Country report **The Netherlands**

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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 Kjærheim Fredwall, Prof. Frederik Swennen, Prof. Paula Távora Vítor, Dr. Velina Todorova and Prof. Michelle Cottier. They are supported by the Secretary Rieneke Stelma-Roorda.
Country reports for all jurisdictions have been produced by country reporters. The country reports have been reviewed by at least one Member of the Coordinating Group. Language and contents of the countries reports fall under the responsibility of the country reporters. The reports are representing the law as it stands in 2022.

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

THE NETHERLANDS[1]

Kees Blankman
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SECTION I - GENERAL

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

The legal framework for the protection and empowerment of vulnerable adults in the Netherlands can be found in the Dutch Civil Code. Book 1 of the Civil Code (CC), titled the 'Law on Persons and Family', contains provisions on three state-ordered measures. These are: full guardianship [curatele], protective trust [beschermingsbewind] and personal guardianship [mentorschap]. Full guardianship – which provides protection and support in financial, medical and personal matters – is the oldest measure and originates in the Roman 'cura furiosi'. The protective trust deals with the financial interests of the adult only, while personal guardianship includes the support and representation of adults in non-financial matters, such as care and treatment. The court can order a protective trust and personal guardianship at the same time.

Since 2010, adults have the possibility to make what is known as a 'levenstestament'. As section 4 of this report discusses, a *levenstestament* can include two components often considered separate instruments in other countries: a (continuing) power of attorney and advance directives. Despite the Council of Europe Recommendation 2009(11), which urges Member States to introduce instruments such as the *levenstestament* and facilitate their use through legislation, there is currently no such legislation in the Netherlands. Instead, the *levenstestament* has been designed and conceptualised by the Dutch notariate within the framework of the existing law. Although there is no legislation on the relationship between the *levenstestament* and the state-ordered measures, in practice, the courts have adopted a principle of subsidiarity, giving the *levenstestament* preference over the state-ordered measures.

[1] This country report is partly based on a country report of the Netherlands that was prepared for the International Academy of Comparative Law.

Provisions on *ex lege* representation can be found in Book 7 of the Civil Code. Articles 446 to 468 of Book 7 CC – in practice also referred to as the Medical Treatment Act – formulate the rights and duties of patients and medical professionals when concluding an agreement on medical treatment. An important provision is the requirement of informed consent. If the patient lacks the mental capacity to give informed consent – i.e., the patient is missing the necessary decision-making skills – the medical professional needs the consent of a representative unless it concerns an emergency or a minor act regarding the body or the health of the patient concerned (article 7:466 CC). If there is a guardian or an attorney, this person can act, but if there is no court-appointed or self-appointed representative, the partner or a close relative of the adult concerned (a parent, grandparent, child, grandchild, brother or sister) is authorised by law to represent the adult concerned (article 7:465 CC). Similar *ex lege* provisions are included in mental health legislation.[2] As the above makes clear, *ex lege* representation functions as a default provision in the Netherlands. If there is no guardian or attorney appointed by the adult, an informal representative can enter the picture and represent the adult concerned. However, a situation where informal representation works well in practice can also be a reason for the court to consider a state-ordered measure unnecessary. Matrimonial property law contains a provision allowing one spouse to act on behalf of the other spouse regarding the administration of that property. The same possibility for *ex lege* representation exists in case of a registered partnership.

2. **Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *опека - opeka*]. As explained in the General Instructions above, please briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.**

The key terms and definitions in the terminology section of this questionnaire have been used as a starting point, with modifications and additions where necessary.

Adult [meerderjarige]**:** a person who has reached the age of 18 years.

Advance directive [wilsverklaring]: instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity. In the Netherlands, these instructions or wishes can be addressed to the attorney as part of the continuing power of attorney or to a third party (e.g., a doctor).

2 Article 1:3(3) Compulsory mental health care act (Wvggz); Article 1(1) sub e and article 3(2) Compulsory care act (Wzd).

Attorney [gevolmachtigde, vertegenwoordiger, levensexecuteur]: a representative/support person appointed through a *levenstestament* or a continuing power of attorney.

Continuing power of attorney [in het geval van wilsonbekwaamheid doorlopende of inwerking tredende volmacht]**:** a power of attorney given by an adult with the purpose that it shall either be effective immediately, or enter into force in the future, and shall remain in force in the event of the granter's incapacity. A continuing power of attorney is also known in the Netherlands and can be included in a *levenstestament*.

***Ex lege* representation** [onbenoemde vertegenwoordiging]**:** an adult protection measure providing legal authority to other persons to act *ex lege* (by operation of law) on behalf of the adult, requiring neither a decision by a competent authority *nor* a voluntary measure by the adult.

Granter [vertegenwoordigde, volmachtgever, levensexecuteur]: a capable adult giving the continuing power of attorney or drawing up the *levenstestament*.

Guardian [wettelijk vertegenwoordiger]: term still used in the Netherlands to refer to a representative appointed by the court under full guardianship, protective trust or personal guardianship.

Legal capacity [handelingsbekwaamheid]: the ability to hold rights and duties (passive legal capacity or legal standing) and to exercise those rights and duties (active capacity or legal agency).

Levenstestament: a Dutch umbrella term for an instrument that can include a continuing power of attorney, a medical treatment advance directive and/or an advance directive addressed to the court with, for example, the adult's choice of representative in case the court deems a state-ordered measure necessary.

Medical treatment advance directive [medische wilsverklaring]: wishes, preferences or instructions expressed by a capable adult regarding medical treatment desired or refused under certain conditions.

Mental capacity [wilsbekwaamheid]: the *de facto* decision-making and decision-communication skills of a person.

Power of attorney [volmacht]: the authority granted by a person, the granter, to another person, the attorney, to perform one or more legal acts in the name of the granter.[3]

Representative [vertegenwoordiger]**:** a natural or legal person who acts on behalf of the adult.

State-ordered measures [wettelijke beschermingsmaatregelen]: adult protection measures, ordered by the court at the request of the adult or others.

Support person [ondersteuner]: a natural or legal person who assists the adult to legally act or who acts together with the adult.

Voluntary measures [vrijwillige maatregelen]: any measure initiated by the adult without external compulsion *ex lege* or a decision by any competent state authority.

Vulnerable adult [kwetsbare meerderjarige] adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

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.

According to the 2021 census, 20.0% (3.525.453 inhabitants) of the population in the Netherlands (17.590.672 inhabitants) was 65 years or older, compared to 12.8% in 1990.[4] Not only is the percentage of the population aged 65 or older growing, but the percentage of adults aged 80 or over has also increased over time. In 1990, 2.9% of the population was 80 years or older. This has increased to 4.9% in 2021. Figure 1 shows the so-called 'grey pressure', i.e. the number of inhabitants aged 65 or over compared to the number of inhabitants aged between 20 and 65. In 2022 the 'grey pressure' was 34%, meaning that for every person aged 65 or over, there were 3 persons aged between 20 and 65. The 'grey pressure' is expected to increase to 50% in the coming years.[5]

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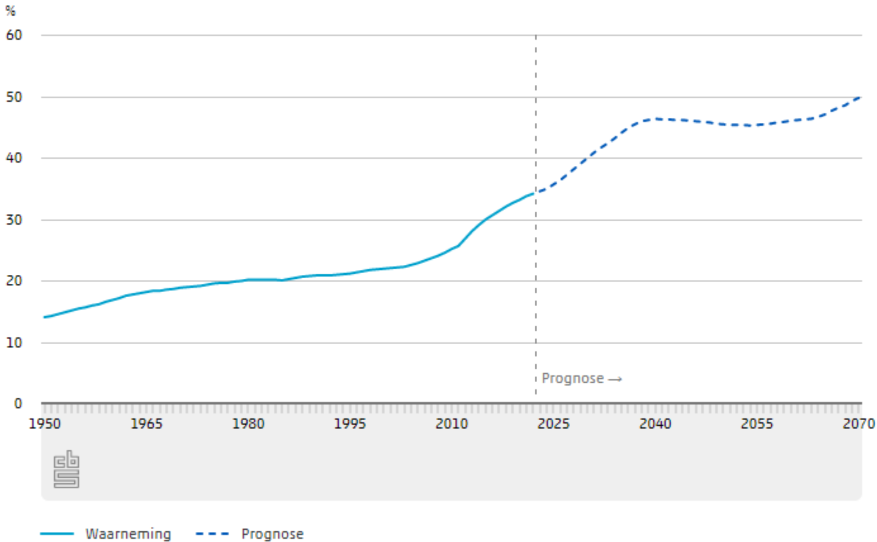
3 Article 3:60 CC.

4 Centraal Bureau voor de Statistiek, https://www.cbs.nl/nl-nl/visualisaties/dashboard-bevolking/leeftijd/ouderen (last accessed: 24-01-2023).

5 Ibid.



Source: Statistics Netherlands[6]

Disability is defined in the Convention on the Rights of Persons with Disabilities as an evolving concept resulting from 'the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.[7] In terms of this definition, no reliable statistical information is available in the Netherlands, as there is no data on the above-mentioned interaction between having an impairment and attitudinal and environmental barriers. Statistical information is available on the various impairments people may experience. In this regard, the Dutch Association of Healthcare Providers for People with Disabilities [Vereniging Gehandicaptenzorg Nederland] distinguishes between mental impairments, sensory impairments and physical impairments. According to the factsheet published on their website, there are 142.000 persons with an intellectual impairment or an IQ below 70 in the Netherlands. 261.400 persons have a sensory impairment and 1,4 million people have a physical impairment.[8]

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6 Centraal Bureau voor de Statistiek, https://www.cbs.nl/nl-nl/visualisaties/dashboard-bevolking/leeftijd/ouderen (last accessed: 24-01-2023).

7 Preamble sub e) Convention on the Rights of Persons with Disabilities.

8 Dutch Association of Healthcare Providers for People with Disabilities, https://www.vgn.nl/feiten-en-cijfers-de-gehandicaptenzorg (last accessed: 24-01-2023).

See the answers to questions 30 (state-ordered measures) and questions 48 (voluntary measures) for empirical information, more specifically statistical data, on adult protection measures.

In 2018, a study on the nature and scope of elder abuse was conducted by Bakker *et al.*[9] Based on an interview study and an informant study, Bakker *et al.* concluded that 1 in 20 of those aged 65+ living at home has at some stage experienced a form of elder abuse. 1 in 50 of those aged 65+ experience elder abuse on an annual basis.

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.

Several international instruments are relevant to the system of adult protection measures in the Netherlands. These include the European Convention on Human Rights (ECHR), the Convention on the Rights of Persons with Disabilities (CRPD) and the Hague Convention on the International Protection of Adults (The Hague Convention). The Netherlands is also a member state of the Council of Europe, which has adopted Recommendation (99)4 on Principles Concerning the Legal Protection of Incapable Adults and (2009)11 on Principles concerning continuing powers of attorney and advance directives for incapacity. The Hague Convention has been signed (13 January 2000), but not yet ratified by the Netherlands. However, in cross-border cases concerning adult protection measures, the courts frequently apply the provisions of this convention.[10] The Netherlands has signed (30 March 2007) and ratified (14 June 2016) the CRPD, but has made, upon ratification, several reservations concerning the interpretation of the convention in the Netherlands. An important reservation concerns article 12 CRPD. In this regard, the Netherlands has declared its understanding that the Convention allows for both supported and substitute decision-making arrangements, with the latter to be applied only when necessary and as a last resort.[11]

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9 L. Bakker, B. Witkamp, M. Timmermans, J. Jansen, J. Lindenberg, Aard en omvang ouderenmishandeling, WODC: Regioplan 2018.

10 E.g. Dutch Supreme Court 02-02-2018, ECLI:NL:HR:2018:147; Court of Appeal the Hague 14-03-2018, ECLI:NL:GHDHA:2018:731; District Court of Zeeland-West-Brabant 27-09-2018, ECLI:NL:RBZWB:2018:5753.

11 United Nations Treaty Collection, Chapter IV-15 Convention on the Rights of Persons with Disabilities, via: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec (last accessed: 06-01-2022).

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

The international instruments mentioned in the answer to the previous question have not yet led to a reform of the current framework of adult protection measures in the Netherlands. With regard to the state-ordered measures, historical milestones to date remain the introduction of the protective trust and personal guardianship in 1982 and 1995 as less intrusive and more tailored state-ordered measures in addition to full guardianship. On 1 January 2014, the Amendment Act on full guardianship, protective trust and personal guardianship came into force. However, this Amendment Act resulted only in minor changes to the grounds for ordering state-ordered measures, the list of persons who can be appointed as representatives and improved the possibilities of supervision by the court. As noted above, it did not include a fundamental overhaul of the current system.[12] The first historical milestone regarding voluntary measures dates back to 1995 when adults were given the option to make a medical treatment advance directive through the enactment of article 7:450(3) of the Civil Code. The further development and promotion of voluntary measures were then left to practice by the Dutch legislator. In 2010, the Dutch notariate presented the first model of what in practice would become known as a *levenstestament* (discussed more elaborately in the answer to question 32). The *levenstestament* was designed and conceptualised by the Dutch notariate within the framework of the existing law. To date, the Dutch legislator has not deemed it necessary to adopt specific legislation in line with, for example, Recommendation (2009)11 on Principles concerning continuing powers of attorney and advance directives for incapacity.

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

The interpretation and the reservation made by the Dutch government concerning article 12 CRPD (see the answer to question 4), have been questioned by the Netherlands Institute for Human Rights.[13] In its shadow report submitted to the Committee on the Rights of Persons with Disabilities – as part of the first reporting cycle under article 35 CRPD – the Institute expressed its concern that the law on

12 K. Blankman, 'Meerderjarigenbescherming' in: W.M. Schrama, M.V. Antokolskaia & G.C.A.M. Ruitenberg (eds.), Familierecht. Een introductie, The Hague: Boom Juridisch 2021, pp. 97-134 (99).

13 This independent institute is in the Netherlands responsible for the monitoring mechanism under article 33(2) CRPD.

adult protection measures in the Netherlands does not seem to provide sufficient opportunities for supported decision-making.[14] The shadow report referred in this regard to an earlier report– commissioned by the institute – by Blankman and Vermariën. Blankman and Vermariën argued that the CRPD requires the promotion of measures and instruments which maximise the adult's autonomy and their ability to make their own decisions.[15] Such measures should be given preference over the state-ordered measures, which should only be applied as a last resort. This report, which initially attracted little attention, has gained more interest over time. In 2020 a large research consortium consisting of a cooperation between academic and societal partners obtained public funding to conduct a six-year project aimed at modernising the system of adult protection measures, in particular concerning older persons, in the Netherlands.[16]

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

There are no pending and future reforms regarding the framework of adult protection measures in the Netherlands. As noted in the answer to question 6, a large research consortium consisting of a cooperation between academic and societal partners is currently conducting a six-year project aimed at modernising the system of adult protection measures in the Netherlands.

SECTION II – LIMITATION OF LEGAL CAPACITY

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

a. on what grounds?

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

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

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

14 Institute for Human Rights, Submission to the Committee on the Rights of Persons with Disabilities. Concerning the initial report of the Netherlands, December 2018.

15 C. Blankman & K. Vermariën, Conformiteit van het VN-Verdrag inzake de rechten van personen met een handicap en het EVRM met de huidige en voorgestelde wetgeving inzake vertegenwoordiging van wilsonbekwame personen in Nederland, 2015.

16 NWO, Towards more autonomy for vulnerable elderly people, January 2022, via: https://www.nwo.nl/en/cases/towards-more-autonomy-vulnerable-elderly-people (last accessed: 31st of January 2022).

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

f. are there any other legal instruments,[17] besides adult protection measures, that can lead to deprivation or limitation of legal capacity?

The Dutch system allows for a (full) deprivation of legal capacity [handelingsonbekwaamheid] and a (partial) limitation of legal capacity [handelingsonbevoegdheid]. The difference between these two forms is the scope of the limitation of the adult's legal capacity to perform legal acts. A (full) deprivation of legal capacity concerns (almost) all legal acts. Adults placed under full guardianship [curatele] encounter this. Article 1:381(2) CC stipulates that persons under full guardianship cannot perform legal acts insofar as the law does not provide otherwise. A (partial) limitation of legal capacity only relates to specific legal acts. For example, in the context of a protective trust [beschermingsbewind] property and financial matters and in the context of a personal guardianship [mentorschap] personal or medical matters.

In principle, where adults are concerned, a deprivation or limitation of legal capacity is only possible in the context of a state-ordered measure, i.e. full guardianship, protective trust or personal guardianship.[18] These measures are discussed in more detail in section 3 of this report and for the answer to this question, we, therefore, refer to section 3, in particular the answers to questions 17 and 24.

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

a. property and financial matters;

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

c. medical matters;

d. donations and wills;

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

See below question 24.

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17 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

18 As discussed in more detail in the answer to question 63, a de facto limitation of legal capacity is also possible in the context of a so-called 'bestuursopdracht' (article 1:91 CC), whereby a spouse/registered partner is authorised by the court to take over the management of certain affairs of the other spouse/registered partner.

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

Limitation of legal capacity could have a retroactive effect under the pre-1970 Civil Code. Article 501 old CC stated that legal acts performed before the entry into force of the full guardianship measure could be annulled if the reason or ground for this measure already clearly existed. This provision was not included in the new Civil Code. However, the imposition of a state-ordered measure resulting in a limitation of legal capacity may strengthen an argument in favour of the annulment of a legal act on the basis of articles 3:33 and 3:34 CC (see question 14) on the grounds that the adult at the material time was not capable of a reasonable appreciation of the interests involved.

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

See below question 18 and regarding restoration question 29.

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

See below question 19 and regarding restoration question 29.

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

a. a requirement of legal representation of the adult;
b. participation of family members and/or of vulnerable adults' organisations or other CSOs;
c. requirement of a specific medical expertise/statement;
d. hearing of the adult by the competent authority;
e. the possibility for the adult to appeal the decision limiting legal capacity.

See below question 21.

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

- **a. property and financial matters;**
- **b. family matters and personal rights (e.g. marriage, divorce, contraception);**
- **c. medical matters;**
- **d. donations and wills;**
- **e. civil proceedings and administrative matters (e.g. applying for a passport).**

During the Parliamentary deliberations more than half a century ago on a new Civil Code and, in particular, on the difference between legal capacity and mental capacity, it was argued that, in the interest of legal certainty, a limitation of legal capacity should be related to a precise and readily ascertainable fact, while the absence of mental capacity should be proved.[19] Art. 3:32 CC concerns legal capacity and articles 3:33 and 34 CC mental capacity. A legal act performed by an adult with an impairment of his mental faculties can be annulled if this disturbance prevented a reasonable appreciation of the interests involved or if the adult's statement, the expression of his will, was influenced by this impairment of mental faculties. Art. 3:34(1) CC specifies the last situation by stating that a statement is presumed to have been made under the influence of the mental impairment if the legal act was detrimental to the person unless the disadvantage was not foreseeable at the time the legal act was performed. There is little case law on these provisions.[20]

Mental capacity is relevant in family matters and personal rights. According to article 1:32 CC, a person cannot enter into a marriage if his mental faculties are disturbed in such a way that he is not capable to determine his will or to understand the meaning of his statement. The civil registry officer will no longer cooperate or may, in case of doubt, require a medical expert to inform him about the mental capacity of the person who wants to marry. The explicit requirement of mental capacity also applies if persons wish to register their partnership (article 1:80a(5) CC). The requirement of mental capacity as formulated in article 1:32 CC also applies in divorce procedures. An adult under full guardianship does not need the consent of his guardian for a divorce, as this is considered too personal a matter

19 Parliamentary history Book 3 Civil Code, Kluwer, Deventer 1981, p. 159.

20 In a case before the District Court of Amsterdam on 6 April 2022 an adult – who had donated a famous painting to the Dutch Rijksmuseum – argued together with her family that at the time of the donations she was suffering from a disturbance of her mental faculties and that therefore the legal act had to be annulled and the painting returned to her. However, the Court decided that the adult and her family did not succeed in proving the absence of mental capacity. See ECLI:NL:RBAMS:2022:1782

for a guardian to represent the adult or give his consent to initiate the divorce proceedings. Whether or not the person meets the requirements regarding mental capacity can be decided during the court procedure. If the person is found not capable to determine his will or to understand the meaning of his statement, his request for a divorce will be declared inadmissible.[21] A special provision can be found in article 817 of the Code of Civil Procedure [Wetboek van Burgerlijke Rechtsvordering] and relates to the situation where a spouse files for divorce while the other spouse is living in a care institution. The court then orders free legal aid for this spouse.

As will be described in more detail in section 3 of this report, with regard to medical decisions, a limitation of legal capacity through a personal or full guardianship order has gradually lost much of its effect, as it has been replaced by an assessment of whether a person has the mental capacity to make a decision himself. This can be explained by the fact that healthcare decisions often involve important human rights such as the right to the integrity of the body and the right to move freely. The threshold for having such decisions taken by someone else, a representative, is therefore rightly high. Only when the adult is no longer capable of making a decision for himself, can a decision be made by a representative on behalf of the adult. And even then, representation is ruled out for certain highly personal matters, such as euthanasia.

There are no specific provisions regarding donations and mental capacity. Article 942 old CC stipulated that to make or revoke a will, the person must have mental capacity. This explicit requirement has disappeared in the new Civil Code but still applies based on the general rule of articles 3:33 and 3:34 CC, discussed above. The same general rules apply to civil proceedings, which can only be validly performed if the person performing the legal act has both legal and mental capacity. Persons with limited legal capacity can often perform legal acts with the consent of their guardian or the court. An adult subject to an adult guardianship measure has the right to initiate proceedings aimed at terminating this measure or aimed at the dismissal of his guardian. The adult does not need the consent of his guardian to initiate such proceedings.[22]

Any adult can initiate administrative proceedings; this includes persons under full guardianship, a protective trust or a personal guardianship, provided they are ca-

21 See Dutch Supreme Court 28 March 1980, NJ 1980/378.

22 The possibility for a person under a guardian measure to start a procedure in order to have his guardianship measure re-examined by another court is protected by the ECHR. See Shtukaturov v Russia {2008} ECHR 44009/05 (27-03-2008).

pable of a reasonable appreciation of the interests involved. Persons under a guardianship measure can apply for a driving licence or identity card independently of their guardian but need their guardian's permission to obtain a passport.[23]

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?

There are no significant court cases on the Dutch system of legal capacity as such. Nor has this system received much attention from politicians or legislators. Except for the state-ordered measures the system has not been evaluated. See questions 31, 61 (including the impact of a recent evaluation of state-ordered measures) and 68.

SECTION III – STATE-ORDERED MEASURES

Overview

16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.[24] Pay attention to:
  - **a. can different types of state-ordered measures be applied simultaneously to the same adult?**
  - **b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;**
  - **c. does your system provide for interim or ad-hoc state-ordered measures?**

The three state-ordered measures in the Netherlands are full guardianship [curatele], protective trust [beschermingsbewind] and personal guardianship [mentorschap]. Full guardianship is the oldest measure; this measure already existed in ancient Roman law (the so-called 'cura furiosi') and offers protection and support in all areas of life. The protective trust deals with the financial interests of the adult only, while personal guardianship includes the support and representation of adults in non-financial matters, such as care and treatment. The court can order a protective trust and personal guardianship at the same time. Both measures were introduced after the Second World War (in 1982 and 1995) as a result of the growing

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23 See Paspoortuitvoeringsregeling Koninklijke Marechaussee 2001, articles 20 and 21 (request by a person without legal capacity).

24 Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

importance of human rights and the need to introduce less intrusive, more tailored measures, in addition to full guardianship.[25]

An example of subsidiarity can be found in chapters 19 and 20 of Book 1 of the Civil Code, where the court when confronted with a request to order a full guardianship can dismiss the request and ex officio order a less intrusive measure instead or even a combination of personal guardianship and the protective trust. The court can also honour a request for the termination of full guardianship but at the same time ex officio order a personal guardianship, a protective trust or a combination of both (articles 1:432(3) and (4) and article 1:451(3) and (4) CC). In case of a request for a protective trust because of problematic debts, the court can end the measure after a few months when the mayor and aldermen of a municipality advise the court to do so, and the court agrees that debt counselling would be a more tailored and less intrusive solution (article 1:432a(6) CC). In practice, courts are also inclined to reject a request for a protective trust when the adult still has the mental capacity to make a *levenstestament*. The courts can also reject a request for a personal guardianship measure when the person to be appointed is a partner of the adult or a close relative and is already *ex lege* authorised to represent his partner or relative. The application of the principle of subsidiarity in the last two situations is not laid down by law.

The three measures can be ordered temporarily; during a procedure aimed at ordering a full guardianship measure the court can order a preliminary measure [provisioneel bewind] (article 1:380 CC). This measure ends when the appointed full guardian starts his work (article 1:383(11) CC). From article 12(3) CRPD it follows that measures must be applied for the shortest duration possible. In the Netherlands, the state-ordered measures can last for the duration of a person's (adult) lifetime. However, after a maximum period of five years, guardians are to submit a report in which special attention must be paid to the question of whether the measure ought to be continued or not (articles 1:385(2), 446a and 459(3) CC).

Ad-hoc state-ordered measures do not exist in the Dutch Civil Code, but the courts can, for example, limit the protective trust to certain matters, such as the sale of the house in the situation that the adult is moving to a nursing home and lacks the mental capacity for a valid conveyance of the house.

Start of the measure

Legal grounds and procedure

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25 K. Blankman, 'Guardianship models in the Netherlands and Western Europe', International Journal of Law and Psychiatry, 1997, pp. 47-57.

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

17.1 Chapter 16 of Book 1 of the Dutch Civil Code (articles 1:378 to 391 CC) deals with full guardianship [curatele]. This measure covers both the adult's material and immaterial interests. The court can order this measure when an adult temporarily or continuously, does not properly take care of his interests or when an adult is endangering his own safety or the safety of others as a result of his physical or mental condition or as a result of habitual abuse of alcohol or drugs. The court can only order full guardianship when the interests of the adult cannot be served adequately with a more appropriate and less intrusive provision (article 1:378 CC). Until January 2014, prodigality was also a ground for full guardianship; however, this ground disappeared as a ground for full guardianship and was reintroduced as a new ground for the protective trust from this date. Also, in January 2014 the words 'mental disorder' were replaced by the more neutral wording 'physical or mental condition' and 'habitual abuse of drugs' was added as a ground for full guardianship. The new formulation makes clear that a physical condition such as aphasia or a coma of a somatic nature can also result in full guardianship. Habitual abuse of alcohol has been a ground for full guardianship since 1919. Full guardianship based on a physical or mental condition has a more extensive effect on the legal capacity of the adult than full guardianship on the ground of habitual use of drugs or alcohol. As discussed in more detail under 24.1, adults placed under a full guardianship measure on the ground of habitual abuse of alcohol or drugs, remain for instance legally capable to perform legal acts within the area of family law.

17.2 Chapter 19 of Book 1 of the Civil Code (articles 1:431 to 449 CC) regulates the protective trust, also known as financial guardianship [beschermingsbewind]. This measure only deals with the financial interests of the adult. The first ground for ordering this measure is that the adult because of his physical or mental condition, is unable to take care of his financial interests in a proper way, be it temporarily or permanently. A second ground, introduced in 2014 and subject to minor amendments in 2021, created the possibility for the court to order a protective trust when an adult is temporarily unable to take care of his financial interests as a result of prodigal behaviour or problematic debts. A protective trust based on this second ground is, in most cases, ordered for a period of three years. Since 2021, municipalities can ask the court to end a recently ordered protective trust on the grounds of problematic debts, arguing that the interests of the adult can be sufficiently served without a guardianship measure in a more appropriate and less intrusive manner (article 1:432a CC). The idea behind this option for municipalities is that they can offer budget management and debt counselling on a voluntary basis. This alternative is preferable to a protective trust from a human rights point

of view and might, in addition, also turn out to be less expensive than a protective trust. Offering the aforementioned alternative may therefore be preferred by municipalities in some cases. Especially in situations where the adult is unable to pay the remuneration of a financial guardian, as in this case the municipality is obliged to pay the guardian's fees. By offering an alternative, the municipality has more control over the costs involved in the support that is provided to the adult. In some cases, a housing association or an energy supplier requires that the adult be placed under a protective trust before they allow the adult to enter into a – new – contract, as a protective trust – it is believed – provides more certainty that the bills will be paid in the future.

Although article 1:431(1) CC formulates that the court can order a protective trust over one or more assets, in practice most measures cover all current and future assets. In some cases, only the house is brought under the protective trust. Articles 1:433 and 434 CC make clear that proceeds from the assets under the protective trust fall under the protective trust and open the possibility to add assets to the protective trust or dismiss them from the protective trust.[26] Problems can arise if the adult is married and a community of property exists, especially when his or her partner is not appointed as guardian (article 1:431(5) CC). The result can be that the community as a whole is put under the protective trust.

17.3 Chapter 20 at the end of Book 1 of the Civil Code (articles 1:450 to 462 CC) contains the regulations regarding personal guardianship [mentorschap]. The ground for ordering this measure is that the adult as a result of his mental or physical condition is unable to take care of his immaterial interests in a proper way, be it temporarily or permanently. This measure deals with the adult's non-financial interests, such as the care, nursing, treatment and support of the adult. In a way personal guardianship is the counterpart of the protective trust; a combination of personal guardianship and protective trust often occurs, sometimes with the same guardian, and sometimes with two different guardians. The opinion of the personal guardian prevails in case there is a difference of opinion with the financial guardian (articles 1:458 CC). If a person with substantial assets wants to stay home instead of moving to a nursing home but needs day and night supervision by nurses, the personal guardian can arrange for nurses to be contracted even if the financial guardian opposes this decision because of a considerable loss in assets.

18. Which authority is competent to order the measure?

18.1 Full guardianship can be ordered by the District Court or in case of an appeal by a Court of Appeal. A full guardianship on the ground of abuse of drugs

26 Fruits can be the rental income from a house owned by the person under guardianship that has been rented out, apples from an orchard or animals born of animals falling under the protective trust.

or alcohol can be altered into a full guardianship on the ground of a physical or mental condition.

18.2 A protective trust can be ordered by the District Court or, in case of an appeal, by a Court of Appeal. Article 1:432(3 and 4) CC allows the court to order a protective trust ex officio after rejecting a request for a full guardianship measure. And in case the request concerns the termination of a full guardianship measure, the court can also after ending the full guardianship measure ex officio order a protective trust.

18.3 For personal guardianships the same rules apply: the measure can be ordered by a District Court or in case of an appeal by a Court of Appeal. Article 1:451(3 and 4) CC allows the court to order a personal guardianship ex officio after rejecting a request for full guardianship. And in case the request concerns the abolition of full guardianship, the court can also after ending the full guardianship ex officio order a personal guardianship.

19. Who is entitled to apply for the measure?

19.1 The group of persons authorised to request full guardianship is limited. This group encompasses the adult concerned, his partner and other close relatives (not the family-in-law) and the public prosecutor. In addition, a financial guardian, i.e. a guardian appointed through a protective trust, or a personal guardian can request a full guardianship measure. Full guardianship can also be requested by an organisation providing support to the adult or by the institution where the adult lives, such as a nursing home, a psychiatric hospital or a care home for persons with an intellectual disability. A government organisation aimed at investigating cases of elderly abuse and fighting domestic violence [Veilig Thuis] is not authorised to request a guardianship measure and neither is the attorney appointed by the adult through a voluntary measure.

The measure can also be requested for a person who is still a minor but close to the age of majority (18 years). Authorised are the parents with parental powers or the guardian of the minor. The measure enters into force on the day the person becomes of age.

19.2 The regulations concerning the persons that can apply for full guardianship as explained under 19.1, apply mutatis mutandis with regard to the protective trust. A full guardian or a personal guardian can request a protective trust. Unlike full guardianship, a protective trust on the ground of problematic debts can also be requested by the mayor and aldermen.

19.3 The regulations concerning the persons that can apply for a full guardianship measure as explained under 19.1, apply mutatis mutandis with regard to a request for a personal guardianship measure. A full guardian or a financial guardian can request a personal guardianship measure. In addition, care organisations applying forced treatment **must** request a personal guardianship measure for a client or patient, when the adult lacks mental capacity and has no representative.[27]

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?

20.1 Full guardianship can be ordered despite opposition from the adult. The court will then have to assess the effectiveness of the measure that is requested. A relevant question to consider by the court is whether an appointed guardian will be able to realise some form of cooperation with the adult to improve the protection of the adult's interests, above all financial.

20.2 Consent of the adult is not required. See question **20.1**

20.3 The adult's consent is not required. Sometimes it is impossible to communicate with the adult because of his mental or physical condition, e.g., when the adult is in a comatose state. Should the adult be able to communicate and strongly oppose the measure, the court has to decide whether personal guardianship nevertheless will be effective.

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

- **a. a requirement of legal representation of the adult;**
- **b. availability of legal aid;**
- **c. participation of family members and/or of vulnerable adults' organisations or other CSOs;**
- **d. requirement of a specific medical expertise/statement;**
- **e. hearing of the adult by the competent authority;**
- f. **the possibility for the adult to appeal the order.**

21.1 Most rules regarding the procedure are laid down in the Code of Civil Procedure (CCP). Article 266 CCP stipulates that the competent authority to hear a request for full guardianship is the court in the district where the adult officially resides or, if the adult has no registered address, the court in the district where the adult actually resides. The involvement of a solicitor in the proceedings is not re-

27 See article 1:3 (4) Compulsory mental health act (Wvggz) and article 3(6) Compulsory care act (Wzd).

quired. The adult can hire a solicitor to assist and represent him, but the adult cannot apply for legal aid to do so. In appeal procedures, the services of a solicitor must be used. The personal contribution of the adult when receiving legal aid depends on the income and assets of the adult. Generally, the costs are € 218 or more.[28]

According to article 278(1) CCP, a request for full guardianship needs to contain certain details such as the name of the person or legal person that files the request, his address as well as the facts that support the request. On the public webpage www.rechtspraak.nl, a model form can be found that can be used to request full guardianship. Not only does the personal data of the person or persons that file the request have to be filled in but also the personal data of the adult for whom the measure is requested and the persons for whom the request is relevant. In procedures aimed at starting or ending full guardianship, under articles 798 and 799 CCP, the adult himself and his partner, parents and siblings are considered interested parties. In practice, the court does not distribute attachments containing medical or personal information to interested parties. Interested parties have the right to start an appeal procedure within three months after they have been notified of the court's decision (article 806 CCP). The partner and close relatives are asked to indicate on the form whether they support the request and the proposed guardian. The applicant must confirm on the form that the guardian is willing to be appointed as such. The last question on the form is meant to indicate whether the adult has drawn up a *levenstestament*. The form suggests the addition of one or more attachments to the form to substantiate the need to order full guardianship. According to article 799(2) CCP, such attachments (such as a medical assessment) should accompany the request 'as far as needed'.

According to article 800 CCP, the adult can be summoned to appear before the court. However, when the adult is not capable of going to the courthouse, the hearing can take place at his home or at the place where he resides, e.g., a nursing home (article 802 CCP). The court is not obliged to visit the adult, article 802 CCP suffices with the formulation that the court can decide to hear the adult outside the courthouse when the statement of the adult can be relevant for the assessment of the request. And article 809 CCP stipulates that before the court can make a decision, the adult must be given the opportunity to communicate his opinion about the request. On www.rechtspraak.nl, adult guardianship judges have published the so-called Recommendation regarding full guardianship which includes further directions as to how the legal provisions on full guardianship should be interpreted and applied. The Recommendation stipulates that since full guardianship implies a severe limitation of personal rights, as a rule, the judge will want to speak with

28 See Decree on personal contribution for legal aid [Besluit eigen bijdrage rechtsbijstand], article 2.

the adult and hear his opinion about the request.[29] In practice hearings outside the courthouse do not take place when medical experts have indicated that hearing the adult would be meaningless.

Although the civil procedure law requirements are fairly lenient, in practice, due to the Recommendation and the model form, full guardianship is not as easily ordered as might be expected. It is for instance common practise that in the majority of cases, the court requires a medical assessment to be able to determine whether the grounds for a full guardianship measure have been met. In addition, because courts must pay attention to less intrusive alternatives such as personal guardianship, the protective trust or the so-called 'levenstestament', quite often requests are rejected.

21.2 Most of the procedural rules regarding full guardianship as described in 21.1 apply mutatis mutandis to the protective trust. A medical assessment is not a mandatory element of the procedure. The same applies to the hearing of the adult. In most cases, the court will want to hear the adult concerned as well as the person to be appointed as guardian, but the law allows the court to order a measure and appoint a guardian without medical assessment and without a hearing. As for hearing the adult, there are different policies in the Netherlands: some courts insist on hearing every adult, even if the medical assessment indicates that communication with the adult is hardly possible. This is however exceptional.[30] In most cases, the adult receives a letter in day-to-day language informing him that a guardianship procedure has been started and that he has the opportunity to appear in court and give his opinion or the option to inform the court of his opinion in writing. In some cases – situations where the adult wants to be heard but is unable to come to court – a hearing takes place at the institution where the adult resides.

A protective trust can be limited to certain assets, but this seldom happens. In most cases, the protective trust covers all present and future assets of the adult.[31]

In case of a request filed by the adult himself, some courts require proof of mental capacity to ascertain that the request is really from the adult himself. Occasionally a protective trust request by an adult himself and ordered by the court is in appeal

29 See https://www.rechtspraak.nl/SiteCollectionDocuments/Aanbevelingen-curatele.pdf. p.3 under A.4.

30 Not hearing the adult can result in dismissal of the appointed guardian. See Dutch Supreme Court 14-10-2022, ECLI:NL:HR:2022:1458 annotated by W.M. Schrama.

31 Article 1:431(1) CC explicitly states that the court can order a protective trust over one or more of the assets of the adult. According to article 1:433 CC the court can customise the protective trust by removing assets from or bringing assets under the protective trust.

annulled because it became clear that the adult was wrongly or partly informed when signing the form.[32]

21.3 The procedural rules to be applied in case of a request for personal guardianship are identical to the procedural rules in case of a request for a full guardianship measure or a protective trust as described in **21.1** and **21.2** above. A medical assessment is not a mandatory element of the procedure. The same applies to the hearing of the adult. However, in most cases, the court will want to hear the adult concerned as well as the person to be appointed as guardian.

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

22.1 In the case of full guardianship, the measure and the appointment of the guardian are registered in a national register of full guardianships and protective trusts. The register also contains information about the date upon which the measure ended and information about the name and address and the appointment and dismissal or suspension of guardians. All full guardianship measures are registered in the register. It is a public register that can successfully be consulted if the date of birth and the surname of the adult are known (article 1:391 CC).[33]

Court orders that started or ended full guardianship as well as court orders regarding provisional full guardianships are published in the Government gazette [Staatscourant] (article 1:390 CC). Publication and registration are irrelevant for the effect of the full guardianship measure; the guardian can annul any financial act or transaction committed by or with the adult for which he gave no permission, regardless of publication or registration. Publication in two newspapers was prescribed until 2014, but this provision was removed from the Civil Code. The publication was rather costly and had lost most of its effect in informing third parties.

22.2 A protective trust must be registered in the national public register of full guardianship measures and protective trusts, when ordered on the ground of prodigal behaviour and problematic debts and can be registered when ordered on the ground of the adult's physical or mental condition. Registration of a protective trust enhances the protection of the adult's assets. A person entering into a contract with the adult, acting without the cooperation of the adult's guardian or the authorisation by the court, is not protected when that person knew about the protective trust or should have known. It is up to the guardian to prove the third party

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32 See District court Arnhem-Leeuwarden, 25-02-2019, ECLI:NL:GHARL:2019:1253. The adult was wrongfully informed and requested a protective trust assuming she would have a coach to help her with her tax affairs.

33 See https://ccbr.rechtspraak/

was aware of the guardianship measure. If the protective trust was registered, the 'good faith' of the third party is less likely to be assumed. A protective trust is not published in newspapers or the Government gazette, but if the trust includes firms or real estate the measure must be registered in the relevant registers (article 1:436(2) CC).

22.3 Unlike full guardianship or protective trust, registration of personal guardianship is not required by law. And in no way is this form of adult guardianship made public. It is up to the personal guardian to inform relevant third parties, such as healthcare professionals, of his appointment.

Appointment of representatives/support persons

23. Who can be appointed as a representative/support person (natural person, public institution, CSOs, private organisation, etc.)? Please consider the following:
   a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?
   b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?
   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?
   d. what are the safeguards as to conflicts of interests at the time of appointment?
   e. can several persons be appointed (simultaneously or as substitutes) as representatives/support persons within the framework of a single measure?
   f. is a person obliged to accept an appointment as a representative/support person?

23.1 When it concerns the appointment of full guardians, the law contains two 'instructions' the court has to adhere to. First, the court has to respect the preference of the adult concerning the choice of guardian, unless there is an important reason not to do so (article 1:383(2) CC). Not following the adult's preference is possible, this however requires an explanation by the court.[34] Second, in the event the adult has not expressed a preference or this preference cannot be respected, the

34 This preference might cause a problem in tackling elder abuse. The 'victim' may not be convinced of the need for a measure and if the court nevertheless decides to order a guardianship measure, the preference of the 'victim' might be to appoint the 'abuser'.

court is in principle obliged to appoint either the partner or one of the close relatives (i.e. a parent, child, brother or sister) of the adult concerned. Again, the court may deviate from this preference, in which case usually a guardian from outside the family is appointed. Legal persons can also be appointed as guardians. A relationship with the adult is not a requirement.

The number of guardians to be appointed is limited to two. As a rule, each guardian can exercise all the powers of the full guardian on his own. In case of a disagreement between the two guardians, the court can, upon the request of one of the guardians or upon the request of the organisation providing support to the adult or the institution where the adult lives, decide the matter at hand (article 1:383(10) CC). As for appointing a guardian, there is no preference for a non-professional guardian, such as a family member or volunteer, over a professional guardian, a qualified individuals who often acts as representative for multiple clients. The court is not obliged to take into account other preferences laid down in a *levenstestament* or a separate statement by a partner or a close relative, but in practice most courts do. There is no provision regarding substitute guardians.

There are some restrictions concerning the choice of guardian. A social worker or a medical professional who is actively involved in the care and treatment of the adult, cannot become the adult's full guardian. A person who has gone bankrupt or a person who does not have legal capacity (such as minors and adults placed under full guardianship) cannot be appointed as full guardian.[35] More generally, a person who has been placed under one of the guardianship measures, cannot act as a guardian for another person. In all cases, the court must check whether the person to be appointed, is ready to be appointed and whether he is suited to the task at hand (article 1:383(1) CC). No one is obliged to accept the appointment, although the room for legal persons acting as professional guardians to refuse an appointment when approached by the court, is limited. Being too fastidious in accepting cases might result in getting fewer cases from the court which consequently would have an impact on the finances of the professional guardian. Special quality requirements apply to guardians outside the family. All these requirements are included in the Decree of quality requirements for guardians [Besluit kwaliteitseisen curatoren, beschermingsbewindvoerders en mentoren], which entered into force in 2014. The so-called Landelijk Kwaliteitsbureau CBM (LKB) – housed at the District Court in Den Bosch – monitors the compliance of professional guardians with these quality requirements. To be appointed a professional guardian, i.e., a guardian outside the family with three or more appointments, professionals need to have an official statement of good conduct, a suitable education, a complaint procedure for clients as well as liability insurance. The guardian also

35 There is one exception: the partner or close relative who went bankrupt can be appointed if the other full guardian takes care of the financial interests of the adult (article 1:383(6) CC).

has to meet several requirements regarding proper business operations. Some of the requirements are checked yearly by an accountant, and the fulfilment of other requirements is checked based on a yearly statement by the full guardian himself. If the requirements are not met, the professional guardian cannot be appointed. In severe cases, he can be removed from all his guardianships.

A special feature of Dutch guardianship legislation is the important position of partners and family members. There is currently no data available concerning the number of guardians who are the partner, or another family member of the adult concerned.

23.2 In 2014, the Amendment Act on full guardianship, protective trust and personal guardianship entered into force. As a result of this Act, the provisions regarding the three measures became more adjusted to one another.[36] At this point, the rules regarding the appointment of full guardians, mutatis mutandis apply to the appointment of a financial guardian (see **23.1**).

23.3 See the rules and requirements described under **23.1** regarding the appointment of a full guardian; they also apply with regard to the appointment of a personal guardian. In the case of personal guardianship, a guardian from outside the family may be a professional guardian, but can also be a volunteer, trained and supervised by an organisation such as Mentorschap Nederland, a civil society organisation (CSO) with regional branches responsible for the recruitment and training of volunteers who are to become a personal guardian.

During the measure

Legal effects of the measure

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

24.1 Full guardianship results in a loss of legal capacity, unless the Civil Code or another act states differently (article 1:381(2) CC). According to article 1:381(3) and (5) CC permission by the guardian makes the adult legally capable to perform a certain legal act and money given to him for maintenance can be spent according to this goal. Article 1:381(6) CC confirms that an adult under full guardianship can always start procedures concerning the state-ordered measure and submit an appeal against the decision made by the court. The adult is entitled to seek legal aid when starting a procedure to terminate the measure or to replace the appointed

36 Wet van 16 oktober 2013 tot wijziging van enige bepalingen van Boek 1 van het Burgerlijk Wetboek inzake curatele, onderbewindstelling ter bescherming van meerderjarigen en mentorschap ten behoeve van meerderjarigen en enige andere bepalingen, Staatsblad 2013, 414.

guardian. The guardian can only effectively oppose this when hiring a solicitor would cause serious damage to the mental health of the adult himself.[37] The adult is except for these procedures legally incapable to start or act in civil procedures. In administrative law, the adult under guardianship is allowed to start or act in a procedure as long as he is mentally capable of acting in this procedure (article 8:21 (2) General Act Administrative Law [Algemene Wet Bestuursrecht]). As will be clarified under **24.3**, health legislation creates a huge exception to the general rule that the adult loses legal capacity. The loss or limitation of legal capacity as an automatic consequence of the guardianship measure, when it comes to health matters, is replaced by the rule that legal capacity is limited only in situations where the adult lacks the mental capacity to make a specific decision. As discussed under **24.3**, another more tailor-made exception can be found in article 1:380(2) CC (preliminary measure full guardianship): the adult is no longer legally capable of making decisions regarding his assets unless the court decides otherwise.

Remarkable from a CRPD perspective is the sequence of the decisions of the court. The ordering of the measure results in an automatic and immediate loss of legal capacity. The court appoints one or more guardians at the same time or as soon as possible after ordering the measure (articles 1:381(1), art. 1:435(1) CC and 1:452(1) CC. Under the former Civil Code, two different courts were involved: the first court declared that the adult had lost his legal capacity, the interdiction, and after the expiration of the period of appeal another court decided upon the appointment of the guardian (articles 1:500 and 503 old CC).

The effect of the measure also depends on the ground for ordering the measure. In case of full guardianship on the ground of habitual abuse of liquor or drugs, the adult as a rule remains legally capable to perform legal acts within the area of family law (article 1:382 CC): exercising parental powers or becoming a guardian over a minor is still possible, but a marriage is only possible with the permission of the guardian (article 1:37 CC). Full guardianship on the ground of a physical or mental condition results in the inability to have and exercise parental powers. Getting married is not impossible, but the adult requires permission from the court to do so (article 1:38 CC). Starting a divorce procedure does not require permission from the guardian or the court; during the procedure, it will become clear whether the adult is mentally capable to act in this procedure. In the case of full guardianship based on a physical or mental condition, the permission of the court is required to make or change a will (article 4:55 CC). Full guardianship does not remove the right to vote. And article 19(1) of the Funeral Act leaves the adult the possibility to record his wishes on paper concerning his funeral or cremation, even after having lost his legal capacity.

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37 Dutch Supreme Court, 28-01-1994, NJ 1994, 687.

24.2 The limitation of legal capacity resulting from financial guardianship, is limited to financial matters and does not affect the adult's legal capacity in the area of family or health affairs. Article 1:438 CC makes a difference between acts aimed at preserving assets and acts aimed at changing the ownership of assets. Preserving acts can only be performed by the guardian.

To perform legal acts changing the ownership such as buying, selling or donating, the adult under the protective trust needs the cooperation of the guardian or the authorisation of the court. This is different from full guardianship. Another difference between full guardianship and the protective trust is the possibility to annul legal acts performed by the adult with his assets without permission or authorisation by the guardian or the court. In the case of full guardianship, it is always possible to annul these acts. But in the case of a protective trust, third parties entering into a contract with the adult are protected when they did not know about the protective trust nor should have known that the adult was not allowed to perform this legal act, because of the protective trust.

There is hardly any difference between the two grounds – based on which a protective trust can be ordered – in terms of the impact they have on the adult's legal capacity. A relevant difference is that protective trusts based on prodigality or problematic debts can only be ordered for a fixed period, mostly 3 years (article 1:431(1) under b CC).

24.3 Article 1:453(1) CC in the first instance stipulates that personal guardianship results, similar to the protective trust, in a limitation of legal capacity. Upon a closer examination of this article, it becomes clear however that only in a limited number of cases there will be an actual limitation of legal capacity since the legal capacity of the adult is only limited when another act or treaty does not state otherwise. Laws on medical treatment and on forced mental health care use the concept of mental capacity to assess whether an adult can make a decision himself. This means that an adult who has the decision-making skills to make a decision himself concerning for example medical treatment may enter into a care contract himself, even if the adult has been placed under personal or full guardianship.[38] Since article 1:453 CC applies mutatis mutandis to full guardianship (article 1:381(4)) CC), it is clear that health legislation makes an important difference to adults under full or personal guardianship. There is no automatic loss or limitation of legal capacity, but rather a time- and decision-specific assessment by a medical expert of the adult's (mental) capacity to decide in the matter at hand. In matters of care and treatment the position of the adult under full guardianship equals the

38 See e.g., article 7:465(2) and (3) CC, article 1:3(3) Compulsory mental health care act (Wvggz) and article 3 (2) Compulsory care act (Wzd).

position of the adult under personal guardianship. This shift is not yet clearly formulated in the articles in Book 1 of the Civil Code where the measures are regulated. The Civil Code so far states that the guardian in case of personal or full guardianship is to enhance the possibilities for the adult to act on his own whenever he has the mental capacity to do so (article 1:454(1) and 381(4) CC). Part of the task of the personal guardian can also be organising a holiday abroad special for adults suffering from dementia or ordering the adjustment of the home because of a physical handicap. Decisions like these fall within the remit of the personal guardian, but outside the scope of (mental) health law, which means that the exception mentioned above does not apply. According to this reasoning, there would be a limitation of legal capacity for these matters and the guardian would decide on behalf of the adult. But in practice, the presence or absence of mental capacity is also the decisive criterion for these matters.

Powers and duties of the representatives/support person

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

a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:
- **property and financial matters;**
- **personal and family matters;**
- **care and medical matters;**

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

c. 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?

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

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

25.1 The Civil Code does not provide full guardians with criteria for the proper fulfilment of their task. There is no reference to criteria for decision-making, such as taking into account the will and preferences, as included in international instruments such as the CRPD. In situations of care and treatment of the adult, both the full guardian and the personal guardian have to act as a 'good guardian'. This criterion is formulated for personal guardians in article 1:454 CC and this article also applies in the case of full guardianship according to article 1:381(4) CC. Also applicable in the case of full guardianship is article 1:337(2) CC, regarding the duty of a guardian over a minor (article 1:386(1) CC). This article stipulates that the guardian over a minor must manage the minor's assets as a 'good guardian'. The

full guardian, therefore, has to operate as a 'good guardian', when he manages the adult's financial interests and takes care of the adult's non-financial interests. The exact meaning of this criterion is left to its development in practice and jurisprudence. A basic element of acting as a good guardian is involving the adult as much as possible in the fulfilment of the task at hand. The need to involve the adult is formulated in article 1:454(1) CC. Professional full guardians have to meet several quality requirements. These requirements are laid down in the Decree on quality requirements for guardians [Besluit kwaliteitseisen CBM]. Article 4 of this decree formulates that the guardian has to promote the adult's self-reliance as much as possible.

As for the powers of the full guardian, there is a difference between the guardian's powers regarding the adult's financial interests and the guardian's powers regarding the adult's non-financial interests. Article 1:386(1) CC refers to the general powers and duties of the guardian over a minor. These articles primarily relate to the assets and financial interests of the minor. Since they also apply in the case of guardianship over an adult, the guardian can perform whatever acts for the adult he finds necessary, useful or expedient (article 1:343(1) CC). However, these powers are limited in the sense that authorisation from the court is required for far-reaching decisions, such as situations in which the guardian acts as a counterparty of the adult or situations in which the guardian is acting on behalf of the adult in a lawsuit (article 1:386(1) CC in combination with 1:346 and 349 CC).

In taking care of the non-financial interests of the adult, the powers of the full guardian are limited differently. In family law and health law situations, the guardian is not allowed to represent the adult when the adult himself is mentally capable to act or decide. In addition, the guardian cannot make highly personal decisions, such as non-treatment decisions or the decision to make a will, on behalf of the adult. Such decisions can only be made by the adult himself.[39] The powers of the guardian are also limited in situations where human rights such as the right of integrity to the body or the right to liberty are at stake. Forced mental health treatment or involuntary admission into a hospital requires a court order. As for duties within the field of health law, the corresponding articles (articles 1:453 and 454 CC) and duties of the personal guardian apply. See **25.3** and **26.3**.

As for other duties, the full guardian must ensure an efficient investment of the adults' property as far as this should not be spent on the proper care of the adult (article 1:386(2) CC). The guardian also has to submit an inventory and open a

39 The request of a full guardian for a permission from the court to have the adult vaccinated against Covid-19 against his will, was considered inadmissible; District Court Noord-Nederland, 07-04-2021, ECLI:NL:RBNNE:2021:1350.

special bank account. Every year the full guardian must render account of his work to the court.

In performing his task, the professional full guardian must take the philosophy of life, religion and cultural background of the adult as the starting point and as far as possible enhance the adult's self-reliance (article 4 Decree on quality requirements for guardians). Quality requirements furthermore include the drafting of a guardianship plan, together with the adult, which includes the goals and the mutual agreements, e.g., how the full guardian can be contacted. This plan must be submitted to the court. As a rule, the full guardian has to contact the adult at least every two months and inform the adult each month of changes in the adult's bank account. The full guardian must also inform the adult about his replacement when absent. The full guardian must be accessible by phone at least 4 days a week (article 5 Decree on quality requirements for guardians). He also needs to have a complaints procedure of which the adult must be informed (art. 6 Decree). Article 9 of the Decree refers to the integrity of the full guardian: the guardian is not allowed to benefit in any way from his position as a full guardian. He cannot accept gifts or buy goods from the adult or benefit from a will that was made by the adult during the measure. It is also contrary to the professional integrity to commission himself or someone in his organisation or his partner or one of his close relatives while executing his task as guardian.[40]

The effect of decisions made by the guardian can be far-reaching; article 1:384 CC formulates that if the measure after being ordered, is overturned in appeal the decisions made by the guardian remain in force.

Every guardian is entitled to get any costs reimbursed and to receive remuneration. According to the Regulation on the Remuneration of full guardians, financial guardians and personal guardians, partners or family members acting as full guardians are entitled to a yearly remuneration of € 1217, -. In practice, this remuneration is not often claimed. Professional full guardians are entitled to a yearly amount of € 2241, -. The Regulation came into force in 2014 and the amounts are amended periodically.

25.2 The powers and duties of the guardian in case of a protective trust are very much similar to the powers and duties of the full guardian; both guardians have to take care of the financial interests of the adult. However, there are differences. The idea behind the protective trust is that important decisions are, in the first instance, made in cooperation between the adult and the guardian. Whereas in the case of full guardianship, the guardian has to apply to the court straight away

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40 See District Court Den Haag, 01-03-2019, ECLI:NL:RBDHA:2019:5823.

and is not obliged to seek the cooperation of the adult. The law originally limited the task of the guardian in case of a protective trust to taking proper care of the assets put under the protective trust. But since 2014 it is clear that the tasks and duties of the financial guardian are broader; similar to the full guardian, the financial guardian must take care of all the financial interests of the adult (article 1:441(1) CC). This might include enhancing debt counselling or trying to get the municipal taxes waived. Unless the adult's assets are needed for the care of the adult, a proper investment of these assets is required. Article 1:441(2) CC formulates several legal acts for which the financial guardian needs the permission of the adult or in case the adult refuses or is unable to give consent, the authorisation of the court. As described above (see **24.2**), article 1:338(2) CC formulates the same rule but here the initiative to act comes from the adult. As a rule, courts require the guardian to apply for authorisation when they intend to sell the house or perform a legal act involving a value of more than € 1500, -. Article 1:441 CC also mentions accepting a gift with conditions, lending money or accepting a legacy as acts requiring the authorisation of the court.

Just like the full guardian, the financial guardian, shortly after taking up the role of guardian, has to open a special bank account, make an inventory of the adult's assets and has to submit this information to the court. Each year an annual report must be submitted and upon the termination of the measure, the guardian must submit a final report. If the adult has the (mental) capacity to receive and understand this annual or final report, the report must be submitted to the adult and a copy of the report must be sent to the court's administration office. In case the adult does not have the capacity to receive and understand the report, the report must instead be sent to the court (article 1:445(1) and (2) CC). On this occasion, the court will check the report and may subsequently ask the guardian to provide further explanation. In case the court is not satisfied with the way the guardian has executed his task (e.g., in case of fraud or mismanagement), the court can dismiss the financial guardian.

Unlike the professional full guardian or personal guardian, contact with the adult is not obligatory for the professional financial guardian. Article 5 (4) of the Decree on quality requirements for guardians, requires guardians to have contact with the adult at least every two months but does not apply to financial guardians. Because full guardians and personal guardians decide with and on behalf of the adult in medical and personal matters personal and regular contact with the adult is considered necessary. The need for regular contact is considered less important for financial guardians taking care of the financial interests of the adult.

If the financial guardian decides to start or engage in a court procedure, he can ask the adult for consent. If the adult refuses or is mentally incapable to give his consent, the guardian can ask for authorisation from the court (article 1:443 CC).

According to the Regulation on the Remuneration of full guardians, financial guardians and personal guardians, partners or family members are entitled to a remuneration of € 675, -. Professional financial guardians are entitled to a yearly amount of € 1245, -. Article 1:447(2) CC states that in case two guardians are appointed, the remuneration can be divided by the court between them taking into account the work performed by each of them.

25.3 The guardian appointed through a personal guardianship measure, acts as a representative in care situations unless the adult has the mental capacity to decide himself or representation is impossible because of the very personal character of the matter. Like a full guardian, a personal guardian cannot ask for euthanasia on behalf of the adult. And involuntary admission into a closed ward is beyond the powers of representation conferred to the personal guardian. The most important duty of the personal guardian is to support and advise the adult, to safeguard his interests in care matters and to involve the adult as much as possible while executing his task as personal guardian (article 1:453(2), (3) and (4) and article 454(1) CC). If the adult opposes a far-reaching intervention or decision in a care situation, this intervention or decision can only take place if it is necessary to prevent serious harm to the adult (article 1:453(5) CC). The same provision can be found in article 7:465(6) CC. The powers and duties of the full guardian concerning care matters equal the tasks and duties of the personal guardian. When personal guardianship is combined with a protective trust, the combination almost equals full guardianship.

According to the quality requirements, a professional personal guardian, like a full guardian, has to contact the adult at least every two months unless the adult does not want contact or the guardian is unable to achieve contact. Personal guardians, as well as full guardians, must be accessible by phone at least 4 days a week (article 5 Decree on quality requirements for guardians). If the guardian wants to start or engage in a court procedure, he can ask for the adult's consent. If the adult refuses or lacks the (mental) capacity to give his consent, the guardian can ask for authorisation from the court (article 1:456 CC).

According to the Regulation on the Remuneration of full guardians, financial guardians and personal guardians, partners or family members acting as personal guardians are entitled to a remuneration of € 675, - In practice this remuneration is not often claimed. Professional personal guardians as well as legal CSOs supervising voluntary personal guardians are entitled to a yearly amount of € 1245, -.

The Regulation came into force in 2014 and the amounts are amended periodically.

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

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

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

26.1 Full guardianship cannot be combined with a protective trust or a personal guardianship. Two full guardians may be appointed by the court. In this situation, article 1:383 (10) CC states that as a rule both guardians are allowed to act separately, but the court can order a division of tasks. In case of a dispute between the two guardians, the court can decide the matter at hand, when asked to do so by one of the guardians or by the organisation providing support to the adult or by the institution where the adult lives.

26.2 The court can appoint two financial guardians. In this situation, article 1:437 CC states that as a rule both guardians are allowed to perform the tasks separately, but the court can order a division of tasks. In case of a dispute between the two guardians, the court can decide the matter at hand, when asked to do so by one of the guardians or by the organisation providing support to the adult or by the institution where the adult lives. In case the protective trust is combined with personal guardianship, according to article 1:458 CC, the financial guardian cannot veto care decisions made by the personal guardian when there are sufficient financial resources to meet the costs of the decision at hand.

26.3 Two personal guardians can be appointed. In this situation, article 1:452(9) CC states that as a rule both guardians are allowed to perform the tasks separately, but the court can order a division of tasks. In case of a dispute between the two guardians, the court takes a decision in the matter at hand, when asked to do so by one of the guardians or by an organisation providing support to the adult or by an institution where the adult lives.

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?

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

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

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

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.

27.1 The Civil Code provides the courts with several instruments and powers to supervise guardians. The full guardian is obliged to submit an inventory and plan at the start of his task, setting out the goals of the measure, the routes to achieve them and the agreements with the adult, for example on a monthly living allowance. Each year the guardian must report to the court and submit an update of the plan. If data in the report is missing or unclear, the guardian can be summoned by the court to provide an explanation. This can result in a hearing at the court and in severe cases in a dismissal of the guardian. The guardian is obliged to provide the court with the information the court deems necessary. Besides that, the court must be informed by the guardian right away of facts that are relevant to the continuation of the guardianship measure (article 1:385(2) CC). After a maximum period of five years, the yearly report must explicitly deal with the question of whether the measure should be ended or continued.

As described in **23.1**, professional guardians have to meet several quality requirements contained in the Decree on quality requirements for guardians. Each year an accountant checks the administrative and financial requirements, and the professional guardian must declare that the other requirements in this degree have been met. These requirements relate to the professional training of the professional guardian, respect for the adult's religious and cultural background, the requirement to enhance the adult's ability to live independently, communication with the adult, accessibility for the adult and the possibility to file a complaint. The declarations from the accountant and the guardian himself are submitted to the Landelijk Kwaliteitsbureau (LKB) (article 13 Decree). The LKB is situated at the District Court of Den Bosch. Approval means that the professional guardian can be appointed again for a year. The eleven courts in the other districts are informed about

the outcome of this annual check regarding the quality requirements. If a new professional guardian wants to be appointed, the court will invite him or her to submit and explain the business plan. If the professional training or the expertise to become a guardian is missing, the candidate will not be appointed. The supervision performed by the courts sometimes overlaps with the information required by the LKB. The scope of the powers of supervision by the courts and the Landelijk Kwaliteitsbureau are not specified in great detail.

During the measure, the courts have to supervise the guardians operating within their district. Far-reaching decisions regarding assets or finances need authorisation by the court in advance. The court can appoint a special guardian next to the full guardian if the interests of the adult require such an appointment. This special guardian partly takes over the task of the full guardian and the court can order the full guardian to pay the remuneration of this special guardian (article 1:370 CC). This instrument is seldom used.

All guardians can be held accountable for damages or financial loss caused by not fulfilling their duty properly (articles 1:386 jo. 362 CC). The State can be held accountable if the financial loss suffered by an adult under guardianship, was caused by insufficient supervision by the court.[41]

The guardian can be dismissed upon his own request because he no longer meets the requirements to be appointed or because of important reasons, such as fraud or mismanagement of the adult's affairs. In the latter case, dismissal can be requested by any (legal) person authorised to request a guardianship measure or – in the event two guardians have been appointed – by the other guardian (article 1:385(1) under d CC). The judge can also ex officio dismiss the guardian. After dismissal, the guardian must perform those acts that cannot be delayed until someone else has taken up the responsibility to take care of the interests of the adult. Under the former Civil Code, all full guardians were given the opportunity to ask for dismissal after eight years. This request had to be granted. This opportunity was not available for spouses or children or parents of the adult (article 515 old CC). Under current law, the guardian can request to be dismissed at any moment, but the court is not obliged to grant the request.

27.2 The scope of the powers of supervision for financial guardianship is almost identical to the rules and powers in the case of full guardianship. The court

41 Court of Appeal Den Haag, 24-03-2009, LJN: BH9022.

may at any time request the guardian to provide such information as the court may require.[42]

In contrast to full guardianship, decisions about assets only require the court's consent if the guardian does not agree or does not want to cooperate with a decision proposed by the adult (article 1:438(2) CC). The court's consent is also required when the adult does not agree with a decision proposed by the guardian when it concerns one of the legal acts included in article 1:441(2-5) CC.[43] All guardians can be held accountable for damages or financial loss caused by not fulfilling their duty properly (article 1:444 CC).

Like the full guardian, the financial guardian can be dismissed upon his own request, because he no longer meets the requirements to be appointed or because of important reasons, such as fraud or mismanagement of the adult's affairs. In the latter case, dismissal can be requested by any (legal) person authorised to request a guardianship measure or – in the event two guardians have been appointed – by the other guardian (article 1:448(2) CC). The court can also ex officio dismiss the guardian. After dismissal, the guardian must perform those acts that cannot be delayed until someone else has taken up the responsibility to take care of the interests of the adult.

27.3 The personal guardian must submit a care plan shortly after being appointed, setting out the goals and mutual agreements with the adult (insofar as these can be realised). Professional personal guardians have to meet the quality requirements mentioned under **27.1**. An independent expert performs the annual audit and the findings of this expert together with the declaration of the guardian himself are submitted to the Landelijk Kwaliteitsbureau (LKB). There is some criticism of the way the LKB supervises guardians. Supervision can focus too much on formalities and, according to some, is not focused enough on the manner in which the guardian exercises this task.[44] All guardians can be held accountable for damages or financial loss caused by not fulfilling their duty properly (article 1:455 CC). Full guardians and guardians in a protective trust are to seek the per-

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42 In supervising a guardian the court gave instructions regarding the labour contract of one of the employees of the guardian which according to the High Court exceeded the powers of supervision of the court. Dutch Supreme Court, 17 December 2021, ECLI:NL:HR:2021:1921

43 See e.g. article 1:441(2) under a CC. This provision deals with legal acts such as buying and selling assets of the adult under a protective trust. The sale of the house of person with dementia admitted to a nursing home requires court approval if the adult refuses to give his consent to the sale or is no longer able to express is opinion.

44 Bureau Bartels – E.J. Davelaar & H.A. Tissing, Werking Wet wijziging curatele, beschermingsbewind en mentorschap, Besluit kwaliteitseisen cbm en Regeling beloning cbm, WODC, Amersfoort 2018. p. V.

mission of the court before far-reaching financial decisions can be made. This instrument of supervision is not available in the case of personal guardianship; for example, even a far-reaching decision such as giving consent for cutting off the adult's leg does not require authorisation by the court. It is mainly left to the courts and the LKB to determine their position as supervisors since the law does not provide specific instructions or criteria for supervision.

28. Describe any safeguards related to:

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

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

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

d. conflicts of interests

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

28.1 See **27.1** for decisions that need the approval of the court. Approval of the court is also required when an adult under full guardianship (on the ground of the adult's physical or mental condition) wants to marry or enter into a registered partnership (articles 1:38 and 80a(5) CC). In addition, the adult requires the consent of the court to make or change a will (article 4:55 CC). An important feature of full guardianship is that in case of unauthorised legal acts performed by the adult under guardianship, the full guardian has the power to annul these acts. The possible damage of such an annulment is suffered by the third party even if this party was unaware of the measure. The Civil Code does not provide a provision regarding conflicts of interest in the case of state-appointed financial or personal guardians. In case of full guardianship, the court can appoint a guardian ad litem in case of a conflict of interests (article 1:385(1) and 250 CC). The Decree on quality requirements for guardians does contain a provision on conflicts of interest in article 9, but this article only applies to professional guardians. Article 9 of the Decree stipulates that the guardian may not derive any benefit from his position as guardian other than his remuneration for acting as guardian.

28.2 See **27.2**. The protection against unauthorised legal acts by the adult is almost equal to the protection offered by full guardianship when the protective trust is registered. Article 1:442(1) CC deals with the relationship between the guardian and third parties and stipulates that when it comes to the rights and obligations of a third party, the provisions of the power of attorney in the Book 3 of the Civil Code apply. The Civil Code does not provide any provision regarding conflicts of interest with one exception. According to article 1:442(1) CC in combination with article 3:68 CC, the guardian can act as the counterparty of the adult

if the legal act is accurately described and a conflict of interest is excluded (in the Netherlands referred to as ‘selbsteintritt’). In case of conflict of interests between an adult and a full guardian, the court may appoint a guardian ad litem. In other cases, where authorization from the court is sought for an act involving a conflict of interests, the court may deny the request. And if an act involving a conflict of interests becomes apparent at a later moment, the court will be able to order the guardian to undo the act, if possible. The Decree on quality requirements for guardians contains a provision on conflicts of interests in article 9, but this article only applies to professional guardians.

28.3 See **28.2**. Article 1:453a CC states that the court can decide that the adult is no longer allowed to exercise parental responsibilities. Unauthorised acts performed by the adult or the guardian are dealt with in article 1:457 CC. Third parties are only protected if they knew that the adult did not have the approval of the guardian or was not mentally capable to perform the legal act. In the case of an act performed by the guardian, this act can only be considered unlawfully performed if the third party knew that the guardian was acting beyond his authority. The Civil Code does not provide any provision regarding conflicts of interest. The Decree on quality requirements for guardians does so in article 9, but this article only applies to professional guardians. This article stipulates that guardians may not derive any benefit from their position as guardians other than their remuneration for acting as guardians.

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.

29.1 Full guardianship terminates in case the duration for which it has been ordered elapses, in the event the adult dies, or in the event this state-ordered measure is replaced by another state-ordered measure or terminated by the court. The court can end the measure if the necessity for it no longer exists or if the continuation of the measure proves to be not significant and effective. The court can do so upon request of any (legal) person authorised to request full guardianship or upon the request of the person appointed as guardian. This includes the adult himself. The court can also end the measure ex officio (article 1:389 CC).

When a full guardian is dismissed for reasons other than on his own request, the court can enter the office of this ex-guardian and confiscate books, electronic files and computers. The court can also decide that no final report has to be submitted. This facilitates the start of the successive guardian, who can start with a clean slate

(article 1:385(1) CC in combination with article 1:448(5) CC). According to article 1:386(1) CC in combination with articles 1:338 and 339 CC the new guardian has to submit an inventory within eight weeks. As a rule, this inventory is based on the final report from the former guardian. If the former guardian is late in submitting his final report or does not submit at all, the successive guardian can nevertheless start his work.

29.2 The measure terminates in case the duration for which it has been ordered elapses, in the event the adult dies, or in the event the measure is replaced by another state-ordered measure or terminated by the court. The court can end the measure if the necessity for it no longer exists or if the continuation of the measure proves to be not significant and effective. The court can do so upon request of any (legal) person authorised to request a guardianship measure which includes the adult himself or upon the request of the person appointed as guardian. The court can also end the measure ex officio (article 1:449 CC).

When a guardian is dismissed for reasons other than on his own request, the court can enter the office of this ex-guardian and confiscate books, electronic files and computers. The court can also decide that no final report has to be submitted. This facilitates the start of the successive guardian, who can start with a clean slate (article 1:448(5) CC) and does not have to await the final report of the previous guardian.

29.3 Personal guardianship terminates in case the duration for which it has been ordered elapses, in the event the adult dies, or in the event the measure is replaced by another state-ordered measure or terminated by the court. The court can end the measure if the necessity for it no longer exists or if the continuation of the measure proves to be not significant and effective. The court can do so upon request of any (legal) person authorised to request a guardianship measure or upon the request of the person appointed as guardian. This includes the adult himself. The court can also end the measure ex officio (article 1:462 CC).

Reflection

30. Provide statistical data if available.

In recent years, the number of full guardianship measures has slowly declined; the numbers changed from 22.585 at the end of 2018 to 22.155 at the end of 2019 and to 21.331 at the end of 2020. The number of protective trusts was 255.150 at the end of 2018, 266.995 at the end of 2019 and 269.896 at the end of 2020, while

personal guardianship measures also increased from 74.146 (end of 2018) to 79.230 (end of 2019) and 83.797 (end of 2020).[45]

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?

The application of state-ordered measures does not seem to meet many problems in practice. This is partly due to recent legislation. The Amendment Act on full guardianship, protective trust and personal guardianship (*de Wet wijziging curatele, beschermingsbewind en mentorschap*) entered into force on 1 January 2014. A few months later, the Decree on quality requirements for guardians (*Besluit kwaliteitseisen cbm*) entered into force for guardians with three or more clients. The Regulations on the Remuneration of full guardians, financial guardians and personal guardians (*Regeling beloning curatoren, bewindvoerders en mentoren*) provides for a binding remuneration system and entered into force on 1 January 2015. The recent legislation was evaluated by researchers connected with Bureau Bartels and improvements as well as problems were identified. Most of the changes were accepted as improvements, such as the introduction of the possibility for care organisations to apply for a measure. The introduction of quality requirements for professional guardians made it possible for courts to 'separate the wheat from the chaff' and resulted in greater awareness among guardians of the importance of providing good services. The supervision by the Landelijk Kwaliteitsbureau is criticised by guardians since this supervision is in their opinion too much focused on formalities. Another issue that was noted concerned the lack of staff at courts and the need for more instruments to conduct supervision. The introduction of the evaluation of the guardianship measure at least every five years is considered an improvement although according to some professionals, the period of five years is too long, especially in the case of a protective trust based on problematic debts.[46] The Covid 19 pandemic caused many problems, especially with regard to the hearing of adults in court proceedings and the visitation of adults by their guardians, but those practical problems no longer arise. On several points, the regulation of state-ordered measures and the application of these measures meets serious criticism from a more theoretical human rights point of view, but those problems are of a different nature and, as such, not problems experienced in practice.

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45 These figures were given to us by the Raad voor de Rechtspraak. The numbers differ slightly from the numbers that were published officially but are the most accurate.

46 See Bureau Bartels – E.J. Davelaar & H.A. Tissing, Werking Wet wijziging curatele, beschermingsbewind en mentorschap, Besluit kwaliteitseisen cbm en Regeling beloning cbm, WODC, Amersfoort 2018, p. 12-18.

SECTION IV – VOLUNTARY MEASURES

This section concerns the application of voluntary measures, allowing the adult him/herself to:

- **a. appoint self-chosen representatives/support persons (e.g., continuing powers of attorney) and/or,**
- **b. give advance directives.**

Overview

32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.[47]

Levenstestament

In the Netherlands, adults can make a so-called ‘levenstestament’ (literally translated as ‘living will’). This instrument has been designed and conceptualised by the Dutch notariate within the framework of existing law. As such, the word *levenstestament* does not appear anywhere in Dutch law. It is a term used in practice for an instrument that allows adults to make their own provisions for a future period of incapacity. According to The Royal Dutch Association of Civil-law Notaries (Koninklijke Notariële Beroepsorganisatie – KNB), adults can include in their *levenstestament*: a continuing power of attorney (CPA), a medical treatment advance directive (discussed below) and/or an advance directive addressed to the court that includes, for example, the adult's choice of representative in case the court deems a state-ordered measure necessary. As the ‘and/or’ makes clear, adults are not required to include all these components in their *levenstestament*.[48] Since the definition of the KNB emphasises the CPA component, we focus on this component of the *levenstestament* in the answers to the following questions.

Medical treatment advance directive

As mentioned above, the *levenstestament* can include a medical treatment advance directive [wilsverklaring]. However, the medical treatment advance directive also exists as a separate instrument. Different types of medical treatment advance directives can be distinguished. Since 1995, adults have had the possibility – through article 7:450(3) of the Dutch Civil Code – to draft a so-called ‘negative treatment directive’; an advance directive in which certain medical treatment is refused by the adult. Adults can also draft a so-called ‘positive treatment directive’; an advance directive in which certain medical treatment is requested by the adult. A

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47 Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

48 https://www.notaris.nl/levenstestament/levenstestament-en-volmacht.

special positive treatment advance directive is the advance directive for euthanasia, in the Netherlands regulated in 2002 (article 2(2) of the Euthanasia Act).

Please answer the following questions [33 - 47] for each (if there are several) voluntary measure.

33. Specify the legal sources and the legal nature (e.g., contract; unilateral act; trust or a trust-like institution) of the measure. Please consider, among others:
   a. the existence of specific provisions regulating voluntary measures.
   b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.

As discussed above (question 32), the *levenstestament* has been designed and conceptualised by the Dutch notariate within the framework of existing law. In the absence of a specific regulatory framework, the conceptualisation of the *levenstestament* – in particular, the CPA component – has been carried out in different ways and there does not seem to be consensus on the precise legal nature of the *levenstestament*.[49] On the one hand, there are notaries who model the *levenstestament* predominantly upon the provisions on ordinary powers of attorney (articles 3:60 to 3:79 CC) [volmacht], a unilateral act. Although not specified in the legislation on ordinary powers of attorney, the Dutch government has confirmed that an ordinary power of attorney (POA) can enter into force and/or remain in force upon the incapacity of the adult, giving it the character of a continuing power of attorney (CPA).[50] On the other hand, there are notaries who – besides the provisions on ordinary powers of attorney – also consider relevant and applicable the provisions on service provision agreements (articles 7:400 to 413 CC) [opdracht] and mandate agreements (articles 7:414 to 7:424 CC) [lastgeving]. There is much to be said for the latter, as a POA in the Netherlands only grants the authority to act on behalf of the adult and does not create an obligation for the attorney to act. Arrangements about an obligation to act on behalf of the adult and arrangements about the rights and duties governing the execution of the POA can be made through an agreement between the adult and the attorney in the form of a service provision agreement or a mandate agreement.

49 L.C.A. Verstappen, 'Het levenstestament: een korte analyse van veel gebruikte modellen', in: F.W.J.M. Schols & B.C.M. Waaijer (eds.), Het levenstestament. Nader verfijnd, Sdu: The Hague 2017, pp. 153-167; L.C.A. Verstappen, 'Het levenstestament: volmacht of toch opdracht/lastgeving?', WPNR 2013-6993, pp. 931-932.

50 Dutch House of Representatives, Kamerstukken II 2011/12, 22054, nr. 6, pp. 2-4.

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.

See the answer to question 32. In addition, to a medical treatment advance directive and an advance directive addressed to the court, the *levenstestament* can also include wishes, preferences and instructions addressed to the attorney.

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

Except for certain highly personal acts (such as making a will), the *levenstestament* can cover all matters, including property and financial matters; personal and family matters; and care and medical matters.

Start of the measure

Legal grounds and procedure

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

There are no specific requirements concerning the (mental) capacity needed to make a *levenstestament*. For legal acts in general, the standard is that an adult must be capable of a reasonable appreciation of the interests involved (articles 3:33 and 3:34 CC). With regard to the capacity required to make a *levenstestament*, the courts have confirmed in several cases that an intellectual impairment does not automatically mean that the adult is not capable of a reasonable appreciation of the interests involved. For example, in a case before the District Court of Limburg, the court considered:

> 'The court states first and foremost that great value must be attributed to the freedom of the adult concerned to draw up a levenstestament. This means that the court must exercise caution in assuming too readily that the requirements of article 3:34 CC have been met. In this regard, the court notes that the mere presence of an intellectual impairment does not mean that the levenstestament has also been made under the influence of that impairment, since an intellectual impairment does not have to prevent a clear appreciation of the interest involved, by the adult. This will

depend on the severity of the impairment and the simplicity or complexity of the levenstestament in question.'[51]

The Royal Dutch Association of Civil-law Notaries (KNB) has developed a guideline that notaries can use to assess whether a client has the capacity to make a *levenstestament*.[52] This guideline also provides tools that notaries can use to support the decision-making process of clients with impaired decision-making abilities, such as the advice to have a conversation with the client in a familiar environment, rather than in the office.

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

In the absence of a specific statutory framework, there are no specific formalities for the creation of the *levenstestament*. In theory, adults can use the services of a notary to make a *levenstestament* or they can make a *levenstestament* themselves in the form of a private document.[53] In practice, the latter is not recommended, as problems can arise with the acceptance by third parties, such as banks. Moreover, some legal acts require a notarised power of attorney in case of representation and therefore a notarised *levenstestament*.[54] Finally, currently, only a notarised *levenstestament* can be registered in the Centraal Levenstestamentenregister (CLTR), a register set up by the Royal Dutch Association of Civil-law Notaries (KNB). Although strongly recommended, the registration of the *levenstestament* in this register is voluntary and does not act as a prerequisite that must be met before the *levenstestament* may be used.

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

a. the circumstances under which voluntary measure enters 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?

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51 District Court of Limburg 13-01-2021, ECLI:NL:RBLIM:2021:381, §4.3 (translated by RSR).

52 In Dutch the guideline is known as the 'Stappenplan beoordeling wilsbekwaamheid ten behoeve van notariële dienstverlening'. The latest version of the guideline was presented in 2021.

53 This was confirmed by the Dutch minister of Justice and Security in a debate on the costs of notarial levenstestamenten (Dutch House of Representatives, Handelingen II 2015/16, nr. 29, item 6).

54 An example is article 3:260 CC (establishing a mortgage). See for other examples S.C.J.J. Kortmann, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Deel III. Vermogensrecht algemeen. Volmacht en vertegenwoordiging, Deventer: Wolters Kluwer 2017, §26.

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

The adult determines when and how the *levenstestament* enters into force. The adult can stipulate that the *levenstestament* enters into force immediately or at a specified time in the future (e.g. mental incapacity of the adult). If the adult chooses the first option, the *levenstestament* can initially be used as a general ordinary power of attorney, enabling representation in situations where there is no decline of the adult's cognitive abilities. The attorney then acts on behalf of the adult, because the adult – although capable of managing his own affairs – simply prefers the attorney to manage these affairs for him. As discussed further in the answer to question 42, this is only possible for financial and personal matters. According to article 7:465(3) CC, representation in medical matters is only possible when the adult is no longer capable of a reasonable appreciation of his interests. Given the dynamic nature of mental capacity, which is often seen as time- and decision-specific, the advantage of the first option – the *levenstestament* enters into force immediately – is that the attorney can step in gradually, providing the adult with support where necessary. If the adult chooses the second option, the adult is well advised to clearly stipulate in the *levenstestament* which formalities must be fulfilled for the *levenstestament* to enter into force. In this regard, the adult can, for example, stipulate that a medical statement by one or two physicians is required. Failure to clearly define when the *levenstestament* enters into force could lead to problems with the acceptance of the *levenstestament* by third parties, such as banks, who require proof that the attorney may use the authority conferred to him.

Appointment of representatives/support persons

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

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

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

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

In the absence of a specific statutory framework, there are no specific provisions requiring the exclusion of certain persons as attorneys. In other words, adults have considerable leeway in their choice of attorney and can appoint one or more attorneys to act jointly, separately, concurrently (e.g., an attorney for financial matters and an attorney for medical and personal matters) or as substitutes. Article 3:68 of

the Dutch Civil Code states that, unless otherwise provided, the attorney may only act as the adult's counterparty if the content of the act is precisely defined, excluding the possibility of a conflict of interests. As the phrase 'unless otherwise provided' makes clear, the adult has the option to make other arrangements in the *levenstestament* regarding conflicts of interests.

During the measure

Legal effects of the measure

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

To assess the extent to which the *levenstestament*, and the wishes expressed within it, are legally binding, it is necessary to make a distinction between the various components a *levenstestament* can entail. As discussed in the answer to question 32, a *levenstestament* can include a continuing power of attorney (CPA), a medical treatment advance directive and/or an advance directive addressed to the court including, for example, the adult's choice of representative in case the court deems a state-ordered measure necessary.

Starting with the CPA, it is important to note that unless both the adult and the attorney have agreed otherwise through a service provision agreement or a mandate agreement (see the answer to question 33), the attorney is not obliged to make use of the authority granted to him through the power of attorney.[55] However, when the attorney decides to use the authority granted to him, the attorney is obliged to behave as befits a 'good attorney'. This means that the attorney must act in accordance with the adult's instructions and is obliged to inform the adult when he uses the authority conferred to him.[56] Again, in the absence of a specific regulatory framework, this rather general rule applying to ordinary powers of attorney has not been further substantiated or elaborated in relation to the *levenstestament*. Brinkman and Van Anken note that as more time passes (since the drafting of the *levenstestament*) and personal and social relationships change, a

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55 S.C.J.J. Kortmann, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Deel III. Vermogensrecht algemeen. Volmacht en vertegenwoordiging, Deventer, Wolters Kluwer 2017, §68; A.R. Bloembergen & W.A.M. van Schendel, 'Vertegenwoordiging en volmacht', in: J. Hijma, C.C. van Dam, W.A.M. van Schendel & W.L. Valk, Rechtshandeling en Overeenkomst, Deventer, Kluwer 2010, pp. 78-134 (92-93).

56 S.C.J.J. Kortmann, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Deel III. Vermogensrecht algemeen. Volmacht en vertegenwoordiging, Deventer, Wolters Kluwer 2017, §101; C. Spierings, De eenzijdige rechtshandeling, Nijmegen, Wolters Kluwer 2016, pp. 57-61.

deviation from the adult's wishes and preferences becomes more justifiable.[57] However, adults would do well to include in their *levenstestament* instructions on the extent to which the attorney is bound by their wishes and preferences.

The aforementioned applies especially to wishes and preferences on financial and personal matters. Indeed, the legislator has provided a further specification of the binding nature of the adult's medical wishes and preferences as included in a medical treatment advance directive. According to article 7:450(3) CC, the medical wishes and preferences of the adult are, in principle, binding on both the healthcare provider and the representative (either court-appointed, appointed by the adult or *ex lege*). Only the healthcare provider may deviate from the medical treatment advance directive if there are valid reasons to do so. This is the case, for example, when the advance directive is based on outdated information; information that, had the patient been aware of it, would probably have led to a different decision.[58] Article 7:450(3) CC also makes clear that a medical treatment advance directive only applies when the adult can no longer be considered 'capable of a reasonable appreciation of his interests in the matter'. In other words, when the adult is still able to express his wishes and preferences, these wishes and preferences prevail over any (conflicting) wishes and preferences as recorded in the medical treatment advance directive. Although the law stipulates this only concerning medical treatment advance directives, it can be assumed that this also applies to the adult's financial and personal wishes and preferences, as recorded in the *levenstestament*.

As discussed in the answer to question 23, articles 1:383(2) CC (full guardianship), 1:435(3) CC (protective trust) and 1:452(3) CC (personal guardianship) stipulate that the court shall follow the adult's express preference concerning the choice of guardian, unless there are valid reasons not do so. While these articles are silent as to the possibility of using an advance directive to convey the adult's choice of guardian to the court, the courts are generally inclined to accept such advance directives. Reasons not to follow the explicit preference of the adult, as set out in the advance directive, include, for example, a situation where the adult has designated the attorney as his choice of guardian, while the execution of the *levenstestament* has made it clear that the attorney is unsuitable for the task of representative.[59]

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

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57 R.E. Brinkman & J.M. van Anken, 'Levensexecuteur/volmacht', in: A.R. Autar, J.P.M. Stubbé & L.C.A. Verstappen (eds.), Compendium Levenstestament, Sdu, The Hague 2021, pp. 93-135.

58 H.J.J. Leenen, J. Legemaate, J. Dute, E.J.C. de Jong, M.E. Gelpke, J.K.M. Gevers en G.R.J. de Groot, Handboek Gezondheidsrecht, Boom Uitgevers, Den Haag 2014, § 2.6.5.

59 See e.g. Court of Appeal Arnhem-Leeuwarden, 23-11-2017, ECLI:NL:GHARL:2017:10353, §5.7 & §5.8.

The entry into force of the *levenstestament* does not affect the legal capacity of the grantor.

Powers and duties of the representative/support person

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

a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:
- **property and financial matters;**
- **personal and family matters;**
- **care and medical matters?**

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

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

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

Based on article 3:60 CC (financial and personal matters) and article 7:465(3) CC (medical matters), the adult can authorise another person – the attorney – to act on his behalf. Acts performed by the attorney within the confines of his authority bind the adult in relation to a third party as if the act had been performed by the adult himself (article 3:66 CC). In the absence of a specific regulatory framework, it is in practice left to both the adult and the attorney to make further arrangements about the powers and duties of the attorney. Blankman considers this an omission in the law and has advocated the adoption of a general standard obliging representatives (both guardians, attorneys and informal representatives) to involve the adult as much as possible in the decision-making process, for example by providing decision-making assistance and by informing and consulting the adult.[60] In the absence of such a standard, adults are well advised to include, in their *levenstestament*, provisions concerning the involvement of the adult in the decision-making process. Arrangements on remuneration can also be included in the *levenstestament*. Without such arrangements, a right to remuneration cannot automatically be assumed.

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

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60 K. Blankman, 'Een wettelijke regeling voor het levenstestament', in: F.W.J.M. Schols & B.C.M. Waaijer, Het levenstestament. Nader verfijnd, Sdu, The Hague 2017, pp. 45-64.

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?**
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)?**

Multiple voluntary measures can be simultaneously applied to the same adult. For instance, the adult can make more than one *levenstestament* or combine a *levenstestament* with a medical treatment advance directive. The adult can also appoint multiple representatives in the framework of the same voluntary measure. In both cases, it is up to the adult to determine how the authority is distributed among the attorneys and how the attorneys should exercise their powers and duties. The adult can stipulate that the attorneys should act jointly, separately or concurrently. The adult can also distinguish between matters, for example, that the attorneys act jointly on important matters such as the sale of the family home and can act separately on other matters. In practice, potential problems with the acceptance of the *levenstestament* by third parties, particularly banks, may influence the manner in which the authority between attorneys is distributed. For example, banks may be reluctant to accept a *levenstestament* that requires attorneys to act jointly in relation to banking matters because they do not have the resources to verify that attorneys are acting jointly and want to minimise the risk of being held accountable when this is not the case.[61]

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?**

A *levenstestament* cannot be simultaneously applied with full guardianship. However, a *levenstestament* for medical matters can coexist with a protective trust and a *levenstestament* for financial matters can coexist with personal guardianship. A *levenstestament* can also coexist with *ex lege* representation when the authority of

61 T. Denekamp, 'Wilsonbekwaamheid en de bank', in: A.R. Autar, J.P.M. Stubbé & L.C.A. Verstappen (eds.), Compendium Levenstestament, Den Haag: SDU 2021, pp. 195-206 (204).

the attorney appointed through the *levenstestament* only covers financial and personal matters. The *ex lege* representative can then act on behalf of the adult concerning medical matters. Third parties are not explicitly informed about the co-existence of the measures. Moreover, there are no clear rules on how representatives acting under different measures should coordinate their activities. An analogous application of article 1:458 CC, according to which the opinion of the personal guardian prevails in case of disagreement with the financial guardian, seems logical. However, there is no case law confirming this.

Safeguards and supervision

45. Describe the safeguards against:

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

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

c. conflicts of interests

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

See the answer to question 39 for safeguards against conflicts of interests.

There are no unauthorised acts by the adult, as a *levenstestament* does not affect the adult's legal capacity. Ill-conceived acts by the adult can be grounds for the court to deem a state-ordered measure necessary. In a case before the District Court of Noord-Holland, the court ordered a protective trust because the adult regularly made financial transactions that subsequently had to be cancelled or withdrawn.[62]

Article 3:66 CC makes clear that only legal acts performed by the attorney within the limits of his authority have legal effect. In other words, unauthorised acts by the attorney do not, in principle, bind the adult. According to article 3:69 CC, the adult – when he still has the capacity to do so – can ratify the unauthorised act, thereby giving it legal effect. Ill-conceived acts by the attorney, in principle, bind the adult but could give rise to a state-ordered measure.[63]

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.**

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62 District Court of Noord-Holland, 18-02-2020, ECLI:NL:RBNHO:2020:1171.

63 See e.g. Court of Appeal 's Hertogenbosch, 02-07-2020, ECLI:NL: GHSHE:2020:2045.

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.**

There is no formal system of safeguards and supervision in place concerning the execution of the *levenstestament* by the attorney. The inclusion of safeguards and the supervision of the attorney is ultimately the responsibility of the adult, who can appoint a supervisor and include safeguards in the *levenstestament*. In this regard, the adult has several options, such as the appointment of a family member or a professional as supervisor, the inclusion in the *levenstestament* of the obligation for the attorney to annually render account to the appointed supervisor, the appointment of multiple attorneys who are to take decisions jointly or the obligation for the attorney to consult an expert concerning certain major decisions, such as the sale of the house. Although supervision and the inclusion of safeguards is ultimately the responsibility of the adult, several initiatives have been undertaken by the Dutch notariate to prevent situations of abuse or misuse of the levenstestament as much as possible. An example is the guideline mentioned in the answer to question 36, which functions not only as a tool for the assessment of capacity, but also draws attention to situations in which the adult might be unduly influenced by the prospective attorney to make a *levenstestament*.[64] Another example is a pilot project with professional supervisors to learn more about the experiences and best practices with professional supervision, which started in 2021.[65] In cases where there are suspicions of misuse or abuse of the *levenstestament*, the persons and entities mentioned in articles 1:379 CC (full guardianship), 1:432 CC (protective trust) and 1:451 CC (personal guardianship) may file a request for a guardianship measure (see also question 19). In these instances, the court can only choose between keeping the *levenstestament* in force or terminating it in whole or in part by ordering a guardianship measure (see also questions 44 and 47). Unlike in other countries, such as Germany, the court does not have the option to appoint a supervisory guardian.

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.

64 KNB, Stappenplan beoordeling wilsbekwaamheid ten behoeve van notariële dienstverlening, april 2021.

65 W. van Hoeflaken, ‘Voor het behoud van vertrouwen’, Notariaat Magazine 2021-4.

Article 3:72 CC states that a POA, and thus also a *levenstestament,* terminates in the event the adult dies, is placed under full guardianship [curatele] or becomes bankrupt.[66] The adult can also revoke the *levenstestament*. The death or bankruptcy of the attorney and the termination by the attorney of the authority conferred to him, need not necessarily result in the termination of the *levenstestament*. This can be avoided if the adult has appointed a substitute attorney who can replace the former attorney. As discussed in the answer to question 44, the *levenstestament* does not necessarily terminate when the court orders a protective trust or personal guardianship. Instead, the authority conferred to the attorney through the *levenstestament* is limited by the state-ordered measure. This means that, for example, in a situation where the court deems personal guardianship necessary, the *levenstestament* can remain in force with regard to the adult's financial and property affairs, and vice versa.[67]

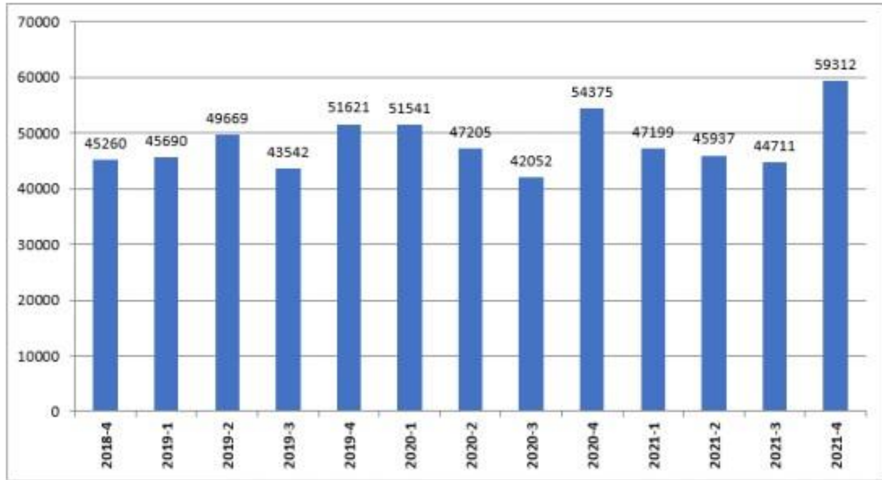
Reflection

48. Provide statistical data if available.

66 Of course, a levenstestament need not end with the adult's or the attorney's bankruptcy if it only concerns medical matters. It is unclear whether this is the case in practice. Again, clear specific rules are lacking in this regard.

67 This was the outcome in a case before the District Court of Noord-Holland, where the adult was placed under personal guardianship while a protective trust was not deemed necessary, because the attorney satisfactorily took care of the adult's financial interests (District Court Noord-Holland 18-02-2020, ECLI:NL:RBNHO:2020:1161).

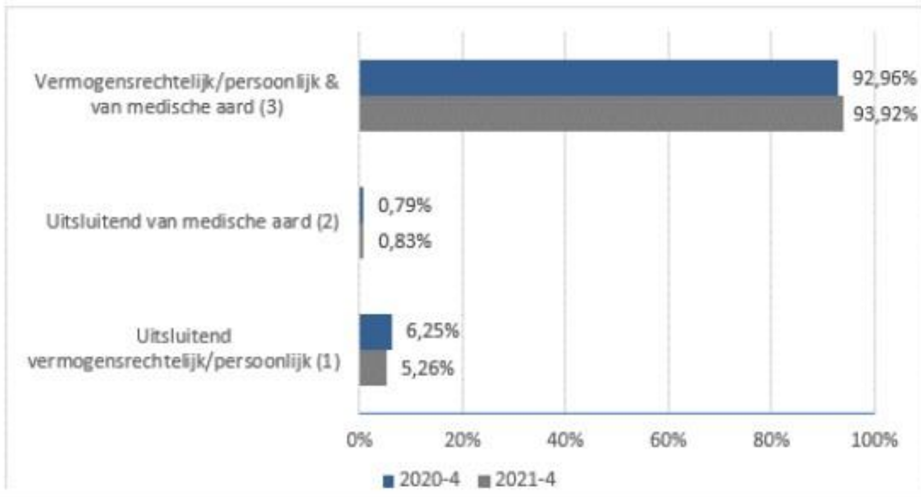
The figure below shows the number of registered *levenstestamenten* per quarter until January 2022. It is important to note here that only notarised *levenstestamenten* are registered. Moreover, registration is not mandatory. The number of unregistered *levenstestamenten* is, therefore, unclear.



Source: Royal Dutch Association of Civil-law Notaries (KNB)[68]

In the Netherlands, the *levenstestament* can cover financial, personal and medical matters. The figure below gives an indication of the affairs adults include in their *levenstestament*. It distinguishes between financial and personal matters only (bottom column, number 1); medical matters only (middle column, number 2) and financial, personal and medical matters (top column, number 3) and compares the last quarter of 2021 with the last quarter of 2020. The top column shows that at 93,92% in 2021, the vast majority of registered *levenstestamenten* covered both financial, personal and medical matters. Only 0,83% of all registered *levenstestamenten* covered only medical matters and 5,26% of all registered *levenstestamenten* covered only financial and personal matters.

68 KNB, Factsheet Testamenten (CTR, CLTR en Arert), January 2022 via: https://www.knb.nl/actueel/factsheets.



Source: Royal Dutch Association of Civil-law Notaries (KNB)[69]

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)? Have the measures been evaluated, if so what are the outcomes?

As part of a multidisciplinary PhD study on the Dutch *levenstestament*, three small-scale, exploratory studies were conducted exploring the application of the *levenstestament* and the problems that may arise in practice.[70] The first study involved a survey of notaries in the Netherlands, looking at the experiences of these professionals with the *levenstestament*.[71] The second study involved an analysis of court cases published on the Dutch website www.rechtspraak.nl, looking at cases in which the court, even though the adult had made a *levenstestament*, still deemed a state-ordered measure necessary. Both these studies showed that the application of the *levenstestament* does not, in all cases, run smoothly. The study of court cases showed that disputes between attorneys or between attorneys and other family members could hinder the execution of the *levenstestament*. The execution of the *levenstestament* can also be frustrated by problems with the acceptance of the *levenstestament* by third parties, such as banks. Finally, there have been several cases where the attorney has been prosecuted for the financial abuse of the adult

69 KNB, Factsheet Testamenten (CTR, CLTR en Arert), January 2022 via: https://www.knb.nl/actueel/factsheets.

70 H.N. Stelma-Roorda, In anticipation of a future period of incapacity: the Dutch 'levenstestament' from a legal, empirical and comparative perspective, forthcoming.

71 R. Stelma-Roorda, Managementrapportage. Het levenstestament: gebruik en toepassing door het notariaat, via https://www.knb.nl/nieuwsberichten/regelen-financiele-kwesties-belangrijkste-reden-opstellen-levenstestament.

or where the court has found an attorney unsuited to the task at hand, for example, because the adult had acted against the wishes of the adult.[72] Notwithstanding this risk of abuse by the attorney, several notaries in the survey study noted that it can be challenging to convince adults to include some form of supervision in the *levenstestament* (see also the answer to question 46, a form of supervision must be included in the *levenstestament* by adults themselves).[73]

The third exploratory study consisted of interviews looking at the expectations and experiences of adults and attorneys, both around making the *levenstestament* (adults and nominated attorneys) and at the time of application (active attorneys).[74] The interviews revealed a picture in which the authority granted to the attorney is frequently considerably broad. Adults find it difficult to record exact wishes and preferences because they do not know what the future holds. This can lead to situations where the attorney has broad powers but knows little about the adult's wishes and preferences regarding the execution of these powers. Furthermore, not all adults and attorneys are aware of the dynamic and enduring nature of the *levenstestament*, in the sense that the process of drafting a *levenstestament* is not always accompanied or continued by conversations about the adult's (changing) wishes and preferences and the adult's expectations of the attorney's role. Stelma-Roorda and Eichelsheim note that the value of the *levenstestament* can be enhanced when it is embedded in and accompanied by such ongoing conversations between the adult and the attorney.[75]

Considering the exploratory nature of these studies, future research exploring problems that may occur in practice remains important.

SECTION V – EX LEGE

Overview

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72 District Court of Noord-Nederland 29-06-2021, ECLI:NL:RBNNE:2021:2845; District Court of Limburg 26-03-2021, ECLI:NL:RBLIM:2021:2690; District Court of Rotterdam 17-02-2021, ECLI:NL:RBROT:2021:1390; District court Midden-Nederland 02-10-2020, ECLI:NL:RBMNE:2020:4216; District Court Overijssel 09-05-2017, ECLI:NL:RBOVE:2017:1932; District Court Noord-Nederland 08-04-2016, ECLI:NL:RBNNE:2016:1712; District Court of Midden-Nederland 14-03-2019, ECLI:NL:RBMNE:2019:1113; District Court of Noord-Holland 12-10-2017, ECLI:NL:RBNHO:2017:8483, §2.3; District Court of Noord-Holland 12-10-2017, ECLI:NL:RBNHO:2017:8481, §2.3; Court of Appeal Amsterdam 02-02-2016, ECLI:NL:GHAMS:2016:346, §4.12.

73 H.N. Stelma-Roorda, In anticipation of a future period of incapacity: the Dutch 'levenstestament' from a legal, empirical and comparative perspective, forthcoming.

74 R. Stelma-Roorda, V.I. Eichelsheim, 'Decision-making by and for adults with impaired capacity: The potential of the Dutch levenstestament', International Journal of Law and Psychiatry 2023, afl. 1, p. 1-11.

75 Ibid.

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

Several health laws contain provisions allowing *ex lege* representation of adults by their partner or a close relative. The most relevant are the Medical Treatment Act (Wgbo), the Compulsory Care Act (Wzd) and the Compulsory Mental Health Act (Wvggz). The Medical Treatment Act is not a separate law but part of the Civil Code; articles 7:446 – 468 CC describe in general the rights and duties of two parties – one seeking care or treatment and the other providing care or treatment – that arise when they enter into a medical treatment contract. Although covering several areas of health law, the different provisions in the three acts are almost identical in creating a form of *ex lege* representation. It is besides negotiorum gestio and the possibility in article 1:90(3) CC (see under 63) the only form of *ex lege* representation in the Dutch system. Article 465(3) CC (part of the Medical Treatment Act) stipulates that if a patient lacks the mental capacity to give informed consent for certain medical treatment, the medical professional requires the consent of a representative. In this regard, there is an order of precedence, a physician must first turn to the full guardian or personal guardian or – when no guardian has been appointed – the attorney appointed through a *levenstestament*. Only when no guardian or attorney is appointed or when these representatives do not act, *ex lege* representation by the adult's partner or a close relative is possible if there are no objectives from the adult concerned. Articles 7:446 to 7:468 CC came into force in 1975, a time when they perfectly matched the strong tradition in the Netherlands to take care of vulnerable family members within the family.

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?

The legal ground giving rise to the *ex lege* representation in health law is mental incapacity. The words 'mental incapacity' as such generally do not appear in the law; the most commonly used description is that the adult is 'unable to make a reasonable appreciation of his interests in the matter at hand'.[76]

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

76 There is one exception: article 2(2) Compulsory care act (Wzd) contains the word 'wilsonbekwaam' which can be considered the Dutch equivalent of mentally incapable.

There is no direct statutory provision in the Medical Treatment Act that requires medical expertise or a medical statement in every case of action for the adult by the *ex lege* representative. However, article 7:465(3) CC does stipulate that a healthcare provider should only turn to *ex lege* representation when the adult himself at the material time is not capable of a reasonable appreciation of the interests involved. This requirement implies an assessment of the adult's capacity to make his or her own decision in the matter at hand by the healthcare provider. A more clear and direct provision that amounts to the same is included in the Compulsory Care Act where article 3(2) stipulates that the representative may only act on behalf of the client insofar an expert, other than the physician involved in the care of the adult, has made the decision, in accordance with the applicable guidelines, that the adult cannot be considered capable of a reasonable appreciation of the interests involved.

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

Formal registration of *ex lege* representation is not prescribed. In most cases, the care file contains the names and telephone numbers of the contact person or representative and the substitute contact person. However, this cannot be considered a de facto registration. *Ex lege* representation seems to occur primarily in situations where the partner of the family member is admitted to a care home or institution.

Representatives/support persons

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

Article 7:465 CC includes a certain hierarchy when it comes to the representation of the adult. At tiers 1 and 2, the court-appointed (full or personal) guardian and the attorney authorised by the adult can be found. If no guardian or attorney has been appointed, the partner (tier 3) or a close relative (tier 4) may *ex lege* represent the adult. To the circle of close relatives consisting of the parents, children and siblings of the adult concerned, the grandparents and grandchildren of the adult concerned were recently added. The partner (tier 3) does not have to be the married or registered partner of the adult concerned. In-laws do not fall under the scope of article 7:465 CC. The wording of article 7:465 CC indicates that *ex lege* representation is only possible by one person at a time. As the aforementioned makes clear, *ex lege* representation is only applicable when no guardian or attorney has been appointed or when the guardian or attorney does not act. If an attorney is appointed

and takes up representation, the partner and close relatives have no power to represent the adult *ex lege*. They do not have a right to be involved in the decision-making process, nor do they have access to the medical files of the adult. The guardian (tier 1) overrules all other representatives when it comes to care matters. A guardian will, however, only be appointed when a partner or close relatives are absent, or when they are unfit to become representatives, for instance, because of conflicts within the family or between the partner and the children. When the adult has authorised an attorney to make care decisions on his behalf, the court generally will only appoint a guardian when the attorney does not act in the interests of the adult or does not act at all. Other health laws such as the Compulsory mental health act and the Compulsory care act, contain the same hierarchy and provisions on *ex lege* representation.[77]

During the ex-lege representation

Powers and duties of the representatives/support person

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

The *ex lege* representative must act as a good representative, which means that he must involve the adult in the exercise of his powers as much as possible (article 7:465(5) CC). The scope of the *ex lege* representative's authority is limited to care and medical matters. Much of the *ex lege* representative's work has to do with giving permission for treatment, medication, therapy, or other medical interventions. The *ex lege* representative's consent is not required in cases of emergency or non-invasive care decisions, such as applying a plaster (article 7:466 CC). As a rule, the *ex lege* representative has access to the adult's care and medical records and can be present when the doctor examines or treats the adult or when the therapist starts the session with the adult (art. 7:457 and 459 CC).

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?

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77 Article 1(1) sub e and article 3(2) Compulsory care act (Wzd). Article 1:3(3) Compulsory mental health act (Wvggz); This article leaves room for the possibility that the attorney can exercise his power to represent even in a situation where the adult has not lost his mental capacity.

The *ex lege* representative has the same powers and faces the same restrictions as other representatives. In some situations, the government or a health insurer require representation by a court-appointed representative. It concerns situations in which far-reaching decisions have to be made or situations in which decisions have significant financial consequences, such as a request for the adult to be admitted to a nursing home. As for giving or withholding informed consent on behalf of the adult in care and treatment matters, the *ex lege* representative meets certain limitations. *Ex lege* representation is not possible when the adult has the mental capacity to decide himself. The second limitation is that the *ex lege* representative's power to represent the adult does not extend to personal or far-reaching health decisions, such as contraceptive sterilization. The *ex lege* representative cannot decide that euthanasia should be performed on the adult, nor can he order an involuntary admission of his client into a psychiatric hospital. The *ex lege* representative has the same right to information as a guardian or attorney.

The only way for the adult to prevent *ex lege* representation is to appoint a representative, for example, through a *levenstestament*. In situations where *ex lege* representation already takes place and the adult is not satisfied with this representation, the adult has two options. Despite his reduced decision-making capacity, he can still file a request for a personal guardianship measure. In this request, he can indicate that he prefers that someone other than the *ex lege* representative is appointed to act on his behalf. The second possibility is to convince the healthcare provider to start a procedure for a personal guardianship measure.[78] Besides the aforementioned, adults can – when they still have the mental capacity to do so – record their wishes and preferences in a medical treatment advance directive. According to article 7:450(3), the *ex lege* representative is obliged to follow the wishes and preferences recorded by the adult.

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

Ex lege representation cannot be combined with personal guardianship or full guardianship. However, *ex lege* representation can coexist with a protective trust, with the *ex lege* representative responsible for decisions in health matters and the financial guardian responsible for financial matters. As described above, the appointment of an attorney or a personal or full guardian result in the end of the *ex lege* representation. In practice, care organisations tend to inform the adult's partner or family member and involve them in decision-making process about the

78 Authorised to file a request for personal guardianship is not the healthcare provider himself; article 1:451(1)CC states that the legal person, the organisation providing (health)care must file the request.

adult's care and treatment, based on the assumption that the adult's family is entitled to be involved. In practice, (professional) court-appointed guardians frequently do the same.

Safeguards and supervision

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

To provide certain checks and balances in the system of *ex lege* representation, health laws assign an important role to professional healthcare providers. They have the power to overrule the representative's decision in certain situations. If the *ex lege* representative requires – the continuation of – a certain treatment, the healthcare provider can ignore this wish and override the representative's instruction, when this treatment is not considered in the interest of the adult. The same applies in situations when the representative refuses consent, at which time the healthcare provider can nevertheless start or continue treatment when this is deemed to be in the interest of the adult. This power and obligation of healthcare providers is based on the general 'acting as a good healthcare provider' standard; a general standard all healthcare providers in the Netherlands must adhere to.[79] Another power given to healthcare providers is the option to file a request with the court for a personal guardianship measure to replace the *ex lege* representative. The system seems to work well, but much depends upon the professionalism of healthcare providers in using these powers.[80]

End of the ex-lege representation

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

Ex lege representation ends in several situations. First, when the adult or the representative dies or when the *ex lege* representative – on his own request – is

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79 See articles 7: 465(4) and 453 CC. Article 7:453 CC describes this standard by formulating that the healthcare provider must act in accordance with the responsibility resting on him, arising from the professional standard applicable to healthcare providers. As it turns out, this standard is largely formed by standards developed by professional bodies of health care providers and by disciplinary decisions based on the medical code of practice. Mental health legislation is less clear on this standard but both article 1:4(7) Compulsory mental health act (Wvggz) and article 3(6) Compulsory care act (Wzd) require the representative to act as 'good representative'.

80 At the end of 2019 care organisations were accused of misusing this power and several media paid attention to this (TV and two national newspapers). It was reported that care organizations request the dismissal of critical parents and family members appointed and acting as personal or financial guardians. According to the researchers their goal was to get critical parents replaced by less critical professional guardians. The problem turned out to be less extensive (Kamerstukken II, 2019/20, 34104, nr. 279, p.2) but still needs to be taken seriously.

replaced by another family member. Second, *ex lege* representation ends when the court appoints a full or personal guardian. In practice, healthcare providers can probably also end *ex lege* representation by accepting another family member as *ex lege* representative. When this is not possible on a voluntary basis – e.g., the current *ex lege* representative objects – the organisation providing (health)care for which the healthcare provider works can ask the court to appoint a full or personal guardian.

Reflection

60. Provide statistical data if available.

Ex lege representation is not registered and statistical data are therefore lacking. Some research has been done on the experiences of partners and family members acting as informal caregivers [mantelzorgers], but informal care can concern both the care of adults with an intellectual impairment and the care of adults with a physical impairment. In addition, representation – acting on behalf or for someone – is often only part of the task of informal carers as informal care can involve so much more (e.g., physical care of the adult, cleaning the house, etc.) The number of *ex lege* representatives will undoubtedly exceed the number of full guardians and personal guardians. Research on informal care confirms that caregivers spend a lot of time looking after the interests of someone else, mostly a partner or family member, and are at risk of being overburdened.[81]

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

No significant problems seem to have arisen in practice. This could be because health care providers have the ability to override dysfunctional (*ex lege*) representatives and have the option – through the organisation providing healthcare for which the health care provider works – to submit a request for a court-appointed guardian. Since little is known about the experiences with *ex lege* representation in practice, further research seems called for. Questions that could be explored include whether there should be some kind of registration of long-term *ex lege* representatives and a list of persons who should not act as *ex lege* representatives.[82]

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81 See Blijvende bron van zorg | Publicatie | Sociaal en Cultureel Planbureau (scp.nl) and Toekomstverkenning mantelzorg aan ouderen in 2040 | Publicatie | Sociaal en Cultureel Planbureau (scp.nl)

82 At the moment an adult under personal guardianship cannot be appointed as personal guardian but can act as ex lege representative for a partner or a close family member.

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?

A special feature of matrimonial property law in the Netherlands concerns liability for acts relating to the normal running of the household; article 1:85 CC in combination with article 1:80b CC stipulate that both spouses and registered partners are liable when one of them performs a legal act relating to the normal running of the household.

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

According to article 1:97 CC in combination with article 1:94 CC, each spouse is allowed to manage the assets which are part of the community of property and may enter into transactions regarding these assets. It follows from article 80b CC that the same applies to a registered partnership. These rules on the community of property apply regardless of mental capacity.

The Dutch Civil Code provides two legal provisions for the situation where the adult to be supported and protected is married or has entered into a registered partnership. Each spouse or partner is authorised to administer his private assets and, as a rule, the assets included in the community of assets. Articles 1:90(3) and 80b CC deal with the situation where the first spouse or partner leaves his administration to the other spouse or partner. The second spouse or partner then takes care of the administration of all the assets including the private assets of the first spouse for which he is not formally authorised. This may occur for example, due to illness or because the administration of these assets is simply left to the first spouse or partner. According to both articles, from a legal point of view, this should be considered a special form of the service provision agreement [opdracht], i.e., the second spouse or partner has instructed the first spouse/partner to look after his interests in relation to these assets. The second provision concerns an intervention by the court. Article 1:91 and 80b CC offer the possibility for the first spouse or partner to seek a court order when it is impossible for the second spouse or partner to

administer his private assets or the common assets, or when he seriously fails in the administration of the common assets. One of the reasons can be the loss of mental capacity. The court can give this order [bestuursopdracht] and authorise the first spouse or partner to take over the administration and perform actual and legal acts with these assets. Although consisting of only one article, this provision resembles a protective trust customised to the situation of marriage or registered partnership.

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?

This form of representation is elaborated in only five legal provisions (articles 6:198 - 202 CC). When a person takes care of the interests of another person on a reasonable ground without being obliged or authorised to do so, several rights and duties arise. The agent must exercise due care and as far as reasonable he must continue to take care of the interests of the other person. For example, when a person discovers that his neighbours are on holiday abroad and that their house is on fire, he can decide (after calling the fire brigade) to rescue the pets and the valuable paintings in his neighbour's house. The neighbours are then obliged to pay any costs he has incurred in rescuing their pets and valuable paintings (art. 6:199, 200 CC). If the requirements of *negotiorum gestio* are met, the representative has the power to represent but must do so in a proper way (article 6:201 CC). The private law instrument *negotiorum gestio* is not suitable to be used as an instrument for the support and representation of a vulnerable adult, as representation in these situations in most cases involves more than just acting in one situation. Besides this, anybody, not just partners or close relatives, can pose themselves as representative.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

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

Annulment of legal acts is possible in cases of error, threat, fraud or deception and what is called abuse of circumstances. The latter provision (article 3:44(4) CC) seems the most relevant. The concept of abuse of circumstances shows similarity with the concept of undue influence as mentioned in article 12 CRPD. There are several components to assume abuse of circumstances. Article 3:44(4) CC

makes clear that the counterparty of the adult must have known or should have known that the adult was induced to perform the legal act because of special circumstances, such as an emergency, dependency, levity, an abnormal mental state of mind or a lack of experience. The second requirement for a successful annulment is that the adult's counterparty has promoted the legal act to be performed although, based on what he knew or should have known, he should have refrained from doing so. The abnormal state of mind is easier to prove than the presence of an intellectual impairment or mental incapacity; the second requirement regarding the knowledge and the behaviour of the counterparty is even more difficult to prove. Article 3:54 CC contains a remarkable provision: the possibility to annul the legal act expires if the misuser offers sufficient compensation instead. And article 3:54(2) CC formulates that the court can order a change in the consequences of the legal act to eliminate the disadvantage instead of annulling the act completely.

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?

The law does not explicitly provide for any party – be it a spouse, parent or someone else – to make advance arrangements on behalf of an adult.

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

Before we proceed with an assessment of the system of adult protection measures in the Netherlands, it seems appropriate to first dedicate a few words to the interpretation of article 12 CRPD; a human rights provision which is often used as a benchmark to assess the extent to which a country promotes the empowerment and protection of vulnerable adults. Article 12 CRPD has been the subject of considerable debate. In this regard, it is argued, by the Committee on the Rights of Persons with Disabilities at the forefront, that so-called measures of substitute decision-making are to be abandoned in favour of supported decision-making alternatives.[83] The terms 'substitute' and 'supported decision-making', which do not feature in the CRPD itself, are however frequently used in different ways and therefore mired with ambiguity.[84] Both concepts can in our opinion best be understood in a factual sense as amounting to a situation where the adult is provided with the support needed to make a decision himself (supported decision-making) and a situation where a decision is made on behalf of the adult in the event the adult is unable to make a decision himself (substitute decision-making). Understanding the concepts in this sense, we consider both forms of decision-making permissible under article 12 CRPD. As article 12(3) CRPD makes clear, however, preference should be given to measures and provisions of support enabling the adult to make a decision himself. In addition, in situations where a decision is made on behalf of the adult, these decisions should, as much as possible, be based on the will and preferences of the adult concerned (article 12(4) CRPD).[85]

For the Dutch system of adult protection measures the aforementioned implies a change of perspective. Instead of the traditional notion of protection through a deprivation or limitation of legal capacity, article 12(3) CRPD emphasizes provisions empowering and supporting the adult in the exercise of his legal capacity. Overlooking the landscape of adult protection measures in the Netherlands, we argue that although the Netherlands has taken some first steps, much more can be done to achieve this ideal. The Dutch system of adult protection measures is still predominantly based on the concept of legal representation. Article 12 CRPD makes clear, however, that preference should be given to support enabling an adult to make his own decisions. We would, therefore, argue that more attention is needed for the development of (new) measures and instruments providing the adult with the support needed to make his own decisions. When it comes to measures

83 CRPD, General Comment No. 1. Article 12: Equal recognition before the law.

84 Although both terms are defined by the Committee in their General Comment No. 1, they are not used in the Convention itself. See also W. Martin, S. Michalowski, J. Stavert, A. Ward, A. Ruck Keene, C. Caughey, A. Hempsey, and R. McGregor, The Essex Autonomy Project Three Jurisdictions Report. Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK (University of Essex, 2016).

85 See also: H.N. Stelma-Roorda, C. Blankman, and M.V. Antokolskaia, 'A Changing Paradigm of Protection of Vulnerable Adults and Its Implications for the Netherlands', Family & Law 2019.

and instruments of support – through legal representation – in the absence of decision-making capacity of the adult, more can be done to ensure that this support is, as much as possible, provided in accordance with the will and preferences of the adult. In this regard, both law and practice already provide for ways in which the will and preferences of the adult concerning the choice of representative, are as much as possible respected. As noted, the court must respect the adult's preference concerning the choice of guardian, unless there are good reasons not to do so. Adults, in addition, have the possibility, through a *levenstestament*, to appoint an attorney of their own choosing. However, more attention to ways in which the adult's wishes and preferences can be respected not only at the start of an adult protection measure but throughout the application of an adult protection measure is called for. In this regard, a good start would be the adoption of a general standard, obliging representatives (both guardians, attorneys and *ex lege* representatives) to involve the adult as much as possible in the decision-making process.

As the aforementioned makes clear, there is in the Netherlands work to be done. This seems to be recognised in practice. Important actors within the adult protection system – the courts, adult guardianship organisations, the notariate, etc. – increasingly search for ways to ensure that the adult's rights, will and preferences are respected. A good example is the development of the *levenstestament*, which has been designed and conceptualised in practice by the Dutch notariate. Another example, on a slightly smaller scale, concerns the Recommendation on state-ordered measures, an informal guideline drawn up by an expert group of judges, which includes the advice – although this is not required by law – to hear the adult in all cases concerning the request for a state-ordered measure.[86] The Recommendation, in addition, advocates a principle of subsidiarity, whereby courts are advised to refrain from ordering an adult guardianship measure when the adult has put in place a *levenstestament*. In this regard, it is important that these and other developments are also followed by appropriate and adequate legislation. On a large scale, this means the reconceptualization of a legal system that is founded upon a notion of protection through a restriction of legal capacity. On a smaller scale, this means that the development of 'new' instruments, such as the levenstestament, should be followed by appropriate legislation when necessary.

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

86 Landelijk Overleg Vakinhoud Civiel en Kanton & Toezicht, Aanbevelingen Meerderjarigenbewind 2018, via: https://www.rechtspraak.nl/SiteCollectionDocuments/aanbevelingen-meerderjarigenbewind.pdf (last accessed: 31-01-2022).

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;**
c. **protection during the operation of adult support measures:**
   - **protection of the vulnerable adult against his/her own acts;**
   - **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**
   - **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;**
   - **protection of the privacy of the vulnerable adult.**

When assessing the Dutch system in terms of protection, a distinction can be made between protection in situations of *ex lege* representation and protection in situations where a state-ordered measure is in force or requested. The options available to the adult to oppose *ex lege* representation which in his opinion is not wanted or not needed, are twofold. The main possibility for the adult is to prove that he never lost his mental capacity or that he has recovered from a period when he lacked the necessary decision-making capacity. Decisive is an assessment by a – medical – expert showing that the adult possesses his mental capacity and that there is no legal basis for *ex lege* representation. The other option for the adult is to apply for a guardian. This option does not lead to the preservation of restoration of the adult's legal capacity but offers the possibility for the adult to obtain a representative of his own choice. In such proceedings, the court is obliged to appoint the person proposed by the adult, unless there are valid reasons not to respect the adult's preference.

Another situation in which an adult may need protection concerns the possibility that the adult wishes to have a legal act performed by himself annulled. The Dutch Civil Code allows such an annulment on the ground that the adult suffered from a disturbance of his mental faculties, as a result of which he could not reasonably assess the interests involved in the legal act performed by him (see also the court case outlined in the answer to question 14). The protection of the adult is weak as the burden of proof is on him. Partial protection can be found in article 6:230o CC. This article offers consumers the right to a cooling-off period up to fourteen days after the product has been delivered or the service has been concluded and the right to dissolve the contract within this period.

Most proceedings leading to deprivation, limitation or restoration of legal capacity are those involving state-ordered measures.[87] Proceedings leading to the application of a state-ordered measure have a low threshold. For instance, the Dutch Supreme Court has ruled several times in the past that an assessment by an independent medical expert is not required.[88] According to article 800 (1) CCP, the adult receives a copy of the request for a state-ordered measure and is summoned to the hearing. Until 1 April 1995, article 885(2) CCP obliged the court to hear the adult at his place of residence if the adult could not come to court. Currently, courts are no longer obliged to do so; article 802 CCP formulates hearing the adult at his place of residence as a possibility. Instead, the court must give the adult the opportunity to express his opinion (article 809(2) CCP). This is undoubtedly a restriction of the adult's procedural rights. This step back in the protection of the adult's procedural rights is partly corrected by the courts themselves and their case law. As mentioned above (see the answer to question 67), the Recommendation on state-ordered measures, drawn up by the courts, includes the advice that the adult should be heard in all cases concerning the application for a state-ordered measure. And failure to hear the adult can result in the dismissal of the appointed guardian.[89]

Legal aid is not available for the above proceedings. While the low threshold for initiating and realising support and protection can be considered an advantage for adults who need this support and protection, the lack of legal aid undoubtedly has a negative impact on the adult's legal position. The Dutch system also lacks an infrastructure in which the adult is informed and prepared for a procedure that may result in a lifelong restriction of the adult's legal capacity. A minor deterioration of the protection of the adult during the procedure is the removal of the obligation for the court (article 883 CCP old until 1995) to decide on an application for full guardianship by a chamber composed of three judges. The procedural rights and the legal position of a minor facing proceedings to have a state-ordered measure take effect when he comes of age are unclear. Article 1:381(6) CC is likely to apply and provides that the person whose full guardianship it concerns, is authorised to initiate proceedings or appeal full guardianship. Proceedings include the application, alteration or termination of the measure or the dismissal of the guardian.

The protection against 'unwise decisions' is very strong in cases of full guardianship and the same applies to protective trusts if the protective trust is registered in the Curatele- en bewindregister. Legal acts performed without consent or co-operation can be annulled in most cases.

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87 As discussed in the answer to question 63, a de facto limitation of legal capacity is also possible in the context of a so-called 'bestuursopdracht' (article 1:91 CC), whereby a spouse/registered partner is authorised by the court to take over the management of certain affairs of the other spouse/registered partner. However, this concerns a limited number of cases.

88 Dutch Supreme Court, 6 October 2017, ECLI:NL:HR:2017:2562 and 6 April 2018, ECLI:NL:HR:2018:533.

89 Decided by the Dutch Supreme Court on 14 October 2022, ECLI:NL:HR:2022:1458.

According to article 1:385 (1 under b) CC Old, it was impossible for the adult under full guardianship (when it was based on his physical or mental condition) to request the dismissal of his guardian. This violation of the adult's human rights was remedied in 2014 through article 1:381(6) CC, which allows the adult to initiate proceedings concerning his full guardianship. The person under full guardianship can start proceedings against his full guardian and instruct a solicitor unless he lacks the mental capacity to do so, even with the support of his solicitor. The full guardian is allowed to veto this contact only when the impact of this contact on the adult's health is so unfavourable that this contact should be considered irresponsible.[90] This decision still leaves room for the full guardian to obstruct the adult in initiating proceedings aimed at the guardian's discharge, but this can be considered a proper balance between empowerment and protection.

The regional branches of the Dutch organisation *Veilig Thuis* have the power and the duty to act upon a report of abuse or neglect of the adult. They can initiate an investigation that can end the neglect and stop the abuse. However, situations of abuse are hard to detect and, in some cases, 'victims' do not consider themselves as such or are ashamed to report the abuse. The government has started awareness campaigns on television. Research regarding elder abuse and undue influence is slowly gaining momentum.

The digital privacy of vulnerable adults is generally well protected due to the introduction of the European Union General Data Protection Regulation, in the Netherlands also known as the *Algemene Verordening Gegevensbescherming* (AVG).

As an overall assessment, two relevant observations can be made: the balance between empowerment and protection is shifting towards more emphasis on empowerment, although there remains room for correcting unwise decisions.[91] Legislation on state-ordered measures is lagging behind and needs to be modernised in order to meet the standards of the CRPD. The imbalance is most evident with the procedural rules regarding state-ordered measures. A second general concluding remark is that much is unknown because empirical research on these issues is lacking.[92]

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90 Dutch Supreme Court 28 January 1994, ECLI:NL:HR:1994:ZC1246. Also in case of a protective trust District Court Rotterdam, 11 November 2016, ECLI:NL:RBROT:2016:8858.

91 Two decisions illustrate this development. The Dutch Supreme Court decided on 15 July 2022, ECLI:NL:HR:2022:1113, that the full guardian was authorised by the court to change the regime of the adult's matrimonial property law and the adult under full guardianship could not veto this change that resulted in a tax saving of € 350,000 for both spouses. The Court of appeal Arnhem-Leeuwarden decided on 11 October 2022, ECLI:NL:GHARL:2022:8787, that an adult under protective trust was free to decide on accepting or rejecting an inheritance and was not bound by provisions in inheritance law such as article 4:193 CC, requiring him to decide within three months.

92 The lack of data is, in a more general sense, at odds with article 31 CRPD.