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## LEGAL PROTECTION AND EMPOWERMENT OF VULNERABLE ADULTS IN SERBIA<sup>1</sup>

**Abstract:** *Having in mind demographic trends and especially growing number of the population in the old age, it is very important that family law deals with the needs of the vulnerable adults. In 2021 in Serbia the percentage of the population aged 65 and older is 21.3%. The number of users in Centres for social work that are deprived of 'transactional' ('contractual') capacity is growing (in 2017 13.075 persons are deprived of the 'transactional' ('contractual') capacity.*

*Having in mind UN Convention on the Rights of Persons with Disabilities (Serbia has ratified the Convention in 2009) in this paper authors analyse legal changes in the procedural law which aim is protection and empowerment of vulnerable adults in Serbian law. One solution is limitation of the deprivation of 'transactional' ('contractual') capacity in a way that the decision is to be re-examine in the period of maximum three years (Law on Non-Contentious Proceedings amendments 2014). Other solution is the obligation of the court to define legal operations which the person deprived of the capacity can undertake by himself/herself and especially if this person can exercise his/her elective right (Law on Non-Contentious Proceedings amendments 2022).*

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<sup>1</sup> Рад је настао као резултат рада на научно-истраживачком пројекту „Правна традиција и нови правни изазови“ чији је носилац Правни факултет у Новом Саду.

*The authors analyse proposed legal changes in the family law which aim is to empower vulnerable adults. The recent Draft Law on Amendments to Family Act empowers vulnerable adults in the several ways. It is proposed to abandon the existing institution of “deprivation of legal capacity“ and to keep only the institution of the “limitation of legal capacity“. It is proposed that court in the decision on limitation of ‘transactional’ (‘contractual’) capacity should determine the legal operations that a person partially deprived of capacity may not undertake independently. The Draft Law on Amendments to Family Act adds the legal acts to legal operations which the person deprived of capacity may undertake. This solution empowers vulnerable adults giving them wider circle of independent rights.*

*It is proposed that the guardianship authority is obliged to protect the dignity and well-being of the ward; try to limit the rights of the ward as little as possible; encourage the ward’s independent decision-making; provide him/her support in decision-making, as well as the participation in community life; take into account all the specifics of the ward’s personality and accept his decisions, opinions, wishes, and attitudes, unless it is in conflict with the welfare of the ward. In addition, it is proposed to stipulate the guardian’s obligation to make sure that the adult ward receives all the information on issues that concern him/her in a timely manner and to take into account in the utmost extent possible the ward’s decisions, opinion, wishes and attitudes when performing the guardian’s duties.*

**Keywords:** *vulnerable adults, protection, empowerment, deprivation, limitation, ‘transactional’ (‘contractual’) capacity.*

## 1. INTRODUCTION

In 2021 in Serbia number of the total population is 6.797.105, population 65 and over is 1.447.834, so the percentage of the population aged 65 and older is 21.3%.<sup>2</sup> Data from the Republic Institute for Social Protection shows that the number of users in Centres for social work that are deprived of ‘transactional’ (‘contractual’) capacity<sup>3</sup> is growing – 12.732 in 2015, 13.030 in 2016 and 13.075 in 2017.<sup>4</sup>

On 31/12/2020, under guardianship are 13.436 adult beneficiaries. In the past three years, the total number of adult beneficiaries under permanent guardianship has been continuously growing, and in 2020 it is 2.1% higher than in 2019. Of the

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<sup>2</sup> <https://data.stat.gov.rs/Home/Result/18010403?languageCode=sr-Latn>

<sup>3</sup> Serbian term ‘poslovna sposobnost’ is translated for the purpose of this article as ‘transactional’ (‘contractual’) capacity.

In English language there is no adequate term that clearly distinguishes terms ‘poslovna sposobnost’ and ‘pravna sposobnost’.

<sup>4</sup> Report on the work of for 2017, Republic Institute for Social Protection, Belgrade, December 2018, <http://www.zavodsz.gov.rs/media/1423/izvestaj-o-radu-csr-2017rzs.pdf>

total number of adult beneficiaries under guardianship in 2020, 55% are male. When it comes to the age of the users, 70% belong to the elderly category and this distribution has been present in the previous three years.<sup>5</sup>

In the course of 2020, 5.203 decisions were made on the application of measures of temporary guardianship over person adult beneficiaries. Of the total number of temporary guardians of adult beneficiaries, in 75.3% of cases the guardian is a natural person, while direct guardianship appears in 20.3% of cases.<sup>6</sup>

It is very worrying that full deprivation of legal capacity still dominates, that 31% of persons are under the direct guardianship of Centre for social work, and that 43% of persons deprived of legal capacity live in institutions. Also, the deprivation of legal capacity has a very negative effect on women with disabilities, especially those who are in residential institutions, in terms of sexual and reproductive rights, bearing in mind that they do not decide independently about the use of contraception, the birth of children and/or termination of pregnancy, since it is decided by their guardians.<sup>7</sup>

In Serbian legislation main legal sources that regulate deprivation of legal capacity are: Family Act and Law on Non-Contentious Proceedings.<sup>8</sup>

Serbia has ratified both the UN Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol.<sup>9</sup> Concluding observations on the initial report of Serbia (2016) given by the UN Committee on the Rights of Persons with Disabilities<sup>10</sup> as supervisory international authority for monitoring the implementation of the Convention is important document which is and would be considered in changes in domestic concept of legal capacity of the vulnerable adults.

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<sup>5</sup> Report on the work of Centre for Social Work for 2017, Republic Institute for Social Protection, Belgrade, December 2018, <http://www.zavodsz.gov.rs/media/1423/izvestaj-o-raducsr-2017rzz.pdf>

The report on the work of Centre for Social Work is one of the reports on the work of social welfare institutions prepared by the Republic Institute for Social Welfare. The report was compiled on the basis of individual statistical reports on the work of 170 departments. The data presented by the Centre for Social Work should be taken as an illustration of the state of the system, given that the area of data collection is not sufficiently regulated and that there is no unified information system for records and data entry of social welfare institutions, with defined responsibilities of each instance in the process.

<sup>6</sup> Ibid.

<sup>7</sup> Strategy for improving the position of persons with disabilities in the Republic of Serbia for the period from 2020 to 2024, *Official Journal of Republic of Serbia*, No 44 of March 27, 2020, p. 32.

<sup>8</sup> Family Act, *Official Journal of Republic of Serbia*, No 18/2005, 72/2011 – other law and 6/2015), hereinafter FA, Law on Non-Contentious Proceedings, *Official Journal of the Republic of Serbia* No. 25/82 with amendments.

<sup>9</sup> The UN Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol, *Official Journal of Republic of Serbia –International treaties*, No.42/2009.

<sup>10</sup> CRPD Committee, Concluding Observations on the Initial Report of Serbia, (UN Doc CRPD/C/SRB/CO/1, 23 May 2016).

## 2. DEPRIVATION OF 'TRANSACTIONAL' ('CONTRACTUAL') CAPACITY

In current Serbian Family law there are two types of the deprivation of 'transactional' ('contractual') capacity: full and partial.

The full deprivation is the measure in the situation if due to illness or impediments in psychophysical development, a person of age is not able to reason normally and is thus unable to take care of himself/herself and to protect his/her rights or interests (Article 146/1 Family Act).

The partial deprivation is the measure in the situation if due to illness or impediments in psychophysical development, a person of age directly endangers his/her own rights and interests or the rights and interests of other persons by his/her actions (Article 147/1 FA).

The limited 'transactional' ('contractual') capacity can be restored and reversed from full capacity to partial and *vice versa*. When the reasons for which the person has had his 'transactional' ('contractual') capacity removed cease to exist, the court shall, *ex officio* and upon the motion of the guardianship authority and spouse, child or parent render a ruling on the restoration of his/her capacity (Article 42b/1 Law on Non-Contentious Proceedings). If after rendering a ruling on full deprivation of 'transactional' ('contractual') capacity of a person it is established that his mental state has improved to such a degree that partial deprivation of capacity is sufficient, the court shall amend its previous ruling and order partial deprivation of capacity (Article 42a/1 Law on Non-Contentious Proceedings).

The 'transactional' ('contractual') capacity of the person who is fully deprived of capacity is equal to the capacity of a young minor (Article 146/1 FA). That means this person may undertake legal operations whereby he/she acquires exclusively rights, legal operations whereby he/she does not acquire either rights or obligations and legal operations of small significance (Article 64/1 FA).

The 'transactional' ('contractual') capacity of the person who is partially deprived of capacity is equal to the capacity of a senior minor (Article 146/2 FA). That means this person may undertake, in addition to legal operations whereby he/she acquires exclusively rights, legal operations whereby he/she does not acquire either rights or obligations and legal operations of small significance, all other legal operations with the prior or subsequent consent of his/her guardian, or the consent of the guardianship authority for the disposition of immovable property and movable property of considerable value (Article 64/2 FA).

According to Family Act a child who has reached the age of fifteen may undertake legal operations whereby he/she manages and disposes of his/her income or property acquired through his/her own work (Article 64/3 FA). If the person who is partially deprived of 'transactional' ('contractual') capacity works, the question is if this provision might apply to his/her legal operations. The court can

and should (to have tailored-made decision) make a decision on partial deprivation of capacity which determines the legal operations that a person partially deprived of capacity may/may not undertake independently. So, if the person who is partially deprived of capacity works, the court should specify that he/she may undertake legal operations whereby he/she manages and disposes of his/her income or property acquired through his/her own work. The reason why is a person deprived of capacity is important factor for issuing such decision or not. For instance, the reason might be prodigality, or addiction, in these cases it probably would not be appropriate to give the adult ward possibility to undertake legal operations whereby he/she manages and disposes of his/her income or property acquired through his/her own work independently.

According to Family Act provisions, a person deprived of ‘transactional’ (‘contractual’) capacity is not able to conclude a marriage as inability to reason is one of the marriage impediments.

“Marriage may not be concluded by a person unable to reason” (Article 18 FA).

This provision is not questionable if person is fully deprived of ‘transactional’ (‘contractual’) capacity. It seems important to have in mind the provision which authorizes a court to permit a minor who has reached sixteen years of age, and who has reached the physical and mental maturity necessary to perform the rights and duties of marriage, to conclude a marriage for justified reasons (Article 23/2 FA). The capacity of the person who is partially deprived of ‘transactional’ (‘contractual’) capacity is equal to the capacity of a senior minor (child of fourteen years of age). So, the question is: is it possible for a court in a decision on partial deprivation of ‘transactional’ (‘contractual’) capacity to permit this person to conclude a marriage? In our opinion, decision on partial deprivation of capacity should not include marriage conclusion, as this is an act which should be expressly regulated by the Family Act because of its great importance.<sup>11</sup> Comparatively speaking, in Croatia, for instance, the person who is deprived of capacity has a capacity to conclude marriage, or to file for a divorce, but not independently (according to Family Act 2015 with amendments Article 234/5). As divorce is concerned, in Serbian law, the person who is deprived of ‘transactional’ (‘contractual’) capacity cannot file for divorce by himself/herself, as this person does not have procedural capacity for doing so. The guardian of a spouse without capacity may initiate action for divorce, but only with prior consent of the guardianship authority (Article 220/4 FA).

Concerning the consent to a medical intervention of a person who is deprived of legal capacity according to the Article 19/2 of the Law on the Patient’s Rights,

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<sup>11</sup> In the paragraph 21 of the Concluding observations on the initial report of Serbia (2016) given by the UN Committee on the Rights of Persons with Disabilities is stated: “The Committee is especially concerned by the denial of the rights to marry and to vote.”

a physician or other healthcare professional is obliged to enable patient who is deprived of legal capacity to be involved in decision-making on giving consent to the proposed medical treatment due to her/his maturity and mental capacity.<sup>12</sup> In the Article 19/4 is stipulated that if the 15 year old child refuse medical treatment, physician or other healthcare professional is obliged to ask the consent from the child's legal representative. This solution is not stipulated for the the adult patient partially deprived of legal capacity. The question is if the patient partially deprived of legal capacity could enjoy negative autonomy or not (analogous to the right of the child who has reached the age of 15). Having in mind main principle of the CRPD (Article 12) on the importance of having in mind the will and preferences of the vulnerable adult, principle which prevails the principle of the best interest (see more in the further text of this article), the legal position of the child who has reached the age of 15 and the adult person who is deprived of the legal capacity should not be equal.

Concerning a personal name, the child at the age of fifteen if he/she is able to reason has a right to change it. A child who has reached the age of ten and who is able to reason has the right to give consent to the change of his/her personal name (Article 346 FA). Having in mind that the 'transactional' ('contractual') capacity of the person partially deprived of capacity is the same as capacity of the senior minor (child over 14 years of age), the question is: If the person partially deprived of the capacity may change a personal name, similarly to the child at the age of fifteen? It should be noticed that the legal norm on the 'transactional' ('contractual') capacity of the person partially deprived of the capacity stipulates the possibility to take legal operations, which include contracts in the first place, and not other legal acts. Changing the personal name could be qualified as a legal act. So, the conclusion could be that he/she cannot change the personal name *ex lege*. Another question is: is it possible for a court in a decision on partial deprivation of 'transactional' ('contractual') capacity to permit this person to change his/her personal name and/or to give consent to the change of his/her personal name? In our opinion, decision on partial deprivation of 'transactional' ('contractual') capacity should include rights on personal name, as these rights are of personal nature and might be of a great importance for the person in question.

The person who is 15 years of age and who is able to reason can make a will.<sup>13</sup> Once again, having in mind that the 'transactional' ('contractual') capacity of the person partially deprived of capacity is the same as capacity of the senior minor (child over 14 years of age), the question is: If the person partially deprived of 'transactional' ('contractual') capacity should make a will? In the theory there are different opinion on this issue. There are authors who are of the opinion that

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<sup>12</sup> Law on Patien's Rights, *Official Journal of the Republic of Serbia* No. 45/2013, 25/2019.

<sup>13</sup> Law on Inheritance, *Official Journal of the Republic of Serbia* No. 46/1995, Article 79.



if person is deprived of the capacity regardless if it is full or partial deprivation, he/she is not able to make a will.<sup>14</sup> Other others are of the opinion that the partial deprivation is not relevant for the capacity to make a will<sup>15</sup>, or that person partially deprived of the ‘transactional’ (‘contractual’) capacity can make a will, except if the court in the decision of partial deprivation orders otherwise, or if afterwards medical expertise found he was not capable to make a will.<sup>16</sup> As making a will is very specific legal operation, in our opinion it should be explicitly stated in the Law on Inheritance if person partially deprived of ‘transactional’ (‘contractual’) capacity have a capacity to make a will and what conditions have to be meet for doing so. But, if Law on Inheritance does not refer to this issue, as it is the case now, we are of the opinion that person partially deprived of the capacity can make a will, except if the court in the decision of partial deprivation orders otherwise. If after the will was made, medical expertise found the testator was not capable to make it, the will would be null. This situation is the same as general situations of making a will, regardless of the fact the person was deprived of the capacity or not. In the practise of making a will, especially private form of will so-called “lawyers form” it is common to have a medical examination of the testator to prove that he/she is able to reason, before making the will.

Concerning administrative matters, in the Law on Passports is explicitly stated that the authority to make a request for issuing passport for the person who is deprived of ‘transactional’ (‘contractual’) capacity has guardian of this person.<sup>17</sup>

The proceedings for the deprivation of ‘transactional’ (‘contractual’) capacity is regulated by the Law on Non-Contentious Proceedings. The family members who can initiate the proceedings for the deprivation of ‘transactional’ (‘contractual’) capacity are: spouse, child or parent, and if he/she lives with such person in the same family household than also grandfather, grandmother, brother, sister or grandchild. The family members are persons who can provide the information on the life and behaviour of the person in relation to whom the proceedings are conducted and on other important circumstances.

The court shall question the guardian or temporary representative, the petitioner and other persons who can provide the required information on the life and behaviour of the person in relation to whom the proceedings are conducted and on other important circumstances. Where needed, the court will obtain information about information on the life and behaviour of the person in relation to whom the proceedings are conducted and on other important circumstances from the bodies of the socio-political community, self-management organisations and com-

<sup>14</sup> For instance: Оливер Антић, *Наследно њраво* 2009 (Inheritance Law) p.234.

<sup>15</sup> Дејан Ђурђевић, *Институције наследној њрава* (Institutiones of Inheritance Law) 2011 p. 122.

<sup>16</sup> Наташа Стојановић, *Наследно њраво* 2011 (Inheritance Law) p. 198.

<sup>17</sup> Law on Passports *Official Journal of the Republic of Serbia* No. 90/2007, Article 29.

munities, legal and other persons, to whom such information is available (Article 37 Law on Non-Contentious Proceedings).

The person in relation to whom the proceedings for removal of ‘transactional’ (‘contractual’) capacity are conducted must be examined by no less than two physicians of the appropriate speciality, who will provide their findings and opinion on the mental state and the capacity of such person to make judgments. The expert examination shall be performed in the presence of a judge, except when it is performed in an in-patient health organisation. The court may determine by a ruling that the person in relation to whom the proceedings are conducted, shall be temporarily, no longer than three months, placed in an appropriate health institution. This ruling would be made if, in the opinion of the physician, this is necessary to determine his mental state, but not if that may cause harmful consequences to his health (Article 38 Law on Non-Contentious Proceedings). In such proceedings, the ruling shall be made on the basis of oral hearing. The person in relation to whom the proceedings are conducted, shall be summoned to the hearing (Article 35 Law on Non-Contentious Proceedings).

The ruling on the placement into the health care institution may be appealed by the person in relation to whom the proceedings is conducted regardless of his mental state. The court shall forward the appeal with accompanying documents to the second instance court, which shall decide within three days of the receipt of the appeal (Article 39 Law on Non-Contentious Proceedings).

The court may suspend rendering the ruling on partial deprivation of ‘transactional’ (‘contractual’) capacity due to abuse of alcohol or narcotic substances, if it may reasonably be expected that the person in relation to whom the proceedings are conducted will refrain from the abuse of alcohol or narcotic substances and if such person, on his own initiative or the proposal of the court, subjects himself to treatment in a specified health care organisation. The court may suspend the rendering of ruling on deprivation of ‘transactional’ (‘contractual’) capacity for a period of 6 to 12 months. The ruling may be revoked if the person terminates the treatment or is discharged from the health care organisation for disorderly behaviour (Article 41 Law on Non-Contentious Proceedings).

Another important issue concerns the legal status of the person who is not capable to reason, if he/she is not deprived of the ‘transactional’ (‘contractual’) capacity (yet). Concerning contracts it is possible to start court proceeding to prove that the person who was not deprived of ‘transactional’ (‘contractual’) capacity in the moment of making the contract, was not capable of reason and because of that reason the contract is null. This is general legal principle and it is applied in the court practise. Specifically, a notary public may not act if he/she is aware or should be aware that the person is not able to conclude a contract for some legal reason (Article 53/4 the Law on Notary Public<sup>18</sup>). So if the person is

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<sup>18</sup> Law on Notary Public, *Official Journal of the Republic of Serbia* No. 31/2011.



not deprived of the ‘transactional’ (‘contractual’) capacity, but notary public is aware the person is not capable of reason he/she should not permit him/her to conclude the contract. In such case the party can complain to the decision of the notary public starting the court procedure (Article 53a the Law on Notary Public).

### 3. EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

The UN Convention on the Rights of Persons with Disabilities supports the social concept of disability laying the foundations for all the current and possible future changes. This UN international human rights treaty obliges state parties to recognize the right of a person with disability to enjoy legal capacity (Article 12). One of the main principles in connection of the legal status of the vulnerable adult is the will and preferences principle (Article 12), thus, the transition from the best interest principle to the new principle of the will and preferences is needed.<sup>19</sup>

The key interpretation of the Article 12 of the Convention is given in General Comment No. 1 (2014) of the UN Committee on the Rights of Persons with Disabilities (paragraph 21).

“Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The “best interests” principle is not a safeguard which complies with article 12 in relation to adults. The “will and preferences” paradigm must replace the “best interests” paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”

In connection with the legal model of the deprivation of the transactional (‘contractual’) capacity and substitute decision-making by vulnerable adult’s guardian in the Explanatory report is stated:

“Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making...”

“Article 12, paragraph 3, recognizes that States parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.”<sup>20</sup>

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<sup>19</sup> The interpretation of the Article 12 of the Convention is given in General Comment No. 1 (2014) of the UN Committee on the Rights of Persons with Disabilities (paragraph 21). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

<sup>20</sup> Ibid.

The domestic acts were amended having in mind the aim of UN Convention on the Rights of Persons with Disabilities. The amendments of Law on Non-Contentious Proceedings from 2014 empower the persons deprived of the transactional ('contractual') capacity (vulnerable adults) in different ways.

First, the deprivation of 'transactional' ('contractual') capacity is not limitless as it was before the amendments, as has to be re-examined in the period of maximum three years.<sup>21</sup> In the deprivation the court has to define time-limit for checking if the reasons for the removal still exist (Article 40/2). This stipulations is introduced after the decision of European Court for Human Rights *Salontaji-Drob-njak v. Serbia*.<sup>22</sup> In this decision European Court for Human Rights, among other opinions, states that "... the applicable domestic legislation does not seem to provide for a periodical judicial re-assessment of the applicant's condition..."

The person in relation to whom the proceedings are conducted has a right to file a complaint on the decision on deprivation of 'transactional' ('contractual') capacity regardless of his mental state in 8 days of receiving the decision. This provision improves the rights of the person who is deprived of the legal capacity.

Another issue concerns rights of a persons without 'transactional' ('contractual') capacity to exercise his/her rights. The court may allow that the participant without 'transactional' ('contractual') capacity can institute actions for the purposes of exercising his/her rights, if believes that he is capable of understanding the meaning and legal consequences of such actions (Article 7 Law on Non-Contentious Proceedings). Thus, this person has right to adversarial trial and has active role in the proceedings.<sup>23</sup> In addition, the person who is deprived of 'transactional' ('contractual') capacity may institute proceedings for the restoration of his/her capacity, if he/she is capable of understanding the meaning and legal consequences of this petition. This is possible in the situation when the reasons cease to exist (Article 42b Law on Non-Contentious Proceedings). On the other hand, it is possible for the person whose capacity is to be removed to file a petition to institute proceedings for the deprivation of his/her capacity if he is capable of understanding the meaning and legal consequences of his petition (Article 32/3 Law on Non-Contentious Proceedings).

The recent novelty of Law on Non-Contentious Proceedings, amendments from 2022, is that in the decision of the partial deprivation of 'transactional' ('con-

<sup>21</sup> Невена Петрушић, "Поступак за лишење пословне способности", *Зборник радова Правној факултету у Нишу Број 70 | Година LIV | 2015*, pp. 903-920.

<sup>22</sup> Application no. 36500/05, *Hudoc*. More in: Марија Драшкић, "Нови стандарди за поступак лишења послове способности: Актуелна пракса Европског суда за људска права", *Анали Правној факултету у Београду* Година LVIII, бр. 2/2010, pp. 355-371.

<sup>23</sup> Невена Петрушић, "Поступак за лишење пословне способности у праву Србије у контексту међународних стандарда о правима особа са инвалидитетом," *Зборник радова Правног факултета у Нишу, Број 70, Година LIV, 2015*, стр. 903-920.

<http://www.prafak.ni.ac.rs/files/zbornik/sadrzaj/zbornici/z70/50z70.pdf>

tractual') capacity of the person the court has to define legal operations which this person can undertake by himself/herself and especially if this person can exercise his/her elective right (Article 40/3). The Law on Election of National Deputies 2022 stipulate that the person partially deprived of 'transactional' ('contractual') capacity may elect national deputies and may be elected to be national deputy if court in the decision of the partial deprivation finds he/she does not have capacity for doing so (Article 3/2).<sup>24</sup> Thus, the recommendation of the Concluding observations on the initial report of Serbia (2016) given by the UN Committee on the Rights of Persons with Disabilities is adopted in the Serbian legislation.<sup>25</sup>

The recent Draft Law on Amendments to Family Act proposes to abandon the existing institution of "deprivation of 'transactional' ('contractual') capacity" and to keep only the institution of "limitation of 'transactional' ('contractual') capacity" (Article 146).<sup>26</sup> The court shall determine the duration of limitation, it cannot exceed three years. This amendment would protect vulnerable adults having in mind contemporary solutions in international and comparative family law.

According to Law on Cessation of Pregnancy in a Healthcare Institution pregnant woman who is partially deprived of 'transactional' ('contractual') capacity has the right to independently request for an abortion.<sup>27</sup> If pregnant woman is fully deprived of capacity, the consent of the guardian is needed for the abortion. If the consent of the guardian is not possible to obtain because of his/her absence or if because he/she is prevented to give consent for some reason, the consent of the guardianship authority (centre for social work) is needed (Article 2). Concerning contraception there is no explicit provision in Serbian law which would regulate if a person deprived of 'transactional' ('contractual') capacity has a right to decide on contraception independently. So, the question is: Is it possible for a court in a decision on partial deprivation of 'transactional' ('contractual') capacity to permit this person to decide on contraception? In our opinion, decision on partial deprivation of capacity could include rights on contraception, if the court finds this person is able to make such decision. Having in mind that the pregnant woman who is partially deprived of 'transactional' ('contractual') capacity can independently request for an abortion, we are of the opinion it should be the same for the decision on contraception, as both rights are reproductive rights, exceptionally personal and private in nature.

The novelty proposed in the Draft Law on Amendments to Family Act is to add legal acts to legal operations which the person deprived of capacity may undertake.

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<sup>24</sup> The Law on Election of National Deputies, *Official Journal of the Republic of Serbia* No. 14/2022.

<sup>25</sup> Op. cit. In the paragraph 21 is stated: "The Committee is especially concerned by the denial of the rights to marry and to vote."

<sup>26</sup> The Draft is available with the Commission for drafting the text.

<sup>27</sup> Cessation of Pregnancy in a Healthcare Institution Act, *Official Journal of the Republic of Serbia* No. 16/1995.

This is solution which empowers vulnerable adults giving them wider circle of independent rights, similarly to the child at the age of fifteen.

The recent Draft Law on Amendments to Family Act empowers vulnerable adults. First, it is proposed that the guardianship authority is obliged to protect the dignity and well-being of the ward; strive to limit the rights of the ward as little as possible; encourage the ward's independent decision-making provide; him/her support in decision-making, as well as the participation in community life; take into account all the specifics of the ward's personality and accept his decisions, opinions, wishes, and attitudes, unless it is in conflict with the welfare of the ward (Article 124). When it comes to taking care of the ward, it is proposed to add the guardian's obligation to make sure that the adult ward receives all the information on issues that concern him/her in a timely manner and to take into account in the utmost extent possible the ward's decisions, opinion, wishes and attitudes when performing the guardian's duties (Article 135).

According to Family Act two decisions enable tailored-made incapacitation to some extent. First is a court decision on partial deprivation of 'transactional' ('contractual') capacity which determines the legal operations that a person partially deprived of capacity may/may not undertake independently (Article 147/3). On the other hand, the Law on Non-Contentious Proceedings has different solution, so it is stated the court may in the ruling for partial deprivation of 'transactional' ('contractual') capacity of a person determine the type of transactions such person may undertake independently in addition to the transactions to which he is authorised by the law (Article 40/2).<sup>28</sup> In the recent Draft Law on Amendments to Family Act it is proposed that court in the decision on deprivation of 'transactional' ('contractual') capacity should determine the legal operations that a person partially deprived of capacity may not undertake independently. This formulation in fact means that all other legal operations which are not specified in the court decision vulnerable adult can take independently.

Another type of tailored-made decision is the decision on placing someone under guardianship. This decision includes a guardianship plan, which is specific for each person.

In the current law there is a possibility for the manager of a social service institution for accommodation (or a person employed in such an institution), to be appointed as the guardian of all the wards accommodated in that social service institution. The Draft Law on Amendments to Family Act proposes abandon this solution (Article 130), in order to protect vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions.

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<sup>28</sup> More in Петрушић 2015 p. 908.

The Draft Law on Amendments to Family Act proposes that apart from a ward's spouse, relative or foster parent who are primarily appointed as a guardian according to the current law, the person who is particularly close to the ward may be appointed as a guardian, as well (Article 126/2).

Another novelty concerns types of the guardian. It is proposed that the form of guardian, now called "direct guardian", to be changed to "state guardian". A state guardian would be appointed if the following persons cannot be appointed as guardians: a spouse, a relative, a foster parent, or a person particularly close to the ward. The work of the state guardian is performed by an official, employed in the body of the local self-government unit that performs social protection and social activities, and who is designated by the head of that body. The work of the state guardian is performed by an official who is trained and has special knowledge in the field of family law and social protection.

The Draft Law on Amendments to Family Act proposes to add as a ground for relieving the guardian of his/her duties, the case when the guardian has concluded a life care contract with the ward or another contract that leads to the incompatibility of the rights and obligations from the contract with the duties of the guardian (Article 133).

#### 4. CONCLUSION

Having in mind demographic trends and especially growing number of the population in the old age, it is very important that family law deals with the needs of the vulnerable adults. The current institution of the deprivation of the 'transactional' ('contractual') capacity and in particular court proceedings for the deprivation of the capacity seem too strict and too formal for contemporary situation. Family law provisions have to be adapted to incorporate principles of the empowerment and protection of the vulnerable adults and to make "a shift from the substitute decision-making paradigm to one that is based on supported decision-making".

Serbian law made a first step by amending the procedural law. The deprivation of 'transactional' ('contractual') capacity is not limitless as has to be re-examined in the period of maximum three years (Law on Non-Contentious Proceedings amendments 2014). In the decision of the partial deprivation of 'transactional' ('contractual') capacity of the person, the court has to define legal operations which this person can undertake by himself/herself and especially if this person can exercise his/her elective right (Law on Non-Contentious Proceedings amendments 2022).

The recent Draft Law on Amendments to Family Act empowers vulnerable adults in the several ways. It is proposed to abandon the existing

institution of “deprivation of legal capacity“ and to keep only the institution of the “limitation of legal capacity“. It is proposed that court in the decision on limitation of ‘transactional’ (‘contractual’) capacity should determine the legal operations that a person partially deprived of capacity may not undertake independently. Comparing to current solution which enables court to determine the legal operations that a person partially deprived of capacity may (or may not) undertake independently, the new proposition actually empower vulnerable adults, as the court can only determine the legal operations that a person with limited capacity may not undertake independently; all other legal operations which are not specified in the court decision vulnerable adult can take independently.

The Draft Law on Amendments to Family Act adds the legal acts to legal operations which the person deprived of capacity may undertake. This solution empowers vulnerable adults giving them wider circle of independent rights, similarly to the child at the age of fifteen.

It is proposed that the guardianship authority is obliged to protect the dignity and well-being of the ward; strive to limit the rights of the ward as little as possible; encourage the ward’s independent decision-making; provide him/her support in decision-making, as well as the participation in community life; take into account all the specifics of the ward’s personality and accept his decisions, opinions, wishes, and attitudes, unless it is in conflict with the welfare of the ward. In addition, it is proposed to stipulate the guardian’s obligation to make sure that the adult ward receives all the information on issues that concern him/her in a timely manner and to take into account in the utmost extent possible the ward’s decisions, opinion, wishes and attitudes when performing the guardian’s duties. It is a first step in transition from the principle of the “best interest“ of a ward to the principle of “will and preferences“ of a ward. If these amendments would be accepted, the legal status of the vulnerable adults as ward would be improved.

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## Правна заштита и оснаживање одраслих, рањивих лица у Србији

**Сажетак:** Имајући у виду демографске трендове који иду у правцу повећања броја сивановника старије животној доби, врло је значајно да се породично право бави потребама одраслих, рањивих лица. У 2021. години у Србији проценат сивановништва од 65 година и старијих износи 21.3. Број корисника центара за социјални рад који су лишени пословне способности је у порасту (у 2017. години је 13.075 лица лишено пословне способности).

Имајући у виду одредбе Конвенције УН о правима особа са инвалидитетом, коју је Србија ратификовала 2009, аутори у овом раду анализирају измене у процесном праву чији је циљ правна заштита и оснаживање одраслих, рањивих лица. Једна од солуција је лимитирање одлуке о лишењу пословне способности на тај начин што се предвиђа да та одлука треба да буде проверавана у максималном року од три године. Друга солуција је увођење обавезе за суд да дефинише правне послове које лице лишено пословне способности може да обавља самостално, а посебно да може да обавља своје изборно право (Закон о ванпарничном поступку, измене из 2014. године).

Аутори даље анализирају предложене измене породичног права чији је циљ правна заштита и оснаживање одраслих, рањивих лица. Скорашњи Нацрт измена и допуна Породичног закона садржи одредбе којима се оснажују лица којима је потребно ограничити пословну способност. Један од предлога је напуштање услове лишења пословне способности и увођење услове ограничења пословне способности. Осим тога се предлаже да се судском одлуком о ограничењу пословне способности одреде не само правни послови, како је предвиђено у садашњем тексту Породичног закона, него и радње, које лице ограничено пословне способности није способно да само-

сјално предузима у односу на своју личност и имовину. Укључивањем правних радњи се, у ствари, проширује круг права која има лице ораничене пословне способности, јер би могао самостјално да предузима не само правне послове нешто и правне радње који нису обухваћени одлуком. Даље се одређује дужност орана стјарањељства да заштитити досјојанство и добробит штитеника; да тежи што мањем ораничању права штитеника; да подстиче самостјално доношење одлука штитеника, да му пружа подршку у доношењу одлука, као и учешће у живоју заједници; да узима у обзир специфичност личности штитеника и прихвата његове одлуке, мишљење, жеље и ставове осим ако је то у сујројности са добробити штитеника. Превидића се обавеза стјарањеља да се стјара да штитеник блаовремено добије сва обавештења о ишањима која та се тичу и да у обављању послова стјарањеља у највећој могућој мери узме у обзир одлуке, мишљење, жеље и ставове штитеника. На тај начин се даје примат принципју жеља и ставова штитеника у односу на ранији принцип најбољеј интереса штитеника, а што је у складу са савременим креињима у комјаритивном јородичном праву.

**Кључне речи:** оградла, рањива лица, заштитија, оснаживање, лишење, ораничење пословне способности.

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