

## ARTICLE

# The reforms of Spanish law on legal capacity and supported decision-making for persons with disabilities

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## 1. The long road towards implementing Article 12 CRPD into Spanish Law

### 1.1 Introduction

Spain signed the Convention on the Rights of Persons with Disabilities (hereafter CRPD) on 3 December 2007. It has been in force since 3 May 2008. Following the adoption of the CRPD, several special statutes about the social and economic rights of people with disabilities were enacted.<sup>1</sup> Yet the reforms related to the right to legal capacity (Art. 12 CRPD) only took off at the end of 2018, when the government presented a comprehensive bill prepared by the General Commission of Codification to abolish incapacitation and adult guardianship. The bill was passed with substantial amendments as Act 8/2021 of 2 June.<sup>2</sup> The act entered into force three months later, on the 3 September 2021.

This article examines the new legal framework for supporting and protecting adults introduced by Act 8/2021. After a very brief review of the old law and some issues raised until the enactment of the reform (1.2 and 1.3), the article describes the various elements whereby current Spanish legislation seeks to comply with Article 12 CRPD: how the issue of equal legal capacity for all has been tackled, the legal instruments aimed at giving effect to the right to obtain support in the exercise of one's legal capacity, and the statutory safeguards (2). The article concludes with a critical balance of the first years of application of the new law (3).

### 1.2 The situation before the Act 8/2021 of 2 June

The original wording (of 1889) of the Spanish Civil Code on adult protection law was in line with centuries-old rules based on Roman law and on the deprivation of legal agency to those considered mentally insane. This legal framework started from their inability to act and paved the way to permitting their detention without due process of law.<sup>3</sup>

- 1 Currently consolidated in the General Act on the rights of persons with disabilities and their social inclusion, approved by Royal Legislative Decree 1/2013, of 29 November (*Boletín Oficial del Estado* (hereafter BOE) no. 289, 3 December 2013).
- 2 Act 8/2021, of 2 June, reforming civil and procedural legislation for supporting people with disabilities in the exercise of their legal capacity (BOE no. 132, 3 June 2021).
- 3 R. Bercovitz provided a vivid account of injustices in his remarkable book *La marginación de los locos y el Derecho*, Taurus: Madrid 1976. See also F. de Castro, *Derecho civil de España*, vol. II-1, Instituto de estudios políticos: Madrid 1952; new ed. Civitas, Madrid 1984.

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After the passing of the democratic constitution in 1978, adult protection law was substantially reformed to protect the interests of people suffering from impairments that prevented them from managing their personal and economic interests.<sup>4</sup> The reform relied on the judicial procedure of *incapacitation*. Article 200 CC (as of 1983) stated that the only grounds to incapacitate a person were the ‘permanent physical or psychic diseases or impairments that prevent a person from making his or her own decisions’. Article 760.1 Civil Procedure Act (hereafter LEC), also demanded that any ruling on incapacitation ought to lay down its scope and the limits it stipulated on the person’s legal capacity. Thus, since 1983, Spanish law already pointed to the principles of legality, necessity, and proportionality.<sup>5</sup> In practice, however, most people with impaired decision-making capacity were deprived of their legal autonomy outright. They could not give valid consent to most legal acts, and the court transferred the decision-making power to a guardian or to the parents, in the case of adult children with disabilities.<sup>6</sup>

### 1.3 *The CRPD and the need to reform Spanish civil law*

After the entry into force of the CRPD, it was suggested that it automatically entailed the repeal of incapacitation. Such a view was, however, categorically rejected by the Civil Chamber of the *Tribunal Supremo*. In a judgment issued on 29 April 2009, it said:

[The] Civil Code would not be contrary to the values of the Convention because the adoption of specific measures for this group of people is justified, given the need for protection of these persons on the grounds of their lack of understanding and will.

The court believed that the existing protection measures complied with the CRPD so long as they were effectively tailored to the incapacitated person’s needs and impairments. Case law prompted lower courts to give priority to the most flexible measure already available in the adult protection system. Instead of guardianship (*tutela*), courts should prefer trusteeship (*curatela*). They reframed it as a supported decision-making tool which was allegedly CRPD-compliant. Courts also adapted their approach to individual cases<sup>7</sup> and the judgments’ language, focusing on personal issues such as the right to vote<sup>8</sup> or the right to marry<sup>9</sup> and trying to strike a fair balance between autonomy and protection regarding financial issues.

4 See Act 13/1983, of 24 October, reforming guardianship law (BOE no. 256, 26 October 1983).

5 As stated fundamentally in Recommendation no. R(99)4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults, adopted on 23 February 1999.

6 See also P. Cuenca Gómez, ‘Reflections on the Reform of Spanish Civil Legislation on Legal Capacity of Persons with Disabilities’, in: M. Donnelly, R. Harding & E. Taşcıoğlu (Eds.), *Supporting Legal Capacity in Socio-legal Context*, Hart Publishing: Oxford 2022, p. 158-60.

7 See among many others *Tribunal Supremo* 20 October 2015 and 19 January 2020.

8 See also Organic Act 2/2018, of 5 December, on the right to vote for all persons with disabilities (BOE no. 294, 6 December 2018).

9 For instance, see *Tribunal Supremo* 15 March 2018.

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Many kept asking for substantive and procedural reforms. The leading voice was that of the *Comité Español de Representantes de Personas con Discapacidad* (CERMI).<sup>10</sup> Other organizations, including persons with disabilities and their families, as well as service providers, also lobbied to get the law changed.<sup>11</sup> They were encouraged by the CRPD Committee. In 2011, it required that

[T]he State party reviews the laws allowing for guardianship and trusteeship, and takes action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will, and preferences.<sup>12</sup>

At a political level, the consensus seemed easy. On two occasions, the Spanish Parliament set a deadline for the government asking it to present a bill on this issue. Yet successive deadlines expired, and no project or draft bill saw the light of day for more than ten years.

Academics were split among those aligned with the views held by the CRPD Committee in General Comment No. 1<sup>13</sup> and those who shared a more nuanced view of the challenges the CRPD posed to traditional capacity law. The former produced mostly philosophical work around the need to enshrine universal legal capacity and against procedures depriving disabled people of their legal capacity.<sup>14</sup> Civil society organizations took the same approach in non-official proposals of law reform.<sup>15</sup> The second opinion was represented by academics who followed the line taken by the Supreme Court, pointing out that limitation of legal capacity and substitutive decision-making were reasonable means of protecting people with

- 10 See CERMI Estatal, *Derechos humanos y discapacidad. Informe España 2009* (27 May 2010) (including a *Propuesta de esquema básico del CERMI para instaurar un nuevo procedimiento de provisión de apoyos para la toma de decisiones de acuerdo con la Convención Internacional sobre los Derechos de las Personas con Discapacidad* (see p. 66-70)). CERMI is the independent mechanism for monitoring the application of CRPD in Spain.
- 11 See more references in M. Pereña Vicente, 'La Convención de Naciones Unidas sobre los derechos de las personas con discapacidad. ¿El inicio del fin de la incapacitación?', *La Ley* 2011, no. 4, p. 1423-1424.
- 12 § 34 Concluding observations on the report submitted by Spain under Art. 35 UNCRPD (CRPD/C/ESP/CO/1) (19 November 2011).
- 13 General comment No. 1 (2014) Art. 12: Equal recognition before the law (CRPD/C/GC/1) (19 May 2014).
- 14 Instituto de Derechos Humanos Bartolomé de las Casas de la Universidad Carlos III de Madrid, *El impacto de la Convención internacional sobre los derechos de las personas con discapacidad en el ordenamiento jurídico español* (2009) p. 16-8; available at [www.tiempodelosderechos.es/docs/informe\\_huri-age1.pdf](http://www.tiempodelosderechos.es/docs/informe_huri-age1.pdf). The Spanish Bioethics Committee took a similar approach: *Informe del Comité de Bioética de España sobre la necesidad de adaptar la legislación española a la Convención de Derechos de las Personas con Discapacidad*, 20 December 2017, p. 20-23; available at [http://assets.comitedebioetica.es/files/documentacion/es/informe\\_final\\_CDPD.pdf](http://assets.comitedebioetica.es/files/documentacion/es/informe_final_CDPD.pdf) (last accessed: 12 June 2023).
- 15 Submisión de Expertos sobre el Procedimiento de Modificación de la Capacidad de Obrar del Real Patronato sobre Discapacidad, *Propuesta articulada de reforma del Código Civil y de la Ley de Enjuiciamiento Civil para su adecuación al artículo 12 de la Convención Internacional de los Derechos de las Personas con Discapacidad* (13 June 2012).

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cognitive and psychosocial disabilities.<sup>16</sup> A proposal for a new Civil Code by the Association of Civil Law Professors also relied on the automatic restriction of legal capacity by court-ordered measures.<sup>17</sup>

The final milestone was the passing of Act 8/2021. The presentation of the initial draft bill triggered a reaction from hundreds of social agents, individuals, and institutions, who sent comments to the public consultation.<sup>18</sup> The bill also resulted in observations from different consultative bodies. Among them, the judiciary council voiced the harshest critique, pointing to the lack of financial and human resources to execute the reform as it was planned. Hundreds of proposals for the bill's amendment were filed in the Parliament. After intense negotiation between the ruling parties and the other political parties in both Chambers, the Act was passed with a large majority of votes.

The reforms were received unevenly. Organizations representing persons with disability and their families backed them.<sup>19</sup> Providers of guardianship services also endorsed the change even if they expressed concerns about the lack of proper funding and the need to adapt their support practices.<sup>20</sup>

Legal practice and academia appeared divided. Judges and public prosecutors felt overwhelmed with the prospect of reviewing thousands of old incapacitation and guardianship orders.<sup>21</sup> Legal practitioners expressed their doubts about the actual scope of the reform and how to handle new cases.<sup>22</sup> Academics focused on the many deficiencies of a reform involving more than 300 articles from different statutes. The old divisions of opposing views remain under new forms. Those who were

- 16 C. Amunátegui Rodríguez, '¿Crisis de la incapacitación? La autonomía de la voluntad como posible alternativa para la protección de los mayores', *Revista de Derecho Privado* 2006, no. 90, p. 9-68 and G. García Cantero, '¿Incapacitación vs. Persons with disability... o viceversa?', *Revista jurídica del notariado* 2014, no 88, p. 743-819. See also C. Martínez de Aguirre y Aldaz, *El tratamiento jurídico de la discapacidad psíquica: reflexiones para una reforma legal*, Thomson Reuters Aranzadi: Cizur Menor 2014.
- 17 Art. 172-1.3 *Propuesta de Código Civil*, Tecnos: Madrid 2018, p. 286.
- 18 See the statement made by the Spanish Psychiatry Society: 'Posicionamiento de la Sociedad Española de Psiquiatría sobre la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad', *Revista de Psiquiatría y Salud Mental*, 2020 Vol. 13, no. 4, p. 177-179 (critical against the stance taken by the CRPD Committee and the draft bill).
- 19 *Plena Inclusión España* ([www.plenainclusion.org/noticias/entra-el-vigor-la-mayor-reforma-legal-sobre-discapacidad/](http://www.plenainclusion.org/noticias/entra-el-vigor-la-mayor-reforma-legal-sobre-discapacidad/)) (last accessed 9 May 2023)
- 20 *Liber* (<https://fundacionestutelares.org/espana-asume-desde-manana-la-mayor-reforma-legal-de-su-historia-relacionada-con-las-personas-con-discapacidad/>) (last accessed 19 April 2023).
- 21 See *Memoria Fiscal General del Estado 2022*, p. 875. Available at [www.fiscal.es/memorias/memoria2022/FISCALIA\\_SITE/index.html](http://www.fiscal.es/memorias/memoria2022/FISCALIA_SITE/index.html) (last accessed 27 May 2023).
- 22 In spite of very critical individual voices, professional bodies and corporations have backed the reforms by producing good practices documents and guidelines. For instance, the General Notary Council immediately endorsed a practical guide for practitioners (*Guía Jurídica sobre la gran reforma de la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica*; available at <https://fundacionestutelares.org/recursos/el-impacto-de-la-reforma-del-derecho-civil/>) (last accessed 29 May 2023). See also LIBER, Asociación de entidades de apoyo a la toma de decisiones, *Protocolo de buenas prácticas en los procedimientos de provisión de apoyos para el ejercicio de la capacidad jurídica* (March 2022); available at <https://fundacionestutelares.org/se-presenta-el-primer-protocolo-de-buenas-practicas-en-actuaciones-judiciales-para-el-cumplimiento-de-la-ley-sobre-discapacidad-y-capacidad-juridica/> (last accessed 29 May 2023).

reluctant to the change complained of the inconsistencies of the reform and warned about the risks of prioritizing the will and preferences of the person with a disability.<sup>23</sup> Those who supported the reforms applauded the legislators' steps but regretted missed opportunities due to the compromises made during the drafting process.<sup>24</sup> The Supreme Court's initial statements about the new legislation's principles seem indeed to have watered the expectations of the reform's emancipatory effects, particularly for persons with psychosocial disability and mental health disorders.<sup>25</sup>

## 2. The new framework of measures for the exercise of legal capacity

### 2.1 The right to legal capacity

By merging the traditional concepts of *capacidad jurídica* – capacity to hold rights and duties (legal standing) – and *capacidad de obrar* – capacity to exercise those rights and duties (legal agency) – under the umbrella of *capacidad jurídica* (legal capacity), the new law starts from *universal legal capacity* for all persons of age.

Limitations on the legal capacity of adults should thus no longer be possible. Any person of age, even if they suffer from an intellectual or developmental disability, dementia, mental disorders, or any other impairment that permanently or occasionally affects their rational functioning, is to be legally treated as any other person of age without a disability.<sup>26</sup> Hence, the ability to consent to legal acts cannot be excluded from the outset either, and it should be assessed *in casu* according to the individual's factual capacity.

However, the 2021 reform did not entirely get rid of restrictions on the legal capacity of persons with disabilities. It took a more pragmatic approach, whereupon courts and practitioners could keep the assumption that the concerned person cannot legally act on their own in subject-matters belonging to the responsibility of the support person. To that extent, in practice, the effects of a court-ordered support measure on limitation of the exercise of legal capacity are the same as for incapacitation.

23 C. Martínez de Aguirre y Aldaz, 'La observación general primera del Comité de Derechos de las Personas con Discapacidad: ¿interpretar o corregir?', in: G. Cerdeira Bravo de Mansilla, L.B. Pérez Gallardo (dirs.) & M. García Mayo (coord.), *Un nuevo Derecho para las personas con discapacidad*, Olejnik: Santiago de Chile 2021, p. 85-112. See also, among others C. Cuadrado Pérez, 'Modernas perspectivas en torno a la discapacidad', *Revista Crítica de Derecho Inmobiliario*, 2020, no. 777, p. 13-90; C. Rogel Vide, '¿Capacidad de los discapaces?: Notas en torno al proyecto de ley 121/27', *Revista general de legislación y jurisprudencia*, 2021, no. 1, p. 7-19 and T. Rubio Garrido, 'La Ley 8/2021, de 2 de junio, sobre personas con discapacidad: ¿un ejemplo de buenismo y adanismo legislativos?', *InDret* 2022, no. 3; available at [www.indret.com](http://www.indret.com).

24 M.P. García Rubio, 'La reforma de la discapacidad en el Código Civil. Su incidencia en las personas de edad avanzada', *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 20221, no. 25, p. 81-109. See also Cuenca Gómez (2022), p. 158 ('the new regulation perpetuates some elements of substituted decision-making including some controversial limits to the principle of respect of the will and preferences of persons with disabilities').

25 See para. 2.3.1.

26 General comment No. 1 (2014) § 13: 'Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.'

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Under the old law, it was custom that judgments forbade incapacitated persons from entering into legal transactions, getting married, making a will, voting at elections, etc. This is the reason why the new Article 269 CC prohibits ‘mere deprivation of rights’. However, the Supreme Court is construing this provision in the sense that the law intends to avoid outright deprivation of rights, but ‘without prejudice of any limitation *that derives from the support measures ordered*’.<sup>27</sup>

Moreover, even if according to Article 7 LEC ‘any person may appear in court’, the legal ability of vulnerable adults to appear in court depends on whether support measures are in place. ‘The scope and content of the support measures’ determines therefore their actual procedural capacity. The lack of procedural capacity is ascertained by the court *ex officio* at any time during the proceedings.<sup>28</sup> If a person is found lacking, the court appoints a *defensor judicial* (interim representative) to act on their behalf.<sup>29</sup>

Finally, the new Article 1302.3 CC states that a contract can be declared void if a person with a disability concludes it *without using support measures*. This provision has triggered different interpretations. The prevailing view seems to be that it is irrelevant whether that person had the decision-making skills to agree to the contract. The contract should be void because they entered into it without the supporter’s intervention.<sup>30</sup> Other authors contend that support must have been necessary in the case at issue. They claim that if the person concerned had the factual capacity to enter the contract, it should be valid, irrespective of the lack of support.<sup>31</sup>

27 *Tribunal Supremo* 8 September 2021. Emphasis added.

28 Art. 9 LEC. Art. 7 bis 1.2 LEC, introduced by the 2021 reform, demands that persons with a disability participate in equal conditions as others in any legal proceedings in which they may be involved, and that courts provide ‘the adaptations needed to guarantee that these persons can communicate, understand the procedure and interact with the judicial administration’. Implementation of this provision is still a work in progress and NGOs complain about lack of political will to afford the financial means.

29 Art. 8 LEC.

30 See S. de Salas Murillo, ‘La reforma de la legislación civil para el apoyo a las personas con discapacidad en materia de obligaciones y contratos’, *Diario La Ley* 2021, 9841, and more references therein. The action may be filed within four years from the conclusion of the legal act at the request of the person concerned (with support if needed), their heirs, and the support person. The act may be confirmed before the end of the limitations period, and the effects of annulment can be opposed to third parties, even in good faith. However, in the case of an action brought by the support person, avoidance requires that the contracting party ‘knew the measures of support at the time of the contract or had abused the situation of disability to obtain an unfair advantage’ (Art 1302.3 II CC). There is an increasingly complex scholarly controversy regarding these provisions and the scope of the restitution due by the person with a disability. See an overview in M.A. Egusquiza Balmaseda, ‘La reforma del régimen de la anulabilidad’, in: F. Lledó Yagüe et al. (Eds), *Reformas legislativas para el apoyo a las personas con discapacidad: estudio sistemático de la Ley 8/2021, de 2 de junio, al año de su entrada en vigor*, Dykinson: Madrid 2022, p. 1151-1180.

31 See R. Tena Arregui, ‘El régimen de ineficacia de los contratos celebrados sin apoyo por las personas con discapacidad’, *El notario del siglo XXI: Revista del Colegio Notarial de Madrid*, 23022, no. 101, p. 40-46 (arguing on the basis of the wording of Art. 1301.4 CC [*cuando fueran precisas*]). See also Art. 1304, 1314 III and 1765 CC.



## 2.2 *The right to get support*

The starting point of any legal measure, including court-ordered measures, is not that a person's condition impairs them from acting rationally but that they can get 'support for the proper exercise of their legal capacity'. Support is to be offered to achieve 'the full development of their personality and legal development in conditions of equality'.<sup>32</sup> By doing so, Spanish legislation intends to comply with Article 12.3 CRPD.

The law no longer mentions certain types of disability, impairments, or health conditions as grounds for court-ordered measures.<sup>33</sup> However, Article 249 II CC states that support measures shall pursue that the person 'can develop their decision-making process, by informing them, helping them understand and reason, and facilitating that they can express their preferences'.<sup>34</sup> In practice, court orders focus on persons whose health conditions, intellectual or psychosocial disability, or mental health issues place them in serious difficulties in handling their affairs alone.<sup>35</sup>

The 2021 reform links support with different legal tools. They are ranked following the principles of autonomy and subsidiarity.

First of all, the individual is free to appoint the person who will support them in exercising legal capacity and to set the scope of this support.<sup>36</sup> The legal instruments provided involve the explicit consent of the granter – the law terms them voluntary measures – and have to be formalized in a notarial deed. Voluntary measures have priority over any other type of support, including court-ordered measures.<sup>37</sup>

In addition to voluntary measures, Article 250 I CC lists two other types of supports: a) the *guarda de hecho* (roughly translated as 'de facto custody'), which points to informal support provided by relatives, family members or non-professional carers;<sup>38</sup> and b) court-ordered measures: the *curatela* and the *defensor judicial*.<sup>39</sup> When support is provided *de facto*, courts are prevented from appointing a support person or issuing supplementary orders unless the assistance the person receives is proven insufficient or inadequate.

32 See Art. 249 I CC.

33 M. Pereña Vicente, 'Una contribución a la interpretación del régimen jurídico de las medidas de apoyo en el ejercicio de la capacidad jurídica consagradas en la ley 8/2021 de 2 de junio', in: M. Pereña Vicente & M.M. Heras Hernández (Dirs.), *El ejercicio de la capacidad jurídica por las personas con discapacidad tras la Ley 8/2021 de 2 de junio*, Tirant lo blanch: València 2022, p. 172.

34 M.P. García Rubio & M.E. Torres García, 'Artículo 249', in: M.P. García Rubio & M.J. Moro Almaraz (Coord.), *Comentario articulado a la reforma civil y procesal en materia de discapacidad*, Thomson Reuters-Civitas: Madrid 2022, p. 209.

35 A. Vaquer Aloy, 'El sistema de apoyos como elemento para el ejercicio de la capacidad jurídica', in: F. Lledó Yagüe et al (Eds), *Reformas legislativas para el apoyo a las personas con discapacidad: estudio sistemático de la Ley 8/2021, de 2 de junio, al año de su entrada en vigor*, Dykinson: Madrid 2022, p. 508.

36 Art. 250 II CC. See 2.2.1.

37 Art. 249 I CC.

38 Art. 263 to 267 CC. See 2.2.2.

39 Art. 250 V and VI CC. See 2.2.3.

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### 2.2.1 *Voluntary measures*

The new law includes two types of instruments under this heading. On one side, the continuing powers of attorney<sup>40</sup> (hereafter CPA) whereby the granter gives powers to a representative in the event of their need for support.<sup>41</sup> The other instrument is the *support agreement*, which aims to secure the support one of the parties needs when it is concluded. Whereas the former has been known since 2003 and is widely employed, the latter is a novelty, for which the new provisions only indirectly mention its availability and nothing else.<sup>42</sup>

Before the 2021 reform, CPAs were considered only suitable for financial matters because the agent did not have *legal* representative status. For personal matters, the adult's will should be channeled through advance directives and *autotutela*, subject to their own rules and safeguards.<sup>43</sup> Currently, however, both CPAs and support agreements may tackle the adult's personal as well as financial issues.

There are two remarkable differences between CPAs and support agreements. The CPAs are *typically* unilateral and, therefore, valid and effective regardless of the person appointed being aware of it.<sup>44</sup> Conversely, support agreements are *always* bilateral and purport the obligation of one party to provide support to the other under the binding terms of the agreement. Besides, while the CPAs consist in vesting the attorney with powers to act on the granter's behalf, support agreements are appropriate for supported decision-making.

These differences point to the potential users of each instrument. Individuals planning their future incapacity do not need to agree with those they want to appoint, even if this could be advisable.<sup>45</sup> When they grant a CPA, they do not necessitate the support they are contemplating; it is an uncertain event. But future incapacity may deprive them of their ability to handle personal and financial issues. Representative tools will be the only alternative to court-ordered substitute decision-making measures. On the other hand, support agreements are offered to persons with disability who need the support they seek to be able to participate in legal transactions. The agreement warrants support tailored according to the person's needs and circumstances. It also implies the individual's continuous involvement in handling their affairs. Vesting the support person with

40 Arts. 256 to 262 CC (under the heading *poderes or mandatos preventivos*).

41 See also Art. 271 I CC concerning the anticipatory appointment of a *curador* by unilateral act, also termed *autocuratela*.

42 Art. 255 I CC. See C. Guilarte Martín-Calero, 'Comentario al art. 250', in: C. Guilarte Martín-Calero (Ed.), *Comentarios a la Ley 8/2021 por la que se reforma la legislación civil y procesal en materia de discapacidad*, Aranzadi: Cizur Menor 2021, p. 536, and C. Amunátegui, 'Comentario al art. 255', in: C. Guilarte Martín-Calero (Ed.), *Comentarios a la Ley 8/2021 por la que se reforma la legislación civil y procesal en materia de discapacidad*, Aranzadi: Cizur Menor 2021, p. 574 (both including criticisms for the lack of regulatory content on support agreements).

43 C. Amunátegui Rodríguez, *Incapacitación y mandato*, La Ley: Las Rozas 2008, p. 263.

44 M.P. García Rubio, 'Las medidas de apoyo de carácter voluntario, preventivo o anticipatorio', *Revista de Derecho Civil*, 2018, no. 5, p. 37-38.

45 §104 Recommendation CM/Rec(2009)11 of the Committee of Ministers to member states on principles concerning continuing powers of attorney and advance directives for incapacity (adopted on 9 December 2009) (recognizing nonetheless the granters' potential interest in not disclosing their intentions to the appointed attorneys).



representative powers is not forbidden. But as a tool to maximize the person's autonomy, the support agreement is fully operative without them.

Each instrument's different starting points and goals help tackle some issues the new law omits to regulate.

Concerning capacity, granting a CPA demands full competence. Support agreements do not need instead such stringent conditions, because they are based on the idea that the individual is competent to carry out all kinds of legal acts and participate in social life *on the condition that they receive appropriate support*. Therefore, this party must only be cognizant that this agreement is meant to appoint someone to intervene in their lives by advising and informing them and perhaps by acting on their behalf in certain matters.<sup>46</sup> Only a minimal capacity threshold would be enough for the support agreement. But if the concerned person's functioning does not allow them to recognize the goal and the scope of the supporters' functions, this instrument is not adequate. Any entitlement resulting therefrom may be questioned.

Notaries must carry out the necessary checks on the conditions to set up a support agreement: the need for support, the free and informed consent of both parties and the legal aptitude of the person chosen to carry out the function.<sup>47</sup> But the notary should also be aware of potential conflicts of interest or undue influence.<sup>48</sup> Legal scholars stress that although the concerned person can appear with the person they want to designate, the notary must interview them separately.<sup>49</sup>

No additional procedure is required to validate or homologate support agreements or CPAs, neither from the notary nor from any public authority. The notary must only notify them to the Civil Registry.<sup>50</sup> Their validity or legal effects, however, do not depend on their registration in the civil Registry, neither between the parties or concerning third parties. The purpose of registration is merely to avoid the risk of overlapping if a petition for judicial support is filed. Voluntary measures can also be notified to the Land Registry to be registered<sup>51</sup> when their content restricts the free administration and disposition of individual properties.<sup>52</sup>

Support agreements always enter into force immediately after being agreed upon. The entry into force of the CPA occurs instead when the granter is proven to need support.<sup>53</sup> Reference to incapacity or other descriptive formulae, such as the impossibility to personally attend one's affairs, was ruled out. Article 257 CC also states that the granter can decide how the need for support is to be proven. In practice, reference is frequently made to official recognition of a disability or

46 C Guilarte Martín-Calero 2021, p. 538. See also A. Castro-Girona, 'Artículo 255', in: M.P. García Rubio & M.J. Moro Almaraz (Coord.), *Comentario articulado a la reforma civil y procesal en materia de discapacidad*, Thomson Reuters-Civitas: Madrid 2022, p. 267.

47 Art. 145 Notarial Regulations (hereafter RN).

48 See A. Leciñena Ibarra, 'Reflexiones sobre la formación de la voluntad negocial en personas que precisan apoyos en el ejercicio de su capacidad jurídica', *Revista de Derecho Civil*, 2022, no. 9, p. 257-293, 267-269.

49 Amunátegui 2008, p. 576.

50 Art. 260 II CC.

51 Art. 2.4 *Ley Hipotecaria* (Land Registry Act, hereafter LH).

52 Art. 242 bis LH.

53 Arts. 249 I and 250 IV CC

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dependency degree. But the usual practice is that the notary formally compiles the conclusions of one or several physicians stating the granter's loss of capacity. Other possibilities are their admission to a nursing home, with or without a medical report. In addition, the granter may also expressly allow the attorney, or a trusted third party, to state that the support measure is to be activated.<sup>54</sup>

Neither the CPA nor the agreement appointing a support person limit the legal capacity of the concerned person. However, support agreements may include restrictions on the free disposal of assets or limitations in some personal issues (such as healthcare decisions). One example of the former is the power of veto that may be granted to the supporter as regards a particular type of financial transaction.<sup>55</sup>

Finally, attention must be paid to some grounds for terminating voluntary support measures. Their *revocation* or withdrawal is always possible, provided the individual meets the factual capacity requirements. The fact that the CPA enters into force upon 'proof of incapacity' does not mean that the granters lack the aptitude to revoke the CPA after that moment. They may well be able to form a free and informed decision, either acting alone or with support.<sup>56</sup> Secondly, in stark contrast with CPAs, a substantial change in the person's health condition should lead to the termination of any support agreement in force. They might no longer meet the minimum capacity requirements for making decisions with support, and any representative powers granted to the support person would become groundless. It is worth noting that the individual's situation is generally stable in many instances. Still, in other cases – such as progressive illnesses like dementia – the concerned person needs to transition from supported decision-making to substitute decision-making. In practice, this situation could be handled by entering a support agreement and then (with support) to grant a CPA. By doing so, the person can avoid the need for future judicial involvement to obtain additional protection measures.

### 2.2.2 *The role of the guarda de hecho*

Another dimension of the subsidiarity principle points to the role that must be recognized to informally-provided support as an alternative to court-ordered measures. Under the old law, the Supreme Court reinforced this principle by holding that there was no need to incapacitate people who had their interests protected through the intervention of their family or close persons.<sup>57</sup> By then, most of the adults who could be incapacitated were not. Their parents, children or siblings supervised their daily activities and acted on their behalf when needed.

The law named this situation *guarda de hecho*. If requested by the judge, the *guardador de hecho* had the legal duty to provide information about the situation of the adult and the state of their assets.<sup>58</sup> In 2015, an amendment to the Civil Code

54 See J.M. Valls i Xufré, *El poder preventivo*, Tirant lo blanch: València 2018, p. 329-333.

55 Guilarte Martín-Calero 2021, p. 537.

56 García Rubio 2018, p. 57.

57 *Tribunal Supremo* 17 October 2008.

58 Art. 303 CC.

allowed courts to grant the *guardador de hecho* temporary powers akin to those of a guardian.<sup>59</sup>

The 2021 reform wanted to follow this path and reinforced the position of these informal supporters. The *guarda de hecho* was thus placed on equal footing with voluntary and court-ordered measures.<sup>60</sup> As a result, if the person with a disability concludes a legal act together with their *guardador de hecho* the latter's intervention would now confer legal validity on the act.<sup>61</sup> Moreover, being *guardador de hecho* also amounts to a valid title for assisting a person in need of support and for acting on their behalf without further formalities.<sup>62</sup> The *guarda de hecho* may operate *simultaneously* with a voluntary support measure – such as a CPA – if the latter is not working properly.<sup>63</sup>

Despite its practical and legal importance, the law does not define the *guarda de hecho*. Scholarly definitions point to *permanent* support<sup>64</sup> provided *informally* on the grounds of a family or trust relationship.<sup>65</sup> It is not confined to spouses, partners, or relatives and must not be identified with *care*.<sup>66</sup> Cohabitation is not necessary either.

The *guarda de hecho* does not need to be communicated to the judge or adult protection authority<sup>67</sup> nor registered in the Civil Registry. But each time a person wants to act as *guardador de hecho*, this person must provide evidence of their relationship with the person concerned. Supplying such evidence has proven difficult. Proving that the adult and a person claiming to be their *guardador de hecho* share the same residence would not be enough.<sup>68</sup> Documents issued by social services showing that they are the contact persons regarding administrative,

59 Art. 303 I CC as amended by Act 26/2015, of 28 July (BOE no. 180, 29 July 2015).

60 See Art. 263 CC. A. Leciñena Ibarra, 'Comentario a los arts. 263 a 267', in C. Guilarte Martín-Calero (Ed.), *Comentarios a la Ley 8/2021 por la que se reforma la legislación civil y procesal en materia de discapacidad*, Aranzadi: Cizur Menor 2021, p. 647-648.

61 C. Guilarte Martín-Calero, 'Las grandes líneas del nuevo sistema de apoyos regulado en el Código Civil español', in: Asociación de profesores de derecho civil, *El Nuevo sistema de apoyos a las personas con discapacidad y su incidencia en el ejercicio de su capacidad jurídica*, Thomson Reuters Aranzadi: Cizur Menor 2022, p. 73 ('unless there is undue influence').

62 M. Pereña Vicente, 'La transformación de la guarda de hecho en el Anteproyecto de Ley', *Revista de Derecho Civil*, 2018, no. 5, p. 68.

63 Art. 250 III CC.

64 Benevolent interventions of third parties who engage in managing a personal or financial interest of a vulnerable adult on a particular occasion would be governed by the rules on *negotiorum gestio* (Arts. 1888-1894 CC). P. Lescano Feria, *La guarda de hecho*, Dykinson: Madrid 2017, p. 37-48.

65 Leciñena Ibarra 2021, p. 652.

66 *Professional* carers, at home or in residential premises, can no longer undertake support functions. See Art. 250 VIII CC. N. Álvarez Lata, 'Comentario a los arts. 263 a 267', in: R. Bercovitz Rodríguez-Cano (coord.), *Comentarios al Código Civil*, 5th ed., Aranzadi: Cizur Menor 2021, p. 493.

67 Álvarez Lata 2021, p. 496.

68 According to Leciñena Ibarra 2021, p. 660. But judges involved in these proceedings would have agreed to recommend that courts accept police and social reports, co-residence proof and deposition by witnesses, among others, as evidence of informal support. See *Grupo de trabajo sobre el nuevo sistema de provisión judicial de apoyos a personas con discapacidad y su aplicación transitoria*; available at [www.poderjudicial.es/cgpj/en/Subjects/Justice-and-Disability-Forum/Activities/Courses/Grupo-de-trabajo-sobre-el-nuevo-sistema-de-provision-judicial-de-apoyos-a-personas-con-discapacidad-y-su-aplicacion-transitoria--Cod--EX2201-](http://www.poderjudicial.es/cgpj/en/Subjects/Justice-and-Disability-Forum/Activities/Courses/Grupo-de-trabajo-sobre-el-nuevo-sistema-de-provision-judicial-de-apoyos-a-personas-con-discapacidad-y-su-aplicacion-transitoria--Cod--EX2201-) (last accessed 26 April 2023).

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medical or social issues are also deemed insufficient.<sup>69</sup> Banks, insurance companies or even public administrations will reject their intervention on behalf of the adult.<sup>70</sup> Different possibilities are being used in order to sort these difficulties out.<sup>71</sup> Some courts make official statements that some persons are *guardadores de hecho*,<sup>72</sup> whereas public prosecutors will issue decrees at their request in order to facilitate their actions vis-à-vis banks or insurance companies.<sup>73</sup>

The scope of the *guarda de hecho* has not been fully developed by the 2021 reform. It does not deal with the non-representative side of informal support. The law relies on the traditional practice of relatives handling affairs on behalf of vulnerable adults. Representative acts might involve all kinds of legal issues<sup>74</sup> and bind the adult regardless of their positive or negative outcome.<sup>75</sup> However, the *guardador de hecho* is legally authorized to act in a limited number of issues without judicial permission, namely applying for social benefits and concluding transactions on assets of limited value (unless they have 'personal or family significance for the adult').<sup>76</sup>

The *guarda de hecho* ends under different circumstances.<sup>77</sup> On the one hand, it ends when the adult requests that support be organized in another way. This element highlights the priority given by Spanish law to the adult's will.<sup>78</sup> On the other hand, it ends 'when the grounds that justified it disappear'.<sup>79</sup> So, if voluntary or court-ordered support measures were temporarily inoperative, resuming their activity should mean that the *guarda de hecho* must end.<sup>80</sup> The support person may also give up their task at any time. But in this case they must notify any vulnerability risk to the adult protection authority. Finally, at the request of the public prosecutor or any person interested in providing support to the adult, the judge may terminate the *guarda de hecho* if this is 'convenient'.<sup>81</sup> Scholarly writing is critical about this

69 R. Garcimartín Montero, *La provisión judicial de apoyos a personas con discapacidad*, Aranzadi Thomson Reuters: Cizur Menor 2021, p. 62.

70 C. Prados García, 'Negativa de un banco a reconocer la condición de guardador de hecho. Comentario al Auto 8/2022 del Juzgado n.º 3 de Córdoba, de 11 de enero de 2022', *Diario La Ley*, 2022, no. 10018, p. 1-4. See the reference to conversations opened by the public prosecutors with banks and insurance companies in *Memoria de la Fiscalía General del Estado 2022*, p. 886.

71 *Circular de la Comisión permanente del Consejo General del Notariado 3/2021*, of 27 September (exploring the legal possibilities available for the notaries' assistance in these matters).

72 See the references provided by J.R. de Verda y Beamonte, 'La guarda de hecho de las personas con discapacidad', in: Asociación de profesores de derecho civil, *El nuevo sistema de apoyos a las personas con discapacidad y su incidencia en el ejercicio de su capacidad jurídica*, Thomson Reuters Aranzadi: Cizur Menor 2022, p. 102-104.

73 *Memoria Fiscal General del Estado 2021*, p. 1098.

74 Álvarez Lata 2021, p. 495 (it is not confined to the ordinary administration of assets).

75 According to the old law, disadvantageous legal acts could be annulled. The relevant provision has been repealed by the 2021 reform.

76 N. Álvarez Lata 2021, p. 495 (no analogy allowed). In case of doubt, acts listed in Art. 287 CC (for which the *curador* needs judicial permission) do require judicial authorization (see Art. 264 IV CC).

77 See Art. 267 CC.

78 Leciñena Ibarra 2021, p. 649.

79 Art. 267, 2 CC.

80 Álvarez Lata 2021, p. 499.

81 Art. 267, 4 CC.

possibility, arguing that it challenges the very principle of subsidiarity and the preference for informal support,<sup>82</sup> and that specific legal grounds for removal should be proven.<sup>83</sup>

### 2.2.3 Court-ordered support measures

Courts can order the appointment of a *curador* or a *defensor judicial*. The former is reserved for instances where continuous or structural support is needed.<sup>84</sup> The *defensor judicial* is to be appointed when support is required sporadically, even if the same necessity may arise from time to time.<sup>85</sup> The statutory provisions do not provide more details about when to appoint one or the other; it is left to the court's discretion. However, any order must be proportionate and thus tailored to the person's circumstances. Appointing a *defensor judicial* shall be enough if they need assistance for a single act only. Otherwise, if support is required permanently, it should be provided by a *curador*.

It must be recalled that the 2021 reform has given priority to *guarda de hecho* over court-ordered measures: the appointment of a *curador* is dependent on proving 'the absence of a *guarda de hecho* that provides sufficient support...'.<sup>86</sup> This requirement of sufficiency also connects to the need that court-ordered support measures are proportionate.<sup>87</sup>

The measures cannot be ordered *ex officio*. They must result from a procedure filed by the individual, their relatives or the public prosecutor<sup>88</sup> before the first instance court of the individual's residence.<sup>89</sup>

After the 2021 reform, the petition must be filed through a non-contentious procedure (*jurisdicción voluntaria*).<sup>90</sup> The idea behind this innovation was that, in most cases, there is no contention that the support is needed and that the person or their close relatives should get a court-ordered measure through the easiest and fastest procedure available. Parents or children are no longer required to sue each other and undergo a potentially embarrassing legal procedure to get support.<sup>91</sup> The problem is that the 2021 reform made this petition compulsory *in all cases*. As a result, where contention arises between the involved parties,<sup>92</sup> they must endure a

82 Leciñena Ibarra 2021, p. 679.

83 Álvarez Lata 2021, p. 499.

84 Art. 250 V CC.

85 Art. 250 VI CC.

86 Art. 255 V pr CC.

87 In this sense, *Tribunal Supremo* 23 January 2023 (rejecting the appointment of a *curador* when the informal support provided by the son is sufficient to cope with the concerned person's needs).

88 The law mentions non-separated spouse or cohabitant, parent(s), children, and siblings. See Art. 42 bis a), 3 Act 15/2015, of 2 July, on voluntary jurisdiction (hereafter LJV).

89 Arts. 42 bis a).2 LJV and 756.2 LEC.

90 See Art. 42 bis a) LJV and 756.1 LEC.

91 On the personal and social costs involved in incapacitation procedures, see the anthropological account provided by J. Endara Rosales, *La construcción jurídica de la discapacidad*, Barcelona: UOC 2019.

92 But see Art. 42 bis b) 5 II LJV: Mere opposition to the appointment of a specific person as *curador* does not allow the closing of the non-contentious procedure.

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useless and time-consuming non-contentious procedure before filing a claim for an adversarial procedure.<sup>93</sup>

The court cannot decide on the support measure unless the individual and their close family members have been heard and medical and social expert witnesses have provided their professional report. Other professionals may also intervene to advise about the suitable support measures in the case.<sup>94</sup>

The current legal framework for court-ordered measures is meant to enhance supported decision-making and rule substitute decision-making out.

Article 255 V CC states that the powers conferred to the court-appointed support person shall be determined according to ‘the situation and circumstances of the person with a disability and their support needs’. Court-ordered measures shall also aim to ‘maximise [the adult’s] autonomy in exercising legal capacity’.<sup>95</sup> Only ‘in exceptional cases, when, despite considerable effort, it is not possible to determine the will, desires and preferences of the person, the support measures may include representative functions’.<sup>96</sup> Article 269 II and III CC also highlights that the order must specify the legal acts in which the person concerned is to be ‘assisted’ by the *curador* and where, as a last resort only, the *curador* may act on their behalf. The Preamble of Act 8/2021 admits that the powers given to the *curador* can, in this case, be general for financial as well as for personal issues. The law demands that ‘the life history of the person with a disability, their beliefs and values, as well as the aspects that they would have taken into consideration, must be considered, to make the decision they would have adopted if not being represented’.<sup>97</sup> However, the person holding or exercising representative powers also needs the court’s previous approval for certain legal acts,<sup>98</sup> in which case the court decides by assessing their ‘convenience ... to the adult’s interests’.<sup>99</sup>

### 2.3 Statutory safeguards

All support measures should be subject to safeguards aimed at countering the risks associated with the vulnerability arising from a limited decision-making capacity and the need to involve the intervention of support persons. Yet under the 2021 reform these safeguards may not apply equally on voluntary supports and on other kinds of supports.

#### 2.3.1 Respecting the rights, will and preferences of the person

The very first goal of safeguards is to respect the rights, will and preferences of the person. Article 249 II CC states that support persons ‘must act according to the

93 Art. 758 ff LEC.

94 Art. 759.3 LEC. The omission of medical evidence triggers the procedure’s nullity (*Tribunal Supremo* 15 October 2001).

95 Art. 268 CC.

96 Art. 249 III CC.

97 Art. 249 III in fine CC.

98 The *curador* needs the approval of the court for any act specifically mentioned in the order appointing them, but also, in any case, for the acts listed in Art. 287 CC.

99 Art. 65.1 LJV.



will, desires and preferences of the person concerned'.<sup>100</sup> This rule applies to all kinds of support.

Relatives providing informal support should therefore focus on enhancing the person's possibilities to decide by themselves, and activate their capacity as legal representatives as a last resort only. Concerning voluntary measures, supporters need to act in a way as to promote that decisions are really made by the adult, and refrain from influencing them and from acting as substitutive decision-makers in disguise. In the case of CPAs, respect for the person's will and preferences does not end at the time of granting the CPA, nor when they enter into force. Appointed attorneys have to respect the granter's actual will and, moreover, they must offer them ways to form and express their will.<sup>101</sup> Article 268 stipulates that all judicial measures shall 'take into account, in any case, the adult's will, desires, and preferences'.

The final responsibility for safeguarding the individual's will and preferences lies with the judiciary. Disagreements resulting from applying CPAs, support agreements or informal supports will eventually end in court. Somebody shall ask for orders supplementing or substituting dysfunctional non-judicial instruments. Against this background, the Spanish Supreme Court examined the possibility of imposing a support measure against the will of the individual concerned after the 2021 reform.

The case was initiated under old law but solved according to the new provisions. It involved a 68-year-old man who kept enormous amounts of garbage in his apartment. The neighbors and the local council had complained to the public prosecutor, who asked for the coercive appointment of a guardian to have the apartment cleaned and the person medically treated for his Diogenes syndrome. The Supreme Court held that the regional social service was to be appointed as *curador* and be permitted to enter the defendant's home, discuss with him, if possible, the apartment's cleaning, and ensure that he received 'effective medical care ... concerning the disorder he suffers'. These measures were to be reviewed every six months.<sup>102</sup>

The Supreme Court concluded that Article 268 CC does not necessarily mean that courts need to *always* follow the opinion of the person concerned about the support measures proposed:

Even if usually the Court must yield to the will and the opinion of the concerned person, in some cases, such as the case at issue, it might be otherwise, provided that there are grounds for justification. This Court is aware that it is impossible to determine in advance in which cases such justification will exist since each case's circumstances must be considered. But the case at stake is relevant since the opposition of the person concerned, as occurs in many mental disorders, is the result of a disorder to which a lack of consciousness of the disease is associated.

100 See also Art. 282 III CC.

101 García Rubio 2018, p. 52.

102 *Tribunal Supremo* (Plenary Section, Civil Chamber) 8 September 2021.

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Although the court acknowledged that the person's cognitive abilities were not substantially affected, the judgment focused on his 'conduct disorder':

The disorder not only causes him a clearly and objectively degrading situation but also prevents him from being aware of its pathological nature and his need for help.

The Supreme Court added that:

Not intervening in these cases, for the reason that the contrary will of the person be respected, would be social cruelty, [it would mean] abandoning to their misfortune those who, due to the direct effect of a (mental) disorder, are not aware of the process of personal degradation they are suffering. ... the [coerced] provision of support in these cases entails a judgment or assessment that, if these persons were not affected by their pathological disorder, they would agree to avoid or mitigate their personal degradation.

The criteria set by the Supreme Court in this ruling define the practical contours of the freedom of action allowed to people with disabilities after the 2021 reform. Hence, some voices have strongly disagreed with the Supreme Court and claimed that its arguments resuscitate the biomedical paradigm the CRPD is meant to end.<sup>103</sup> A greater number have nonetheless praised the Supreme Court for its cautious approach,<sup>104</sup> some pointing out that the ruling stroke a fair balance between various rights enshrined in the CRPD. Lower courts hastened to apply the ruling's *dicta* to cases involving persons with psychosocial disabilities, well beyond the particular circumstances of this case.

Depending on the future evolution of case law, the ruling has the potential to neutralize the 2021 reform. But it is submitted that the requirements for coercive orders are quite stringent: the (disorder-related) opposition can only be overruled when it is proven that the lack of support would lead the individual to *personal degradation*, that is, actual risk of very serious damage, and that coercive support would prevent that from happening. Taken to its words, the ruling points to *necessity*, a disability-neutral criterion. Subsequent judgments already reveal that case law may deploy a more proactive stance towards respecting the adult's will in future cases where their opposition to court-ordered measures is at stake.<sup>105</sup>

103 M.P. García Rubio & M.E. Torres Costas, 'Primeros pronunciamientos del Tribunal Supremo en aplicación de la Ley 8/2021, de 2 de junio, por la que se reforma la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica', *Anuario de derecho civil* 2022, Vol. 75, no. 1, p. 279-334. See also C. Amunátegui Rodríguez, *Sentencia de Pleno de 8 de septiembre de 2021, sobre adopción de medidas de apoyo en aplicación de la Ley 8/2021. ¿Van a cambiar mucho las cosas?*, blog *Hay Derecho* 27 September 2021.

104 R. Bercovitz Rodríguez-Cano, 'Medidas de apoyo a discapacitado de acuerdo con la nueva regulación introducida por la Ley 8/2021. Comentario a la STS 589/2021, de 8 de septiembre', *Cuadernos Civitas de Jurisprudencia Civil*, 2022, no. 118.

105 See *Tribunal Supremo* 21 December 2022, where the court focused on the evidence that the support required against the individual's will was disproportionate and not justified in the case at issue.

### 2.3.2 Preventing conflict of interest and undue influence

Safeguards must exist that prevent people in need of support from being exploited and abused. Prevention of the risks of conflict of interest and undue influence should therefore be paramount.

The 2021 reform, however, took a somewhat reluctant approach to safeguards regarding conflict of interests. Although whoever has a conflict of interest with the adult cannot be appointed as their *curador*, the judge could appoint them on the grounds of undetermined 'exceptional circumstances'.<sup>106</sup> In addition, the granter of a voluntary support measure – such as a CPA – can also deactivate the general prohibition of self-contracting.<sup>107</sup> Furthermore, in voluntary measures for profit legal entities can be appointed as attorneys and supporters.<sup>108</sup> It is submitted that if support is provided to earn a profit the chances of conflict of interest increase, and giving up statutory safeguards when appointing these legal entities is undoubtedly a risky business.

### 2.3.3 Control and supervision of support measures

The new regulation has borrowed the control and supervision mechanisms of old guardianship rules. The court-appointed support person is subject to a general duty of informing and consulting the adult *as much as possible*. But basically, they are under the duty to report on the situation of the concerned person and their assets *to the court*, typically on an annual basis,<sup>109</sup> although the judge and the public prosecutor can require information about these items at any time.<sup>110</sup> Regarding the *guarda de hecho*, the statutory safeguards are very much the same, even if the court's discretion is wider.<sup>111</sup>

The requirements, limitations and responsibilities of court-appointed *curador* are the default rules for attorneys appointed by a CPA that confers *general powers of representation*.<sup>112</sup> However, these rules are generally deemed too burdensome, and it is argued that their application would render CPAs less attractive.<sup>113</sup> Hence, CPAs are usually granted with immediate effect, without establishing control or

106 Art. 275.3, 2 CC.

107 Art. 251 II CC. This is what happens in practice in most, if not all, of the CPAs granted these days.

108 García Rubio 2018, p. 50. Valls i Xufré 2018, p. 203.

109 Art. 51 LJV.

110 Art. 270 CC.

111 Art. 265 CC states that the judge 'may ask the *guardador*, at any time, *ex officio* or at the request of the public prosecutor or any interested party' to provide information about the actions undertaken on behalf of the adult. Art. 52 I LJV adds the vulnerable adult. Garcimartín Montero 2021, p. 58 proposes a broad interpretation of possible *interested parties*. The judge may also, at any time, ask for a detailed report of the management of the adult's assets (Art. 265 II CC). Leciñena Ibarra 2021, p. 670 critically points out that these controls are excessive and rely on the mistrust against carers that is inconsistent with the option to reinforce informal supports.

112 Art. 259 CC.

113 See J.A. Carbonell Crespi, 'Los poderes preventivos', in: F. Lledó Yagüe et al. (eds.), *Reformas legislativas para el apoyo a las personas con discapacidad: estudio sistemático de la Ley 8/2021, de 2 de junio, al año de su entrada en vigor*, Dykinson: Madrid 2022, p. 570 ff.

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supervision safeguards. The prevailing view seems to be that one can always refer to the public prosecutor and the courts when needed.<sup>114</sup>

At any rate, there is compelling evidence that these traditional safeguards do not work. For many years, courts have not even been able to compel guardians to file the annual reports. Guardians who did so, filed poorly drafted reports and many could not be approved without further action, which was never attempted by courts. In many cases sums spent by guardians for unjustified expenses were left unclaimed as a matter of course.<sup>115</sup>

#### 2.3.4 *Periodical review by a judicial body*

The safeguards shall also ensure that measures relating to the exercise of legal capacity apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.<sup>116</sup>

The 2021 reform stipulated that all court-ordered measures are deemed temporary and must be periodically reviewed according to the timetable set by the judicial order, within three or, in exceptional cases, six years.<sup>117</sup> Any person entitled to ask for the measure of support can also seek its review if a change in the person's situation demands modifying or ending the measure.<sup>118</sup> Pursuant to the fifth transitional provision, the measures established before the entry into force of the 2021 reform must also be reviewed in one year, if requested by the adult or other interested parties, or in three years in any other case.

Whether the existing or future CPAs or the support agreements need periodical reviews appears to be controversial. As a support measure, they should be.<sup>119</sup> In particular, the review would be very convenient for support agreements because the person's condition may worsen, and the agreement might become insufficient or inadequate. The review would also provide the occasion to check whether the person wants the agreement to continue. On the other hand, in CPAs, the attorneys are usually not appointed temporarily, but indefinitely. The default statutory rules entail reviewing them at least every six years<sup>120</sup> but the granter may decide to rule this review out. If that is the case, the only way to adapt the support provided by the CPA to changing circumstances is to file for court-ordered measures that might add safeguards<sup>121</sup> or even terminate the CPA.

114 E. Toral Lara, 'Las medidas de apoyo voluntarias en el nuevo sistema de provisión de apoyos del Código Civil' in: E. Llamas Pombo; N. Martínez Rodríguez & E. Toral Lara (eds.), *El nuevo derecho de las capacidades: de la incapacitación al pleno reconocimiento*, Wolters Kluwer: Las Rozas Madrid 2021, p. 109.

115 See *Memoria de la Fiscalía General del Estado 2021*, p. 1106-1110.

116 See Art. 12.4 CRPD.

117 Art. 761 LEC and 268 II CC.

118 Art. 42 bis c).1 LJV and 268 III CC.

119 See Art. 12.4 CRPD.

120 Guilarte Martín-Calero 2021, p. 537.

121 See Art. 249 IV CC.

### 2.3.5 Removal of the support person and termination of support

The legal grounds for dismissal of the *curador* are a) intentional or negligent infringement of their support duties and b) serious and continuous problems with the adult if they live together.<sup>122</sup> The same grounds apply to removing support persons appointed in voluntary measures. Courts may also issue supplementary orders when the assistance the person receives through informal support, a support agreement or a CPA is proven *insufficient or inadequate*.<sup>123</sup>

After the dismissal, the *curador* has to render the general account of the administration of the adult's assets. Accounts must be rendered within three months unless the judge accepts there is ground to extend this deadline. The adult or their representatives may ask for the general account during five years.

Termination of voluntary support measures is subject to additional particular rules. Firstly, CPAs granted to the spouses or unmarried partners automatically terminate upon break up, unless it is proven that the granter would have wanted the spouse or partner to continue acting as an attorney.<sup>124</sup> Article 258 III CC also mentions other 'specific forms of termination of power' that could have been established, like a limited time duration or the termination based on particular situations (for instance, that the attorney reaches a certain age).<sup>125</sup> The CPA may also include circumstances upon which it is deemed to have been revoked<sup>126</sup> or terms that empower third parties or a supervisory body to revoke it and replace the attorney.<sup>127</sup>

## 3 Final remarks and provisional balance of the 2021 reform

The reform aimed to remove the legal obstacles that hindered the empowerment of people with disabilities. The new law repeatedly states CRPD principles and holds the UN Committee's views. Universal legal capacity is formally established regardless of disability. The Act's Preamble also highlights the shift from substitute to supported decision-making; the former should be a last resort only.

Yet the reality is that significant compromises have been made on restrictions to the legal capacity of disabled people.<sup>128</sup> Moreover, concerning the priority given to supported decision-making, first-person movement reports for example that:

We fear that persons who are now 'incapacitated' or 'in the process of incapacitation' will be subjected to a 'curatela with full representation'... not so

122 Art. 278 CC.

123 If the voluntary measure is insufficient, it needs not to be withdrawn entirely. The judge should appoint a *curador* to handle the interests not covered. The *curador* will not have powers of supervision or control of the support person in other matters. If a conflict arises in interpreting the scope of the coexisting measures, it is argued that the provisions of the voluntary measures should prevail over the judicial ones. García Rubio 2018, p. 54.

124 Art. 258 II CC.

125 Valls i Xufre 2018, p. 265.

126 Garcia Rubio 2018, p. 57.

127 Valls i Xufre 2018, p. 125.

128 See above para. 2.1.

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much because this is the most convenient according to their circumstances, but because there is a lack of resources for another measure or simply a lack of training for those who have to apply the law.<sup>129</sup>

For the time being, the skeptical view on the reform's capacity to achieve its main goal seems to be confirmed by available data. Courts seem to be applying the new rules to reconstruct the old system under the new legal language, thereby limiting the reform's potential. The outcome of the new procedures, as well as of the review of old measures, shows judges' reluctance to confine representative orders to exceptional cases. Substitute decision-making is still commonly authorized as a result of application for support measures.<sup>130</sup>

Part of the problem lies in that the 2021 reform did not actually develop supported decision-making. The new law only stated some guiding principles. Furthermore, the reform redrafted old provisions on guardianship, self-guardianship or *guarda de hecho* to accommodate the new legal language.<sup>131</sup> The provisions on the allegedly new support measures are still primarily based on the granting of representative powers. The rules on *guarda de hecho* focus on legal acts that can be performed on behalf of the concerned person. The CPA, by definition, involves the future exercise of representative powers. The rules on *curatela* mainly concern which legal acts the *curador* needs to conclude with judicial permission. No statutory basis is provided to regulate support agreements, which are one of the most prominent instruments for supported decision-making under the 2021 reform. All this makes it even more difficult for practitioners, judges and support providers to grasp the actual scope and contents of the (new) tasks the support person is expected to perform, as well as their legal liabilities. As a result, many judges are keen to avoid navigating uncharted land, and opt for merely substituting the new *curatela* for the old guardianship.

The 2021 reforms have notably reinforced the principle of subsidiarity. Judicially appointed supports are deemed exceptional, particularly given the status agreed to the *guarda de hecho*. But this option has shortcomings. Firstly, *guarda de hecho* operates too often disregarding the adult's will and preferences. Vulnerable adults living with their family or relatives typically abstain from giving their opinion. The risk of relatives not changing the paternalistic view of their role should not be minimized. In addition, abuse and exploitation within these informal settings can hardly be avoided with the current statutory safeguards, which rely heavily on monitoring roles of both judges and public prosecutors. Besides that, the advantages of informal supports are undermined by the increasing need to provide legal evidence of the support role. The exercise of the *guarda de hecho* has been plagued so far with issues of evidence that practitioners are handling erratically. *Informal*

129 Salud Mental España, *Informe sobre el estado de los derechos humanos en salud mental 2021*, Madrid, 2022, p. 27.

130 See evidence resulting from more than 300 judgments analyzed in *Primer informe del Observatorio de jurisprudencia sobre sistemas de apoyo al ejercicio de la capacidad jurídica* (December 2022); available at [www.plenainclusion.org/1/observatorio-jurisprudencia/materiales/](http://www.plenainclusion.org/1/observatorio-jurisprudencia/materiales/) (last accessed 26 May 2023). See also the critical reflections made in *Memoria del Fiscal General del Estado 2022*, p. 877.

131 See the criticisms raised by Cuenca Gómez 2022, p. 171.



support is becoming increasingly formalized and *judicialized*<sup>132</sup> for the sake of commercial traffic, with a full disregard of the implications for the legal framework of support measures as a whole.

In line with the CRPD Committee views held in General Comment No. 1, one of the goals of the 2021 reform was to replace the best interest standard.<sup>133</sup> However, since the reform entered into force, legal scholarship and case law have emphasized that some legal provisions still rely on the best interest standard.<sup>134</sup> Case law has also confirmed that overriding the individual's opposition is possible, as well as granting substitutive decision-making powers to act in their best interest.<sup>135</sup>

Support persons are typically in a position where abuse and disloyalty on their part severely endanger those needing support. Hence, Article 12.4 CRPD demands that all measures relating to the exercise of legal capacity shall provide appropriate and effective safeguards to prevent abuse. Safeguards must be proportional, namely 'adjusted to the degree to which the support measures affect the person's rights and interests'. Unfortunately, the new law is in this particular matter unfinished work. Although several provisions mention safeguards here and there, it does not live up to the proportionality requirement.

First of all, judicial intervention is not compulsory when the support persons merely assist the adult in giving consent, even in highly complex or risky transactions. Silence around the safeguards that need to be established in support agreements produces a legal vacuum that also undermines confidence in this new legal instrument. Any conflict of interest, abuse or undue influence that could be ascertained in these cases will only give rise to *ex post* liabilities for violating the statutory duties towards the adult.

The more all-embracing and intrusive the powers of the support person are, the more rigorous and extensive the control and supervision must be. Court-appointed support persons are thus subject to rigorous control and supervision. Voluntary measures are instead executed under very few constrictions to the granters' freedom to give up statutory safeguards. One-sided and too optimistic regulation has left a protection gap. Wide-ranging monitoring powers of judges and public prosecutors are in practice ineffective due to the lack of resources and unproductive case management. In too many cases, their reaction takes place *ex post facto*, when harm to vulnerable adults cannot be remedied.

Data show that the number of CPAs is growing at an increasing pace. This might eventually come at a cost. People might be placing themselves at risk of depending on the benevolence of the support persons they appointed, for they have no real guarantee that the latter will not exploit them. It is thus submitted that the legal regulation should be improved and compulsory qualitative assessment of voluntary measures by an independent authority should be introduced. Meanwhile, voluntary support measures with minimal or even non-existent safeguards should be

132 See above para. 2.2.2. Warning about this point see *Memoria del Fiscal General del Estado 2022*, p. 872.

133 A.L. Martínez-Pujalte, 'La clave hermenéutica de la nueva legislación civil sobre capacidad jurídica', *Revista de derecho privado*, 2022, Vol. 106, no. 3, p. 41-63.

134 As was anticipated in the criticisms raised by Cuenca Gómez 2022, p. 174.

135 See above para. 2.3.1.

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considered as providing insufficient or inadequate support, thereby triggering the need for supplementary or additional court-ordered measures.<sup>136</sup>

136 See J. Ribot Igualada, 'Comentario de los artículos 256 a 262 del Código Civil y 51 bis Ley de Jurisdicción Voluntaria (Poderes y mandatos preventivos)', in: C. Guilarte Martín-Calero (Ed.), *Comentarios a la Ley 8/2021 por la que se reforma la legislación civil y procesal en materia de discapacidad*, Aranzadi: Cizur Menor 2021, p. 598.