup> in the currently dominant understanding, if an adult is no longer capable of judgement especially in relation to most financial and property matters, the state-ordered measure must ensure that the curator can act as a representative on his or her behalf. When establishing whether a person lacks capacity of judgment and therefore needs to be represented, it is not considered whether the person may be capable of acting reasonably with support; capacity of judgment presupposes individual capabilities of the person himself or herself.<sup>90</sup> A supporting or cooperative curatorship is therefore regarded as not sufficient as these measures do not allow for representation by the curator. This leads to the frequent establishment of a representative curatorship or a comprehensive curatorship.<sup>91</sup>

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<sup>85</sup> C. TOBLER, 'Gleichstellung und politische Rechte: auf dem Weg zu einer integrativen Demokratie' (2021) *Zeitschrift für Schweizerisches Recht* 277, 327.

<sup>86</sup> Para. 56(a) Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

<sup>87</sup> Article 16 SCC, see above question 8 a).

<sup>88</sup> BGE 140 III 49 E. 4.3.1; This requires, on the one hand, careful clarification of the entire circumstances, namely the state of weakness and the resources of the person concerned, as well as knowledge of both the measures of adult protection and the alternative state and private care options and, on the other hand, prudent and empathetic action, see T. GEISER, 'Das neue Erwachsenenschutzrecht und die Aufgabe der Gerichte' (2013) *Zeitschrift des Bernischen Juristenvereins* 1, 15-16, 19.

<sup>89</sup> See D. ROSCH, 'Erwachsenenschutz zwischen Selbstbestimmung, Supported Decision Making und Substitute Decision Making' (2019) *Die Praxis des Familienrechts* 105, 108; critical in this regard W. BOENTE, 'Erste Auswirkungen der Behindertenrechtskonvention auf das Erwachsenenschutzrecht' (2018) *Die Praxis des Familienrechts* 110, 120 f.

<sup>90</sup> See W. BOENTE, *Zürcher Kommentar, Der Erwachsenenschutz, Die eigene Vorsorge und Massnahmen von Gesetzes wegen Art. 360-387 ZGB*, Geneva/Zürich/Basel 2015, Vorbemerkungen zu Art. 360 N 143.

<sup>91</sup> See for statistics below question 30.

It is however also generally admitted, that a comprehensive curatorship can be stigmatising and has far-reaching consequences.<sup>92</sup> Therefore, it is understood that the authority should thoroughly consider a representative curatorship before ordering a comprehensive curatorship. However, this is not yet fully implemented in practice: The statistics on the number of comprehensive curatorships in the individual cantons clearly show that there are still considerable differences and that not all authorities respect the principle of subsidiarity and proportionality sufficiently.

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

The authority shall, at the request of a person involved in the proceedings or *ex officio*, take all precautionary measures necessary for the duration of the proceedings. In urgent cases, the authority may take precautionary measures immediately and without hearing the parties involved (article 445 SCC).

*Start of the measure*

*Legal grounds, procedure*

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

According to article 390 para. 1 (1) SCC, the authority must order a curatorship if an adult is wholly or partially incapable of managing his or her own affairs due to mental disability, mental disorder or similar inherent weakness.

“Mental disorder” includes the recognised clinical conditions of psychiatry, i.e. psychoses and psychopathies, whether physically justifiable or not, as well as dementia, in particular senile dementia.<sup>93</sup> Also, neuroses and personality disorders (e.g. paranoid-cross-disorder and dissocial personality disorder) can also be summarised under this heading.<sup>94</sup> The law does not explicitly mention addictive disorders (e.g. alcohol, drug, medication, gambling, sex or cyber addiction) as these also fall under the concept of mental disorder if they correspond to the medical circumscription of addiction.<sup>95</sup>

The term “inherent weakness” covers weakness due to old age, prodigality, extreme cases of inexperience and also unwillingness.<sup>96</sup> On the other hand, it may also include, in exceptional situations, the most severe manifestations of physical impairment (e.g. severe paralysis) or multiple disabilities (e.g. combination of blindness and deafness).<sup>97</sup>

A curatorship can also be ordered if an adult is neither able to take care of the matters to be taken care of nor has a representative appointed due to a temporary loss of capacity of judgement or temporary absence (article 390 para. 1 (2) SCC).<sup>98</sup>

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<sup>92</sup> See above.

<sup>93</sup> Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), BBl 2006 7001, 7043.

<sup>94</sup> Federal Supreme Court, unpublished decision from 10.3.2014, 5A\_4/2014, E. 5.1.

<sup>95</sup> Federal Supreme Court, unpublished decisions from 12.11.2013, 5A\_667/2013, E. 6.2; 20.9.2013, 5A\_638/2013, E. 2.1, 3.2; BGE 137 III 289, 291 E. 4.2; BGE 137 III 289, 291 E. 4.2; see also Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), BBl 2006 7001, 7043; L. MARANTA and P. TERZER, “Allgemeine Voraussetzungen einer Beistandschaft des Erwachsenenschutzes”, in D. ROSCH, C. FOUNTOULAKIS and C. HECK (eds), *Handbuch des Erwachsenenschutzes*, Bern 2018, Haupt Verlag, 485, margin note 1222 ff.

<sup>96</sup> Ibid; with more detailed examples see Y. BIDERBOST in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 390 N 13 f.; the Federal Supreme Court requires a restrictive interpretation of the catch-all provision (unpublished decision from 1.12.2015, 5A\_638/2015, E. 5.1); L. MARANTA and P. TERZER, “Allgemeine Voraussetzungen einer Beistandschaft des Erwachsenenschutzes”, in D. ROSCH, C. FOUNTOULAKIS and C. HECK (eds), *Handbuch des Erwachsenenschutzes*, Bern 2018, Haupt Verlag, 485, margin note 1235, points out in this context that especially an interpretation as a gateway for ethos laws or moral re-education as well as for disciplining people should be prevented.

<sup>97</sup> Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), BBl 2006 7001, 7043; KINDES- UND ERWACHSENENSCHUTZKONFERENZ (KOKES), *Praxisanleitung Erwachsenenschutzrecht*, Zürich 2012, Dike Verlag, margin note 1.162 ff.; Federal Supreme Court, unpublished decisions from 1.12.2015, 5A\_638/2015, E. 5.1.

<sup>98</sup> A curatorship by reason of absence presupposes that the person concerned is in an unknown place during the period in which the matters are to be dealt with or cannot be reached in time for other reasons, even if the place of residence is known, and no curator has been

## 18. Which authority is competent to order the measure?

The adult protection authority (article 440 SCC) is responsible for ordering measures and describing the tasks of the mandate holders (curators).

The organisation of adult (and child) protection is the responsibility of the cantons. The Confederation makes only minimal specifications. Each canton needs to establish the child and adult protection authority (CAPA, article 440 para. 1 and 3 SCC), the administrative supervisory authority (article 441 SCC)<sup>99</sup> and designate an appeal court (article 450 SCC). The CAPA needs to be an interdisciplinary, specialised authority with at least three members elected according to professional criteria. Depending on the canton, the child and adult protection authority is a judicial authority, or an administrative authority organised at cantonal or (inter) communal level. The Conference for Child and Adult Protection (*Kindes- und Erwachsenenschutzkonferenz KOKES/Conférence en matière de protection des mineurs et des adultes COPMA*) coordinates the work of the cantons as an intercantonal conference of experts and directors.<sup>100</sup>

## 19. Who is entitled to apply for the measure?

A curatorship is established at the request of an adult in need of protection, a close person or ex officio (article 390 SCC).<sup>101</sup> Furthermore, according to article 443 SCC, any person may notify the authorities if a person appears to need help. Any person in public service who knows of an emergency is also obliged to inform the competent authority. According to article 390 para. 3 in conjunction with article 446 para. 1 SCC, the adult protection authority investigates the circumstances of the case *ex officio* (cf. article 444 et seq. SCC).

## 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 consent and participation of the adult is only required in the case of a supporting curatorship. In contrast, a representation, cooperation or comprehensive curatorship can be ordered without the consent of the adult. If an adult resists a measure, the authority must consider a supporting curatorship or, if possible, assistance by a public service provider. However, any measure must be appropriate and comply with the principles of subsidiarity and proportionality.

## 21. Provide a general description of the procedure for the measure to be ordered.

The procedure in adult protection law is regulated by cantonal law. The SCC only lays down some general procedural rules (articles 443 to 450g SCC).<sup>102</sup> The procedure is divided into a preliminary phase to clarify the competence of the authority involved (article 444 SCC), the need for precautionary measures (article 445 SCC) or the legal representation of the adult (article 449 SCC), and an assessment phase to clarify the circumstances (article 446 SCC), including possible medical reports (article 446 para. 2 sentence 3 SCC). Following the organisational structure provided by cantonal law or the philosophy of the concrete CAPA, the authority's decision-making body carries out the assessment itself, or delegates it to an internal assessment service or to an

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appointed, see P. MEIER in A. BÜCHLER, C. HÄFELI, A. LEUBA and M. STETTLER (eds), *FamKomm Erwachsenenschutz*, Stämpfli Verlag, Bern 2013, Art. 390 N 21.

<sup>99</sup> Cf. below question 27.

<sup>100</sup> <https://www.kokes.ch/de/organisation/organisation-kantone>, accessed 14.06.2022.

<sup>101</sup> A close relative is a person who, due to his or her abilities and regularly due to their relationship (kinship, friendship), appears suitable to look after the interests of the person concerned. This may be the parents, siblings, children of the person concerned, relatives, the spouse or life partner, doctors, social workers, a priest, a person who has been caring for the person concerned for a long time, etc., see unpublished decision of the Federal Supreme Court from 25.3.2009, 5A\_837/2008, E. 5.2. However, it is also necessary that the relationship is characterised by the responsibility of this person for the welfare of the person concerned, see unpublished decision of the Federal Supreme Court from 5.11.2013, 5A\_663/2013, E. 4.1).

<sup>102</sup> For details regarding the proceedings before the adult protection authority cf. P. FASSBIND, „Verfahren vor der KESB“ in D. ROSCH, C. FOUNTOULAKIS and C. HECK (eds), *Handbuch des Erwachsenenschutzes*, Bern 2018, Haupt Verlag, 485, margin note 233 ff.; KINDES- UND ERWACHSENENSCHUTZKONFERENZ (KOKES), *Praxisanleitung Erwachsenenschutzrecht*, Zürich 2012, Dike Verlag, margin note 1.162 ff.

external entity (article 446 para. 2 sentence 2 SCC).<sup>103</sup> During the assessment it must be evaluated explicitly and as a standard whether self-determination of the adult can be ensured within the framework of a voluntary or state-ordered measure as well as within the framework of voluntary support offers (see also 363 SCC).<sup>104</sup> Based on the assessment, the final phase of decision-making is initiated. This comprises a hearing of the adult (article 447 SCC) and the issuing of the decision.

**Pay attention to:**

**a. A requirement of legal representation of the adult;**

A legal representation of the adult in the proceedings is not required. However, according to article 449a SCC, the adult protection authority can advise that the adult must be represented in the procedure and appoints a person experienced in care-related and legal matters as curator for the duration of the procedure, if necessary.

**b. Availability of legal aid;**

Legal aid is guaranteed by article 29 Federal Constitution under certain conditions: A person affected by adult protection proceedings is entitled to legal aid if he or she does not have sufficient financial means to hire legal counsel and if the applications are not unrealistic or otherwise insufficient. Legal aid covers the costs of proceedings and legal representation (lawyer's fees).

**c. Participation of family members or/and of vulnerable adults' organisations or other CSO's**

When the authority is notified that a person is not receiving assistance, it must investigate the circumstances of the person's life in order to assess the need for protection. To complete this assessment, the authority may need to speak to family members or other close persons. The adult may also wish a family member to become their curator (article 401 SCC). In addition, the authority should inform the family members that they have the right to propose a particular person as curator.<sup>105</sup> A reform proposal improving the position of family members in (child and) adult protection is currently being discussed.<sup>106</sup>

**d. Requirement of a specific medical expertise / statement**

In order to determine whether a state of weakness within the meaning of article 390 para. 1 (1) SCC or an incapacity of judgement (article 390 para. 1 (2) SCC) exists, the adult protection authority must, if necessary, obtain a medical opinion (article 446 SCC). According to legal literature it is necessary to obtain an external expert opinion if a measure is planned that removes or restricts the adult's active legal capacity.<sup>107</sup> Also, according to the Federal Supreme Court a medical expertise must be established in case of a comprehensive curatorship because of a mental disorder or mental disability, unless a member of the authority assisting in the decision has the necessary expertise.<sup>108</sup>

**e. Hearing of the adult by the competent authority**

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<sup>103</sup> L. MARANTA, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Vorbemerkungen zu Art. 443-450g N 9.

<sup>104</sup> KINDES- UND ERWACHSENENSCHUTZKONFERENZ (KOKES), *Praxisanleitung Erwachsenenschutzrecht*, Zürich 2012, Dike Verlag, margin note 1.148.

<sup>105</sup> KINDES- UND ERWACHSENENSCHUTZKONFERENZ (KOKES), la curatelle confiée à des proches – critères de mise en oeuvre de l'art. 420 CC, November 2016 <[https://www.kokes.ch/application/files/7214/8061/4384/Recommandations\\_art\\_420\\_CC.pdf](https://www.kokes.ch/application/files/7214/8061/4384/Recommandations_art_420_CC.pdf)> accessed 14.06.2022; cf. also ECOPLAN FORSCHUNG UND BERATUNG IN WIRTSCHAFT UND POLITIK (eds), Bericht zur Umfrage Kindes- und Erwachsenenschutzrecht, Erhebungen zum Einbezug nahestehender Personen allgemein und zum Umgang mit privaten Beiständen im Besonderen, 28.8.2019, 16 et seq. <<https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/externe/2019-08-28.html>> accessed 14.06.2022.

<sup>106</sup> See above question 7.

<sup>107</sup> C. FOUNTOLAKIS in M. AMSTUTZ ET AL (eds), *Handkommentar zum Schweizerischen Privatrecht, Personen- und Familienrecht*, Schulthess Verlag, Zürich 2016, Art. 390 N 3.

<sup>108</sup> BGE 140 III 97, 100.



According to article 447 SCC a personal, oral hearing must be held unless this appears disproportionate.<sup>109</sup> The adult person who is capable of judgement can waive his or her right to be heard.<sup>110</sup> The hearing gives the adult the opportunity to present his or her point of view and to actively participate in the search for a solution.<sup>111</sup> Depending on the constellation, a trusted person may accompany the adult at the hearing.

#### **f. The possibility for the adult to appeal the order**

The adult (and persons close to him) may appeal against the measure to the competent cantonal court (article 450 et seq. SCC).<sup>112</sup> An appeal in civil matters to the Federal Supreme Court is admissible against the appeal decision of the last cantonal instance (article 75 Law on the Federal Supreme Court<sup>113</sup>).

It is also possible for the adult, a close person or a person with a legitimate interest to appeal to the adult protection authority (as supervisory authority) to intervene against acts or omissions of the authorised representative or a third party or an authority to whom the adult protection authority has given a mandate (article 419 SCC).<sup>114</sup>

## **22. Is it necessary to register, give publicity or to give another kind of notice of the measure?**

Adult protection measures are not made public. However, according to article 413 SCC, third parties must be informed of a measure or of a restriction of an adult's legal capacity, as far as this is necessary. As a rule, registration is not required for adult protection measures. The adult protection authority only notifies the civil registry office if it places a person under comprehensive curatorship due to permanent loss of capacity of judgement (article 449c SCC), what leads to an entry in the civil register.<sup>115</sup> According to article 452 para. 2 SCC, if the curatorship limits the legal capacity of the adult, the debtor must be informed that contractual performance will only release him from his obligations if he pays the curator. Prior to notification, the *bona fide* debtor can still validly pay a creditor who is under curatorship. In addition, any person who demonstrates a credible interest may request information from the authority about the existence and effects of an adult protection measure (article 451 SCC).

### *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:**

Under the SCC, only a natural person can be appointed as a curator (article 400 SCC). The law distinguishes between professional and private curators. In particular, a private person, a specialist from a private or public social service or a professional curator may be appointed.<sup>116</sup>

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<sup>109</sup> Disproportionality is admitted, for example, if the hearing could cause harm to the health of the person concerned, see L. MARANTA, C. AUER and M. MARTI in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 447 N 14; cf. in this matter also BGE 116 II 406, 407 E. 2.

<sup>110</sup> See Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7079. This is however controversially discussed in the literature, see L. MARANTA, C. AUER and M. MARTI in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 447 N 17; question left open by the Federal Supreme Court (unpublished decision from 14.8.2019, 5A\_902/2018, E. 4.5).

<sup>111</sup> BGE 140 III 49 ff.

<sup>112</sup> For the requirements of a judicial appellate authority cf. BGE 139 III 98 E. 3.5; for the circle of persons who are considered "close to the adult" cf. BGE 137 III 67, 70; BGE 122 I 18, 29 f.; BGE 114 II 213, 217; BGE 113 II 232, 233 f.

<sup>113</sup> Bundesgerichtsgesetz/Loi sur le Tribunal fédéral/Legge sul Tribunale federale, SR 173.110.

<sup>114</sup> See below question 27 b).

<sup>115</sup> Art. 8 lit. k para. 2 Civil Registry Ordinance (*Zivilstandsverordnung/Ordonnance sur l'état civil/Ordinanza sullo stato civile*, SR 211.112.2).

<sup>116</sup> Cf. art. 404 para. 1 s. 2, Art. 421 (3), Art. 424 s. 2, Art. 425 para. 1 s. 2 SCC; Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7049 ff.

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

The authority shall appoint as curator a natural person who has the personal aptitude and knowledge to perform the proposed duties, who has the time necessary to do so, and who can perform the duties personally and gives his or her consent to the task (article 400 SCC).

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

If the adult proposes someone as curator, the authority is obliged to agree to the request, provided the person is suitable and gives his or her consent (article 400 and 401 SCC).<sup>117</sup> In addition, the authority must, if possible, take into account the wishes of family members or other close persons,<sup>118</sup> but may appoint an even more suitable person as curator at its own discretion. If the adult rejects a particular person as curator, the authority must respect this wish if it is justified.<sup>119</sup>

**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?**

The SCC does not imply a ranking of preferred representatives like family members. In turn, there is preferential treatment for close family members in terms of safeguards.<sup>120</sup>

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

The adult protection authority must examine the suitability of a potential curator ex officio (article 446 SCC). If a person's interests conflict with those of the adult, he or she is not suitable as a curator within the meaning of article 400 SCC and should therefore not be appointed.<sup>121</sup> If the authority appoints a curator despite a conflict of interest, its decision can be challenged by appeal to the court (article 450 SCC).

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

Normally there is only one curator within a measure. If the circumstances so require, the court may appoint two or more persons as curators, who are simultaneously responsible within the same curatorship (article 400 SCC).<sup>122</sup>

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

Since a reform that entered into force on 1 January 2019, there is no obligation to accept an appointment as representative<sup>123</sup>. A person may only be appointed as a curator with his or her consent (article 400 para. 2 SCC).

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<sup>117</sup> Cf. ECOPLAN FORSCHUNG UND BERATUNG IN WIRTSCHAFT UND POLITIK (eds), Bericht zur Umfrage Kindes- und Erwachsenenschutzrecht, Erhebungen zum Einbezug nahestehender Personen allgemein und zum Umgang mit privaten Beiständen im Besonderen, 28.08.2019, p. 15 et seq. <<https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/externe/2019-08-28.html>> accessed 14.06.2022.

<sup>118</sup> BGE 118 Ia 229 E. 2; BGE 117 Ia 506; BGE 107 II 504 E. 3; BGE 107 Ia 343 E. 2.

<sup>119</sup> BGE 140 III 1, E. 4.3.2.

<sup>120</sup> See below question 27 b).

<sup>121</sup> Cf. unpublished decision of the Federal Supreme Court from 14.1.2015, 5A\_860/2014, E. 3 summarised in *Zeitschrift für Kindes- und Erwachsenenschutzrecht* 2015 172; see also BGE 140 III 49 E. 4.3.2; for further examples of possible conflicts of interest in the family or also with professional curators cf. R. REUSSER, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 400 N 23.

<sup>122</sup> See also below question 26 b).

<sup>123</sup> Before that date the appointment could not be declined, irrespective of the question if the appointed person was a close family member or not, see Message of the Swiss Federal Council, Bundesblatt 2017 6239.

## *During the measure*

### *Legal effects of the measure*

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

A **supporting curatorship** does not affect the active legal capacity of the adult (article 393 SCC). Even in case of a **representation curatorship** (article 394 SCC), the active legal capacity is not necessarily impaired. The adult may retain his or her active legal capacity in parallel with the curator. In this case the adult has the capacity to act, but at the same time is bound by the legal acts of the curator. If necessary, the authority may decide to restrict the active legal capacity inferring an exclusive competence to the curator. The restriction can have as its object an act or a group of acts of the same nature (such as a leasing operation or any type of credit transaction), a particular field or an object (the sale of a building)<sup>124</sup>.

In the case of a **cooperation curatorship** the active legal capacity is limited by law in relation to the acts that are subject to the duty to collaborate (article 396 SCC). In the case of a **comprehensive curatorship**, active legal capacity is revoked by operation of law (article 398 para. 3 SCC). If a person has lost his or her capacity of judgement, active legal capacity is suppressed in relation to the acts for which capacity of judgement is lacking, even without the measure (articles 17 and 18 SCC)<sup>125</sup>.

Legal capacity is not completely removed by a curatorship (even comprehensive curatorship): according to the general rules on legal capacity, a person whose active legal capacity is restricted under a curatorship still has some capacity to act concerning certain acts, if he or she is deemed capable of judgement in relation to the act in question<sup>126</sup>.

### *Powers and duties of the representatives/support person*

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

- **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;**

In property and financial matters, the curator (as representative or support person, depending on the type of curatorship) administers the assets with due care and performs all legal acts connected with their administration (article 408 et seq. SCC).<sup>127</sup> In addition, the curator provides the adult with a personal allowance from the adult's assets, which he or she may dispose of freely (article 409 SCC). However, the curators' powers and duties are restricted by law in respect of certain acts: firstly, the curator may not provide financial security, set up a foundation or make a gift on behalf of the adult, with the exception of customary occasional gifts. Also, assets of special value to the adult or his or her family may not be disposed of, if possible (article 412 SCC). In addition, the power of the curator is limited, as the SCC requires the consent of the adult protection authority for various transactions (article 416 SCC).<sup>128</sup>

Representation in personal and family matters is more restricted: Under the SCC, an adult under curatorship who lacks active legal capacity but has capacity of judgement exercises his or her strictly personal rights independently (article 407, article 19 et seq. SCC).<sup>129</sup> Representation of an adult under curatorship in matters of personal rights is therefore only necessary or possible if the consent of a legal representative is expressly

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<sup>124</sup> A. LEUBA, in P. PICHONNAZ, B. FOËX and C. FOUNTOLAKIS (eds), *Commentaire Romand Code civil I*, Helbing Lichtenhahn, 2<sup>nd</sup> edition, Basel 2023, Art. 394 N 24.

<sup>125</sup> See above question 8 a).

<sup>126</sup> See above question 8 b).

<sup>127</sup> K. AFFOLTER, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7<sup>th</sup> edition, Basel 2022, Art. 408 N 4 et seq. Cf. for due diligence care also Art. 413 SCC; BGE 135 III 198 E. 2.; BGE 136 III 113 E. 3.2.1; BGE 52 II 319.

<sup>128</sup> See below question 28.

<sup>129</sup> See further explanations question 8 b).

prescribed by law.<sup>130</sup> The consent of the curator is required, for example, for the conclusion of a marriage contract (article 183 para. 2 SCC), the recognition of the child (article 260 para. 2 SCC) or the conclusion of an inheritance contract as testator (article 468 para. 2 SCC). In the case of persons who lack capacity of judgement, the curator also acts as representative in personal and family matters, unless it is an absolutely strictly personal right, so that any form of representation is excluded by law (article 19c para. 2 SCC, e.g. marriage or drawing up a will).

In addition, the SCC regulates privacy during an adult protection measure: without the consent of the adult, the curator may only open letters addressed to the adult or enter the adult's home if the authority has expressly granted the power to do so (article 391 para. 3 SCC).

Personal care may also include representing a person without capacity of judgement in making decisions about **medical matters** and giving or withholding consent to such matters (article 378 SCC). In case of permanent incapacity, the hypothetical will of the adult must be taken into account. For this purpose, an advance medical directive (article 370 et seq. SCC) or a lasting power of attorney (article 360 et seq. SCC) must be used. In addition, an *ex lege* representation applies to medical measures in accordance with article 377 et seq. SCC in the order of priority of existing beneficiaries (article 378 SCC).<sup>131</sup>

If, on the other hand, the person concerned is deemed capable of judgement, he or she alone has the right to decide on medical interventions and the release of medical data entrusted to the physician.

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

According to article 388 SCC, the measures taken by the authorities should preserve and promote the self-determination of the adult as an expression of human dignity as far as possible (para. 2), i.e. build on existing resources.<sup>132</sup>

The curator shall fulfill the tasks in the interest and according to the will of the adult. Therefore, the opinion of the adult must be taken in account and the will and preferences respected "as far as possible" (article 406 SCC).<sup>133</sup>

The guiding principles in article 406 SCC express that the adult does not have to live up to an officially determined normative behavior and that the curator should support the adult in their efforts to shape their life according to their own ideas: Any state intervention should therefore be based on a person's known or presumed will and previous life history.<sup>134</sup>

Considering article 388 para. 2 SCC and based on the principles of subsidiarity and proportionality (article 389 and article 392 SCC; BGE 140 III 49 E. 3), "as far as possible" means that this self-determination must take place whenever possible. The task of the curator is thus to secure and implement the right of self-determination of the adult.<sup>135</sup> Finding the right degree of self-determination or external determination in the ordering of state ordered measures as well as in their management requires careful assessment of the entire circumstances, namely the state of weakness and the adult's resources, and in respect of the adult's personal rights.<sup>136</sup> This means that the curator should use his or her power of representation only as *ultima ratio*, namely when self-determination is not possible in the internal relationship due to the adult's incapacity of judgement and the need for protection makes action in the external relationship necessary.

In the management of the curatorship, external determination takes precedence if the opinion of the adult can no longer be ascertained because he or she is incapacitated, and no other sources are available. Also, this is the case if it is not "expedient" in the individual case (Art. 406 para. 1 SCC) to take the adult's opinion into account,

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<sup>130</sup> Art. 19c para. 1 SCC.

<sup>131</sup> See below question 50.

<sup>132</sup> Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7042.

<sup>133</sup> On the right to one's own lifestyle versus asset protection cf. BGE 136 III 113 E. 3.2.1; cf. also BGE 139 I 169, according to which an application for naturalisation can also be submitted for a person who is incapable of judgement via a (legal) representative.

<sup>134</sup> Corresponding reflections are expressly standardised in Art. 377 para. 3 and 382 para. 2 SCC, for example.

<sup>135</sup> D. ROSCH, 'Die Beistandschaft, die Selbstbestimmung und die UN-Behindertenrechtskonvention im schweizerischen Recht unter besonderer Berücksichtigung von Art. 12 BRK', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, 86 ff.

<sup>136</sup> In addition to the highly personal rights under Art. 19c SCC, there are other areas that restrict the actions of the curator: the prohibited transactions (Art. 412 SCC) or even entering the home and opening the mail, which is subject to a decision by the authority (Art. 391 para. 3 SCC).

e.g. if consent to taking out a loan must be refused within the framework of a cooperation curatorship in order to prevent the adult from becoming over-indebted.<sup>137</sup>

- **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?**

According to article 405 et seq. SCC, the curator is obliged to establish personal contact as soon as he or she has assumed curatorship and must then also carry out the measure expressly in accordance with the adult's opinion and will. If the curatorship involves asset management, the curator has a duty to draw up an inventory of the assets to be managed without delay in cooperation with the adult protection authority (article 405 SCC).<sup>138</sup> In addition, the curator is obliged to report and account to the authority at least every two years (article 410 f. SCC) so that the authority can exercise its supervision.<sup>139</sup> On this occasion, the authority examines whether the measure is still necessary and whether it can be adapted or revoked. A curator who is also a close relative may be exempted from this obligation (article 420 SCC). In addition, according to article 413 para. 1 SCC the curator has the same duty of care in the performance of his duties as an authorised representative under the provisions of the Swiss Code of Obligations (SCO).<sup>140</sup> Furthermore, the curatorship is subject to the duty of confidentiality, unless this conflicts with overriding interests (article 413 para. 2 SCC).<sup>141</sup> The adult must be consulted by the curator when the report is drawn up, if possible, and must receive a copy. In addition, the curator must inform the adult about the accounts. Apart from the regular reports, the curator is obliged to inform the adult protection authority without delay of any circumstances that require a change in the measure or allow the curatorship to be terminated (article 414 SCC). For some specific transactions, the consent of the (capable) adult is required by law (article 416 SCC).

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

The curator must build a trusting relationship with the adult. He or she should actively and personally care, get to know the circumstances of the adult's life and visit the adult at home if necessary (article 405, 406 SCC). Personal care depends on individual needs and may relate to different areas of life, such as accommodation, food, clothing, physical and health care, education, employment, mental and physical treatment, provision of a suitable social environment and caregivers.

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

The curator is entitled to reasonable remuneration and reimbursement of necessary expenses from the adult's assets (article 404 SCC).<sup>142</sup> This applies to all types of curatorships and regardless of whether it is a private or professional curator. In the case of professional curator, the remuneration is paid and expenses are reimbursed by the adult protection authority. The adult protection authority is entitled to demand reimbursement from the adult's assets. Pursuant to Art. 404 para. 1 sentence 1 SCC, the adult must first and foremost pay for the compensation of the curator. The cantons shall issue implementing provisions and regulations on remuneration and reimbursement of expenses if these cannot be paid from the adult's assets. The adult protection authority also determines the amount of the remuneration. In doing so, it shall take into account the scope and complexity of the tasks assigned to the curator, the economic situation of the person being cared for, the special effort required in the individual case and the special professional skills required by the task.<sup>143</sup>

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<sup>137</sup> Y. BIDERBOST in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 388 N 10.

<sup>138</sup> BGE 136 III 113; BGE 135 III 198.

<sup>139</sup> BGE 118 IV 41 E. 4.

<sup>140</sup> Art. 413 SCC is referring to Art. 398 SCO.

<sup>141</sup> The curator and the authority are authorised to disclose the fact of the curatorship and, where appropriate, other data in the event of conflicting overriding interests and for the purpose of the proper performance of the mandate, see Art. 452 f. SCC and as well U. VOGEL, 'Verhältnis der Schweigepflicht nach Art. 413 und Art. 451 ZGB zum Amtsgeheimnis nach Art. 320 StGB' (2014) *Zeitschrift für Kindes- und Erwachsenenschutz* 250, 252 ff., 259.

<sup>142</sup> The mandate of a curator is not an honorary office, see BGE 113 II 394 E. 2.

<sup>143</sup> BGE 116 II 399 E. 4b.

**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?**

The intervention used will be tailored to the needs of the adult. It may be a combination of different measures. The adult protection authority coordinates the responsibilities of the representatives if there is more than one representative (article 402 SCC).

- 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 the authority appoints two or more curators, it shall determine whether their duties are to be performed jointly or who is responsible for which duties. Two or more curators may only be required to perform their duties jointly if they agree to do so (article 402 SCC).<sup>144</sup> In asset management or legal transactions, curators with joint duties must act jointly for a legal transaction to be valid.<sup>145</sup> Tasks of minor importance concerning personal care may be delegated or shared.<sup>146</sup> In transactions with third parties, all curators must act jointly or with the prior consent or subsequent approval of the others. If a transaction is urgent and there is no time to obtain the consent of the co-curators, one assignee may validly act alone even without the consent or approval of the others.<sup>147</sup> Third parties must address the community of curators and not the individual curator in order to establish rights and obligations.

In the case of separate responsibilities, each curator is independently responsible for the tasks assigned to him or her and acts as a legal representative vis-à-vis third parties.<sup>148</sup>

*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 cantons appoint the child and adult protection authority (CAPA, article 440 SCC), the administrative supervisory authority (article 441 SCC) and the appeal authority (article 450 SCC) – all of them are responsible for supervision.<sup>149</sup> The CAPA exercises control and supervision activities within the framework of ongoing measures.<sup>150</sup> The administrative supervisory authority (article 441 SCC) supervises, supports and controls the administration of the CAPA (and indirectly also that of the mandate holders) in administrative, organisational and professional respects. It ensures the correct and uniform application of the law. Depending on the canton, it is either an administrative authority or a judicial authority. Administrative supervision is ex officio or on appeal and is exercised preventively, repressively, by control or by networking. The appellate authority (article 450 SCC) is a judicial authority. It acts on appeal and examines the formal and substantive correctness of the decisions of the

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<sup>144</sup> For separate responsibilities of two or more curators cf. R. REUSSER, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 402 N 21.

<sup>145</sup> The law of mandate is applied analogously, article 394 et seq. and article 403 SCO, see P. FASSBIND, *Kommentar Erwachsenenschutz*, Orell Füssli Verlag, Zürich 2012, article 402 ZGB N 1.

<sup>146</sup> R. REUSSER, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 402 N 6 et seq.

<sup>147</sup> *Ibid.*, Art. 402 N 9.

<sup>148</sup> Shared management may be considered, in particular, in the case the combination of curatorships (article 397 SCC) and a comprehensive curatorship (article 398 SCC) if these involve very diverse, complex and time-consuming tasks for the curator (e.g. division of personal care and property care), see R. REUSSER, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 402 N 19.

<sup>149</sup> <https://www.kokes.ch/de/organisation/organisation-kantone>, accessed 16.06.2022.

<sup>150</sup> See above question 18.

CAPA. Its duties are derived from the law (article 450-450e SCC). Individual cantons have provided for their own appeal bodies to review decisions in the area of care-related hospitalisation (article 439 SCC).

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

The adult protection authority must request reports and invoices from the curators at regular intervals and check that the representation and administration are being carried out correctly and that personal care is being provided. If necessary, the authority must take *ex officio* measures to safeguard the interests of the adult (article 415 para. 3 SCC). In addition, the authority must examine and approve special transactions that require statutory authorisation (article 416 SCC, e.g. acceptance of an inheritance).

The adult, a close person or any person with a legitimate interest may request the adult protection authority to intervene in the case of acts or omissions by the curator or a third party or a service (i.e. a specialist from a private or public social service) to which the adult protection authority has given a mandate (article 419 SCC).<sup>151</sup> If the requirements of article 419 SCC are not met, the application is mainly considered in the literature as a general supervisory complaint (or even a mixed form) to request the authority to intervene *ex officio*.

Furthermore, the legal literature has pointed out the problem of exemption and preferential treatment of close relatives with regard to safeguards: Where the adult's spouse, registered civil partner, parent, sibling or de facto civil partner is appointed as curator, the authority may exempt the curator in whole or in part from the duties to prepare an inventory<sup>152</sup>, to submit periodic reports and accounts<sup>153</sup>, and to obtain consent to certain transactions if justified by the circumstances (article 420 SCC).<sup>154</sup> The authority's general supervision of the curator is an important protection against possible abuse of adults under curatorship. The complete release of a curator from all duties under article 420 SCC is therefore likely to oppose article 12 (4) CRPD.<sup>155</sup>

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

In this case, the authority has the right to intervene and impose sanctions. It may itself give its consent to a legal transaction or instruct the curator to take a new decision. In the event of a breach of the duty of care (article 413 SCC), the authority may primarily order disciplinary measures (article 419 SCC). It is also possible to dismiss a curator (article 423 SCC) and initiate criminal proceedings in the event of a breach of confidentiality (for state-employed professional curators, article 320 Swiss Criminal Code); and in the event of unlawful infliction of damage, the curator may be liable under civil law to cover the damage caused as well as to pay compensation if this is justified (article 454 SCC).<sup>156</sup>

If accounts and reports are not submitted on time or are insufficient, appropriate sanctions must be taken to enforce accountability.

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

Any person who is harmed by an unlawful act or omission on the basis of an adult protection measure has the right to claim damages, and in justified cases also compensation. In this case, only the canton is liable, so it is not

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<sup>151</sup> Cf. regarding safeguards Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7049 f., 7059.

<sup>152</sup> Art. 405 para. 2 SCC.

<sup>153</sup> Art. 410 f. SCC.

<sup>154</sup> Contrary to the curator, for whom the canton is liable in the event of an act in breach of the duty of care, the authorized representative of a lasting power of attorney and the spouse in case of an *ex-lege* representation, as well as contractors, are personally liable pursuant to the SCO, cf. Art. 456 ZGB, Art. 398 Abs. 2 OR.

<sup>155</sup> Legal literature therefore advocates that release from obligations should only be granted with great reluctance, see with further notes C. HÄFELI, in D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 420 N 6.

<sup>156</sup> See above question 27 d).

possible to assert claims directly against the curator. The canton may nevertheless exercise a right of recourse against the curator (article 454 SCC).<sup>157</sup>

- 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.**

The SCC does not make provision for financial liability of the representative or support person in such a case.<sup>158</sup>

## **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;**

The authority's approval is required for the following transactions on behalf of the adult (article 416 SCC): (1.) the dissolution of the household, the termination of the lease of a dwelling in which the adult resides; (2.) long-term contracts for the adult's accommodation; (3.) the acceptance or renunciation of an inheritance, where an express declaration is required for this purpose, as well as inheritance contracts and contracts for the division of an estate; (4.) the acquisition, disposal, pledging and other encumbrance of real property and the construction of buildings which go beyond the scope of ordinary administrative activities; (5.) the acquisition, disposal and pledging of other assets as well as the granting of usufruct if these transactions do not fall within the scope of ordinary administrative activities; (6.) taking out and granting substantial loans, incurring liabilities under bills of exchange; (7.) life annuity and life maintenance agreements and life insurance policies, unless these form part of an occupational pension scheme in connection with an employment contract; (8.) taking over or liquidating a business, participating in a company with personal liability or a substantial equity interest; (9.) declaring insolvency, conducting legal proceedings, conclusion of a settlement, an arbitration agreement or a composition agreement, subject to the reservation of provisional measures by the curator in cases of urgency.

The authority's consent is not required if the adult who is capable of judgement gives his or her consent and his or her capacity to act is not restricted by the curatorship (article 416 para. 2 SCC; cooperation curatorship, representation curatorship if applicable). In addition, the authority may also determine other transactions (not expressly listed in article 416 SCC) that require its consent (article 417 SCC). If the curatorship is administered by a relative, it is at the discretion of the authority whether it may waive consent to all or certain transactions in whole or in part in individual cases or in general (article 420 SCC).

Contracts between the curator and the adult also always require the consent of the adult protection authority (article 416 para. 3 SCC).

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

If a transaction has been concluded without the required consent of the curator or the adult protection authority, it may be approved retrospectively.<sup>159</sup> If the authority or the curator refuses approval, the agreement is invalid, and either party may demand restitution of the services already rendered, even if third parties have acted in good faith (article 418, article 19a, article 19b and article 452 SCC).<sup>160</sup> An adult person whose legal capacity has been restricted by an adult protection measure is liable only to the extent that he or she has already benefited from the benefit or has enriched himself or herself or has spent the benefit in bad faith at the time the claim is made (art.

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<sup>157</sup> A study on the frequency of liability cases revealed that in the three years examined by the report (2016-2018), a total of 1'217 liability cases pursuant to Art. 454 et seq. SCC had occurred with private curators (1.4 % of this type of curatorship) and 1'081 with professional curators (0.5 % of this type of curatorship), see ECOPLAN FORSCHUNG UND BERATUNG IN WIRTSCHAFT UND POLITIK (eds), *Bericht zur Umfrage Kindes- und Erwachsenenschutzrecht, Erhebungen zum Einbezug nahestehender Personen allgemein und zum Umgang mit privaten Beiständen im Besonderen*, 28.8.2019, 31. <<https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/externe/2019-08-28.html>> accessed 14.06.2022.

<sup>158</sup> For the liability of the representative in case of unauthorised transactions see below question 28 b).

<sup>159</sup> P. MEIER, *Droit de la protection de l'adulte*, 2nd edition, Zürich 2022, N 998.

<sup>160</sup> See U. VOGEL, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 418 N 8-11.



19b para. 1 second sentence SCC).<sup>161</sup> If the person has misled another to believe that he or she has full legal capacity, he or she is liable for the damage caused (article 418, article 19b para. 2, article 452 para. 3 SCC).<sup>162</sup>

In contrast, the curator is liable for damages in tort if he or she failed to inform the contracting parties of the need for official authorisation.<sup>163</sup>

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

If a person is deemed incapable of judgement in relation to a particular act, he or she loses his or her active capacity *ex lege* in relation to that act (article 17 and 18 SCC). The act is therefore void with effect *ex tunc*, and its voidness can be invoked by anyone, anytime, in any procedure.<sup>164</sup>

If the adult is deemed capable of judgement and does not need the consent of his or her representative for a particular act to be valid, no protection against ill-conceived acts exists.

In the case of ill-conceived acts of the curator, the adult, a person close to him or her or a person with a legal interest may request the authority to intervene in relation to acts or omissions of the curator. If the adult is harmed by an unlawful act or omission in connection with a measure, he or she has the right to compensation for economic damages and, if the seriousness of the harm justifies it, to compensation for moral damages (article 454 SCC).

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

If the interests of the curator conflict with those of the adult, the authority shall appoint a substitute curator (as a permanent replacement for the initial curator) or settle the matter itself. In the event of a conflict of interest, the powers of the curator in the matter in question lapse by operation of law (article 403 SCC). A conflict of interest within the meaning of article 403 SCC may also occur if the curator enters into business relations with a third party with whom the adult is closely associated (indirect conflict of interest). Article 403 SCC covers not only the concrete, but also the abstract or theoretical danger of a conflict of interest.<sup>165</sup>

If a transaction was concluded despite a conflict of interest, it is unilaterally non-binding for the adult.<sup>166</sup> Therefore, a reversal of the contractual performance must take place if this is still possible. Today, the legal literature generally admits that there is no *bona fide* protection for contracting parties who have relied on the power of representation of the curator<sup>167</sup>. The curator is liable for the damage caused by the termination of the contract.

*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.**

A curatorship ends by operation of law with the death of the adult. In addition, the adult protection authority terminates a curatorship at the request of the adult or a person close to him or her or *ex officio* as soon as there is no longer any reason for its continuation (article 399 SCC), or if a curator is no longer suitable to perform the duties or if there is another important reason for his or her dismissal (article 423 SCC). Upon termination of the curatorship the mandate of the curator ends by operation of law (article 421 para. 2 SCC) and his or her powers

<sup>161</sup> On the question of compensation for the use of an object, see BGE 110 II 244 E. 2b.

<sup>162</sup> T. GEISER, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 452 N 28 et seq.; BGE 115 II 17; BGE 113 II 480; BGE 79 II 361.

<sup>163</sup> P. FASSBIND, *Kommentar Erwachsenenschutz*, Orell Füssli Verlag, Zürich 2012, Art. 418 ZGB N 2.

<sup>164</sup> See R. FANKHAUSER, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 18 N 6-8.

<sup>165</sup> BGE 118 II 101 E. 4; 107 II 105 E. 4.

<sup>166</sup> Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7051; BGE 107 II 105 E. 5; BGE 118 II 101.

<sup>167</sup> Cf. also art. 452 SCC. According to the Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7090, the protection of the person and thus the efficiency of the measure taken is to be given higher priority than the interests of the legal transaction; in a decision concerning the law applicable before 2013, BGE 107 II 105 E. 6a, the Federal Supreme Court had left this question open, but had already expressed itself critically on the protection of property; cf. for the different views on this point in the legal literature R. REUSSER, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 403 N 34.

cease with immediate effect. The curatorship and thus the function of the curator only expire with the official decision to revoke the measure. Throughout the assessment period and until a final decision is issued, the curator has the rights and duties associated with the curatorship.

In addition, the mandate of a curator terminates by law on expiry of a term of office set by the adult protection authority, unless the curator is confirmed in office, or upon termination of employment as a professional curator, even if the curator himself or herself becomes subject to a curatorship, becomes incapable of judgement or dies (article 421 SCC). A curator may apply for dismissal at the earliest after a term of office of four years or for good cause (article 422 SCC).<sup>168</sup> At the end of the term of office, the curator submits a final report to the adult protection authority and, if applicable, files the final account (article 425 SCC).

### *Reflection*

#### **30. Provide statistical data if available.**

As at 31 December 2022, 90'493 adults were subject to an adult protection measure. 14.24 out of every 1,000 adults are affected by a protection order.<sup>169</sup>

The trend of milder measures increasing and harsher measures decreasing has continued: 86% of the state-ordered measures were tailored curatorships (2021: 86 %, 2020: 85%, 2019: 84%, 2018: 83%, 2017: 82%, 2016: 81%), only 13% of cases (2021: 13 %, 2020:14%, 2019: 15%, 2018: 16%, 2017: 17%, 2016: 18%) were comprehensive curatorships. Compared to guardianships under the old system of measures (before 2013), which still accounted for around 32% of cases, this is a significant decrease. It can be assumed that the share of comprehensive curatorships will decrease even further in the future. There is a clear difference between the cantons in terms of the number of comprehensive curatorships. Their proportion is relatively high in the French-speaking cantons (FR, GE, JU, NE, TI, VD and VS). For example, compared to the canton of Basel-City with only six ongoing comprehensive curatorships based on the revised law on the protection of adults of 2013, the canton of Vaud recorded 1'211 and the canton of Geneva 601 ongoing comprehensive curatorships by 2022.<sup>170</sup>

Overall, relatively few procedural representations according to article 449a SCC are ordered in adult protection proceedings. The canton of Geneva is the only canton that requires procedural curatorships to be ordered whenever a measure restricting active legal capacity or care-related hospitalisation is being considered. Due to this particular legal basis, the number of procedural representations in the canton of Geneva is significantly higher than in the other cantons (specifically: 1'639 cases out of a total of 1'836 cases in Switzerland as a whole in 2022).<sup>171</sup>

#### **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?**

An initial evaluation of the revised adult protection law by the Federal Council in 2017 revealed that in many cases a person's close environment was insufficiently involved in the procedure of adult protection measures. Also, professional curators were often appointed without checking whether there are relatives who could be entrusted with the task in question.<sup>172</sup> A following expert opinion<sup>173</sup> and survey of the cantonal adult protection authorities on the inclusion of close persons in general and on the dealing with private curators<sup>174</sup> identified

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<sup>168</sup> Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7060.

<sup>169</sup> <https://www.kokes.ch/de/dokumentation/statistik/aktuellste-zahlen>.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> See Report of the Swiss Federal Council, *Erste Erfahrungen zum revidierten Kindes- und Erwachsenenschutzrecht*, 29.03.2017, p. 11, <<https://www.bj.admin.ch/dam/bj/de/data/gesellschaft/gesetzgebung/kesr/ber-br-d.pdf.download.pdf/ber-br-d.pdf>> accessed 17.06.2022.

<sup>173</sup> R. FANKHAUSER, *Die Stellung nahestehender Personen im Kindes- und Erwachsenenschutzrecht*, 2019 <<https://www.bj.admin.ch/dam/bj/de/data/gesellschaft/gesetzgebung/kesr/gutachten-kesr-d.pdf.download.pdf/gutachten-kesr-d.pdf>> accessed 17.6.2022.

<sup>174</sup> ECOPLAN FORSCHUNG UND BERATUNG IN WIRTSCHAFT UND POLITIK (eds), Bericht zur Umfrage Kindes- und Erwachsenenschutzrecht, Erhebungen zum Einbezug nahestehender Personen allgemein und zum Umgang mit privaten Beiständen im Besonderen, 28.8.2019, <<https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/externe/2019-08-28.html>> accessed 14.06.2022.

potential for improvement in both areas: In particular, the possibilities of close persons to raise concerns by taking action against decisions of the authorities could be improved.

Another problematic point was seen in the duty to inform third parties about adult protection measures, which is still perceived differently by the cantons: A corresponding draft ordinance is in preparation, with the aim to provide relevant information simply, quickly, and according to a national standard.<sup>175</sup>

The report of 2017 stated as well that the new adult protection law is applied very differently among the cantons, which leads to unequal treatment.<sup>176</sup> A look at the significant difference in numbers of comprehensive curatorships among the cantons shows that there are still great discrepancies today and that the restriction of legal capacity of vulnerable adults is still much more frequent in some cantons than in others.

Finally, Switzerland is criticised in relation to the implementation of the CRPD: in particular, the compatibility of the current adult protection law with Art. 12 CRPD on "equal recognition before the law" is discussed. In its Concluding Observations on Switzerland's initial report of 13 April 2022, the Committee stated that there is a lack of recognition of the right of persons with disabilities to equality before the law, including the existence of laws denying or restricting the legal capacity of persons with disabilities; and also, that there is not enough support for persons with disabilities to exercise their legal capacity on an equal basis with others. Therefore, the Committee recommends that the State party amends the SCC accordingly so that the recognition of a person with disabilities before the law is no longer denied or diminished. It recommends to develop and implement a nationally consistent framework for supported decision-making that respects the will, preferences and individual choices of persons with disabilities<sup>177</sup>.

The Federal Council's report from 2017 already stated that the adult protection law does not comply with the Committee's common interpretation of Article 12 of the CRPD, according to which the provision prohibits any recourse to forms of substitute decision-making. However, the Federal Council decided at the time to continue to follow the discussion at both national and international level and to await any proposals and recommendations from the Committee.<sup>178</sup>

In the last few years, it has been discussed controversially in legal literature if the requirements of the CRPD are already reflected in the existing adult protection law. On one hand, it has been held that an interpretation in conformity with the Convention could be found by means of the possible tailoring of curatorships, which is why there would be a need only for selective adjustments.<sup>179</sup>

On the other hand, it has also been argued that the change of perspective<sup>180</sup> in adult protection law envisaged by the CRPD has not been implemented yet and therefore it did not meet the requirements of federal constitutional

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<sup>175</sup> Cf. Report on the preliminary draft of the Ordinance on Information on Measures for the Protection of Adults, 27.09.2019, <<https://www.bj.admin.ch/dam/bj/de/data/gesellschaft/gesetzgebung/kesr/vn-ber-auskunft-d.pdf.download.pdf/vn-ber-auskunft-d.pdf>>, accessed 17.06.2021.

<sup>176</sup> See Report of the Swiss Federal Council, *Erste Erfahrungen zum revidierten Kindes- und Erwachsenenschutzrecht*, 29.03.2017, p. 11 German version, <<https://www.bj.admin.ch/dam/bj/de/data/gesellschaft/gesetzgebung/kesr/ber-br-d.pdf.download.pdf/ber-br-d.pdf>> accessed 17.06.2022.

<sup>177</sup> Para. 26 Concluding observations on the initial report of Switzerland, CRPD/C/CHE/CO/1.

<sup>178</sup> See Report of the Swiss Federal Council, *Erste Erfahrungen zum revidierten Kindes- und Erwachsenenschutzrecht*, 29.03.2017, p. 76 German version, <<https://www.bj.admin.ch/dam/bj/de/data/gesellschaft/gesetzgebung/kesr/ber-br-d.pdf.download.pdf/ber-br-d.pdf>> accessed 17.06.2022; see also Replies of Switzerland to the list of issues in relation to its initial report, CRPD/C/CHE/RQ/1, 25.09.2020, para. 26; critical of the waiting mode of Switzerland, INCLUSION HANDICAP, Updated Shadow Report, Civil Society Report on the Occasion of the Initial State Report Procedure for Switzerland before the UN Committee on the Rights of Persons with Disabilities, 13.02.2022, p. 23 <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCHE%2f47884&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCHE%2f47884&Lang=en)> accessed 20.09.2022.

<sup>179</sup> See D. WIDER, 'Stellungnahme der Generalsekretärin KOKES: Die Beistandschaft als Unterstützung zu mehr Selbstbestimmung', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, p. 171, 193 ff.; E. BUCHER and R. AEBI-MÜLLER, *Berner Kommentar Schweizerisches Zivilgesetzbuch, Die natürlichen Personen Art. 11-19d ZGB*, Stämpfli Verlag, Bern 2017, Art. 17 N 10a; P. MEIER, 'CDPH et droit suisse de la protection de l'adulte – une coexistence pacifique ou un infranchissable fossé?', in: A. ZIEGLER and J. KUFFER (eds), *Les Minorités et le Droit. Minorities and the Law*, Festschrift zu Ehren von Professorin Barbara Wilson, Zürich 2016, p. 337, 359 f.; P. MEIER and V. ORVILLE, Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Switzerland, in: M. DOMAŃSKI and B. LACKOROŃSKI (eds), *Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD)*, London 2023, p. 531, 544.

<sup>180</sup> See W. BOENTE, 'Handlungsfähigkeit und Erwachsenenschutzrecht auf dem Prüfstand der (Behindertenrechtskonvention und) Bundesverfassung', in: D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0: Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Hep Verlag, Bern 2017, 109, 117 ff.

law.<sup>181</sup> In this context, comprehensive curatorship has been considered to be contrary to the convention.<sup>182</sup> In particular, the absolute abolition of legal capacity in the case of comprehensive curatorship has been considered unnecessary and disproportionate and has therefore been criticised.<sup>183</sup> It has been suggested that the protection of an adult in need of protection could also be achieved by a representative curatorship (if necessary with selective restriction of legal capacity and/or cooperative curatorship).<sup>184</sup> In addition, the further legal consequences of a comprehensive curatorship, e.g. the withdrawal of the right to vote, of parental responsibility, etc., have all been subject to criticism.<sup>185</sup>

More recently, it has been suggested that all acts of representation with simultaneous restriction of legal capacity within the meaning of article 394 para. 2 SCC (representative curatorship) should be abolished, as they are not in line with the CRPD and should therefore be considered contrary to the Convention.<sup>186</sup> According to this view, with the combination of a generally more far-reaching curatorship of representation under article 394 (in conjunction with article 395) SCC with a cooperation curatorship under article 396 SCC in the necessary areas, there is no longer any apparent constellation that requires a withdrawal of the corresponding legal capacity under article 394 para. 2 SCC. Therefore, article 394 para. 2 SCC becomes obsolete.

If the representation curatorship with restriction of legal capacity already becomes obsolete, then this must also apply to the comprehensive curatorship under article 398 SCC. This would mean, however, that in such cases relatively extensive and broadly defined areas of competence would be necessary within the framework of the cooperation curatorship. This would also not contradict the current case law of the Federal Supreme Court.

It is with this aim in view that also this year's updated shadow report of the civil society on the occasion of the initial state report procedure for Switzerland calls on the legislator to amend the provisions of the SCC regarding curatorships and to develop a system of supported decision-making.<sup>187</sup>

Not only legal literature but also practitioners called for authorities, especially those entrusted with the establishment of state-ordered measures, to become even more aware of the tension between external- and self-determination of a vulnerable adult.<sup>188</sup> The self-determination perceived by an affected person depends to a large

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<sup>181</sup> BOENTE, *ibid.* 132 ff., argues for a fundamental reform, 144 ff.; and also in 'Behindertenrechtskonvention und Erwachsenenschutzrecht – ein Zwischenruf' (2016) *Die Praxis des Familienrechts* 111, 121; doubts about the conformity of CRPD with Swiss adult protection law have also been raised by D. ROSCH, 'Die Beistandschaft, die Selbstbestimmung und die UN-Behindertenrechtskonvention im schweizerischen Recht unter besonderer Berücksichtigung von Art. 12 BRK', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, p. 67, 97 f.; similarly D. WIDER, 'Stellungnahme der Generalsekretärin KOKES: Die Beistandschaft als Unterstützung zu mehr Selbstbestimmung', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, p. 171, 183 f. sowie 193 f.; clearly against a fundamental reform E. BUCHER and R. AEBI-MÜLLER, *Berner Kommentar Schweizerisches Zivilgesetzbuch, Die natürlichen Personen Art. 11-19d ZGB*, Stämpfli Verlag, Bern 2017, Art. 19d N 30a: «The demand for a fundamental revision of adult protection law based on Art. 12 CRPD must therefore be rejected in all clarity».

<sup>182</sup> V. LIPP, 'Die Bedeutung der UN-Behindertenrechtskonvention für das deutsche Betreuungsrecht', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, 1 ff., 31; D. ROSCH, 'Die Beistandschaft, die Selbstbestimmung und die UN-Behindertenrechtskonvention im schweizerischen Recht unter besonderer Berücksichtigung von Art. 12 BRK', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, p. 67, 90; of a different opinion: Y. BIDERBOST in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 398 N 35; R. AEBI-MÜLLER, 'Handlungsfähigkeit und Erwachsenenschutz. Versuch einer Klärung', in I. SCHWANDER, R. REUSSER and R. FANKHAUSER, *Brennpunkt Familienrecht*, Festschrift T. Geiser, Dike Verlag, Zürich 2017, p. 1, 16.

<sup>183</sup> Critical in this matter Y. BIDERBOST, 'Schauplatz Handlungsfähigkeit... in KESB we trust', in I. SCHWANDER, R. REUSSER and R. FANKHAUSER, *Brennpunkt Familienrecht*, Festschrift T. Geiser, Dike Verlag, Zürich 2017, p. 67, 85: The resulting "completely inflexible automatism" of a comprehensive curatorship contradicts the principle of need and thus the principle of tailoring of state ordered measures.

<sup>184</sup> D. WIDER, 'Stellungnahme der Generalsekretärin KOKES: Die Beistandschaft als Unterstützung zu mehr Selbstbestimmung', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, p. 171, 193 ff.

<sup>185</sup> Y. BIDERBOST, 'Schauplatz Handlungsfähigkeit... in KESB we trust', in I. SCHWANDER, R. REUSSER and R. FANKHAUSER, *Brennpunkt Familienrecht*, Festschrift T. Geiser, Dike Verlag, Zürich 2017, p. 67, 85.

<sup>186</sup> D. ROSCH, 'Die Vertretungsbeistandschaft nach Art. 394 Abs. 2 ZGB gehört de lege ferenda abgeschafft!? – ein Zwischenruf' (2021) *Die Praxis des Familienrechts* 692, 699.

<sup>187</sup> INCLUSION HANDICAP, Updated Shadow Report, Civil Society Report on the Occasion of the Initial State Report Procedure for Switzerland before the UN Committee on the Rights of Persons with Disabilities, 13.02.2022, p. 24 <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCHE%2f47884&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCHE%2f47884&Lang=en)> accessed 20.09.2022.

<sup>188</sup> D. WIDER, 'Stellungnahme der Generalsekretärin KOKES: Die Beistandschaft als Unterstützung zu mehr Selbstbestimmung', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, p. 171, 176 ff.

extent on how the person and their environment are included in the procedure. Awareness-raising can be achieved above all through targeted training and supervision. Especially, it should be standard and explicitly checked during the assessment whether self-determined decision-making is possible within the framework of voluntary measures, legal representation or voluntary support services (Art. 363 para. 1 SCC).

A study on the implementation of the right to self-determination of persons in need of care in the context of curatorships, and a study on the communication of adult protection authorities with persons with disabilities are currently being carried out in the framework of the National Research Programme 76 “Welfare and Coercion”.<sup>189</sup>

## **SECTION IV – VOLUNTARY MEASURES**

### *Overview*

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

In terms of voluntary measures of adult protection, Swiss law offers the two possibilities of establishing a *lasting power of attorney* (article 360 - 369 SCC) or an *advance medical directive* (article 370 - 373 SCC). With a lasting power of attorney, an adult person can delegate decision-making powers regarding personal and medical care and/or financial matters to a person of one’s choice. With an advance medical directive, advance decisions can be made about medical treatment in the event of incapacity of judgement and a representative for medical decision-making can be designated.

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

- a. the existence of specific provisions regulating voluntary measures;**
- b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

a) The *lasting power of attorney* is regulated specifically in article 360 to 369 SCC. Regarding the appointee’s due diligence, article 365 para. 1 SCC refers to the rules of the Code of Obligations on the simple mandate (article 394 et seq. SCO).

The legal nature of the lasting power of attorney is discussed controversially in legal literature<sup>190</sup>. According to one position, the lasting power of attorney is a bilateral act established by reception.<sup>191</sup> According to the other position, the establishment of a lasting power of attorney is a unilateral declaration of intent.<sup>192</sup> According to this opinion, on the occurrence of incapacity of judgement, the lasting power of attorney becomes irrevocably effective, provided that the requirements for validity are met. In a second step, the acceptance of the lasting power of attorney by the representative creates a legal obligation similar to a contract.

The *advance medical directive* is regulated in article 370 to 373 SCC. It corresponds to an anticipated surrogate of direct consent to or refusal of a medical treatment. It can also include the appointment of a representative, whereas the general rules on representation apply (article 32 et seq. SCO)<sup>193</sup>. In the two cases the legal nature of the advance medical directive can be defined as a unilateral legal act.<sup>194</sup>

b) Existing powers of attorney and mandates expire in principle with the loss of the corresponding capacity of judgement, unless otherwise agreed (article 35 para. 1 and article 405 para. 1 SCO). For dispositions and powers of attorney that are to be effective only from the time of the loss of capacity of judgement, the provisions of the

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<sup>189</sup> See Project ‘Preserving and Encouraging Self-Determination in Adult Protection’ (<https://www.nfp76.ch/en/BmNwPO2DEX6gCASJ/project/project-becker-lenz>) and Project ‘Communicative practices in the establishment of guardian- or deputyship’ (<https://www.nfp76.ch/en/UdzqQbCHq6BoDmMf/project/project-antener>).

<sup>190</sup> See W. BOENTE, Zürcher Kommentar, Der Erwachsenenschutz, Die eigene Vorsorge und Massnahmen von Gesetzes wegen Art. 360-387 ZGB, Geneva/Zürich/Basel 2015, Art. 360 N 10 et seq.

<sup>191</sup> See P. MEIER, Droit de la protection de l’adulte, 2nd edition, Zürich 2022, N 375 with further references.

<sup>192</sup> See A. JUNGO, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 360 N 14 et seq. with further references.

<sup>193</sup> See P. MEIER, Droit de la protection de l’adulte, 2nd edition, Zürich 2022, N 487.

<sup>194</sup> P. MEIER, Droit de la protection de l’adulte, 2nd edition, Zürich 2022, N 477.

lasting power of attorney (article 360 to 369 SCC) apply.<sup>195</sup> According to case law and legal literature, however, mandates and powers of attorney that are to be effective before *and* after the onset of incapacity of judgement are valid and become effective at the respective time.<sup>196</sup> They are subject neither to the formal requirements (article 362 SCC) nor to the effectiveness requirements (article 363 SCC) of the lasting power of attorney. As long as there is only a temporary or limited incapacity of judgement, the mandate is in principle exempt from control by the adult protection authority. However, as soon as it is to be expected that the principal will become permanently incapable of judgement, the authorised representative is obliged to notify the authority at the principal's place of residence (article 397a SCO). Based on this notification, the authority has the right and the duty to examine whether the interests of the principal are sufficiently protected or whether adult protection measures should be ordered in the interest of the principal.<sup>197</sup>

**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 lasting power of attorney and the advance medical directive can both be used to appoint self-chosen representatives.<sup>198</sup> The distinction therefore has no relevance in Swiss law.

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

A *lasting power of attorney* can be used to delegate tasks to an authorised person for the care for assets, personal care or representation in legal transactions (article 360 para. 1 SCC). These tasks may be assigned cumulatively or alternatively. If the mandate includes all three areas – care for assets, personal care and representation in legal matters – it corresponds to a comprehensive curatorship (cf. article 398 SCC).<sup>199</sup>

In an *advance medical directive*, the principal can specify which medical measures he or she consents to or does not consent to in a certain situation, and/or which trusted person should decide<sup>200</sup> on a medical measure on his or her behalf if he or she is no longer able to express himself or herself.

*Legal grounds / Procedure*

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

When establishing a *lasting power of attorney*, the person giving the instruction must have full active legal capacity in accordance with article 360 SCC and therefore be over 18 years of age and capable of judgement. If the capacity to act is restricted only by an adult protection measure (article 19d SCC), the prevailing view in the legal literature admits that the person retains the capacity to establish a power of attorney only for those areas not affected by the adult protection measure.<sup>201</sup> If the person is subject to a comprehensive curatorship, the establishment of a lasting power of attorney is not possible.

For an *advance medical directive* to be issued, it is only necessary for the person to have capacity of judgement (article 370 para. 1 SCC). Full active legal capacity is not a prerequisite since it is a matter of exercising a strictly

<sup>195</sup> A. JUNGO, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 360 N 12d.

<sup>196</sup> BGE 132 III 222. The legislator has omitted to abandon this possibility, critical in this respect: P. MEIER, *Droit de la protection de l'adulte*, 2nd edition, Zürich 2022, N 382. See also SWISS ASSOCIATION OF PROFESSIONAL CURATORS, 'General power of attorney and lasting power of attorney', 22.04.2015, <[https://svbb-ascp.ch/fileadmin/user\\_upload/dokumente/dokumentation/Neues\\_Recht/150422%20Vollmvors.pdf](https://svbb-ascp.ch/fileadmin/user_upload/dokumente/dokumentation/Neues_Recht/150422%20Vollmvors.pdf)>, accessed 17.06.2022.

<sup>197</sup> A. JUNGO, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 360 N 12c; C. FOUNTOULAKIS, 'Die Teilnahme urteilsunfähiger Erwachsener am Rechtsverkehr' *Basler Juristische Mitteilungen* 2015 189, 203 et seq. cf. also question 44 and question 65.

<sup>198</sup> See above question 33.

<sup>199</sup> A. JUNGO, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 360 N 41.

<sup>200</sup> Cf. also Art. 377 SCC.

<sup>201</sup> See the references in: A. JUNGO, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 360 N 23.

personal right (article 19c SCC). Adults under comprehensive curatorship (as well as minors) who are capable of judgement can therefore also draw up an advance medical directive. If a person has written an advance medical directive, it is assumed that he or she has the necessary capacity of judgement.<sup>202</sup>

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

A *lasting power of attorney* must be executed in holographic form or publicly authenticated. The holographic form implies that the document must be handwritten from beginning to end, dated and signed by the principal (article 361 SCC). The public authentication is carried out by a notary.<sup>203</sup> These relatively strict formal requirements intend to protect the adult against imprudent decisions and are justified by the fact that the adult person delegates important personal decisions to a third person.<sup>204</sup>

The person issuing a lasting power of attorney must ensure that the adult protection authority is informed in the event of incapacity. Upon request, the civil registry office enters the fact that a person has established a lasting power of attorney and the place of deposit in a central database (article 361 para. 3 SCC). The entry is not a prerequisite for the validity of the power of attorney.

The *advance medical directive* must be in writing, dated and signed (article 371 para. 1 SCC). Handwriting is not required. There is a large market of templates for advance medical directives (cf. e.g. [www.curaviva.ch](http://www.curaviva.ch)). If a person is unable to sign by hand, the signature may be replaced by public authentication (article 15 SCO).

If an advance medical directive is integrated into a lasting power of attorney, the stricter formal requirements apply (cf. article 361 para. 1 and 2 SCC).

Anyone who draws up an advance medical directive must ensure that the addressees of the directive receive knowledge of it in good time. Therefore, the advance medical directive can, for example, be deposited with the attending physician. It is also possible to have the place of deposit entered on the personal insurance card (article 371 para. 2 SCC). Some cantonal introductory laws to the SCC also provide that the advance medical directive (and lasting power of attorney) can be deposited with the competent adult protection authority (cf. e.g. article 23 para. 1 introductory law of the SCC of the canton of Aargau).

**38. Describe when and how voluntary measures enter into force. Please consider e.g.:**

- a. **The circumstances under which voluntary measures enter into force;**
- b. **Which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?**
- c. **Who is entitled to initiate the measure entering into force?**
- d. **Is it necessary to register, give publicity or to give another kind of notice of the entry into force of the measure?**

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<sup>202</sup> With regard to the active legal capacity, the authority may, in principle, presume capacity of judgement for the time of the establishment of the advance medical directive, unless circumstances are known that speak against this presumption, cf. BGE 124 III 5. Also, a mental illness does not necessarily result in an incapacity of judgement, cf. BGE 127 I 6, 20.

<sup>203</sup> According to article 55 of the final title of the SCC, the cantons determine the way public notarisation is established in their territory. Today, there are three different organisational forms of the notary's office in Switzerland: the freelance notary's office, the official notary's office and various mixed forms.

<sup>204</sup> A. JUNGO, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 360 N 1.

### ***Lasting power of attorney:***

a) If the adult protection authority learns that a person is no longer capable of judgement, but does not know whether a lasting power of attorney exists, it inquires at the civil registry office (article 363 para. 1 SCC).

According to article 363 para. 2 SCC, if a lasting power of attorney exists, the adult protection authority must check whether (1.) it was validly established, (2.) the requirements for its effectiveness are met, (3.) the authorised representative is suitable for his or her tasks and (4.) further adult protection measures are necessary. For this purpose, it conducts proceedings in accordance with article 444 et seq. SCC. The authority must involve the person concerned in the proceedings (article 447 SCC).

b) With regard to validity (article 363 para. 2 (1) SCC), the authority checks whether an original document is available and whether the formal and substantive requirements are met (article 361 paras. 1 and 2, article 360 SCC): The designated person must be named and the tasks assigned to him or her must be described as precisely as possible. If the formal requirements (article 361 paras. 1 and 2 SCC) are not met, the lasting power of attorney is invalid (article 11 para. 2 SCO).

Furthermore, the principal must be incapable of judgement and in need of care for a certain period of time (article 363 para. 2 (2) SCC). Incapacity of judgement is assessed by the authority in each individual case. A medical expertise is not necessary. If the validity of the lasting power of attorney is undisputed in the environment of the person concerned, a certificate from the family physician is sufficient and in this case an assessment by the authority is not necessary.<sup>205</sup>

If the lasting power of attorney is valid and effective, the authority issues an informal declaratory decision.<sup>206</sup> The persons concerned, namely the legal representatives (article 374 SCC) and the authorised representative, are informed of this decision. The authorised person then has the option of accepting the mandate.

c) The beginning of the effectiveness of a lasting power of attorney is discussed controversially in the legal literature: There is disagreement as to whether the lasting power of attorney can take effect by operation of law before the decision of the authority. A minority of authors argues that the actual purpose of the lasting power of attorney, to promote individual provision and avoid interference by the authorities, speaks in favor of its effectiveness by operation of law.<sup>207</sup> The lasting power of attorney is according to this opinion valid even without a decision by the authorities, and the person appointed can act on behalf of the person concerned with legal effect vis-à-vis third parties without such a decision.

However, a majority of authors admits that only the declaratory decision by the adult protection authority, declaring the validity of the lasting power of attorney, allows it to come into effect at the moment of the acceptance by the authorised representative.<sup>208</sup> According to the conception of the law, the mandate can only be accepted when its validity and effectiveness as well as the suitability of the authorised person have been clearly established by the authority.

Before the effectiveness of the lasting power of attorney, the spouse or registered partner may represent the incapacitated person within the framework of the powers granted to them by article 374 SCC (*ex-lege* representation), unless the authority orders precautionary measures.<sup>209</sup>

d) If the authorised person accepts the lasting power of attorney, the authority shall draw their attention to their obligations under the provisions of the SCO on the mandate and issue them with a formal document specifying their powers (article 363 para 3 SCC). In addition, according to article 449c para. 2 SCC, the authority must inform the civil registry office if a power of attorney for a permanently incapacitated person has become effective.

### ***Advance medical directive:***

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<sup>205</sup> See W. BOENTE, Zürcher Kommentar, Der Erwachsenenschutz, Die eigene Vorsorge und Massnahmen von Gesetzes wegen Art. 360-387 ZGB, Geneva/Zürich/Basel 2015, Art. 363 N 102.

<sup>206</sup> W. BOENTE, Zürcher Kommentar, Der Erwachsenenschutz, Die eigene Vorsorge und Massnahmen von Gesetzes wegen Art. 360-387 ZGB, Geneva/Zürich/Basel 2015, Art. 363 N 184 et seq.

<sup>207</sup> See in particular T. GEISER in A. BÜCHLER, C. HÄFELI, A. LEUBA and M. STETTLER (eds), *FamKomm Erwachsenenschutz*, Stämpfli Verlag, Bern 2013, Art. 363 N 1 ff.

<sup>208</sup> P. STEINAUER and C. FOUNTOLAKIS, *Droit des personnes physiques et de la protection de l'adulte*, Stämpfli Verlag, Bern 2014, N 864, 868 et seq., 961a; W. BOENTE, Zürcher Kommentar, Der Erwachsenenschutz, Die eigene Vorsorge und Massnahmen von Gesetzes wegen Art. 360-387 ZGB, Geneva/Zürich/Basel 2015, Art. 363 N 185 et seq.; A. JUNGO, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 363 N 1b – 1c.

<sup>209</sup> Regarding the interaction between the lasting power of attorney and the *ex-lege* representation cf. question 57.



a) An advance medical directive can only be effective if it is known at the relevant time. In the case of an incapacitated person, the attending physicians are obliged to clarify on the basis of the insurance card whether an advance directive has been drawn up and, if so, where it has been deposited (article 371 para. 1 SCC). An exception to the duty to clarify exists in urgent cases.

In addition, the expressed will must be sufficiently determined with regard to the medical measure and the concrete situation. If a representative is chosen (article 370 para. 2 SCC), this must at least be recognisable from the advance medical directive.

If the required formalities (cf. article 371 para. 1 SCC) are not met or if the directive otherwise violates the law, it must always be interpreted in favor of the adult. An advance medical directive must also be based on free will, i.e. it must have been drawn up without external pressure or coercion (within the meaning of article 23 et seq. SCO).

b) The incapacity of judgement needs to be declared by a physician. The adult protection authority does not assume any control function if it is not called upon by a close person (article 373 SCC).

c) The physician determines the medical measures to be taken, advises the person authorised to act as a representative if necessary and may call on the adult protection authority himself/herself if necessary (article 373 SCC). If a representative has been appointed in the directive, the attending physician must give the named person all information relevant to the decision about the proposed medical measure and obtain their consent.

d) No, it is not necessary to register, publish or otherwise publicise the entry into force of the measure.

#### *Appointment of representatives/support persons*

**39. Who can be appointed representative/support person (natural person, private or public legal person, etc.)? Please consider:**

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

*Lasting power of attorney:* One or more natural or legal person(s) may be appointed as representative(s). Only a natural person may be appointed for medical matters. The person appointed must have full legal capacity and be able to perform the tasks arising from the power of attorney essentially by him-/herself. The required suitability of the appointee (article 363 para. 2 no. 3 SCC) is reviewed *ex officio* by the adult protection authority and is based on their individual personal and professional competences and their time and emotional resources as well as on the scope and difficulty of the tasks. The adult person's right to self-determination is respected by the authorities as far as possible and suitability is only denied if there are weighty reasons against recognition.

*Advance medical directive:* Natural persons who are capable of judgement can be named as representatives. Full active legal capacity is not required.

**b. What are the safeguards as to conflicts of interests?**

*Lasting power of attorney:* If business must be conducted that is not covered by the lasting power of attorney, or if the authorised representative has an interest in a matter that conflicts with that of the grantor, the authorised representative must inform the adult protection authority immediately. In the event of a conflict of interest, the powers of the authorised representative expire by operation of law (article 365 para. 2 and 3 SCC). If the interests of the adult are endangered or no longer protected, the adult protection authority must take the necessary measures *ex officio* or at the request of a close person. It can namely withdraw all or some of the representative's powers (article 368 SCC).

*Advance medical directive:* In contrast to the regulation for the lasting power of attorney, a conflict of interest does not lead to the loss of the power of representation by law, but requires the intervention of the adult protection authority which acts on the basis of an appeal by close persons of the vulnerable adult, on the basis of article 373 para. 1 n. 2 SCC.

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

**Lasting power of attorney:** The principal may assign (individual) tasks and competences to the appointees and regulate their relationship to each other. He may also provide for a substitute in the event that the appointee is not suitable for the tasks, does not accept the mandate or terminates the mandate (article 360 para. 3 SCC).

**Advance medical directive:** Several natural persons may be named in an advance directive (simultaneously or as sub-agents). Also, as with the lasting power of attorney, a person may make substitute dispositions in their advance medical directive if the designated person is not suitable for the tasks, does not accept the mandate or terminates it (article 370 para. 3 SCC). For example, the directive may appoint a substitute person. However, it may also determine that the statutory provision, i.e. the cascade provision of article 378 SCC,<sup>210</sup> shall apply.

**During the measure**

**Legal effects of the measure**

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

A **lasting power of attorney** is legally binding for the authorised representative and the authority. Pursuant to article 365 para. 1 SCC, the authorised representative performs his or her duties in accordance with the provisions of the law on mandates (article 394 et seq. SCO). Accordingly, the authorised representative must confine him- or herself to the tasks assigned to him or her and carry them out carefully and in accordance with instructions (article 360 para. 2 SCC, article 396 et seq. SCO). He or she must be able to account for his administration at all times (article 400 SCO). The authorised representative may ask the adult protection authority to interpret the lasting power of attorney and specify secondary points (article 364 SCC).

In the case of an **advance medical directive**, the physician must follow the patient's directive unless it violates statutory provisions or there are reasonable doubts that it is based on the patient's free will or still corresponds to his or her presumed will. The medical doctor must document in the patient's file all the reasons why the advance directive was not followed. In urgent cases, the physician may carry out medical measures in accordance with the presumed will and interests of the patient (article 379 SCC). Urgency is not only given in actual emergency situations. Rather, this requirement is also fulfilled if the power of representation is objectively unclear and a medical measure should not be postponed in the interest of the patient until the adult protection authority has made a decision. Advance medical directives only have limited powers in the case of care-related hospitalisation (*fürsorgerische Unterbringung/placement à des fins d'assistance/ ricovero a scopo di assistenza*) for the treatment of a mental disorder (article 433 et seq. SCC). They need to be respected, but only in so far as they do not impede meaningful treatment.<sup>211</sup> In this case, the best interest of the adult is thus placed over his or her will.

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

The lasting power of attorney and the advance medical directive only take effect in the case of incapacity. With the loss of the capacity of judgement, active legal capacity is lost *ex lege* (article 17 and 18 SCC).<sup>212</sup> The voluntary measures therefore don't affect legal capacity. However, the entry into force of a lasting power of attorney has some additional effects which go beyond the general rules on active legal capacity. Namely, as for a comprehensive curatorship (article 398 SCC), the adult person loses his or her political rights on the federal level.<sup>213</sup>

If the adult person regains capacity of judgement, the lasting power of attorney loses its effectiveness *ex lege* (article 369 para. 1 SCC). The advance medical directive does not need to be relied upon, as the capable adult person is able to take decisions concerning medical treatment him- or herself.

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<sup>210</sup> Cf. below question 54.

<sup>211</sup> Message of 28 June 2006, BBl 2006 7001, 7068.

<sup>212</sup> See above question 8 a).

<sup>213</sup> Art. 2 Federal Act on Political Rights.

### *Powers and duties of the representatives/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?**

**Lasting power of attorney:** The appointed person may act in place of the adult in matters of personal care, care for assets, or representation in legal transactions (article 360 SCC). The powers of the representative are defined by the lasting power of attorney.

The care for assets includes the preservation and administration of property, which also means the opening of related postal correspondence.<sup>214</sup> Also, the legal literature mainly is of the opinion that the authorised representative has the power to sell or mortgage real estate or to take legal action against third parties and to make gifts, in principle, if these legal acts are part of the execution of the lasting power of attorney<sup>215</sup> or - pursuant to article 396 para. 3 SCO - if the lasting power of attorney expressly includes these acts. The legal literature recommends that the following powers should be explicitly mentioned in the lasting power of attorney to avoid practical problems: safe deposit boxes and safes; real estate transactions (including mortgages and securities); securities and bills of exchange transactions, claims and debts; the conduct of litigation, including the conclusion of a settlement as well as the acceptance of arbitration and resulting settlements; power of representation; the opening of private and business mail as well as access and opening of all doors to rented and owned residential, business and private properties; comprehensive release from professional and official secrets as well as other secrets (banking, tax secrets, etc.).<sup>216</sup>

Personal care includes care and decision-making in personal matters, care for mental and physical well-being, deciding on institutionalisation after consultation with relatives and enabling social contacts. Personal care also includes consent to medical measures. The scope of care depends on the adult's individual needs, state of health and previous standard of living. Article 19c para. 2 SCC is applicable: The representative cannot act in relation to a right that is so strictly personal that any form of representation is excluded.

With an **advance medical directive** representation and instructions on treatment in medical matters can be ordered. The advance medical directive can refer to all types of treatment and cover both mental and physical illnesses.

The representative is acting on behalf of the adult. The principal may give instructions to that person (cf. article 370 para. 2 SCC). He or she may also decide whether in certain situations all available treatment options should no longer be exhausted. If possible, the person lacking capacity of judgement shall also be involved in making the decision (article 377 para. 3 SCC).

Article 377 SCC clarifies that the physician is responsible for appropriate treatment and, with the help of the authorised representative, draws up the treatment plan adapted to current developments (article 377 paras. 1 and 4 SCC). The person authorised to represent the adult can only make a valid decision on behalf of the incapacitated person on the consent or refusal of the planned medical measures after sufficient information has been provided. Article 377 para. 2 SCC lists in a non-exhaustive manner the important points about which information must be provided. The decision of the authorised representative is not bound by any form. Consent may also be given by implication.

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<sup>214</sup> H. HAUSHEER, T. GEISER and R. AEBI-MÜLLER, *Das neue Erwachsenenschutzrecht*, Stämpfli Verlag, Bern 2014, N 2.28; of a different opinion: T. GEISER in A. BÜCHLER, C. HÄFELI, A. LEUBA and M. STETTLER (eds), *FamKomm Erwachsenenschutz*, Stämpfli Verlag, Bern 2013, Art. 365 N 18, who argues that a special authorisation is required.

<sup>215</sup> Analogous to article 396 para. 2 SCO, an approval of the authority pursuant to article 416 para. 1 n. 4), 6) and 9) SCC is not required, see A. JUNGO, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 365 N 8, 20; T. GEISER in A. BÜCHLER, C. HÄFELI, A. LEUBA and M. STETTLER (eds), *FamKomm Erwachsenenschutz*, Stämpfli Verlag, Bern 2013, Art. 365 N 5, 14; C. WIDMER BLUM in M. AMSTUTZ ET AL., *Handkommentar zum Schweizerischen Privatrecht*, Schulthess Verlag, Zürich 2016, Art. 365 N 2.

<sup>216</sup> P. FASSBIND, 'Vorsorgeauftrag in der Praxis – Risiken und Nebenwirkungen', in I. SCHWANDER, R. REUSSER and R. FANKHAUSER, *Brennpunkt Familienrecht*, Festschrift T. Geiser, Dike Verlag, Zürich 2017, p. 217 ff., 228.

If the advance medical directive asks for an intervention in the physical integrity of the patient with the aim of shortening life or removing life-sustaining means (direct active euthanasia, article 114 Swiss Criminal Code), it violates the law and the attending physician must deviate from it.<sup>217</sup>

According to article 378 para. 1 SCC, the authorised representative may also consent to hospitalisation. However, if admission to a psychiatric hospital is necessary for the treatment of a mental disorder, the provisions on care-related hospitalisation (*fürsorgerische Unterbringung/placement à des fins d'assistance/ricovero a scopo di assistenza*) apply (article 380 SCC refers to article 426 et seq. SCC).

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

**Lasting power of attorney:** The authorised representative must abide by the adult's decreed will when making decisions. He or she may request the adult protection authority to interpret the decree and to specify subsidiary points (article 364 SCC). The authority must thereby adhere to the principle of the will and ascertain the adult's subjective preferences.

Due to the nature of the contract, the interpretation of the content and/or scope of the lasting power of attorney in accordance with the will of the principal must be based on the principle of trust. This is expressed in particular in the question of the representative's liability: if he or she has caused harm in the exercise of the mandate, it must be ascertained whether his actions are covered by the advance directive as he could reasonably understand it.

If an **advance medical directive** does not contain instructions (article 370 para. 2 sentence 2 SCC), the authorised representative decides according to the presumed wishes and interests of the person incapable of judgement (article 378 para. 3 SCC).

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

**Lasting power of attorney:** In application of article 400 SCC the authorised representative is obliged to give an account of his or her activity and to return everything he or she has received as a result of this activity at the request of the principal at any time. In case of a lasting power of attorney, the fulfilment of the duties cannot be controlled by the principal him- or herself. Therefore, the authority acts in his or her place for the duration of the mandate (article 368 para. 2 SCC). When the lasting power of attorney is terminated, the authorised representative is accountable either to the principal him- or herself (if he or she has regained capacity), to the heirs (if he or she is deceased) or to the curator who takes the place of the authorised representative.

**Advance medical directive:** According to article 377 SCC, the person who is incapable of judgement is also to be involved, if possible, in the decision on medical treatment

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

If the **lasting power of attorney** does not contain provisions on the remuneration of the authorised representative, the adult protection authority shall determine an appropriate remuneration if this appears justified in view of the scope of the tasks or if the services provided by the authorised representative are usually remunerated. The remuneration and the necessary expenses shall be borne by the principal (article 366 SCC).<sup>218</sup> If the adult's means are limited, the authority will negotiate the costs with the authorised representative. Often a lump sum is required to keep the costs manageable.

In the case of an **advance medical directive**, the authorised representative is not entitled to compensation by law. In some cases, the legal literature suggests an analogous application of article 366 SCC if following the

<sup>217</sup> Cf. unpublished decisions of the Federal Supreme Court from 3.11.2006, 2A.48/2006 and 2A.66/2006; see also *Haas v. Switzerland*, ECHR, No. 31322/07, 20.1.2011. In contrast, indirect active euthanasia (e.g. the medication of pain-relieving drugs, whereby the occurrence of death is accepted as a possible premeditation) and passive euthanasia (i.e. not taking the measures that would be necessary to prevent or at least delay the death of another person who is dying, chronically ill or seriously injured) are permissible.

<sup>218</sup> The question of compensation can be answered on the basis of legal literature and case law on the mandate (BGE 120 V 515 E. 4; 117 II 282 E. 4a and b; if the requirements for remuneration are met, the fact that the representative is related to the principal does not prevent this, see E. LANGENEGGER, in D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 366 N2; of a different opinion: T. GEISER in A. BÜCHLER, C. HÄFELI, A. LEUBA and M. STETTLER (eds), *FamKomm Erwachsenenschutz*, Stämpfli Verlag, Bern 2013, Art. 366 N 9.

directive requires a considerable expenditure of time.<sup>219</sup> In any case, the expenses of the authorised representative should at least be reimbursed in application of article 422 SCO.<sup>220</sup>

**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?**

*Lasting power of attorney/advance medical directive:* If the adult names different persons as representatives for medical measures in his lasting power of attorney and in a separate advance medical directive, two different advance medical directives exist. In this case, the intervention of the authority is required, which is informed either by the physician or by a person close to the patient (article 373 SCC). The authority must clarify whether the measures contradict each other or whether one can override or supplement the other. If there is an irresolvable contradiction, either legal representation comes into effect (article 374 et seq. SCC) or a curatorship must be ordered (article 390 et seq. SCC).

- 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)**

*Lasting power of attorney:* The relationship between several jointly authorised persons is determined by the person who issued the lasting power of attorney. If no provision to the contrary has been made, article 365 para. 1 SCC, applying article 403 para. 2 SCO mutatis mutandis, presupposes that the appointees act jointly.<sup>221</sup>

*Advance medical directive:* If several persons are simultaneously authorised as representatives (e.g. several descendants), they decide jointly. In this case, a valid representatives decision requires unanimity. However, the physician acting in good faith may assume that each authorised representative acts in agreement with the others (article 378 para. 2 SCC). If the authorised representatives cannot agree and their disagreement endangers the interests of the adult, any person close to the patient may appeal to the adult protection authority cf. article 373 and article 381 SCC); this authority may appoint a representative (alone) or appoint a curator for him or her (article 381 SCC).

**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?**
- 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?**

If a person is or becomes incapable of judgement and no lasting power of attorney has been drawn up or an existing power of attorney only covers partial advance care, or there is only an advance medical directive, the statutory measures (in particular *ex-lege* representation, article 374 and 378 SCC) come into effect, and if these measures prove insufficient, state-ordered measures are established.<sup>222</sup>

***Interaction of a lasting power of attorney with other measures:***

**a)** In the event that the lasting power of attorney does not cover all the transactions to be carried out and cannot be filled by supplementation (article 364 SCC) and the assistance of a spouse (*ex-lege* representation article 374 SCC) or family member, other close persons or private or public services is or appears insufficient from the outset,

<sup>219</sup> Cf. J. GASSMANN, in D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 370 N 13.

<sup>220</sup> P. MEIER, *Droit de la protection de l'adulte*, 2nd edition, Zürich 2022, N 495, note 876.

<sup>221</sup> For details see W. BOENTE, *Zürcher Kommentar, Der Erwachsenenschutz, Die eigene Vorsorge und Massnahmen von Gesetzes wegen* Art. 360-387 ZGB, Geneva/Zürich/Basel 2015, Art. 360 N 133 et seq.

<sup>222</sup> Cf. in this regard question 57.

the authority must order a measure. The same applies if the lasting power of attorney relates only to personal matters: a curatorship can be established for financial and property matters, or *vice versa*. In certain circumstances, the authorised representative can be appointed as curator for the formerly delegated tasks. In this case, he or she has two functions: On the one hand, he or she is the adult's representative (and is liable to him or her; article 456 SCC) and, on the other hand, he or she is an officially appointed curator (and is liable to the adult protection authority, article 415 et seq. SCC, and to the canton, article 454 paras. 3 and 4 SCC).

In addition to the lasting power of attorney, a care-related hospitalisation involving deprivation of liberty may be ordered if a person is suffering from a mental disorder or mental disability or serious neglect and the required treatment or care cannot be provided otherwise (article 426 et seq. SCC). This is i.e., necessary if the adult needs medical care for health reasons but resists the advice of the representative to be placed in a home. The adult protection authority is responsible for ordering hospitalisation and discharge. In specific cases, it may delegate responsibility for discharge to the institution (Art. 428 SCC).

**b)** According to article 451 para. 2 SCC, any person who demonstrates a credible interest may request information from the adult protection authority on the existence and effects of an adult protection measure. In the case of a lasting power of attorney, the authority issues the authorised person a formal document stating his or her powers (article 363 para. 3 SCC).<sup>223</sup> In addition, the adult protection authority must notify the civil registry office when a lasting power of attorney becomes effective for a person permanently incapable of judgement (article 449c para. 2 SCC).

***Interaction of an advance medical directive with other measures:*** article 378 SCC establishes a cascade order for the coordination of voluntary, *ex-lege* representations and state-ordered measures in medical matters: the provision stipulates in particular that if the patient has already left sufficiently specific instructions within the framework of an advance medical directive, these are deemed to be his or her declared will and there is no room for legal representation. However, relatives of subordinate levels of representation may be consulted by the representative(s) in order to ascertain the presumed will of the person concerned.

### ***Safeguards and supervision***

#### **45. Describe the safeguards against:**

- a. Unauthorised acts of the adult and of the representative/support person;**
- b. Ill-conceived acts of the adult and of the representative/support person;**
- c. Conflicts of interests**

**Please consider the position of the adult, contractual parties and third persons.**

#### ***Lasting power of attorney:***

Under a lasting power of attorney, acts of the adult cannot become valid by authorisation, as this instrument only comes into force in the case of incapacity of judgement, which renders the adult's acts void. If a person is deemed incapable of judgement in relation to a particular act, he or she loses his or her active capacity *ex lege* in relation to that act (article 17 and 18 SCC). The act is therefore void with effect *ex tunc*, and its voidness can be invoked by anyone, anytime, in any procedure.<sup>224</sup>

If an authorised representative does not respect the principal's instructions or acts ill-conceivably, and the adult's interests are therefore endangered or no longer protected, the adult protection authority must take the necessary measures *ex officio* or at the request of a close person: it may issue instructions to the authorised representative, order the taking of an inventory, regular accounts and reports, or withdraw all or some of his or her powers (article 368 SCC). In addition, the representative may be held liable for damage caused by his or her imprudent actions (article 456 SCC refers to the rules on liability applicable to the simple mandate, article 397 para. 2, article 398 paras. 1 and 2, article 399 and article 402 para. 2 SCO).

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<sup>223</sup> See above question 38 d).

<sup>224</sup> See R. FANKHAUSER, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 18 N 6-8.

According to article 365 para. 2 SCC, the powers of the representative expire by operation of law in the event of a conflict of interest between the principal and the representative. Furthermore, article 368 SCC is also applicable in the event of a conflict of interest.<sup>225</sup>

***Advance medical directive:***

According to article 373 SCC, any person close to the patient may approach the adult protection authority in writing and claim that the advance medical directive is not being followed, that the patient's interests are being endangered, and the authority takes the necessary measures. The physician can approach the authority as well. This applies namely in case of ill-conceived acts of the representative or a conflict of interests. In contrast to the regulation for the lasting power of attorney, a conflict of interest does not lead to the loss of the power of representation by law. In urgent cases, the physician may carry out medical measures in accordance with the presumed will and interests of the patient (article 379 SCC).

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

**a. Is supervision conducted:**

- by competent authorities;
- by person(s) appointed by the voluntary measure.

**b. In each case what is the nature of the supervision and how is it carried out?**

**c. The existence of measures that fall outside the scope of official supervision.**

***Lasting power of attorney:***

The supervision of the lasting power of attorney is conducted by the adult protection authority in the first place. When the authority learns of a person's loss of capacity of judgement, it investigates the existence of a lasting power of attorney and, if necessary, verifies its validity and effectiveness (article 363 SCC). Upon request, the authority may also have to interpret the power of attorney and specify it (article 364 SCC). If the interests of the principal are compromised or in danger of being compromised, the authority takes the necessary measures ex officio or at the request of a close person (article 368 para. 1 SCC). In particular, it may give instructions to the representative, order him or her to draw up an inventory of the principal's assets, submit periodic accounts and reports or withdraw his or her powers in whole or in part (article 368 para. 2 SCC).

In addition, the authorised representative has a duty of supervision: if transactions have to be carried out that are not covered by the lasting power of attorney, or if the representative has an interest in a matter that conflicts with that of the principal, he or she must notify the adult protection authority immediately (article 365 para. 2 f. SCC). In addition, due to his duty of care and loyalty, the authorised representative must inform the authority if, in his or her opinion, adult protection measures are necessary (article 365 para. 1 SCC in conjunction with article 400 para. 1 SCO).<sup>226</sup> Failure to comply with this obligation to notify may lead to liability of the authorised representative under article 456 SCC. However, state liability under article 454 para. 2 SCC is also at issue if the authority could and should have become aware of the endangerment by other means.<sup>227</sup>

***Advance medical directive:***

The advance medical directive is primarily addressed to the attending physicians. Nevertheless, according to article 373 SCC, any person close to the patient may approach the adult protection authority in writing and claim that the advance medical directive is not being followed, that the patient's interests are being endangered or are no longer being safeguarded, or that the advance directive is not based on the patient's free will. According to article 373 para. 2 SCC, the provision on the intervention of the adult protection authority in the case of a lasting

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<sup>225</sup> Cf. question 39 regarding conflicts of interest.

<sup>226</sup> Message of the Swiss Federal Council on the Amendment of the Swiss Civil Code (adult protection, law of persons and child law), Bundesblatt 2006 7001, 7028; see also E. LANGENEGGER, in D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 365 N 9.

<sup>227</sup> H. HAUSHEER and R. WEY, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7th edition, Basel 2022, Art. 454 N 25, 28.

power of attorney (article 368 SCC) applies *mutatis mutandis*. Some voices in the legal literature argue that analogously to article 368 para. 1 SCC, the authority can also act *ex officio*.<sup>228</sup>

### *Simple mandates and powers of attorney*

Simple mandates and powers of attorney that are to be effective before *and* after the onset of incapacity of judgement, are in principle exempt from control by the adult protection authority as long as the incapacity of judgement is only temporary or limited.<sup>229</sup>

### *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.**

**Lasting power of attorney:** According to article 362 SCC, an adult who is capable of judgement may revoke the lasting power of attorney at any time in one of the ways provided for its execution (para. 1)<sup>230</sup> or by destroying the document (para. 2).<sup>231</sup>

In addition, the authorised representative may terminate the lasting power of attorney at any time by giving two months' written notice to the adult protection authority. If there is an important reason (e.g. illness), he or she may terminate the measure without notice (article 367 SCC). Finally, the power of attorney of the representative can be revoked by the authority if the interests of the adult are endangered (article 368 SCC).

Finally, if the adult regains capacity of judgement, the lasting power of attorney becomes ineffective by operation of law (article 369 para. 1 SCC).

**Advance medical directive:** According to article 371 para. 2 SCC, the provision on revocation of a lasting power of attorney applies accordingly (article 362 SCC).

In contrast to the lasting power of attorney, the legislature has not regulated the conditions under which the authorised representative may withdraw from his mandate after he or she has accepted it. Article 404 SCO, according to which the mandate can be resigned at any time with immediate effect, is likely to apply.<sup>232</sup> If there is no substitute decree, the *ex-lege* representation according to article 378 SCC becomes applicable in this case.

### *Reflection*

## **48. Provide statistical data if available.**

According to a representative population survey commissioned by the Federal Office of Public Health (FOPH) in 2017, only 16% of the population have an advance medical directive. This proportion increases with age: in the age group over 65 years, 35% have written an advance medical directive. Advance medical directives are more widespread in German-speaking Switzerland than in French- and Italian-speaking part.<sup>233</sup>

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<sup>228</sup> Cf. J. GASSMANN, in D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 373 N 2; H. HAUSHEER, T. GEISER and R. AEBI-MÜLLER, *Das neue Erwachsenenschutzrecht*, Stämpfli Verlag, Bern 2014, N 2.51; of a different opinion: P. BREITSCHMID and A. KAMP, in M. AMSTUTZ ET AL., *Handkommentar zum Schweizerischen Privatrecht*, Schulthess Verlag, Zürich 2016 Art. 373 ZGB N 5.

<sup>229</sup> See above question 33 b.

<sup>230</sup> BGE 108 II 405 E. 3. Thus, an lasting power of attorney that has been established by public notarisation (Art. 361 para. 1 SCC) may also be revoked by a handwritten declaration (Art. 361 para. 2 SCC). The revocation may be comprehensive and concern the entire order or only parts of it, BGE 78 II 348 E. 5.

<sup>231</sup> BGE 73 II 144 E. 3; BGE 116 II 411 E. 4–8.

<sup>232</sup> Cf. J. GASSMANN, in D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 370 N 13; cf. also H. HAUSHEER, T. GEISER and R. AEBI-MÜLLER, *Das neue Erwachsenenschutzrecht*, Stämpfli Verlag, Bern 2014, N 2.43.

<sup>233</sup> Cf. BÜRO FÜR ARBEITS- UND SOZIALPOLITISCHE STUDIEN BASS AG, *Schlussbericht zur Bevölkerungsbefragung Palliative Care, Bern 2018*, <[https://www.bag.admin.ch/dam/bag/de/dokumente/nat-gesundheitsstrategien/strategie-palliative-care/forschungsberichte/palliative-care-bevoelkerungsbefragung-2018.pdf.download.pdf/PalliativeCare2017\\_Schlussbericht\\_BASS\\_mit\\_Summary.pdf](https://www.bag.admin.ch/dam/bag/de/dokumente/nat-gesundheitsstrategien/strategie-palliative-care/forschungsberichte/palliative-care-bevoelkerungsbefragung-2018.pdf.download.pdf/PalliativeCare2017_Schlussbericht_BASS_mit_Summary.pdf)>, last accessed 1.7.2022.



A study by the National Research Program NRP 67<sup>234</sup> shows that standardised counselling processes for advance health planning contribute to the fact that patients' treatment wishes are known significantly more often than in people who have not received such counselling.

The prevalence of the lasting power of attorney is generally considered low by experts.<sup>235</sup> A representative survey from 2017 shows that in German-speaking Switzerland only 16% and in French- and Italian-speaking Switzerland only 5 and 2% respectively have stated that they have written a lasting power of attorney.<sup>236</sup> It should be noted, however, that in the group of pensioners, one in four has drawn up a lasting power of attorney.<sup>237</sup>

#### **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 measure been evaluated, if so, what are the outcomes?**

**Advance medical directive:** In its response to an interpellation of 15 June 2020 on the promotion of advance medical directives to strengthen self-determination, the Federal Council stated the following:<sup>238</sup> The Federal Council has already taken various measures to improve advance health planning. The Federal Office of Public Health (FOPH), together with a group of experts, has developed a national framework concept for advance health planning. The aim of the national platform for palliative care is also to promote an anticipatory planning of treatment and care at the end of life. As part of the National Research Programme (NRP) 67 "End of life", studies were funded that investigated the benefits of advance medical directives.

The Federal Council has also commented on the conscious or unconscious disregard of advance medical directives by physicians: In particular, a study conducted as part of NRP 67<sup>239</sup> had highlighted the need for action in the application of civil and even criminal law consequences in medical practice. On the one hand, advance medical directives are often not found (in time). On the other hand, the mostly too general wording makes it difficult to use them in a situation of emergency. The Federal Council is convinced that access to advance medical directives will be improved with the introduction of the electronic patient file. In addition, they should increasingly be drawn up in standardised processes together with health professionals, which would lead to precisely formulated directives with medically clear instructions for action.

**Lasting power of attorney:** In practice, the lasting power of attorney as a private regulation opposes the measures ordered by the state and thus symbolises the prevention of state intervention. The fear of adult protection measures, which has also been fuelled in the media, and the bad reputation of the authorities have led to an increase in the number of lasting powers of attorney in recent years.<sup>240</sup>

The need for validation is sometimes seen as an undue interference by the state in its own provision.<sup>241</sup> Some cantonal authorities even seem to waive the requirement of validation,<sup>242</sup> which is unique in German-speaking countries in terms of comparative law.<sup>243</sup>

In this context, the legal literature pointed out that a lasting power of attorney also entails risks and side effects in practice.<sup>244</sup> In particular, due to the "lasting power of attorney industry" that has arisen, vulnerable persons risk to become victims of exploitation. It is further pointed out that a curatorship with an appointed elective representative can even be more advantageous than a lasting power of attorney because of the standardised supervision provided by law, the existing state liability, and the standardised support by the authority.

<sup>234</sup> Cf. <http://www.nfp67.ch/en/projects/module-2-decisions-motives-attitudes/project-krones>, last accessed 1.7.2022.

<sup>235</sup> With further references R. FANKHAUSER, 'Die damaligen Revisionsziele des neuen Erwachsenenschutzrechts – eine aktuelle Auslegung zehn Jahre nach Inkrafttreten des Gesetzes' (2022) *Zeitschrift für Kindes- und Erwachsenenschutz* 462, 465.

<sup>236</sup> Pro Senectute, Selbstbestimmung bei Urteilsfähigkeit – Zahlen und Fakten, 1.10.2017, <https://gfs-zh.ch/wp-content/uploads/2017/10/Zahlen-und-Fakten-zur-Selbstbestimmung-bei-Urteilsunfähigkeit.pdf>, last accessed 1.7.2022.

<sup>237</sup> Ibid. 2, 4.

<sup>238</sup> Cf. <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20203615>, last accessed 1.7.2022.

<sup>239</sup> [www.nfp67.ch](http://www.nfp67.ch) > Project Aebi-Müller.

<sup>240</sup> Neue Zürcher Zeitung from 1.3.2019: Angst vor der Kesb lässt die Zahl von Vorsorgeaufträgen in die Höhe schiessen.

<sup>241</sup> N. RENZ, *Der Vorsorgeauftrag und seine Validierung*, Schulthess Verlag, Zürich 2020, N 274.

<sup>242</sup> M. WOHLGEMUTH, 'Vorsorgeauftrag' in C. FOUNTOLAKIS, K. AFFOLTER-FRINGELI, Y. BIDERBOST and D. STECK (eds), *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Schulthess Verlag, Zürich 2016, N 4.42.

<sup>243</sup> N. RENZ, 'Der Vorsorgeauftrag – eine Tour d'Horizon' (2021) *Die Praxis des Familienrechts* 934, 938 ff.

<sup>244</sup> P. FASSBIND, 'Vorsorgeauftrag in der Praxis – Risiken und Nebenwirkungen', in I. SCHWANDER, R. REUSSER and R. FANKHAUSER, *Brennpunkt Familienrecht*, Festschrift T. Geiser, Dike Verlag, Zürich 2017, p. 217 ff.

## **SECTION V – EX-LEGE MEASURES**

### *Overview*

#### **50. Does your system have specific provisions for ex-lege representation of vulnerable adults?**

Yes. According to article 374 *et seq.* SCC, the spouse or registered partner who lives with a person who has lost capacity of judgement or who regularly and personally supports that person has a statutory right to act as that person's representative in relation to certain matters if there is no lasting power of attorney and no curator has been appointed.

*Ex-lege* representation exists also in medical matters designating certain family members and cohabitants as representatives (article 378 SCC) under the condition that there is no representative through an advance medical directive or a lasting power of attorney, no curator appointed by the adult protection authority with the right to represent the person in medical procedures and no spouse or registered partner as legal representative.

### *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?**

For an *ex-lege* representation to be effective, the person represented must be deemed incapable of judgement in relation to a certain act.<sup>245</sup>

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

In relation to the representation by the spouse or registered partner according to article 374 *et seq.* SCC, a medical expertise is not required. But in practice, a spouse or registered partner must usually rely on a medical certificate to prove incapacity of judgement to third parties.<sup>246</sup> For example, many banks do not accept a medical certificate alone and require a document issued by the adult protection authority.<sup>247</sup> Then, if there is any doubt as to whether the requirements for representation are fulfilled, the adult protection authority decides on the right to act as representative and, if requested, issues the spouse or registered partner with a certificate stating his or her powers (article 376 para. 1 SCC). If indicated, the authority must clarify the situation with the help of (medical) experts.

In relation to the *ex-lege* representation for medical treatment according to article 378 SCC, the treating physicians determine if the patient is incapable of judgement.

#### **53. Is it necessary to register, give publicity or give another kind of notice of the measure?**

The legal right of representation under article 374 SCC is intended to ensure that the basic personal and material needs of a person who is incapable of judgement can be met without the need for the authority to become involved. The *ex-lege* representation extends the powers of representation to which a spouse is entitled under

<sup>245</sup> See above question 8 a) for the definition of "incapacity of judgement".

<sup>246</sup> The spouse or registered partner who refers to his or her partner's incapacity of judgement vis-à-vis third parties must prove it, article 8 SCC; cf. BGE 124 III 5 E. 1b; 117 II 231 E. 2b.

<sup>247</sup> M. VAERINI, 'La représentation de l'époux ou du partenaire enregistré incapable de discernement' in M. VAERINI, G. LONGCHAMP, J. RUBIDO (eds), *Le droit des personnes âgées – Aspects de droit civil suisse et international*, Stämpfli Verlag, Bern 2019, p. 37, 52-53.

article 166 SCC and a registered partner under article 15 Law on registered partnerships. Accordingly, no consent or registration is required in principle. Registration, publicity or other kind of notice is not necessary in relation to *ex-lege* representation for medical treatment neither.

### *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.**

As in article 374 et seq. SCC, the spouse or registered partner living with or regularly and personally assisting a person who has lost capacity of judgement has a statutory right to act as that person's representative if there is no lasting power of attorney and no curator has been appointed.

In medical matters, the list of persons who can act as *ex-lege* representatives follows a special order (article 378 SCC): If no representative has been appointed by an advance medical directive or lasting power of attorney or no curator appointed by the adult protection authority, *ex-lege* representation is exercised by the following categories of persons, under the condition that they give assistance to them personally and regularly, in the following order, the former category excluding the latter: (1) The spouse or registered partner, (2) the cohabiting partner, (3) descendants, (4) parents and (5) siblings. A reform project is currently being discussed which would put cohabiting partners on the same level as a spouse or registered partner and add nieces and nephews to the list.<sup>248</sup>

### *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 e.g.: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.**

(i) In property and financial matters article 374 SCC applies: the right to act as representative of a spouse or a registered partner includes all legal acts that are normally required to ensure that the adult's daily needs are met<sup>249</sup>; due management of income and other assets (ordinary administration); and the right to open and deal with mail and e-mail, if necessary. Covered are those transactions which, in the ordinary course of events, are necessary to preserve and increase the assets and are of relatively minor importance, i.e., without any particular risk for the incapacitated spouse or the registered partner. For legal acts involving exceptional asset management (extraordinary administration, e.g., sale of a property)<sup>250</sup>, the spouse or the registered partner must obtain the consent of the adult protection authority.

(ii) Personal and family matters are not covered by *ex-lege* representation.

(iii) Care and medical matters are covered by the special norm of article 378 SCC.

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

If the spouse or registered partner acts as legal representative under article 374 para. 1 SCC, the legal effects of this act - as well as the acts of the legal curator - apply exclusively to the adult and he or she is directly bound by such act. The *ex-lege* representative in medical matters (article 378) gives valid consent to medical treatments.<sup>251</sup>

<sup>248</sup> Cf. reform proposal of February 2023, <https://www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/kesr.html>.

<sup>249</sup> Regarding the representation of the marital union cf. Art. 166 SCC and question 62.

<sup>250</sup> Extraordinary administration includes, in particular, value-enhancing conversions and the establishment of liens on real property, the creation and cancellation of servitudes, the liquidation of a business, the pledging of furniture, the sale of real property and valuable objects such as pictures or good antiques, but also the sale of securities.

<sup>251</sup> Cf. question 42.

An opt-out of *ex-lege* representation is possible: it expires (partially) with the establishment of a lasting power of attorney or of an advance medical directive if the tasks mentioned in article 374 and article 378 SCC are covered. According to current legal literature, however, it is possible to revoke namely the spouse's or registered partner's power of representation in whole or in part of one's own free will, even without a lasting power of attorney, but as a disposition of advance planning. With this disposition, the adult decides in favor of a curatorship and against an *ex-lege* representation in the event of his or her incapacity. The law does not require a certain form for this disposition, and legal doctrine is divided between simple written form or the form of the advance medical directive (article 361 SCC: holographic form or public authentication).<sup>252</sup>

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

Swiss adult protection law attaches great importance to the right of self-determination of an adult in need of protection. For this reason, a lasting power of attorney (article 360 - 369 SCC) issued by the incapacitated person when he or she was still capable of judgement takes precedence over the representation by the spouse or registered partner (article 374 SCC).

It is therefore presumed that the lasting power of attorney covers the legal transactions and acts listed in article 374 paras. 2 and 3 SCC. If this is not the case, *ex-lege* representation and a lasting power of attorney can be applied simultaneously. Furthermore, as an incapacity of judgement of a certain duration is required for a lasting power of attorney to be effective, the *ex-lege* representation comes into effect if the incapacity is only of short duration.<sup>253</sup>

As already mentioned, the majority of legal literature assumes that the *ex-lege* representation applies in the period between the occurrence of the incapacity of judgement and the coming into force of the lasting power of attorney.<sup>254</sup> If the aim of the lasting power of attorney was to avoid the *ex-lege* representation by the spouse, the legal literature recommends, based on practice,<sup>255</sup> that when drafting the lasting power of attorney, it should be pointed out that it also applies as a power of attorney within the meaning of article 405 para. 1 SCO until the decision of the authority is final and the official document evidencing the competences of the authorised representative is issued.

Not only the lasting power of attorney, but also a curatorship takes precedence over *ex-lege* representation (article 374 para. 1 SCC). However, article 389 para. 1 (2) SCC expressly provides that a curatorship is only to be ordered if the measures provided for by law are not sufficient. Especially in simple financial circumstances – e.g. if the spouses or registered partners only have a savings account and the couple lives on a pension – the *ex-lege* representation can cover the needs of the incapacitated person in the long term, provided no unexpected events occur. In contrast, the establishment of a curatorship may be advisable in complex financial circumstances.

*Ex-lege* representation in medical matters is subsidiary to a lasting power of attorney, advance medical directive or a curatorship as well (art. 378 para. 1 n. 1 and n. 2 SCC).

*Safeguards and supervision*

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

In relation to *ex-lege* representation of the spouse or registered partner (article 374 et seq. SCC), according to article 376 SCC, the adult protection authority looks after the interests of the adult: If there are doubts as to whether the requirements for representation are fulfilled, the adult protection authority decides on the authority to represent the adult and issues the spouse or the registered partner a certificate stating his or her powers, if requested. If the interests of the person lacking capacity of judgement are endangered or no longer safeguarded, the adult protection

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<sup>252</sup> R. REUSSER, in T. GEISER and C. FOUNTOLAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7<sup>th</sup> edition, Basel 2022, Art. 374 N 18, with further references.

<sup>253</sup> E. LANGENEGGER, in D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 363 N 9 and Art. 374 N 6.

<sup>254</sup> Cf. question 38 for further references.

<sup>255</sup> Cf. in particular M. VAERINI, 'La représentation de l'époux ou du partenaire enregistré incapable de discernement' in M. VAERINI, G. LONGCHAMP, J. RUBIDO (eds), *Le droit des personnes âgées – Aspects de droit civil suisse et international*, Stämpfli Verlag, Bern 2019, p. 37, 47 f.

authority shall, at the request of a close person or *ex officio*, revoke the power of representation of the spouse or registered partner in whole or in part and appoint a curator.

As regards the duties of the *ex-lege* representative, article 375 SCC refers to the rule applying to the mandate. Accordingly, the following duties apply: Fidelity and conscientious performance of the entrusted duties (article 398, para. 1 and 2 SCO); personal performance of the entrusted duties (article 398, para. 3 and article 399 SCO), accountability (article 400, para. 1 SCO). In addition, as part of due diligence, the spouse or registered partner must inform the authority if there is a conflict of interest, so that authority can establish a curatorship if needed (article 376 para. 2 SCC) or take a measure directly based on article 392 SCC. The question whether the *ex-lege* representation ceases to exist by operation of law in case of a conflict of interest is discussed controversially in legal literature: According to some authors, the *ex-lege* representation continues to exist<sup>256</sup> while others correctly assume that it ceases by operation of law in accordance with the regulation in the event of a conflict of interest between the adult and the authorised representative or curator in the case of a lasting power of attorney or curatorship.<sup>257</sup>

If the spouse or registered partner concludes a commitment transaction without the required authorisation of the authority, the rules for legal transactions undertaken by the curator without the required authorisation of the authority (article 416-418 SCC) may be applied accordingly. The transaction is pending until the authority gives its approval. If it refuses, the transaction is invalid and ceases to exist *ex tunc*. It must therefore be reversed, insofar as this is still possible. However, the incapacitated person is only liable insofar as he or she is still enriched, or benefits have been used in his or her favor.

In relation to *ex-lege* representation in medical matters, article 381 SCC is the legal basis for the intervention of the adult protection authority. The authority establishes a representation curatorship if there is no person authorised to represent the patient or if no person wishes to exercise the right of representation (para. 1). The authority must designate the person authorised to represent the person or establish a representation curatorship if: it is unclear who is authorised to represent; the authorised representatives have differing opinions; or the interests of the person lacking capacity are jeopardised or no longer protected (para. 2). It acts at the request of the physician or another closely related person or *ex officio* (para. 3).

#### ***End of the ex-lege representation***

### **59. Provide a general description of the end of each measure.**

Ex lege representation expires if (a) the person incapable of judgement regains capacity (article 374 para. 1 and article 378 para. 1 *e contrario* SCC); (b) the marriage or registered partnership is dissolved by death or a final court judgement (article 374 para. 1, article 378 para. 1 n. 3 *e contrario* SCC); (c) the joint household is dissolved, and/or assistance is no longer provided personally and regularly (article 374 para. 1, article 378 para. 1 n. 3 to 7 SCC *e contrario*); (d) the representative resigns the legal “mandate” (article 375 SCC and article 404 SCO) or does not make use of the legal right of representation at all; (e) the legal representative loses his or her capacity of judgement (analogous to article 421 para. 4 SCC); (f) the right of representation is restricted or withdrawn by the authority (article 376 para. 2, article 381 para. 2 SCC); or (g) the authority orders a curatorship with duties that include article 374 paras. 2 and 3 or article 378 SCC (article 376 para. 2; article 381 para. 1 and 2; article 398, article 394 or article 395 SCC).

#### ***Reflection***

### **60. Provide statistical data if available.**

No statistical data is available on *ex-lege* representation in Switzerland.

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<sup>256</sup> P. MEIER, *Droit de la protection de l'adulte*, 2nd edition, Zürich 2022, N 575 with further references.

<sup>257</sup> See M. VAERINI, ‘La représentation de l'époux ou du partenaire enregistré incapable de discernement’ in M. VAERINI, G. LONGCHAMP, J. RUBIDO (eds), *Le droit des personnes âgées – Aspects de droit civil suisse et international*, Stämpfli Verlag, Bern 2019, p. 37, 60; C. FONTOULAKIS, ‘Die Teilnahme urteilsunfähiger Erwachsener am Rechtsverkehr’ (2015) *Basler Juristische Mitteilungen* 189, A. LEUBA in A. BÜCHLER, C. HÄFELI, A. LEUBA and M. STETTLER (eds), *FamKomm Erwachsenenschutz*, Stämpfli Verlag, Bern 2013, Art. 375 N 12, Art. 376 N 9.

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

A problem that has arisen in practice is the distinction between *ex-lege* representation and lasting power of attorney, since the dogmatic concept and the beginning of the effectiveness of a lasting power of attorney is discussed controversially in the legal literature.<sup>258</sup> However, the majority assumes that only a lasting power of attorney that has been declared valid by the adult protection authority comes into effect and that it is not already regarded as such by the law. The *ex-lege* representation applies to the period between the occurrence of incapacity and the coming into force of the lasting power of attorney. If the aim of the lasting power of attorney was to avoid the *ex-lege* representation by the spouse, the legal literature recommends that the lasting power of attorney, when it is drafted, is also deemed to be a power of attorney until the decision of the authority is final.<sup>259</sup>

The question of whether *ex-lege* representation expires by operation of law in the event of a conflict of interest is also discussed controversially in the legal literature<sup>260</sup>.

*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?**

Yes, according to *marital and partnership law* (article 166 SCC and article 15 Law on registered partnerships), both spouses or partners, while living under one roof, represent the marital community with regard to the daily needs of the family (ordinary representation).<sup>261</sup> A spouse or partner may represent the marital community/partnership in relation to other needs (extraordinary representation)<sup>262</sup> of the family only if: (1.) he or she is authorised to do so by the other spouse or partner or by court order, (2.) or if the interests of the marital community/partnership do not permit delay and the other spouse is unable to consent because of illness, absence or for similar reasons.<sup>263</sup> And each spouse is personally liable for his or her own acts and, insofar as these do not exceed his or her power of representation in a manner recognisable to third parties, also renders the other spouse jointly and severally liable for these acts (para. 3).<sup>264</sup>

Therefore, insofar as the spouse/partner with capacity of judgement provides for the current needs of the marital community/partnership during cohabitation and not only for the incapable spouse or partner (within the meaning of article 374 SCC) joint debts arise by operation of law. Marriage law therefore takes precedence over the provisions of adult protection law.<sup>265</sup>

Furthermore, there is also a *lex specialis* concerning the family home, which is particularly protected under Swiss law:<sup>266</sup> According to article 169 SCC and article 14 Law on registered partnerships, a spouse or registered partner may only terminate a tenancy agreement, sell the family home or restrict the rights to the family home by other legal transactions with the express consent of the other spouse or partner. If the spouse or partner cannot obtain this consent (as in the case of incapacity of judgement), or if it is refused without good cause, he or she may file an application with the court. These rules are intended to prevent the spouse or partner who has a right

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<sup>258</sup> Cf. question 38.

<sup>259</sup> Cf. also question 57.

<sup>260</sup> Cf. question 58.

<sup>261</sup> BGE 112 II 404; BGE 129 V 90.

<sup>262</sup> Extraordinary administration includes: the construction or purchase of a house, the purchase of an appartement, the renting of rooms intended as a matrimonial or family home (BGE 136 III 436), the purchase of an entire flat, the purchase of expensive furniture, carpets, appliances and luxury items (with family-specific differentiation), the ordering of major repairs and improvements to the joint home, the purchase of cars and the conclusion of certain insurance policies (e.g. life insurance), B. ISENING and M. KESSLER, in T. GEISER and C. FOUNTOULAKIS (eds), *Basler Kommentar Zivilgesetzbuch I*, Helbing Lichtenhahn, 7<sup>th</sup> edition, Basel 2022, Art. 166 N 13.

<sup>263</sup> BGE 119 V 21.

<sup>264</sup> BGE 133 III 59 f.

<sup>265</sup> A. LEUBA in A. BÜCHLER, C. HÄFELI, A. LEUBA and M. STETTLER (eds), *FamKomm Erwachsenenschutz*, Stämpfli Verlag, Bern 2013, Art. 374 N 9.

<sup>266</sup> BGE 114 II 396 E. 5a.

*in rem* or a compulsory right to the family home from depriving the other spouse of the home that is vital to him or her against his or her will in the event of tensions in the marriage or partnership.<sup>267</sup>

Also, there are restrictions in *matrimonial property law* regarding the disposal of co-ownership: If an asset is in the co-ownership of both spouses, neither spouse may dispose of his or her share in it without the other's consent, unless otherwise agreed (article 201 para. 2 SCC).<sup>268</sup> In the matrimonial property regimes of participation in acquired property (article 200 para. 2 SCC) and separation of property (article 248 para. 2 SCC), joint ownership by both spouses is presumed if one spouse cannot prove that an object belongs to him or her or to the other spouse.

If one of the spouses becomes incapable of judgement and is to be represented by his or her spouse with regard to his or her co-ownership share, article 374 SCC finds application in principle and a distinction must be made as to whether it is a matter of ordinary property management (para. 2, i.e. a permissible legal representation) or extraordinary representation (para. 3, i.e. a legal representation permissible only with official authorisation.) If a conflict of interests exists between the spouses, the capable spouse must inform the adult protection authority so that the latter establishes a curatorship (article 376 para. 2 SCC) or directly takes a measure within the meaning of article 392 SCC (in particular, decide itself).<sup>269</sup>

**63. Do the rules governing community of property permit one spouse to act (also) 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.**

***If the spouse has no mental impairment:***

In the case of community of property, joint ownership is presumed (article 226 SCC); neither spouse may dispose of his or her share of the joint property alone. Except in ordinary administration, the spouses may only jointly bind the community and dispose of the joint property, or one of them may do so only with the consent of the other (article 228 SCC).

***If the spouse has a mental impairment:***

The rules on *ex-lege* representation of article 374 SCC and its exceptions apply in this case as well, see question 62.

***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?**

Yes, the private law instrument of *negotiorum gestio* exists in Switzerland (article 419 SCO). In the context of cases involving vulnerable adults it has for example a practical significance for situations where an urgent medical treatment is needed in the interest of the patient who is incapable of judgement, and nor the consent from the patient nor from a representative can be obtained. In this case the medical doctor can proceed with the treatment based on the rules of *negotiorum gestio*.<sup>270</sup> *Negotiorum gestio* is also the basis for the person designated by a lasting power of attorney to act as a representative in urgent matters during the procedure establishing the validity of the voluntary measure.<sup>271</sup>

**SECTION VI – OTHER PRIVATE LAW PROVISIONS**

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

According to article 35 para. 1 and article 405 para. 1 SCO, the powers conferred by means of a power of attorney or a mandate are extinguished on the loss of active legal capacity, unless the contrary has been agreed or

<sup>267</sup> BGE 114 II 396, 399 E. 5a; BGE 142 III 720, 724 E. 4.2.2.

<sup>268</sup> See BGE 141 III 13.

<sup>269</sup> M. VAERINI, 'La représentation de l'époux ou du partenaire enregistré incapable de discernement' in M. VAERINI, G. LONGCHAMP, J. RUBIDO (eds), *Le droit des personnes âgées – Aspects de droit civil suisse et international*, Stämpfli Verlag, Bern 2019, p. 37, 63 et seq.

<sup>270</sup> BGE 148 I 1; D. OSER and R. H. WEBER, in C. WIDMER LÜCHINGER and D. OSER (eds), *Basler Kommentar Obligationenrecht I*, Helbing Lichtenhahn, Basel 2020, Art. 419 N 5;

<sup>271</sup> P. MEIER, *Droit de la protection de l'adulte*, 2nd edition, Zürich 2022, N 429.

is implied by the nature of the business. This means that it is possible to authorise another person to act as a representative in one's own name even in the event of incapacity to act. However, for dispositions and powers of attorney that are to be effective only from the time of the loss of capacity of judgement, the formal requirements of the lasting power of attorney (article 360 to 369 SCC) apply.<sup>272</sup>

**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?**

Advance planning by third parties on behalf of an adult is not possible according to Swiss law. The lasting power of attorney and also the advance medical directive concern self-determination and do not allow for representation.<sup>273</sup>

**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;**
- b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;**
- c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;**
- d. effect of the measures on the legal capacity of vulnerable adults;**
- e. the possibility to provide tailor-made solutions;**

When the CRPD came into force in Switzerland in 2014, the Federal Council assumed that the change of perspective brought about by the CRPD was implemented in the revised adult protection law, as a system of tailor-made measures was introduced that enables supported decision-making.<sup>274</sup>

However, the Committee's criticism on the implementation of supported decision-making towards nearby European countries started a debate consequently that also affected Switzerland with a time delay.<sup>275</sup> In recent years, there has been controversy in the legal literature in Switzerland as to whether a (selective) revision is necessary or whether an interpretation of the current law in conformity with the Convention is possible.<sup>276</sup> In general, supported decision-making and substituted decision-making are regarded as two poles according to which one can align or allocate the possibilities of assistance. According to common practice, capacity or incapacity of judgement is usually used as the decisive criterion for distinguishing between the two.<sup>277</sup>

In the current practice of Swiss adult protection law, the complete or partial incapacitation of a person due to his or her disability or permanent state of weakness leads to a (partial) restriction or even removal of their active legal capacity and to a measure with representative act(s) by the curator and thus to a system of substituted decision making. This does not consider whether a person might be able to act reasonably with assistance and thus remain capable of judgement, a fact that has been criticized by the shadow report of the civil society on the occasion of the initial state report procedure for Switzerland.<sup>278</sup>

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<sup>272</sup> See above question 33 b).

<sup>273</sup> See question 33.

<sup>274</sup> Message of the Swiss Federal Council on the implementation of the CRPD in Swiss law, Bundesblatt 2013 661 ff., 690, 692 and 710.

<sup>275</sup> Cf. details question 31.

<sup>276</sup> In detail question 31.

<sup>277</sup> D. ROSCH, 'Erwachsenenschutz zwischen Selbstbestimmung, Supported Decision Making und Substitute Decision Making' (2019) *Die Praxis des Familienrechts* 105, 114.

<sup>278</sup> See, to that effect INCLUSION HANDICAP, Updated Shadow Report, Civil Society Report on the Occasion of the Initial State Report Procedure for Switzerland before the UN Committee on the Rights of Persons with Disabilities, 13.02.2022, p. 24 <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCHE%2f47884&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCHE%2f47884&Lang=en)> accessed 20.09.2022.



With the principle of tailor-made adult protection measures, Swiss law provides in principle for legal instruments which allow for measures which find the adequate balance between autonomy and protection, and correspond to the requirements of the CRPD. Both the intensity of intervention and the areas of competence assigned to the curator can be tailored to the vulnerable adult's needs for assistance. However, in practice, the spectrum of measures is not systematically used to enhance the adult's autonomy.<sup>279</sup> Statistics show that the most frequent measure is the representative curatorship (article 394 SCC) and that the number of comprehensive curatorships is much higher in some cantons than in others.<sup>280</sup> The principle of proportionality and subsidiarity appears to be applied with varying degrees of rigour within the discretionary powers of the authorities.

The tailoring to the needs of the vulnerable adult applies also to the actions of the curator, which according to Swiss legislation need to favour autonomous decision-making (article 406 SCC). The curator needs to concretely assess the need for protection and the possibility for autonomy.<sup>281</sup> Recommendations exist in the literature in relation to the different degrees of participation and autonomy (information, co-determination, co-decision or self-organisation).<sup>282</sup> In this context, it is of great importance for the actual implementation of the right to self-determination that the authorities make available not only professional expertise, but also time resources.<sup>283</sup> This is unfortunately not the case in all cantons.

On the level of legislation, on the basis on the Committee's criticism<sup>284</sup> of the compatibility of the CRPD and Swiss adult protection law and the current practice, it is time to reconsider in particular those measures and regulations that restrict a person's legal capacity and to develop a system that is more focused on supported decision-making and sets clear limits on substituted decision-making for the individual cantonal authorities.<sup>285</sup> There is also a strong need for clarification and intervention with the aim of achieving a legally equal and more uniform practice with regard to the right to self-determination within the cantons.

The tailoring of the curatorships and also the case law of the Supreme Court allows to combine cooperation and representative curatorships in a way that representative acts with restriction of the legal capacity (representative curatorship Art. 394 para. 2 SCC and comprehensive curatorship Art. 398 SCC), can be abandoned *de lege ferenda*.<sup>286</sup> This would allow for a further transition to supported decision-making and create a milder, more participatory, and self-determined path. The Federal Council has announced already in 2017 that it will make reform proposals following the CRPD Committee's concluding observations<sup>287</sup>, but has not as yet announced any concrete projects.

Although political and social awareness of the right to self-determination of vulnerable adults has developed in recent years under the influence of the CRPD, it must still be considered low today. Also, there is a lack of comprehensive studies or empirical research in Switzerland on the implementation of the right to self-determination of vulnerable adults in the context of curatorships, in line with the aim of the 2013 revision of Swiss adult protection law.

Voluntary measures aim at improving self-determination through advance planning, however have their limits: Advance medical directives are often not found (in time) or are not respected by physicians due to their frequent lack of precision. As for lasting powers of attorney there exists a certain risk of exploitation of the vulnerable adult because of the lack of standardised supervision by the adult protection authority, of state liability, and of standardised support by the authority.<sup>288</sup>

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<sup>279</sup> Regarding the responsibilities of the authorities for guaranteeing the implementation of the CRPD by the curators D. ROSCH, 'Erwachsenenschutz und Behindertenrechtskonvention: Stossrichtung und Umsetzung für die Praxis' (2022) *Zeitschrift für Kindes- und Erwachsenenschutz* 474, 480 f.

<sup>280</sup> See above question 30.

<sup>281</sup> D. ROSCH, 'Selbstbestimmung im revidierten Erwachsenenschutzrecht' (2015) *Zeitschrift für Kindes- und Erwachsenenschutz* 215, 220 ff.

<sup>282</sup> L. MARANTA, 'Selbstbestimmung im Erwachsenenschutzverfahren' (2019) *Die Praxis des Familienrechts* 374 ff.

<sup>283</sup> Critical R. FANKHAUSER, 'Die damaligen Revisionsziele des neuen Erwachsenenschutzrechts – eine aktuelle Auslegeordnung zehn Jahre nach Inkrafttreten des Gesetzes' (2022) *Zeitschrift für Kindes- und Erwachsenenschutz* 462, 472; On the lack of resources and its implications see D. WIDER, 'Stellungnahme der Generalsekretärin KOKES: Die Beistandschaft als Unterstützung zu mehr Selbstbestimmung', in D. ROSCH and L. MARANTA (eds), *Selbstbestimmung 2.0, Die Bedeutung für Berufsbeistände und Behördenmitglieder*, Stämpfli Verlag, Bern 2017, p. 171, 186 f.

<sup>284</sup> Cf. for conformity of Swiss adult protection law with the CRPD and the controversy in legal literature question 31.

<sup>285</sup> Cf. in this regard question 31.

<sup>286</sup> Cf. in this regard question 31. and D. ROSCH, 'Die Vertretungsbeistandschaft nach Art. 394 Abs. 2 ZGB gehört de lege ferenda abgeschafft!? – ein Zwischenruf' (2021) *Die Praxis des Familienrechts* 692.

<sup>287</sup> Report of the Swiss Federal Council of 29 March 2017, p. 76 (German version), p. 69 French version (see links in note 9).

<sup>288</sup> Cf. above question 49.

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

According to article 406 SCC the curator has to follow the will and preferences principle. However, the manner of representation depends on whether the person in question was capable of developing concepts of life at all. Insofar as someone was incapable of judgement from birth, this is only possible to a limited extent. Consequently, one will be guided by a best interest standard, whereby the presumed (recognisable) needs and preferences are to be considered here as well (“best interpretation of will and preferences”).<sup>289</sup>

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

The protection during a procedure of an adult protection measure, which may or not entail deprivation, limitation or restoration of legal capacity, lies mainly within the possibility of legal representation, legal aid and the possibility to appeal against an ordered measure:

According to article 449a SCC, the adult protection authority can advise that the adult must be represented in the procedure and appoints a person experienced in care-related and legal matters as curator for the proceedings, if necessary. Representation in proceedings is always necessary if the person concerned is incapable of judgement or if they are unable to conduct the proceedings.<sup>290</sup> However, with exception of the canton of Geneva, only few procedural representations are actually ordered in adult protection proceedings.<sup>291</sup>

Also, if a person has no financial ability, legal aid is guaranteed by article 29 Federal Constitution if the applications are not unrealistic or otherwise insufficient. Legal aid covers the costs of proceedings and legal representation (lawyer’s fees).

Eventually, the adult (and persons close to him) can appeal against the measure to the competent cantonal court (article 450 et seq. SCC),<sup>292</sup> and to the Federal Supreme Court (article 75 Law on the Federal Supreme Court). However, as an evaluation of the last 10 years of case law has shown, adult protection is characterised, in comparison with other branches of private law, by a low number of appeals to the Federal Supreme Court that are examined on the merits. The persons concerned are often unaware or poorly informed of their rights and of the possibilities of obtaining legal aid. Appeals, when they do occur, are often filed by the individual alone and therefore declared inadmissible, as the argumentation is not considered sufficiently substantiated.<sup>293</sup>

- c. protection during the operation of adult support measures:**
  - protection of the vulnerable adult against his/her own acts;**

The protection of the vulnerable adult against his/her own ill-conceived acts is strong in Swiss law:

The protection is firstly provided by the *general rules on legal capacity*, which apply both in the context of state-ordered and voluntary measures, but also if no measures have been taken: If a person is deemed incapable of judgement in relation to a particular act, he or she loses his or her active legal capacity *ex lege* in relation to that act (article 17 and 18 SCC). The act is therefore void with effect *ex tunc*, and its voidness can be invoked by anyone, anytime, in any procedure (cf. question 28 c).

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<sup>289</sup> With further references D. ROSCH, ‘Erwachsenenschutz zwischen Selbstbestimmung, Supported Decision Making und Substitute Decision Making’ (2019) *Die Praxis des Familienrechts* 105, 114 f.

<sup>290</sup> With further references D. STECK, in: D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 449a N 12 f.; Federal Supreme Court, unpublished decision from 7.5.2012, 5A\_215/2012, E. 4.3.

<sup>291</sup> See above question 30.

<sup>292</sup> For the requirements of a judicial appellate authority cf. BGE 139 III 98 E. 3.5; for the circle of persons who are considered “close to the adult” cf. BGE 137 III 67, 70; BGE 122 I 18, 29 f.; BGE 114 II 213, 217; BGE 113 II 232, 233 f.

<sup>293</sup> P. MEIER, ‘Protection de ‘l’adulte: 10 ans de jurisprudence fédérale – morceaux choisis’ (2022) *Zeitschrift für Kindes- und Erwachsenenschutz* 446, 447.

In the context of *state-ordered measures*, the need for authorisation of the acts of the adult by the curator and the authority also provides for protection (see question 28 b): If a transaction has been concluded without the required consent of the curator or the adult protection authority (or without subsequent ratification), the agreement is invalid, and either party may demand restitution of the services already rendered, even if third parties have acted in good faith (article 418, article 19a, article 19b and article 452 SCC). A person whose legal capacity has been restricted by an adult protection measure is liable only to the extent that he or she has already benefited from the benefit or has enriched himself or herself or has spent the benefit in bad faith at the time the claim is made (article 19b para. 1). If the person has misled another to believe that he or she has full legal capacity, he or she is liable for the damage caused (article 418, article 19b para. 2, article 452 para. 3 SCC).

In what concerns acts of factual self-endangerment, a representative designated by a voluntary measure, a curator or an *ex-lege* representative must respect the will and preferences of the vulnerable adult, but only insofar as they have been/are formulated by an adult who is capable of judgement (see article 406 SCC)<sup>294</sup>.

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

**State-ordered measures:** The adult's interests are protected not only with regard to the suitability of the representative (cf. question 23. d); articles 446 SCC, 450 SCC), but also with regard to abusive (cf. question 28. c), article 454 SCC) or unauthorised acts (cf. question 28. b), article 418 SCC).

In the event of a conflict of interest between the representative and the adult the powers of the curator lapse by operation of law (article 403 SCC). A transaction concluded despite a conflict of interest is also not valid and therefore protected. (cf. question 28. d)). Finally, the adult is also protected by the authority's supervision (cf. question 27 c) and d), articles 413, 419, 423, 454 SCC).

**Voluntary measures:** In the case of a lasting power of attorney, the powers of the representative lapse *ex lege* in the event of a conflict of interest (cf. question 45. b), 39. b), articles 365 para. 2 and 368 SCC, for the liability of the representative article 456 SCC).

**Ex lege representation:** As part of the duty of care, the spouse or registered partner must inform the authority if there is a conflict of interest, so that the authority can establish curatorship if necessary (article 376 para. 2 SCC) or take direct action on the basis of article 392 SCC. The question of whether representation *ex lege* ceases by operation of law in the event of a conflict of interest is disputed in the legal literature (cf. question 58).

- **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;**

In Swiss adult protection, there is no institutional representation of persons in care by law. Representation of persons who are incapable of judgement living in a home is governed by the provisions on representation in medical measures (article 382 para. 3 in conjunction with articles 377 et seq. SCC).<sup>295</sup> If there is neither a person named by an advanced medical directive or a lasting power of attorney and no curator (by state ordered measure), the right of representation is granted to relatives in a specific order. This arrangement has the advantage that one and the same person represents the vulnerable person in medical matters as well as in matters of accommodation in the event of admission to an institution. If no person can be appointed on the basis of the statutory authorisation, the adult protection authority establishes a curatorship.<sup>296</sup>

Articles 382 – 387 SCC contain special provisions for the protection of vulnerable adults in residential-care institutions. Namely, the institution must protect the personality of the person concerned (article 386 SCC). It must look after the person's daily well-being and take their needs into account.

Measures restricting movement of persons who are incapable of judgement are possible (articles 383 et seq. SCC),<sup>297</sup> but must be proportionate and serve to avert a danger to the life or physical integrity of the person

<sup>294</sup> Cf. also question 25.

<sup>295</sup> Cf. D. STECK, in: D. ROSCH, A. BÜCHLER and D. JAKOB (eds), *Erwachsenenschutzrecht*, Helbing Lichtenhahn Verlag, Basel 2015, Art. 382 N 16 ff.

<sup>296</sup> Art. 381 para. 1 SCC in relation with article 382 para. 3 SCC.

<sup>297</sup> These include the restriction of physical movement by mechanical means such as bed rails, strapping for falls, locking doors, fixation measures or isolation, but also electronic measures such as doors secured with codes. Electronic detectors, surveillance cameras and the

concerned or third parties or a serious disturbance of community life. The person concerned or a close person can appeal to the adult protection authority against the measure (article 385 para. 1 SCC).

The cantons are responsible for supervising all homes in which persons with disabilities are cared for, provided that these homes are not subject to federal supervision (article 387 SCC).

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

The new adult protection law that came into force on 1 January 2013 enhanced the protection of the privacy of the vulnerable adults:

Protective measures that restrict a person's legal capacity are no longer published in the cantonal official gazettes. In order to obtain information on the existence of a measure, third parties must contact the adult protection authority responsible in the individual case and prove an interest. The adult protection authority is subject to the duty of confidentiality; information may in principle only go as far as is necessary to ensure safe legal transactions. The adult protection authority should therefore only be allowed to provide information on existing measures if the decision of the authority is enforceable and the legal capacity is restricted in relation to the legal transaction mentioned in the application. Also, the legal framework does not provide for any form of publicity for voluntary and *ex-lege* measures.

Regarding state-ordered measures, special rules apply to the adult's mail and his or her home, as these belong to the private sphere and are protected by fundamental rights. Without the consent of the adult, the curator may only open letters addressed to the adult or enter the adult's home if the adult protection authority has expressly authorised him to do so (article 391 para. 3 SCC).

Finally, article 386 SCC protects the privacy of vulnerable adults in residential-care institutions.

However, no empirical evaluation of the implementation in practice of these guarantees exist.

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like do not belong to movement-restricting measures. If physical integrity is interfered with for the purpose of restricting freedom of movement (administration of medication), this is a coercive measure. Treatments without consent are subject to the regulations applicable to medical measures, articles 377 et seq. SCC, cf. See Message of 28 June 2006, BBl **2006** 7001, 7093. In the special case where a person incapable of judgement is placed in a psychiatric institution because of mental disorders, the special provisions of articles 434 et seq. SCC apply.