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Guardian Appointed for a Disabled Person and Guardian Appointed for a Partially Incapacitated Person

Kurator dla osoby niepełnosprawnej a kurator dla osoby ubezwłasnowolnionej częściowo

ABSTRACT

A guardianship court may appoint in non-litigious proceedings a guardian for a disabled person (Article 183 of the Polish Family and Guardianship Code, hereinafter: FGC) and for a partially incapacitated person (Article 181 FGC). It is not always possible to precisely delimit the areas of application of these provisions which entails problems in practice. Particularly problematic is the nature of the guardianship established for a disabled person and for a partially incapacitated person and the scope of the powers of both guardians. Especially debatable is the status of the guardian of a partially incapacitated person, who has not been authorized by the court to manage the assets of the ward and represent him/her. The purpose of this article is to indicate the scope of action of the guardian appointed for a disabled person and for a partially incapacitated person together with the determination of their status. The guardian is established for a partially incapacitated person, who, under the authority to represent and manage the property of the ward, is the ward's statutory representative. The guardian appointed for a disabled person, who is not a statutory representative of this person, has a different status. The guardian under Article 183 FGC provides, above all, factual assistance to a person who has not been incapacitated, even if the person is affected by mental dysfunctions, while the guardian under Article 181 FGC provides assistance in legal acts, procedural acts and factual acts not relating to legal acts for a person who has been partially incapacitated.

Keywords: guardian appointed for a disabled person; disabled person; guardian appointed for a partially incapacitated person; guardianship

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INTRODUCTION

A court of protection may appoint in non-litigious proceedings a guardian for a disabled person (Article 183 of the Polish Family and Guardianship Code, hereinafter: FGC) and for a partially incapacitated person (Article 181 FGC). It is not always possible to delimit precisely the scopes of application of the provisions in question, especially since the legislature introduces the principle of gradation of interference in the situation where mental dysfunction is identified.[1] That is why the appointment of the guardian for a disabled person and for a person who is partially incapacitated sometimes raises problems. This is so because, in the course of the incapacitation procedure, it may turn out that there are no grounds for incapacitating the person concerned, but there are grounds for establishing a guardian on the grounds of disability.[2] The opposite situation is also possible when, in the course of the proceedings for appointing a guardian for a disabled person, the court notices "changes in the personality" of the participant, which may justify the incapacitation of the participant. In such a situation the court should notify the prosecutor on the doubts regarding this person's sanity.[3] This correlation concerns mental disorders causing disability and partial incapacitation.

The nature of the guardianship established for a disabled person and for a partially incapacitated person and the scope of the powers of both guardians is also problematic. Especially debatable is the status of the guardian of a partially incapacitated person, who has not been authorized by the court to manage the assets of the ward and represent him/her. The purpose of this article is to indicate the scope of action of the guardian appointed for a disabled person and for a partially incapacitated person together with the determination of their status. The findings in this matter may not only have dogmatic value but also a practical one. Although the basic research method used in the article is formal-dogmatic analysis, the methodological approach also takes into account the practice of application of law, using the analysis of the case law of the Polish Supreme Court and common courts and the scientific discussion conducted on the basis of these judicial decisions. The briefly discussed conduct of the procedure for the appointment of the guardian for a disabled person and for an incapacitated person is of particular relevance to judicial practice.

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[1] A. Sylwestrzak, *Charakter prawny i kompetencje kuratora osoby ubezwłasnowolnionej częściowo*, "Przegląd Sądowy" 2011, no. 5, p. 52.

[2] J. Gudowski, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 4: *Postępowanie rozpoznawcze. Postępowanie zabezpieczające*, ed. T. Ereciński, LEX/el. 2016, Article 600 CCP, side number (hereinafter: Nb) 3.

[3] Decision of the Supreme Court of 8 October 1998, IV CKN 903/97, II CKN 903/97, LEX no. 1216978.

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CONDITIONS FOR THE APPOINTMENT OF THE GUARDIAN FOR A DISABLED PERSON AND THE SCOPE OF RIGHTS AND OBLIGATIONS OF THE GUARDIAN

The substantive-law basis for the appointment of the guardian for a disabled person is governed by Article 183 FGC. According to this provision, a guardian is appointed for a disabled person if that person needs assistance to deal with any matters or to a particular type of matter or to deal with a particular issue. The establishment of guardianship for a disabled person requires the cumulative fulfillment of two conditions: the disability of the person for whom the guardian is to be appointed and the need to assist that person.[4]

The Family and Guardianship Code does not define the concepts of disabled person or disability. These definitions are regulated by the Charter of the Rights of Disabled Persons,[5] the Act on professional and social rehabilitation and employment of persons with disabilities,[6] and the Convention on the Rights of Persons with Disabilities.[7]

In the Charter of the Rights of Disabled Persons, disabled persons are defined as those whose physical, psychical or intellectual condition permanently or temporarily hinders, restricts or prevents everyday life, study, work and performance of social roles. At the same time, it was emphasized that in accordance with legal and customary norms, these persons have the right to an independent, self-reliant and active life and cannot be subject to discrimination (§ 1 CRDP). The definition of disabled person also appeared in the Convention on the Rights of Persons with Disabilities. Pursuant to its Article 1, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. In addition, the Preamble to the Convention indicates that disability is an evolving concept and that disability results 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 (letter (e) of the Preamble to the Convention).[8]

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[4] D. Olczak-Dąbrowska, *Wybrane rodzaje kurateli w praktyce sądowej*, "Prawo w Działaniu" 2014, no. 17, p. 93.

[5] Resolution of the Sejm of the Republic of Poland of 1 August 1997 – Charter of the Rights of Disabled Persons (Polish Monitor 1997, no. 50, item 475), hereinafter: CRDP.

[6] Act of 27 August 1997 on professional and social rehabilitation and employment of persons with disabilities (consolidated text, Journal of Laws 2020, item 426).

[7] Convention on the Rights of Persons with Disabilities adopted by the General Assembly on 13 December 2006 (United Nations, A/RES/61/106), hereinafter: the Convention.

[8] J. Sadomski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. J. Wierciński, LEX/el. 2014, Article 183 FGC, Nb 1.

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The literature defines a disabled person as: an individual[9] "in whom significant damage and lowering the efficiency of the body's functioning hinders, restricts or even prevents performance of life tasks and social roles resulting from their age, gender and social, environmental and cultural factors";[10] a person who "as a result of physical, somatic or mental limitations has significant difficulties in fulfilling the tasks faced in everyday life, school, professional life and leisure time";[11] a person "whose physical or mental condition permanently or even periodically hinders, restricts or completely prevents the fulfilment of life tasks and performance of social roles in accordance with the applicable social norms and legal regulations";[12] "an individual who, as a result of congenital defects or diseases, as well as diseases acquired at different stages of life, has suffered a violation of the functions of individual organs, systems or the whole organism, limiting their biological and social function to various degrees";[13] an individual with a reduced state of the bodily capability, which "causes limitations or difficulties in the proper fulfilment of social roles".[14]

In the area of national regulations, Article 2 (10) of the Act on vocational and social rehabilitation and employment of disabled persons defines disability as permanent or temporary inability to perform social roles due to permanent or long-term impairment of the bodily function, in particular resulting in inability to work.[15] Disability has also been defined by the World Health Organization as a multidimensional phenomenon resulting from the interaction between people and their physical and social environment, an effect of barriers encountered in the physical and social environment.[16]

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[9] On the concept of disabled person as compared with person with disabilities, see M. Balwicka-Szczyrba, A. Sylwestrzak, *Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz konwencji ONZ o prawach osób niepełnosprawnych*, "Gdańskie Studia Prawnicze" 2018, vol. 40, p. 152; D. Galsiński, *Osoby niepełnosprawne czy z niepełnosprawnością?*, "Niepełnosprawność – Zagadnienia, Problemy, Rozwiązania" 2013, no. 4, pp. 3–6.

[10] T. Majewski, *W sprawie definicji osoby niepełnosprawnej*, "Problemy Rehabilitacji Społecznej i Zawodowej" 1994, no. 1, p. 35, as in B. Trębicka-Postrzygacz, *O niepełnosprawności w definicjach i regulacjach prawnych w perspektywie inkluzji społecznej*, "Student Niepełnosprawny. Szkice i Rozprawy" 2017, no. 17, p. 45.

[11] J. Zabłocki, *Psychologiczne i społeczne wyznaczniki rehabilitacji osób niepełnosprawnych*, Warszawa 1992, pp. 10–12, as in B. Trębicka-Postrzygacz, *op. cit.*, p. 45.

[12] A. Hulek, *Świat ludziom niepełnosprawnym*, Warszawa 1992, p. 24, as in B. Trębicka-Postrzygacz, *op. cit.*, p. 45.

[13] K. Szawłowski, G. Chojnacka-Szawłowska, *Medyczne i społeczne podstawy rehabilitacji*, Gdańsk 1990, as in B. Trębicka-Postrzygacz, *op. cit.*, p. 45.

[14] T. Gałkowski, J. Kiwerski, *Encyklopedyczny słownik rehabilitacji*, Warszawa 1986, p. 194, as in B. Trębicka-Postrzygacz, *op. cit.*, pp. 45–46.

[15] D. Olczak-Dąbrowska, *op. cit.*, p. 93.

[16] B. Trębicka-Postrzygacz, *op. cit.*, p. 44.

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Disability, therefore, means not only a physical, mental and intellectual state that violates the body's performance, but also hinders, restricts or prevents the playing of social roles as part of participation in society.[17] However, this is not a legal definition that can apply in all branches of law. In the light of Article 183 FGC, it must be only regarded as a certain interpretative directive when interpreting the concept of disability. A similar approach should be taken towards the non-normative definition of disabled person contained in the Charter of the Rights of Disabled Persons.[18]

The term "disabled person" (in Polish: *osoba niepełnosprawna*), which has been used by scholars of civil law since 2007,[19] has replaced the previously existing term "handicapped person" (in Polish: *osoba ułomna*), which became considered to be a pejorative term.[20] The definition of being handicapped contained in the original version of Article 183 FGC included not only a serious disability (e.g., blindness, deafness or muteness), but also any bodily condition that seriously limits the ability to take care of one's own affairs (such as partial paralysis, lack of a limb, long-term illness or even infirmity caused by weakness or old age).[21] This scope excludes mental illness and mental retardation or other mental disorders justifying partial or complete incapacitation, which makes it possible to obtain legal protection in another way.[22] This position was confirmed by the Supreme Court, which stated that "a state of mental weakness, especially due to age, which does not qualify as a mental illness, mental retardation or another type of mental disorder forming

[17] Judgement of the Voivodeship Administrative Court in Warsaw of 29 November 2006, III SA/Wa 1066/06, LEX no. 328667; judgement of the Supreme Court of 20 August 2003, II UK 386/02, OSNP 2004, no. 12, item 213; J. Bodio, [in:] *Kodeks postępowania cywilnego. Komentarz aktualizowany*, vol. 1: *Art. 1–729*, ed. A. Jakubecki, LEX/el. 2019, Article 600 CCP, Nb 1. The disability does not have to be confirmed by any certificate or administrative decision. See G. Matusik, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Osajda, Legalis 2020, Article 183 FGC, Nb A10.

[18] J. Sadomski, *op. cit.*, Article 183 FGC, Nb A10.

[19] Act of 9 May 2007 amending the Code of Civil Procedure and certain other acts (Journal of Laws 2007, no. 121 item 831).

[20] It was also pointed to the need to uniform the legal terminology used since in the legal language the term "disabled person" is widely used. See Substantiation of the Act of 9 May 2007 amending the Code of Civil Procedure and certain other acts (Journal of Laws 2007, no. 121 item 831), the Sejm of the Republic of Poland of the 5th term, Sejm Paper no. 715.

[21] J. Ignatowicz, [in:] *Kodeks rodzinny i opiekuńczy z komentarzem*, ed. J. Pietrzykowski, Warszawa 1993, pp. 724–725; idem, [in:] *System prawa rodzinnego i opiekuńczego*, ed. J. Piątowski, Wrocław 1985, p. 1200; A. Józefowicz, *Kuratela ustanawiana dla osób ułomnych*, "Nowe Prawo" 1975, no. 7–8, p. 982; S. Grzybowski, *Prawo rodzinne. Zarys wykładu*, Warszawa 1980, p. 262; D. Olczak-Dąbrowska, *op. cit.*, pp. 94–95.

[22] A. Józefowicz, *op. cit.*, p. 983; M. Grudziński, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. J. Ignatowicz, Warszawa 1966, p. 895; S. Kalus, [in:] *Kodeks rodzinny i opiekuńczy z komentarzem*, ed. K. Piasecki, Warszawa 2000, p. 880, as in D. Olczak-Dąbrowska, *op. cit.*, p. 95; judgement of the Supreme Court of 5 May 1949, Po. C. 67/49, "Przegląd Notarialny" 1949, no. 11–12, p. 523, as in J. Ignatowicz, [in:] *Kodeks…*, 1993, p. 725; decision of the Supreme Court of 8 December 2016, III CZ 54/16, LEX no. 2186578.

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grounds for incapacitation (Articles 13 and 16 FGC), constitutes a disability within the meaning of Article 183 FGC". According to the Supreme Court, an appropriate measure to protect the procedural interests of a disabled person in such a case may be taking steps by the court to appoint for that person the guardian referred to in Article 183 FGC.[23]

According to the *opinio communis*, the views presented in the literature and judicature on the interpretation of the concept of handicapped person have remained valid after replacing the term "handicapped person" with the term "disabled person".[24] A disabled person is, therefore, any natural person who, as a result of various physical, intellectual or mental incapacitation, is unable to run his/her own affairs.[25]

In practice, it can be problematic to distinguish between mental disorders that justify incapacitation and those that do not. For this reason, the Supreme Court held that, in a situation where, for the grounds of mental weakness, there is a need of procedural protection of a person for whom there are no grounds for incapacitating, the court should establish a guardian for a partially incapacitated person.[26] The position of the judicature is confirmed by established scholarly opinion. In the opinion of G. Jędrejek, in case of doubt, priority should be given to the guardian of a partially incapacitated person, and not to the guardian of a disabled person, since this entails the provision of a broader scope of protection for the ward. The guardian of a partially incapacitated person, unlike the guardian of a disabled person, is obliged to run affairs of the ward (which results from the rules, applied *mutatis mutandis*, governing the content of care which includes custody of the person and the property of the person concerned – Article 178 § 2 FGC), as well as the right of representation and management of the ward's assets.[27]

It should be noted that the appointment of the guardian for a disabled person applies only to an adult person. The guardian for a disabled person is not appointed

[23] Decision of the Supreme Court of 8 December 2016, III CZ 54/16, LEX no. 2186578. Having this in mind, A. Sylwestrzak considers that mental disease is one of manifestations of disability referred to in Article 183 FGC. See A. Sylwestrzak, *Kurator dla osoby niepełnosprawnej*, "Przegląd Sądowy" 2014, no. 9, pp. 15–25.

[24] K. Gromek, *Kodeks rodzinny i opiekuńczy. Komentarz*, Legalis 2013, Article 183 FGC; T. Smyczyński, J. Strzebinczyk, [in:] *System Prawa Prywatnego*, vol. 12: *Prawo rodzinne i opiekuńcze*, ed. T. Smyczyński, Warszawa 2011, p. 907, as in D. Olczak-Dąbrowska, *op. cit.*, p. 95.

[25] Cf. W. Ziętek, *Kurator dla osoby ułomnej – de lege ferenda*, "Rodzina i Prawo" 2007, no. 2, p. 61; A. Sylwestrzak, *Kurator*..., p. 25; J. Gajda, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Pietrzykowski, Legalis 2018, Article 183 FGC, Nb 4; K. Gromek, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Gromek, Warszawa 2021, Article 183 FGC, Nb IV.1; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 460; G. Matusik, *op. cit.*, Article 183 FGC, Nb A5; D. Olczak-Dąbrowska, *op. cit.*, p. 97.

[26] Decision of the Supreme Court of 8 December 2016, III CZ 54/16, LEX no. 2186578.

[27] G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany*, LEX/el. 2019, Article 183 FGC, Nb 4.

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for minors (including completely incapacitated persons) due to the better protection resulting from parental authority or care.[28] Thus, a disabled person within the meaning of Article 183 FGC can only be an adult, physically or mentally disabled person who is not incapacitated (either completely or partially).[29] A minor, even if physically or mentally disabled, is subject to parental authority by operation of law, therefore the protection of his/her rights and property and non-property interests is ensured by his/her statutory representative (parent), so there is no need to provide him/her with other assistance in dealing with personal and property matters.[30] If the child is not under parental authority and there is an appropriate basis, legal guardianship is established for the minor pursuant to Article 145 § 1 FGC.[31] The guardianship for a disabled person also does not apply to a completely incapacitated person and a person for whom a temporary advisor has been appointed, who already have the assistance of a statutory representative.[32]

Moreover, guardianship under Article 183 FGC is established for a person with full capacity to perform acts in law and litigation capacity. A disabled person, despite the appointment of a guardian for him/her, may independently perform all legal and procedural acts and freely undertake the intended activities, and the decision on the appointment of the guardian may not contain any restrictions in this regard.[33] Therefore, guardianship may be established for a disabled woman

[28] J. Gajda, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Pietrzykowski, Warszawa 2020, Article 183 FGC, Nb 5; H. Haak, [in:] H. Haak, A. Haak-Trzuskawska, *Opieka i kuratela. Komentarz do art. 145–184 KRO oraz związanych z nimi regulacji KPC (art. 516, 518, 520, 573–574, 590–598, 599–602, 604–605)*, Legalis 2017, Article 183 FGC, Nb A1; H. Dolecki, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. H. Dolecki, T. Sokołowski, LEX/el. 2013, Article 183 FGC, Nb 3; J. Sadomski, *op. cit.*, Article 183 FGC, Nb 1; G. Matusik, *op. cit.*, Article 183 FGC, Nb A6; A. Józefowicz, *op. cit.*, p. 983; N. Krej, [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. E. Marszałkowska-Krześ, Legalis 2018, Article 660 CCP, Nb 4. Another view is presented by A. Sylwestrzak, who does not rule out an appointment of the guardian under Article 183 FGC if there are persons obliged to assist the disabled, but who do not comply with that obligation. She is of the opinion that in such an event the guardian should not be appointed under Article 183 FGC but rather an intervention into the unduly exercised guardianship or parental authority should be made. See A. Sylwestrzak *Kurator*..., p. 21.

[29] H. Haak, [in:] H. Haak, A. Haak-Trzuskawska, *op. cit.*, Article 183 FGC, Nb 1.

[30] A. Józefowicz, *op. cit.*, p. 983; J. Sadomski, *op. cit.*, Article 183 FGC, Nb 1.

[31] H. Haak, *Opieka i kuratela. Komentarz*, Toruń 2004, p. 307; A. Józefowicz, *op. cit.*, p. 983.

[32] A. Sylwestrzak, *Kurator*..., pp. 15–25; H. Haak, [in:] H. Haak, A. Haak-Trzuskawska, *op. cit.*, Article 183 FGC, Nb A1.

[33] Resolution of the Supreme Court of 14 December 1982, III CZP 55/82, OSNPG 1983, no. 8–9, item 31; T. Żyznowski, [in:] *Kodeks postępowania cywilnego*, vol. 3: *Komentarz. Art. 425–729*, ed. A. Marciniak, Legalis 2020, Article 600 CCP, Nb 2.

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who was married before the age of 18, because as an adult she has full capacity to perform acts in law and litigation capacity.[34]

The second condition for the establishment of guardianship for a disabled person is the need to provide assistance to this person in running his/her affairs. However, the lack of the ability to run a particular affair does not justify the establishment of a guardian for the disabled person.[35]

Article 183 § 1 FGC purposely mentions the "running of affairs" by a disabled person and not his/her representation. The running of affairs covers factual activities, most often related to everyday life.[36] Representation, on the other hand, means carrying out, on behalf of and for the ward, substantive-law and procedural acts, which require the granting of a power of attorney by the disabled person.[37]

Assistance in the running of affairs entails the scope of responsibilities and powers of the guardian to be determined by the court of protection (Article 183 FGC). A. Józefowicz allowed extensive powers of the guardian of a handicapped person (now: a disabled person) explaining that apart from exercising the care and administration of the property, the guardian may be authorized by the court of protection to represent the handicapped person in performing an act in law or to settle a particular case (e.g., an administrative, judicial or pension-related) and the performance of a specific factual act (e.g., receipt of a pension payment).[38] The Supreme Court took a different position, namely that the appointment of a guardian under Article 183 § 1 FGC is only intended to help a handicapped person (now: disabled person) to deal with his/her affairs. The guardian is not the statutory representative of this person, and the guardian's role is to assist the handicapped person in handling his/her affairs due to difficulties of a factual nature.[39] The view expressed in the case law is confirmed by scholars in the field, pointing out that once the guardian is appointed, the disabled person retains his/her full capacity to perform acts in law and litigation capacity. He/she may therefore appoint an attorney to represent him/her in the proceedings before common courts or in administrative proceedings.[40] Therefore, the authors assume that the guardian is appointed to assist a disabled person in factual activities, not to act in lieu of that person and is

[34] J. Bodio, *Status dziecka jako uczestnika postępowania nieprocesowego*, Warszawa 2019, pp. 364–365.

[35] A. Sylwestrzak *Kurator*..., p. 20; G. Matusik, *op. cit.*, Article 183 FGC, Nb A7.

[36] Decision of the Supreme Court of 24 May 1995, III CRN 22/95, OSNC 1995, no. 9, item 134.

[37] Decision of the Court of Appeal in Kraków of 22 November 2011, I ACz 1627/11, LEX no. 1680449; J. Sadomski, *op. cit.*, Article 183 FGC, Nb 3.

[38] A. Józefowicz, *op. cit.*, p. 984.

[39] Decision of the Supreme Court of 24 May 1995, III CRN 22/95, OSNC 1995, no. 9, item 134; decision of the Court of Appeal in Kraków of 3 November 2011, I ACa 968/11, LEX no. 1680462.

[40] J. Ignatowicz, *op. cit.*, p. 725; D. Olczak-Dąbrowska, *op. cit.*, p. 99; W. Ziętek, *op. cit.*, p. 60. The Supreme Court stated that in the case of appointment of a guardian for a disabled person (Article 600 § 2 CCP in conjunction with Article 183 § 1 FGC) the appointment of an agent for litigation for

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not his/her statutory representative.[41] The guardian is therefore not authorized to perform legal or procedural acts on behalf of the ward and can only substitute him/her in factual acts which do not require making the declaration of intent. These acts may concern both the ward and his/her property, which makes the guardianship of a disabled person is a type characterized by a wide scope of care.[42]

"The authorization of the guardian to perform acts in law on behalf of the disabled person requires the granting of a power of attorney by the disabled person, in accordance with the general principles of civil law. Similarly, the authorization to take procedural acts on behalf of the disabled person requires the granting of a power of attorney by the disabled person. The guardian, on the basis of the power of attorney granted, can represent the disabled person in court proceedings as an entity taking care of the interests of the disabled person (Article 87 § 1 of the Code of Civil Procedure)".[43] However, the disabled person may grant the power of at-

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this person without this person's request is not allowed. See decision of the Supreme Court of 25 July 2019, III CZP 16/19, LEX no. 2719114.

[41] B. Bladowski, A. Gola, *Ubezwłasnowolnienie. Opieka i kuratela*, Warszawa 1989, p. 67; T. Smyczyński, J. Strzebinczyk, *op. cit.*, p. 907; J. Ignatowicz, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Pietrzykowski, Warszawa 2012, commentary on Article 183; Haak, *Opieka…*, p. 309; B. Janiszewska, *Skutki ustanowienia kuratora dla osoby niepełnosprawnej*, "Monitor Prawniczy" 2017, no. 11, p. 608; P. Pruś, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 2: *Art. 478–1217*, ed. M. Manowska, LEX/el. 2021, Article 600 CCP, Nb 4; J. Gudowski, [in:] *Kodeks…*, 2016, Article 600 CCP, Nb 5; Z. Strus, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 3: *Artykuły 506–729*, eds. H. Dolecki, T. Wiśniewski, LEX/el. 2013, Article 600 CCP, Nb 7; H. Ciepła, [in:] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *Komentarz do spraw rodzinnych*, LEX/el. 2014, chapter 12.5; T. Żyznowski, *op. cit.*, Article 600 CCP, Nb 2; M. Malczyk, [in:] *Kodeks postępowania cywilnego*, vol. IB: *Komentarz. Art. 425–729*, ed. A. Góra-Błaszczykowska, Legalis 2020, Article 600 CCP, Nb 4; K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz*, eds. A. Zieliński, K. Flaga-Gieruszyńska, Legalis 2019, Article 600 CCP, Nb 5; D. Olczak-Dąbrowska, *op. cit.*, p. 99; decision of the Supreme Court of 24 May 1995, III CRN 22/95, OSNC 1995, no. 9, item 134. A different opinion was presented by K. Korzan (*Kurator w postępowaniu cywilnym*, Warszawa 1966, p. 28), according to whom the guardian of a disabled person is the statutory representative. See also G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 183 FGC, Nb 2 and 3; H. Dolecki, *op. cit.*, Article 183 FGC, Nb 2; M. Wojdała, *Status kuratora dla osoby niepełnosprawnej w świetle prawa do sądu osób z zaburzeniami psychicznymi*, [in:] *Postępowanie cywilne w dobie przemian*, ed. I. Gil, LEX/el. 2017, part 2, chapter 4; E. Gapska, [in:] E. Gapska, J. Studzińska, *Postępowanie nieprocesowe*, Warszawa 2015, p. 615; J. Misztal-Konecka, *O udziale w postępowaniu cywilnym osób, które doznają przeszkód faktycznych w osobistym dokonywaniu czynności procesowych*, "Przegląd Sądowy" 2017, no. 11–12, p. 135; J. Gajda, [in:] *Kodeks rodzinny…*, 2020, Article 183 FGC, Nb 9. Differently G. Matusik, *op. cit.*, Article 183 FGC, Nb C13; A. Sylwestrzak, *Kurator…*, pp. 23–24; H. Haak, [in:] H. Haak, A. Haak-Trzuskawska, *op. cit.*, Article 183 FGC, Nb A5; B. Janiszewska, *O zakresie uprawnień kuratora dla niepełnosprawnego (uwagi na tle praktyki sądów opiekuńczych)*, "Rodzina i Prawo" 2015, no. 11, p. 40–60.

[42] T. Smyczyński, J. Strzebińczyk, *op. cit.*, p. 907; D. Olczak-Dąbrowska, *op. cit.*, p. 99.

[43] J. Sadomski, *op. cit.*, Article 183 FGC, Nb 3; decision of the Court of Appeal in Kraków of 22 November 2011, I ACz 1627/11, LEX no. 1680449.

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torney regardless of the appointment of the guardian, as any person other than the guardian may also be an agent of the disabled person.[44]

At the same time, a proposal for the law as it should stand (*de lege ferenda*) has been put forward by some scholars in the field, to shape the guardianship under Article 183 FGC in such a way that in the event of circumstances which, although not justifying incapacitation, make it impossible to file an application or grant a power of attorney (e.g., due to physical disorders – paralysis, or mental disorders – severe depression), the guardian can be a representative for substitution of the disabled person. In such a situation, the court ruling and a certificate issued on its basis could constitute sufficient authorization for the guardian to undertake certain legal actions on behalf of the disabled person.[45]

CONDITIONS FOR THE APPOINTMENT OF THE GUARDIAN FOR A PARTIALLY INCAPACITATED PERSON AND THE SCOPE OF RIGHTS AND OBLIGATIONS OF THE GUARDIAN

The guardianship for a disabled person should be distinguished from the guardianship for a partially incapacitated person. Partially incapacitated may be a person of legal age who, because of mental illness, mental retardation or other mental disorders, in particular alcohol abuse or drug addiction, needs help to pursue his/her affairs, and his/her condition does not justify complete incapacitation (Article 16 § 1 of the Civil Code).

Assistance in the running of affairs, which is a positive precondition for partial incapacitation, must be distinguished from influence on the person concerned in order to cause a certain behaviour. The guardian is not appointed to give any advice to a partially incapacitated person (e.g., to undergo systematic medical treatment and health monitoring).[46] Assistance in the running of one's affairs can be understood broadly, which means assistance in both factual and legal activities and not only in legal ones.[47] However, the primary purpose of this guardianship is "to assist in the exercise of acts in law and to participate in legal transactions in the broad sense, due to the limitation of the ward's capacity to perform acts in law. This assistance may vary

[44] G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 183 FGC, Nb 5.

[45] A. Sylwestrzak, *Kurator…*, pp. 22–23; J. Misztal-Konecka, *op. cit.*, p. 135.

[46] This kind of advice or care may be undertaken by members of the family of the participant in the proceedings, or competent public authorities or social entities. See decision of the Supreme Court of 9 January 1969, I CR 492/68, LEX no. 6437; G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 181 FGC, Nb 6.

[47] A. Sylwestrzak, *Charakter prawny…*, p. 52; G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Opieka i kuratela. Komentarz do art. 145–184*, Warszawa 2014, p. 169; J. Ignatowicz, [in:] *Kodeks rodzinny…*, 2012, p. 1223, as in G. Matusik, *op. cit.*, Article 181 FGC, Nb B5.

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in terms of intensity, determined by the content of the court's decision. In addition, the guardian may provide assistance in purely factual acts of the ward, but which are directed outward, i.e. in contact with public authorities, and other legal entities".[48]

According to Article 181 FGC, the guardian of a partially incapacitated person is appointed to represent her/him and to manage his/her property only if the court of protection so decides. According to J. Sadomski, "the scope of powers and duties of a guardian appointed for a partially incapacitated person is determined, on the one hand, by the function and purpose of the guardianship, and on the other hand by the content of Article 181 FGC. The guardian is obliged to provide assistance to the partially incapacitated person in running his/her affairs. This general obligation includes the obligation to exercise the care of the ward and the power to perform factual acts in matters relating to that person (e.g., matters related to his/her health, work, organization of domestic affairs). It also includes the obligation to exercise general care over the property of a partially incapacitated person, which is carried out by obtaining information on the financial situation of the ward, providing him/her with advice, and in the event of a threat to his/her interests – applying to the competent court of protection".[49]

As regards the rights related to representation and management of the ward's property in the light of Article 181 FGC, the established scholarly opinion distinguishes two categories of guardians for a partially incapacitated person: guardians appointed by the court without granting the authority to manage and represent the ward (guardianship with a narrower scope) and guardians with full powers, appointed by the court to manage the property of a partially incapacitated person and his/her representation (guardianship with a wider scope). At the same time, the first situation was indicated as a typical one, occurring *ex lege* upon the appointment of the guardian, while the second one may be introduced due to the specific circumstances of a given case, especially when the person for whom the guardian was appointed has difficulties in running their own life's affairs.[50] When appointing a guardian, the court of protection may exercise the right provided for in Article 181 § 1 FGC fully or only partially, e.g., by granting the guardian only the right to manage the property of the partially incapacitated person and the right to represent only in matters related to this management.[51]

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[48] G. Matusik, *op. cit.*, Article 181 FGC, Nb B5.

[49] J. Sadomski, *op. cit.*, Article 181 FGC, Nb 4; H. Ciepła, [in:] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *op. cit.*, chapter 12.3.

[50] J. Sadomski, *op. cit.*, Article 181 FGC, Nb 4; H. Ciepła, [in:] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *op. cit.*, chapter 12.3; H. Dolecki, *op. cit.*, Article 181 FGC, Nb 6; J. Gajda, [in:] *Kodeks rodzinny…*, 2018, Article 181 FGC, Nb II 1.

[51] H. Ciepła, [in:] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *op. cit.*, chapter 12.3; A. Sylwestrzak, *Charakter prawny…*, pp. 45–57; judgement of the Court of Appeal in Gdańsk of 16 January 2014, V ACa 761/13, Legalis no. 895303.

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According to the established scholarly opinion, regardless of the authorization granted, the guardian provides assistance in actual activities of the ward and exercises care of the person and property of the ward.[52]

According to the *opinio communis*, a guardian exercising the guardianship with full powers is the statutory representative of the ward and can carry out legal acts on his/her behalf and manage his/her property,[53] as well as represent the ward in civil proceedings. The legal situation of the guardian authorized to represent an incapacitated person and the management of his/her assets is similar to that of the guardian of a completely incapacitated person, which results from the application of the provisions on guardianship *mutatis mutandis* to guardianship. Like the guardian, he is the statutory representative of the partially incapacitated person, that is to say, is entitled to act on behalf of the represented person and with direct effect for him/her.[54] In this case, it is the guardian's responsibility to care for the partially incapacitated person, the management of his/her property and his/her representation.[55] Moreover, the guardian should take care of the incapacitated person, the conditions and the manner in which he/she lives, his/her state of health and therapy.[56]

The scope of powers of a guardian who has not been authorized by the court of protection to represent and manage the assets of a partially incapacitated person is disputed among scholars in the field. Some of them are in favour of giving such a guardian the status of a statutory representative even without such authorization,[57] while others deny the guardian the position of a statutory representative of a par-

[52] J. Strzebińczyk, *Prawo rodzinne*, Warszawa 2013, p. 396; H. Ciepła, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. J. Ignaczewski, Warszawa 2014, p. 805; A. Sylwestrzak, *Charakter prawny…*, p. 53; G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Opieka…*, p. 169, as in G. Matusik, *op. cit.*, Article 181 FGC, Nb 15.

[53] G. Matusik, *op. cit.*, Article 181 FGC, Nb 16; K. Korzan, *Zastępstwo strony przez kuratora w postępowaniu cywilnym*, "Nowe Prawo" 1964, no. 5, p. 506; idem, *Kurator…*, p. 29; idem, *Glosa do postanowienia z 8 IX 1970, II CZ 115/70*, "Państwo i Prawo" 1972, no. 11, pp. 164–166. The same position in B. Bladowski, A. Gola, *op. cit.*, p. 65; G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 181 FGC, Nb 3; T. Smyczyński, [in:] *System Prawa Prywatnego*, ed. T. Smyczyński, vol. 12, Warszawa 2003, p. 827; J. Strzebinczyk, [in:] *Kodeks cywilny. Komentarz do art. 1–534*, ed. E. Gniewek, Warszawa 2004, p. 73; H. Mądrzak, *Glosa do postanowienia Sądu Najwyższego z 8 września 1970 r., II CZ 115/70*, "Nowe Prawo" 1973, no. 5, p. 794, as in A. Sylwestrzak, *Charakter prawny…*, pp. 45–57; M. Jankowska, *Kuratela nad osobą ubezwłasnowolnioną częściowo. Raport z badania aktowego*, Warszawa 2018, pp. 38–39.

[54] K. Korzan, *Zastępstwo…*, p. 502, 506; D. Olczak-Dąbrowska, *op. cit.*, p. 120; J. Gajda, [in:] *Kodeks rodzinny…*, 2018, Article 181 FGC, Nb II 2.

[55] J. Ignatowicz, [in:] *Kodeks rodzinny…*, 1993, pp. 720–721; D. Olczak-Dąbrowska, *op. cit.*, p. 120.

[56] S. Grzybowski, *Prawo rodzinne…*, p. 260.

[57] J. Sadomski, *op. cit.*, Article 181 FGC, Nb 5.

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tially incapacitated person,[58] and others define him/her as an adviser of the partially incapacitated person, reporting to the court of protection.[59]

A slightly different approach is proposed by A. Sylwestrzak, who states that the guardian is not a statutory representative within the meaning of Article 95 § 2 and Article 96 of the Civil Code, and when referring to Article 17 of the Civil Code proposes either to adopt a different (broader) understanding of the term "statutory representative" or to apply Article 17 of the Civil Code by analogy to the situation of the guardian.[60] This view is a continuation of the previously presented statements that a guardian of a person under partial guardianship, who has not been appointed either to represent the ward or to manage the ward's property, is the ward's statutory representative, but not in the traditional sense arising from Article 95 § 2 and Article 96 of the Civil Code in the traditional interpretation.[61]

Among various opinions expressed by scholars in the field, the prevailing view is that the guardian appointed for a partially incapacitated person is always his/her statutory representative, but if the court has not appointed the guardian to represent and manage the ward's property, the court may only give its consent to or approve legal actions performed by the guardian,[62] and if there is a need to substitute the partially incapacitated person in a trial, the court of protection should give such

[58] Cf. K. Korzan, *Glosa…*, p. 161; J. Ignatowicz, [in:] *Kodeks rodzinny…*, 1993, p. 722; H. Mądrzak, *op. cit.*, p. 792; W. Siedlecki, *Przegląd orzecznictwa Sądu Najwyższego (Prawo procesowe cywilne)*, "Państwo i Prawo" 1972, no. 2, p. 99; M. Lisiewski, [in:] B. Dobrzański, M. Lisiewski, Z. Resich, W. Siedlecki, *Kodeks postępowania cywilnego. Komentarz*, vol. 2, Warszawa 1975, p. 158; M. Sychowicz, [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. K. Piasecki, Warszawa 1996, p. 268, 272; H. Haak, *Opieka…*, pp. 298–299, as in D. Olczak-Dąbrowska, *op. cit.*, p. 121.

[59] M. Grudziński, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. B. Dobrzański, J. Ignatowicz, Warszawa 1975, p. 891; K. Korzan, *Zastępstwo…*, pp. 506–507; idem, *Kurator…*, p. 29; idem, *Glosa…*, pp. 164–166. The same position in B. Bladowski, A. Gola, *op. cit.*, p. 65.

[60] A. Sylwestrzak, *Charakter prawny…*, pp. 53, 55–56.

[61] H. Mądrzak, *op. cit.*, p. 794; P. Ochałek, *Glosa do post. SN z 30.9.1977 r., III CRN 132/77*, "Nowe Prawo" 1981, no. 3, p. 167, as in G. Matusik, *op. cit.*, Article 181 FGC, Nb 8.1.

[62] M. Grudziński, [in:] *Kodeks rodzinny…*, 1975, p. 892; S. Grzybowski, [in:] *System Prawa Cywilnego*, vol. 1, Wrocław 1985, p. 356; J. Gajda, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2000, p. 628; J. Ignatowicz, J. Gajda, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Pietrzykowski, Warszawa 2015, p. 873; J. Ignatowicz, [in:] *Kodeks rodzinny…*, 2012, p. 1223; T. Smyczyński, *Prawo rodzinne*, Warszawa 2012, p. 340; H. Ciepła, [in:] *Kodeks rodzinny*, 2014, pp. 804–805; G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Komentarz. Opieka…*, pp. 168–169; decision of the Supreme Court of 8 September 1970, II CZ 115/70, OSNCP 1971, no. 6, item 104; decision of the Supreme Court of 30 September 1977, III CRN 132/77, OSNCP 1978, no. 11, item 204; decision of the Supreme Court of 12 May 2011, III CSK 54/10, LEX no. 1314553; judgement of the Court of Appeal in Warsaw of 31 January 2018, I ACa 1706/16, Legalis no. 1760434, as in G. Matusik, *op. cit.*, Article 181 FGC, Nb 7–8.

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authorization, with the reservation that it may be limited to representing the partially incapacitated person only in that particular trial.[63]

The considerations presented above suggest that the status of a guardian acting without the authorization of a court in civil proceedings is also debatable. Some of the authors claim, referring to the linguistic interpretation of Article 181 § 1 FGC, that the guardian is not the statutory representative of the partially incapacitated person and cannot act for him/her in civil proceedings in cases where the ward has no litigation capacity. Therefore, the court of protection should each time authorize the guardian to act in a particular case.[64]

Other authors hold that the guardian is always empowered to act for the partially incapacitated person, and thus also in cases where the ward has no litigation capacity.[65] According to J. Sadomski, the attempts made in the legal literature to differentiate the spheres of the permissible substantive and procedural representation of a partially incapacitated person by the guardian not only are not convincing in the light of the general rule under Article 65 § 2 of the Code of Civil Procedure, but also lead to unnecessary complications in the area of procedural law. This author, therefore, considers that the guardian, also in the absence of the appropriate authority granted by the guardian court pursuant to Article 181 FGC, has the power to take procedural action for the partially incapacitated person in cases where the incapacitated person has no litigation capacity.[66]

The unambiguous position on the status of an unauthorized guardian of a partially incapacitated person is expressed in the case law. The Supreme Court found that the guardian of a partially incapacitated person is appointed to consent to his/her assuming an obligation or disposing of his/her right (Article 17 of the Civil Code) also in this case, where the decision of the court of protection does not include the right of the guardian to represent the partially incapacitated person and to manage his/her assets (Article 181 § 1 FGC).[67] When deepening its previous position, the

[63] Similar case is with regard to representing a partially incapacitated person in administrative proceedings (Article 34 CAP). See J. Ignatowicz, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 1975, p. 438; W. Siedlecki, *Przegląd orzecznictwa…*, p. 99; H. Mądrzak, *op. cit.*, p. 788; M. Lisiewski, *op. cit.*, p. 158; K. Korzan, *Glosa…*, p. 161; idem, *Zastępstwo…*, p. 506, as in J. Gajda, [in:] *Kodeks rodzinny…*, 2020, Article 181 FGC, Nb II 5.

[64] D. Olczak-Dąbrowska, *op. cit.*, pp. 124–125; J. Ignatowicz, J. Gajda, *op. cit.*, pp. 873–874; J. Ignatowicz, [in:] *Kodeks rodzinny…*, 2012, p. 1224, as in G. Matusik, *op. cit.*, Article 181 FGC, Nb 18.5.

[65] K. Gromek, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2016, p. 808; J. Sadomski, *op. cit.*, Article 181 FGC, Nb 7; G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Opieka…*, p. 172, as in G. Matusik, *op. cit.*, Article 181 FGC, Nb 18.5.

[66] J. Sadomski, *op. cit.*, Article 181 FGC, Nb 7.

[67] Decision of the Supreme Court of 8 September 1970, II Cz 115/70, OSNC 1971, no. 6, item 104; decision of the Supreme Court of 30 September 1977, III CRN 132/77, OSNC 1978, no. 11, item 204; decision of the Supreme Court of 12 May 2011, III CSK 54/10, LEX no. 1314553; judgement of the Court of Appeal in Poznań of 1 April 2015, III AUa 951/14, Legalis no. 1245707.

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judicature has taken the view that Article 181 § 1 FGC only means the possibility of extending the powers of the guardian beyond the representation provided for by other legal provisions. It cannot be interpreted in the sense that the guardian, to whom the court of protection has not granted the powers provided for in that provision, may not be a representative of a partially incapacitated person even within the scope resulting from the substantive and formal civil law provisions.[68] Furthermore, the Supreme Court noted that the interpretation of Article 66 of the Civil Code in conjunction with Article 65 § 2 of the Civil Code leads to the conclusion that deprived of the litigation capacity is not only a person who is not completely incapable of performing acts in law, but also by a person who is limited in that capacity in matters arising from legal acts which he/she could not have carried out alone. In this respect, the statutory representative of a partially incapacitated person is this person's guardian appointed in accordance with Article 16 § 2 of the Civil Code, which does not require specific authorization by the court of protection.[69]

This view was met with both approval and criticism from scholars in the field. The concept of the Supreme Court was shared by A. Sylwestrzak, according to whom the solution of the question of guardian's powers by means of linguistic interpretation, the result of which would exclude any participation in legal transactions, does not correspond to the interests of the disabled person this institution is to serve. The position expressed in the judicature creates, in the opinion of this author, the framework for the flexible shaping of the scope of the guardian's powers depending on the needs of a specific case. Among the guardian's powers, this author distinguishes between two categories: the first includes those which, as an inherent element of guardian's functions, arise on the part of the guardian as a result of his/her appointment; the second, on the other hand, includes those that are only vested in the guardian if they have been granted to him/her in a court decision. The first category of rights includes, according to A. Sylwestrzak, primarily taking care of the person of the ward to the extent appropriate to his/her health condition, and providing advice in taking specific factual actions. On the other hand, the second category of guardian's powers, depending on the granting of certain rights by the court decision, is the representation and management of the property of a partially incapacitated person.[70]

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[68] Substantiation of the decision of the Supreme Court of 12 May 2011, III CSK 54/10, LEX no. 1314553; judgement of the Court of Appeal in Warsaw of 31 January 2018, I ACa 1706/16, Legalis no. 1760434.

[69] Decision of the Supreme Court of 8 September 1970, II Cz 115/70, OSNC 1971, no. 6, item 104; decision of the Supreme Court of 30 September 1977, III CRN 132/77, OSNC 1978, no. 11, item 204; decision of the Supreme Court of 12 May 2011, III CSK 54/10, LEX no. 1314553; judgement of the Court of Appeal in Poznań of 1 April 2015, III AUa 951/14, Legalis no. 1245707.

[70] A. Sylwestrzak, *Ubezwłasnowolnienie częściowe. Glosa do postanowienia SN z dnia 16 kwietnia 2010 r., IV CSK 470/09*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2010, no. 3–4, pp. 63–70.

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In the study of civil procedure, however, the opposite view is dominant, according to which without the authorization referred to in Article 181 FGC, the guardian is entitled only to activities under Article 17 of the Civil Code and may not represent the party in a trial.[71] Therefore, in a situation where the guardian has not been authorized by the court to represent the partially incapacitated person, and there is a need to replace this person in the trial, the court of protection should grant appropriate authorization, especially when the mental health condition of the incapacitated person partially justifies the supposition, that the person would have difficulty handling even matters of minor importance.[72]

In the opinion of J. Sadomski, such a view leads to equating the institution of a probation officer for a partially incapacitated person with the institution of a probation officer for a disabled person (Article 183 FGC). While a disabled person retains full capacity to perform acts in law and litigation capacity, in the case of a partially incapacitated person, these capacities are significantly limited. Hence, adopting the above position would in practice deprive a partially incapacitated person of the possibility of participating in legal transactions (performing most of the legal actions concerning his/her rights, as well as representation in most judicial proceedings), and given the legal consequences of partial incapacitation entailing the loss of full legal capacity, the mere appointment of the guardian for an incapacitated person would not fulfill the functions assigned to this institution.[73]

To sum up, it must be held that the linguistic interpretation of Article 181 § 1 FGC leads to the conclusion that the guardian is the statutory representative of the incapacitated person only if the court of protection appointed him/her to represent and manage ward's assets.[74] On the other hand, granting the status of statutory representative of the incapacitated person to a guardian not authorized for managing the property and for representation, is partly based primarily on a functional and systemic interpretation which seeks to ensure a sufficient degree of protection for the ward, in accordance with the objective of the institution of partial incapacitation.[75] In view of the wording of Article 181 § 1 FGC and disputes among scholars, it would therefore be desirable for the guardian to be authorized to represent the partially incapacitated person when acting as the statutory representative.[76]

[71] M. Lisiewski, *op. cit.*, p. 158; H. Mądrzak, *op. cit.*, p. 792; H. Haak, [in:] H. Haak, A. Haak-Trzuskawska, *op. cit.*, Article 181 FGC, Nb 7.

[72] H. Haak, [in:] H. Haak, A. Haak-Trzuskawska, *op. cit.*, Article 181 FGC, Nb 8.

[73] J. Sadomski, *op. cit.*, Article 181 FGC, Nb 5.

[74] G. Matusik, *op. cit.*, Article 181 FGC, Nb 7.

[75] A. Sylwestrzak, *Charakter prawny…*, p. 57.

[76] M. Dziurda, *Zdolność procesowa małżonka ubezwłasnowolnionego częściowo w sprawie o rozwód*, "Przegląd Sądowy" 2018, no. 6, pp. 42–61.

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PROCEEDINGS FOR THE APPOINTMENT OF THE GUARDIAN FOR A DISABLED PERSON AND A PERSON WHO IS PARTIALLY INCAPACITATED

In both cases of guardianship, the court with territorial jurisdiction to hear the case is the court of protection of the place of residence or stay of the disabled person (in the case of guardianship under Article 183 FGC), or of the partially incapacitated person (in the case of guardianship under Article 181 FGC), as these are the persons covered by the proceedings (Article 569 § 1 of the Code of Civil Procedure).

However, the possibility of initiating the proceedings looks different. The court of protection receives information about the necessity to establish care for a partially incapacitated person from the court that has adjudicated incapacitation and ordered *ex officio* to send a copy of the final decision to the court of protection (Article 558 § 1 of the Code of Civil Procedure).[77] Based on this decision, the court of protection initiates the procedure for establishing the care *ex officio*.[78]

On the other hand, the court of protection appoints the guardian for a disabled person upon request or *ex officio* (Article 600 of the Code of Civil Procedure). The application may be submitted by the disabled person concerned, or a non-governmental organization whose statutory tasks include protection of the rights of persons with disabilities, providing assistance to such persons or protection of human rights, if the person gives their consent. In case of lack of consent of the disabled person, the request of the non-governmental organization will be dismissed.[79]

The court may appoint a guardian *ex officio* in a situation where the condition of the disabled person precludes the possibility of submitting a request or giving consent. The court may also appoint a guardian *ex officio* if the request for incapacitation is dismissed (Article 600 § 2 of the Code of Civil Procedure), which happens "when during the proceedings for incapacitation it turns out that there are no grounds for incapacitation of the person concerned, but there are reasons to appoint a guardian on the grounds of disability. The guardian shall be appointed where the person, despite the lack of grounds for incapacitation, needs assistance to manage all or a particular type of affairs or to deal with a particular case. In

[77] J. Ignatowicz, [in:] *Kodeks rodzinny…*, 1993, p. 709, 720; J. Gajda, [in:] *Kodeks rodzinny…*, 2020, Article 181 FGC, Nb I.2.

[78] I. Kleniewska, *Praktyka sądowa w zakresie ustanawiania i nadzorowania opieki dla osoby ubezwłasnowolnionej całkowicie*, "Prawo w Działaniu" 2008, no. 4, p. 109; J. Ignatowicz, [in:] *Kodeks rodzinny…*, 1993, p. 720; G. Matusik, *op. cit.*, Article 181 FGC, Nb F20.

[79] D. Olczak-Dąbrowska, *op. cit.*, p. 100. See also M. Maciejewska-Szałas, *Organizacje pozarządowe i formy ich uczestnictwa w postępowaniu cywilnym*, "Gdańskie Studia Prawnicze" 2017, no. 2, pp. 130–131.

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such a case the court of protection shall act upon notification by the court hearing the incapacitation case".[80]

Under general provisions, the appointment of a guardian (Article 7 in conjunction with Article 13 § 2 of the Code of Civil Procedure) may be requested by a public prosecutor.[81] If in the course of the proceedings for the appointment of a guardian for a disabled person the court notices "changes in the personality" of the participant in the proceedings that may justify the participant's incapacitation, it should notify the public prosecutor of its doubts about the person's sanity (taking into account the content of Article 59 of the Code of Civil Procedure, which imposes on the court an obligation to notify the public prosecutor of any case in which it sees prosecutor's participation as necessary).[82] In such a case, pursuant to Article 7 of the Code of Civil Procedure, the prosecutor is entitled to file a request for incapacitation of the person for whom the guardian is to be appointed, and before the court of protection he should file a request to suspend the proceedings until the incapacitation case is concluded (Article 177 § 1 (1) of the Code of Civil Procedure). Another situation is also possible if in a guardianship case the court becomes convinced that there are no grounds for guardianship, but the person concerned needs a guardian to help him/her with everyday affairs. In this case, if the request for guardianship is dismissed, the adjudicating court shall notify the court of protection of the need for appointing a guardian for the disabled person (Article 558 § 2 of the Code of Civil Procedure). The court of protection may then appoint a guardian *ex officio*, pursuant to Article 600 § 2 sentence 2 of the Code of Civil Procedure.[83]

Although according to Article 600 § 1 of the Code of Civil Procedure the guardian for a disabled person is appointed by a court of protection at the request of that person, and at the request of a non-governmental organization mentioned in Article 546 § 3 of the Code of Civil Procedure with the person's consent, this does not mean that a court which is not the court of protection is deprived of the possibility to undertake actions aimed at appointing the guardian for a disabled person. If the condition of the disabled person precludes the possibility of filing a request or giving consent, the court of protection may appoint a guardian *ex officio* (Article 600 § 2 of the Code of Civil Procedure).[84]

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[80] J. Gudowski, [in:] *Kodeks*..., 2016, Article 600 CCP, Nb 3. See also H. Ciepła, [in:] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *op. cit.*, chapter 12.5; J. Sadomski, *op. cit.*, Article 183 FGC, Nb 4; J. Gajda, [in:] *Kodeks rodzinny*..., 2020, Article 183 FGC, Nb 7.

[81] D. Olczak-Dąbrowska, *op. cit.*, p. 100; J. Gudowski, [in:] *Kodeks*..., 2016, Article 600 CCP, Nb 4.

[82] Decision of the Supreme Court of 8 October 1998, II CKN 903/97, II CKN 903/97, LEX no. 1216978.

[83] G. Jędrejek, *Kodeks rodzinny*..., 2019, Article 183 FGC, Nb 14.

[84] Decision of the Supreme Court of 8 December 2016, III CZ 54/16, LEX no. 2186578.

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The participants in the proceedings for the appointment of a guardian for a disabled person and a partially incapacitated person are the person for whom the guardianship is to be appointed and the candidate for guardian, as they are interested parties within the meaning of Article 510 § 1 of the Code of Civil Procedure.[85]

In the case of the appointment of a guardian, the scheduling of a hearing is at the discretion of the court (Article 514 § 1 of the Code of Civil Procedure). It is possible to hear the participants in the proceedings at a hearing, even if no official hearing has been scheduled, or to receive written statements from them (Article 514 § 1 sentence 2 of the Code of Civil Procedure).[86] The disabled person for whom a guardian has been appointed has the capacity to undertake procedural actions (Article 573 § 1 of the Code of Civil Procedure) and can be summoned to appear in person before the court (Article 574 § 1 of the Code of Civil Procedure).[87]

The decision to establish a guardianship for a disabled person and a partially incapacitated person takes the form of a court's decision in which, in addition to the provision on establishment of the guardianship covering the personal data of the guardian and the ward, the scope of guardian's responsibilities must be determined, which is dictated by the need to issue a certificate to the guardian, indicating the extent of his/her powers (Article 604 of the Code of Civil Procedure). The certificate legitimizes him/her to provide assistance to the disabled person and the partially incapacitated person.[88]

Any decision concerning the establishment of a guardian should specify the nature and scope of the guardianship.[89] In the decision to establish the guardian for a disabled person, the court of protection may authorize the guardian to: run affairs of a specific type, i.e., custody and administration of the property of the disabled person, representation in legal proceedings in public administration offices or in the handling of a particular case (e.g., administrative, pension, social assistance); the performance of specific factual activities (e.g., receipt of a pension payment or sum of money from the bank account); to run any affairs of the disabled person, without specifying it in a provision which, for factual reasons, cannot be personally dealt with by the person.[90] The powers of the guardian may be extended by giving him/her a power of attorney to perform a legal act or a power of attorney for litigation.[91]

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[85] H. Haak, *Opieka…*, p. 366; D. Olczak-Dąbrowska, *op. cit.*, p. 101.

[86] D. Olczak-Dąbrowska, *op. cit.*, p. 101.

[87] E. Gapska, *op. cit.*, p. 615.

[88] M. Grudziński, [in:] *Kodeks rodzinny…*, 1966, p. 822; D. Olczak-Dąbrowska, *op. cit.*, p. 99, 101.

[89] J. Gudowski, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 3: *Postępowanie rozpoznawcze. Postępowanie zabezpieczające*, ed. T. Ereciński, Warszawa 2009, p. 246.

[90] W. Ziętek, *op. cit.*, pp. 63–64.

[91] D. Olczak-Dąbrowska, *op. cit.*, p. 99.

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In the decision on establishing the guardian for a partially incapacitated person, in addition to the provision on establishing the guardian covering personal data of the guardian and the ward, the extent of the guardian's responsibilities and authorization to represent and to manage ward's assets should be defined.[92]

In both cases, if the guardianship has not been established to deal with a particular case, the guardian should be obligated to report to the court of protection on the person under guardianship and the management of the person's property (Article 595 of the Code of Civil Procedure), unless the guardianship was established only to settle an individual case.[93] If a guardianship is established to perform a specific factual or legal act in favour of a disabled person within a specified time limit, the court of protection, after approving the guardian's report, finds that the guardianship has ceased and deprives the guardian of the judicial certificate establishing him/her as a guardian.[94]

Based on Article 577 of the Code of Civil Procedure, the court may amend its earlier decision by specifying the scope of guardian's responsibilities and powers other than specified previously,[95] or revoke it. The decision to appoint the guardian for a disabled person is effective immediately (Article 578 of the Code of Civil Procedure).[96]

The court of protection was equipped with supervisory instruments in case the guardian fails to fulfill his/her duties. The instruments of judicial supervision over the guardian of a partially incapacitated person are: 1) inspection of the inventory of the partially incapacitated person's property (Article 160 § 1 FGC); 2) the right to request explanations from the guardian in all matters relating to guardianship and to present documents related to its exercise; 3) the right of the court of protection to issue instructions and orders to the guardian; 4) the possibility of using the assistance of court guardianship officers by requesting social background research to obtain information about the incapacitated person, his/her living situation and the guardianship exercised over him/her; 5) issuing orders to the guardian if he/she fails to perform duly the function (Article 168 of the Code of Criminal Procedure); 6) dismissal of the guardian from the function under Article 169 § 2 FGC.[97]

On the other hand, to a guardian for a disabled person, Article 156 FGC applies, on the basis of which the guardian should seek the permit of the court of protection in all major matters relating to the disabled person or his/her property. The permit concerns only factual acts, not legal or procedural acts. The disabled person can

[92] *Ibidem*, p. 128.

[93] *Ibidem*, pp. 101–102; G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 183 FGC, Nb 11 and 12.

[94] W. Ziętek, *op. cit.*, pp. 62–63. See also T. Żyznowski, *op. cit.*, Article 600 CCP, Nb 4; G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 183 FGC, Nb 13.

[95] W. Ziętek, *op. cit.*, p. 64; G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 183 FGC, Nb 6.

[96] E. Gapska, *op. cit.*, p. 614.

[97] M. Jankowska, *op. cit.*, pp. 53–54.

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perform any acts independently. A permit will be required for a "major" factual act concerning both the person and the property of the disabled person.[98]

A disciplinary measure is also the possibility of imposing a fine by the court of protection on a guardian who does not comply with the orders of this court (Article 598 § 2 of the Code of Civil Procedure in conjunction with Article 605 of the Code of Civil Procedure).[99]

REVOCATION OF GUARDIANSHIP AND CHANGE OF THE GUARDIAN OF A DISABLED PERSON AND PARTIALLY INCAPACITATED PERSON

The reasons for termination of guardianship under Articles 181 and 183 of the Civil Code sometimes overlap. The guardianship relationship for a partially incapacitated person or a disabled person ceases on the basis of a decision of the court of protection to release the guardian from the guardianship (Article 169 of the Code of Civil Procedure in conjunction with Article 178 § 2 of the Code of Civil Procedure), at the request of the guardian for important reasons (Article 169 § 1 FGC) or if the guardian is incapable of exercising guardianship or commits acts or negligence that are detrimental to the welfare of the ward (Article 169 §§ 1 and 2 FGC in conjunction with Article 178 § 2 FGC).[100]

It can be legal or factual incapacity. Legal incapacity is a circumstance that excludes the possibility of appointing a given person a guardian (e.g., loss of full capacity to perform acts in law as a result of incapacitation). This situation does not cause the termination of the guardianship *ex lege*. On the other hand, factual incapacity to exercise guardianship means such a state of affairs in which the guardianship will or may be exercised unduly in the future.[101]

Moreover, the court of protection may, acting *ex officio*, without the request of the disabled person or partially incapacitated person, change the guardian without terminating the guardianship if the court finds that the guardian commits acts or omissions detrimental to the welfare of the person for whom he or she has been appointed.[102] Apart from these reasons for the release from the function by the court, guardianship also expires upon the guardian's death.[103]

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[98] G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 183 FGC, Nb 11 and 12.

[99] D. Olczak-Dąbrowska, *op. cit.*, p. 102.

[100] *Ibidem*, pp. 128–129; J. Ignatowicz, [in:] *Kodeks rodzinny…*, 1993, pp. 722–723; B. Bladowski, A. Gola, *op. cit.*, p. 66; G. Matusik, *op. cit.*, Article 181 FGC, Nb D12.

[101] M. Jankowska, *op. cit.*, p. 64.

[102] W. Ziętek, *op. cit.*, pp. 62–63. See also T. Żyznowski, *op. cit.*, Article 600 CCP, Nb 4; G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 183 FGC, Nb 13.

[103] M. Jankowska, *op. cit.*, p. 64.

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Differences are seen in the revocation of guardianship. Guardianship is terminated at the request of the disabled person for whom it was established (Article 183 FGC). The request to terminate the guardianship is binding on the court of protection.[104]

For the guardianship under Article 181 FGC, if the incapacitation is lifted, the guardianship ceases by operation of law (upon the decision becoming final).[105] This is the case when an incapacitated person regains full legal capacity as a result of lifting partial incapacitation (Article 170 FGC in conjunction with Article 178 § 2 FGC).[106] The court of protection does not issue a decision to terminate the guardianship, but only discontinues the proceedings as pointless.[107] The same is the case when partial incapacitation is changed to complete one, however, in such a case the court of protection is obliged to appoint a guardian for the ward. The current guardian may be appointed as the guardian.[108]

CONCLUSIONS

A guardian is established for a partially incapacitated person, who, under the authority to represent and manage the property of the ward, is the ward's statutory representative. Incapacitation is an institution aimed at providing assistance only to people with mental disorders.[109] In other cases of mental and physical dysfunction, where there is a need for assistance to a particular person, other rules may apply, including the establishment of a guardian for a disabled person (Article 183 of the Civil Code – *curator debilis*). This solution is referred to by Article 558 § 2 of the Code of Civil Procedure, according to which in case of dismissal of the request for incapacitation, the court informs the court of protection of the need to establish a guardian for the disabled person,[110] because the *curator debilis*, unlike the guardian for a partially incapacitated person, is not the statutory representative of the disabled

[104] J. Krajewski, *Postępowanie nieprocesowe*, Toruń 1973, p. 93; W. Siedlecki, *Postępowanie nieprocesowe*, Warszawa 1988, p. 157; W. Siedlecki, Z. Świeboda, *Postępowanie nieprocesowe*, Warszawa 2004, p. 162; D. Olczak-Dąbrowska, *op. cit.*, pp. 101–102; J. Sadomski, *op. cit.*, Article 183 FGC, Nb 5.

[105] J. Gajda, [in:] *Kodeks rodzinny*..., 2020, Article 181 FGC, Nb III.1.

[106] D. Olczak-Dąbrowska, *op. cit.*, pp. 128–129; J. Ignatowicz, [in:] *Kodeks rodzinny*..., 1993, pp. 722–723; B. Bladowski, A. Gola, *op. cit.*, p. 66; G. Matusik, *op. cit.*, Article 181 FGC, Nb D11; H. Haak, [in:] H. Haak, A. Haak-Trzuskawska, *op. cit.*, Article 181 FGC, Nb 11.

[107] J. Sadomski, *op. cit.*, Article 181 FGC, Nb 10.

[108] J. Gajda, [in:] *Kodeks rodzinny*..., 2020, Article 181 FGC, Nb III.1.

[109] Decision of the Supreme Court of 14 March 1977, II CR 58/78, LEX no. 7919.

[110] A. Sylwestrzak, *Ubezwłasnowolnienie*..., pp. 63–70.

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person, as this person retains full capacity to perform acts in law.[111] The guardian under Article 183 FGC provides, above all, factual assistance to a person who has not been incapacitated, even if the person is affected by mental dysfunctions, while the guardian under Article 181 FGC provides assistance in legal acts, procedural acts and factual acts not relating to legal acts for a person who has been partially incapacitated.[112] The guardian of a partially incapacitated person, therefore, has a broader scope of protection of the ward, since, unlike the guardian of a disabled person, he/she has an obligation to run the affairs of the ward, as well as the right to represent him/her and to administer his/her property.[113]

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[111] Decision of the Supreme Court of 24 May 1995, III CRN 22/95, OSNC 1995, no. 9, item 134; J. Sadomski, *op. cit.*, Article 183 FGC, Nb 3.

[112] A. Sylwestrzak, *Charakter prawny…*, p. 52.

[113] G. Jędrejek, *Kodeks rodzinny…*, 2019, Article 183 FGC, Nb 4.

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ABSTRAKT

Sąd opiekuńczy w trybie postępowania nieprocesowego może ustanowić kuratora dla osoby niepełnosprawnej (art. 183 k.r.o.) oraz dla osoby ubezwłasnowolnionej częściowo (art. 181 k.r.o.). Precyzyjne rozgraniczanie zakresów stosowania wskazanych przepisów nie zawsze jest możliwe i w praktyce nastręcza sporo problemów. Problematyczny jest zwłaszcza charakter kurateli ustanowionej dla osoby niepełnosprawnej i dla osoby ubezwłasnowolnionej częściowo oraz zakres uprawnień obu kuratorów. Dyskusyjny jest szczególnie status kuratora osoby ubezwłasnowolnionej częściowo, którego sąd nie upoważnił do zarządu majątkiem i do reprezentacji kuranda. Celem niniejszego artykułu jest wskazanie zakresu działania kuratora ustanawianego dla osoby niepełnosprawnej i dla osoby ubezwłasnowolnionej częściowo wraz z określeniem ich statusu. Dla osoby ubezwłasnowolnionej częściowo ustanawiany jest kurator, który na podstawie udzielonego upoważnienia do reprezentacji i zarządu majątkiem kuranda jest jego przedstawicielem ustawowym. Odmienny status ma kurator ustanawiany dla osoby niepełnosprawnej, który nie jest jej przedstawicielem ustawowym. Kurator

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z art. 183 k.r.o. świadczy przede wszystkim pomoc faktyczną dla osoby, która nie została ubezwłasnowolniona, nawet jeśli dotknięta jest dysfunkcjami psychicznymi, natomiast kurator z art. 181 k.r.o. świadczy pomoc w czynnościach prawnych i procesowych oraz w czynnościach faktycznych niezwiązanych z czynnościami prawnymi dla osoby, która została ubezwłasnowolniona częściowo.

Słowa kluczowe: kurator dla osoby niepełnosprawnej; osoba niepełnosprawna; kurator dla osoby ubezwłasnowolnionej częściowo; kuratela

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