ARTICLE

Representation of Vulnerable Adults in Finland in the Light of the CRPD

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1. Introduction

The aim of this article is to provide a comprehensive overview of the representation of vulnerable adults in Finland and to analyze whether and to what extent the legal system lives up to the expectations of the UN Convention on the Rights of Persons with Disabilities (hereinafter CRPD).[1] The CRPD and the Optional Protocol regarding individual complaints were signed by Finland in 2007 and entered into force in June 2016. The enactment required national legislation to be in accordance with the Convention's requirements, which explains why the process of ratification was prolonged. In principle, in respect to legislation covering representation of adults, modifications were not considered necessary.

The CRPD requires that an adult's own autonomy and ability to live a life according to one's life plan must be safeguarded, even if their legal capacity is limited due to disability or illness.[2] The replacement of intrusive involuntary guardianship measures with less drastic measures is an important element in the removal of barriers and the recognition of vulnerable adults as full members of society. The Committee on the Rights of Persons with Disabilities has stated that States parties must 'review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making' by regimes supporting in exercising legal capacity.[3]

The CRPD is built on the idea of step-by-step protection, *i.e.*, using the least possible intervention when representing vulnerable adults. Adults are to decide for

1 In this article, the following English translations of Finnish terms and concepts are used: 'guardian' (*edunvalvoja*), 'guardianship' (*edunvalvonta*), 'guardianship' (*holhous*), 'continuing power of attorney' *edunvalvontavaltuutus*), 'private mandate' (*tavanomainen yksityisoikeudellinen valtuutus*), 'client' (in the guardianship system) (*päämies*), 'grantor' (*valtuuttaja*), 'attorney' (). The specific meaning of these terms is explained below in sections covering issues related to them. This article also refers to the Digital and Population Data Services Agency (DPSA) (*Digi- ja väestötietovirasto*), which has served as a guardianship authority in Finland since 1 January 2020.

2 I have analyzed the CRPD more thoroughly in my article K. Karjalainen, 'Strengthening the Right to Personal Autonomy and Protection of Vulnerable Adults: from Human Rights to Domestic and European legislation on Voluntary Measures', in: K. Karjalainen et al. (eds), *International Actors and the Formation of Laws*, Springer 2022, p. 65-88.

3 Committee on the Rights of the Persons with Disabilities, General Comment no. 1, 19 May 2014, paras 17, 26. See also A. Arstein-Kerlake, 'Legal capacity and supported decision-making: respecting rights and empowering people', in: C. O'Mahony & G. Quinn (eds.), *Disability law and policy: an analysis of the UN Convention*, Clarus, p. 69-78, p. 70-71.

themselves and are entitled to receive sufficient support when making those decisions (Art. 12(3)). Private arrangements, including voluntary measures as well as the role of family members – when contributing to the will and preferences of a vulnerable adult – have to be given priority over involuntary state-ordered measures.[4] The CRPD provides that an adult has the right to be supported and protected flexibly depending on what their will and preferences are or may be assumed to be.[5] However, a legal system must also provide necessary safeguards that ensure that measures relating to the exercise of legal capacity are free of conflict of interest and undue influence. The safeguards must be proportional to the degree to which such measures affect the person's rights and interests (Art. 12(4)).

The legal system must provide appropriate assessment limited to what types of support a vulnerable adult needs in order to be able to exercise their legal capacity – on an equal basis with others.[6] In Finland, the representation of (vulnerable) adults is based on several statutes. The system is fragmented. The Contracts Act[7] provides a private mandate that can be used in financial matters. Field-specific statutes are important in health care and social welfare matters. *Negotiorum gestio* is legally acknowledged in personal matters but is also more and more used in financial matters due to transactions taking place in online platforms. The

4 Voluntary measures are determined as follows in the review of CM/Rec(2009)11: powers of attorney, advance directives, representation agreements, supported decision-making arrangements, codecision-making arrangements, advocacy arrangements where the advocate is chosen by the person represented, and all other measures established by people to be supported by such measures themselves, as contrasted with involuntary measures imposed by a court, tribunal, authority or other mechanism, including by operation of law, rather than by the people subject to such measures themselves. A. Ward, *Enabling Citizens to Plan for Incapacity. A review of follow-up action taken by member states of the Council of Europe to Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity*, European Committee on Legal Co-operation (CDCJ) 2007, p. 12.

5 Committee on the Rights of Persons with Disabilities General Comment No. 6 (2018) on equality and non-discrimination CRPD/C/GC/6, adopted on 9 March 2018, para. 49. About interpretation of will and preferences see, e.g., G. Szmukler, 'The UN Convention on Rights of Persons with Disabilities: "Rights, will and preferences" in relation to mental health disabilities', *International Journal of Law and Psychiatry* 2017, no. 54, p. 90-97.

6 Arstein-Kerlake 2017, p. 77-78. The Committee on the Rights of Persons with Disabilities states that Arts. 5 (equality and non-discrimination) and 12 are fundamentally connected, because equality before the law must include the enjoyment of legal capacity by all persons with disabilities on an equal basis with others (Art. 3). Discrimination through denial of legal capacity may be present in different ways, including status-based, functional, and outcome-based systems. Denial of decision-making on the basis of disability through any of these systems is discriminatory. See Committee on the Rights of Persons with Disabilities General Comment No. 6 (2018) on equality and non-discrimination CRPD/C/GC/6, adopted on 9 March 2018, para. 47.

7 *Laki varallisuusoikeudellisista oikeustoimista* (228/1929). Available in Finnish and Swedish at https://finlex.fi/fi/laki/ajantasa/1929/19290228. The English translation with amendments up to 31 December 1999 is available at www.finlex.fi/en/laki/kaannokset/1929/en19290228.

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Guardianship Service Act[8] and the Act on the Continuing Power of Attorney[9] are general laws, meaning that in principle they cover the representation of vulnerable adults in all those situations in which decision-making powers can be shared or transferred. However, despite their general nature, they are clearly intended to focus on representation in financial matters.[10]

The article is structured following the step-by-step approach provided by the CRPD. First, I describe the relevant legal framework in respect to what I call roughly, for the purposes of the article, 'private representation'. It entails representation based on the Contracts Act, field specific legislation in health care and social welfare matters as well as *negotiorum gestio*. In the context of the Contracts Act, its general significance is described. Second, I explain the framework of 'officially confirmed representation' provided for by the Act on the Continuing Power of Attorney and the Guardianship Service Act. The division between private and officially confirmed representation is not straightforward. Field-specific legislation entails both rules on private representation as well as officially confirmed representation, but in recent years the emphasis has been on promoting participation of family members, that is, private representation.[11] In addition, continuing power of attorney (CPA) is a voluntary measure. However, it is a voluntary measure entailing characteristics of an involuntary measure. Finally, I make critical remarks on the current legal system and argue that there is a need for legal reform.[12] The article demonstrates

8 *Laki holhoustoimesta* (442/1999). Available in Finnish and Swedish at www.finlex.fi/fi/laki/ajantasa/1999/19990442. The English translation with amendments until 31 December 2000 is available at www.finlex.fi/en/laki/kaannokset/1999/en19990442.pdf.

9 *Laki edunvalvontavaltuutuksesta* (648/2017). Available in Finnish and Swedish at www.finlex.fi/fi/laki/ajantasa/2007/20070648. The English translation with amendments until 21 December 2021 is available at www.finlex.fi/en/laki/kaannokset/2007/en20070648.pdf.

10 The Hague Convention on the International Protection of Adults entered into force in Finland on March 2011. *Yleissopimus aikuisten kansainvälisestä suojelusta SopS* 11/2011 in Finland. Simultaneously, provisions of private international law based on the Adult Protection Convention were added to the Guardianship Service Act (Amendment 780/2010). Correspondingly, provisions relating to continuing powers of attorney under the Hague Convention were incorporated into the Finnish Act on the Continuing Power of Attorney during its drafting. In addition to the Hague Convention, the Nordic Marriage Convention is another important instrument, as its Art. 18 provides that guardianship may be transferred to another contracting state after consultation with the relevant ministers if the vulnerable adult has settled there or the transfer is found to be appropriate for any other reason. Agreement between Finland, Iceland, Norway, Sweden and Denmark concerning marriage, adoption and guardianship within the scope of private international law concluded in Stockholm on 6 February 1931, and the final protocol thereto, and the exchange of notes between the Governments of Finland and Denmark on 9 June 1931.

11 See, e.g., K. Karjalainen & A. Mäki-Petäjä-Leinonen, 'Long-term Elderly Care, Family and Money in Ageing Finland', in: E. Kasagi (ed.), *Solidarity Across Generations. Comparative Law Perspectives*, Springer 2020, p. 194-196.

12 See also, e.g., J. Aalto, 'Arvotodellisuus. Tutkimus päämiehen asemasta holhoustoimen järjestelmässä', *Acta electronica Universitatis Lapponiensis* 280, p. 224-225. M. Aalto-Heinilä & A. Mäki-Petäjä-Leinonen, 'Päämiehen itsemäärämisoikeuden tukeminen: Filosofisesta ideaalista käytännön edunvalvontatyön tarkasteluun', in: K. Weckström & others (eds.), *Modernit perhesuhteet ja oikeus*, Alma 2021; A. Mäki-Petäjä-Leinonen, 'Autonomy of a Person under Guardianship: Self-determination in the Theory and Practice of Guardianship Law in Finland', in: M. Donelly et al. (eds.), *Supporting Legal Capacity in Socio-Legal Context*, Oñati Socio-Legal Series, Hart 2022.

that there is nothing fundamentally wrong in the Finnish legal system when evaluated from the perspective of the CRPD. Nevertheless, there is a need for overall assessment on what representation of vulnerable adults means in the context of the CRPD and to clarify the role of the will and preferences of an individual adult as primary consideration.

2. Private representation and miscellaneous provisions

2.1 Representation in financial matters

The Contracts Act stipulates on validity of juridical acts and sets out general rules on representation. It is a general law that amends to field specific legislation (*e.g.*, the Guardianship Service Act and the Act on the Continuing Power of Attorney). In addition to its general significance, the Contracts Act must be paid attention to in the context of representation of vulnerable adults, because the private mandate drafted in accordance with the Act can also be used in the case of diminished mental capacity.

The Act sets general standards for assessing expression of one's will; that is, whether a person understands the matter in question – the contents of the juridical act or transactions – and has sufficient mental capacity to decide on it. As set out in section 31 of the Contracts Act an adult does not need full decision-making capacity, but only needs to understand the matters that are covered by the transaction in hand. Hence, the content of the juridical act in hand is the determinating factor when assessing validity of the act. Importantly, the provision also sets the standards on deciding juridical acts falling within the scope of representation of vulnerable adults, that is, the continuing power of attorney or advance directive in accordance with the Act on the Status and Rights of Patients (hereinafter the 'Patient Rights Act').[13]

The rules on private mandate are set out in Chapter 2 of the Contracts Act. The grantor issues a mandate in which they specify the agent's general competence. According to Section 10, a grantor acquires rights, and becomes directly bound in relation to a third person by way of the transactions entered into by the agent within the scope of the agent's competence. The diminished legal capacity of the grantor does not automatically terminate the mandate or provide grounds for appointing a guardian. As stated in Supreme Court case 2009:7 a private mandate is a sufficient measure on which to manage vulnerable adults' matters so long as it gives effect to their interests.[14] An appointed guardian may, nonetheless, at their discretion, revoke a private mandate within their competence. The private mandate ceases to be valid if the restrictions of the adult's legal capacity relate to the transactions or property specified in the private mandate. However, only by

13 *Laki potilaan asemasta ja oikeuksista* (785/1992). Available in Finnish and Swedish at www.finlex.fi/fi/laki/ajantasa/1992/19920785. The English translation with amendments up to 1 September 2012 is available at www.finlex.fi/en/laki/kaannokset/1992/19920785.

14 On the Supreme Court case see, e.g., P. Välimäki, *Edunvalvontaoikeus*, Sanoma Pro 2013, p. 42-43; A. Mäki-Petäjä-Leinonen, *Ikääntymisen ennakointi: Vanhuuteen varautumisen keinot*, Talentum 2013, p. 156.

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declaring the adult incompetent is the private mandate permanently terminated (Section 22).

Representation by private mandate is one of the lightest ways to handle financial matters. Drafting one gives an adult a possibility to stipulate freely by whom they are represented and how. In this vein, it gives effect to adults' will and preferences. In theory, a private mandate is not bound to any specific form and can be given orally or implicitly. However, in practice due to problems in proving the competence of the agent, a written mandate is the only feasible option.[15] The mandate is not public like a guardianship decision or registered continuing power of attorney. The key issue in respect of a private mandate is that of efficiency. For example, banks have taken a cautious approach to the acceptance of mandates – aiming to protect both the bank and the client – when it is apparent that the grantor is incapable of understanding the instructions given in the mandate.[16]

2.2 Representation in personal matters

The Finnish legal system contains certain provisions, laid down in field-specific legislation, that can be classified as belonging to the scope of representation of vulnerable adults. The field-specific provisions deal with personal matters, health care and social welfare as well as social benefits. Statutes of note in this respect include the Patient Rights Act, the Act on the Status and Rights of Social Welfare Clients (hereinafter the 'Social Welfare Client Act'),[17] the Act on Supporting the Functional Capacity of the Ageing Population and on Social and Health Care Services for Older People (hereinafter the 'Elderly Care Act'),[18] the Act on Disability Services and Assistance (hereinafter the 'Disability Services Act')[19] and the Act on Special Care for People with Intellectual Disabilities.[20]

Amendments made to the statutes in recent years aim to guarantee the adult's right to be heard and supported within the meaning of the CRPD when they are making decisions. They contain provisions that call for taking adults' will and preferences into consideration. Amendments also clarify the role of the close persons in decision-making. They include rules that come close to *ex lege* representation. However, these rules cannot be directly classified as belonging to the scope of *ex lege* representation used in many other jurisdictions.[21] They do not directly give status-based rights in respect of decision-making or representation, but open up the possibility to certain close persons to contribute to decision-making and speak on behalf of a vulnerable adult.

15 See Mäki-Petäjä-Leinonen 2013, p. 147-148.

16 See, e.g., Mäki-Petäjä-Leinonen 2013, p. 155.

17 *Laki sosiaalihuollon asiakkaan asemasta ja oikeuksista* (812/2000).

18 *Laki ikääntyneen väestön toimintakyvyn tukemisesta sekä iäkkäiden sosiaali- ja terveyspalveluista* (980/2012).

19 *Laki vammaisuuden perusteella järjestettävistä palveluista ja tukitoimista* (380/1987).

20 *Laki kehitysvammaisten erityishuollosta* (519/1977).

21 See, e.g., C. Fountoulakis et al. (eds.), *European Commission's Public Consultation on the Initiative on the Cross-Border Protection of Vulnerable Adults, Response of the European Law Institute*, European Law Institute 2022, p. 17-18. Available at www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Protection_of_Adults.pdf (last accessed 30 November 2023).

Legislative reforms are underway that aim to further empower adults who are patients and clients of social welfare services. The Ministry of Social Affairs and Health has launched a roadmap to strengthen client and patient participation and rights, and a broad-based monitoring group was appointed to support this work.[22] Reform in this area of the law has long been urged by both academics and interest groups.[23] The legislation in force has been regarded as giving insufficient support in respect of, for example, the right to personal autonomy and self-determination of people living in care homes.[24] Furthermore, updating of the provisions of the Patient Act has been on the legal agenda on several occasions and has also been publicly demanded but this has not yet led to changes being made.

- Health care matters

The Oviedo Convention and the practice of the European Court of Human Rights (ECtHR) have had a key impact in Finland, when it comes to respecting the will and preferences of an adult in matters of care and medical treatment. The Oviedo Convention led to the changes in Section 6 of the Patient Act, which governs health-care decision-making where the patient lacks sufficient mental capacity.[25] In the absence of specific rules on advance directives the practice of the ECtHR has played a role interpreting the Patient Act in such a way as to give priority over adults' previously expressed wishes.[26] However, provisions of the Patient Act are ambiguous in respect to the will and preferences of an adult. The challenge is that on the one hand medical decisions are to be made on the basis of the consent given by a legal representative or a family member and, on the other hand, the decision ought to be based on the patient's previously expressed wishes. Problematically, in the Patient Act adults' wishes have not been given clear priority (Section 8) compared to consent given by legal representative or a family member (Section 6). A patient's right to personal autonomy and self-determination is governed by Section 6 of the Patient Act, paragraph 1 of which states that patients have to be cared for in mutual understanding with them. For example, if the patient were to refuse a particular treatment or measure, they should be cared for, as far as possible, in other medically acceptable ways in mutual understanding with them. However, as provided by paragraph 2, if, due to mental disturbance, intellectual disability or

22 Ministry of Social Affairs and Health. Rights of clients and patients to be strengthened through long-term development of legislation and practices, 1 June 2021, available at https://valtioneuvosto.fi/-/1271139/asiakkaan-ja-potilaan-oikeuksia-vahvistetaan-kehittamalla-pitkajanteisesti-lainsaadantoa-ja-toimintatapoja?languageId=en_US (last accessed 1 March 2023).

23 Reforms have also lapsed due to the end of the Government term. Government proposal on Act on Supportive Decision-making of social welfare clients and patients was given to Parliament on 28 August 2014. It lapsed due to the end of the Government term. *Hallituksen esitys eduskunnalle laiksi sosiaalihuollon asiakkaan ja potilaan itsemääräämisoikeuden vahvistamisesta ja rajoitustoimenpiteiden käytön edellytyksistä sekä eräiksi siihen liittyviksi laeiksi* (Government proposal 108/2014). In a similar vein, due to the end of the Government term, legislative reform 2018 for combining patient and social welfare client acts lapsed.

24 See A. Mäki-Petäjä-Leinonen & A. Karvonen-Kälkäjä, *Vanhuusoikeuden perusteet*, Alma 2017, p. 50.

25 See, *e.g.*, I. Pahlman, *Potilaan itsemääräämisoikeus*, Edita 2003, p. 252-253.

26 See *Jehovah's Witnesses of Moscow and Others v. Russia* (Application no. 302/02,) Judgment 10 June 2010, Mäki-Petäjä-Leinonen 2013, p. 134-135.

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another reason, an adult patient is unable to decide on the treatment given to them, the legal representative or a family member or other close person of the patient has to be heard before making an important decision concerning treatment to assess what kind of treatment would be in accordance with the patient's wishes. If this matter cannot be assessed, the patient has to be given treatment that can be considered to be in accordance with their personal interests. In these cases, consent to perform treatment must be obtained from one of the persons mentioned above, and they must respect the patient's previously expressed wishes or the patient's well-being if no wishes had been expressed (paragraph 3).

Section 8 of the Patient Act provides a rule for emergency situations. In the case of an emergency, a patient has to be given the necessary treatment to ward off a hazard imperiling their life or health. However, if the patient has earlier steadfastly and competently expressed their wishes concerning treatment that can be given to them, this previously expressed will must be respected. Despite the reference to emergency situations, the section also covers non-emergency situations. Adults' wishes must be clarified in consultation with a family member or other close person, if an adult is unable to participate in and influence the planning and implementation of the treatment or care measures or understand the proposed solutions or decisions (Patient Act, Section 9). However, the family member does not have the right, for example, to refuse to allow necessary treatment to ward off a hazard imperiling the patient's life or health (Section 8).[27]

Section 8, together with Section 6, is considered to be the legal basis for advance directives. An advance directive may cover appointment of a health care proxy and/or state will and preferences concerning medical treatment and care. To make an advance directive, a person must be capable of understanding its meaning and contents (the Contracts Act, Section 31). There are no specific form requirements for advance directives. In addition to written instructions, a patient in long-term care can, for example, express their wishes to care personnel or to a physician, who must record them in a medical report. Furthermore, an individual can record their will and preferences in the Finnish health care database (*omakanta*), which is an online database containing personal health records and to which the majority of health care service providers have access.

- Social welfare matters

In social welfare matters many statutes have been renewed in recent years. These statutes entail provisions that are similar to those in the Patient Act giving certain competences to legal representative and family members, but the will and preferences of the adult are more clearly the primary consideration in decision-making under these statutes than they are in the Patient Act.

The Social Welfare Client Act lays down the right of clients to decide their own matters as far as conceivably possible (Section 8). The service provider is to consult both the client and their legal representative or family member when the client is unable to explain how they would like their care or treatment to be arranged (Section 9). Options for treatment or measures to be taken must be explained

27 Pahlman 2003, p. 218.

openly and in an understandable manner (Section 5(2)). The Elderly Care Act provides that the elderly person's needs as to social and health care and other services supporting their well-being, health, functional capacity and independent performance are to be comprehensively assessed together with the elderly person and, if necessary, their relatives or their legal representative (Section 15).
The Disability Services Act explains personal assistance in a manner that literally draws from the CRPD, supporting the adult with disabilities in exercising their will and preferences.[28] Section 8c of the Act refers to assisting persons with severe disabilities through necessary measures at home and outside the home in respect of (1) daily functions; (2) at work and studies; (3) hobbies; (4) social involvement; and (5) maintaining social interaction. The intention is to help people with severe disabilities to implement their own choices in carrying out the functions described above.
The Act on Special Care for People with Intellectual Disabilities stipulates strengthening self-determination and the use of restrictive measures in special care (chapter 3a, Section 42). Special care must be provided and the adult in special care must be treated in such a way that their dignity is not violated and that both their convictions and privacy are respected. The wishes, opinions, interests and individual needs of the adult in special care must be considered when special care is put into practice. An adult in special care has to be guaranteed the opportunity to participate and influence their own matters. The adult's well-being, health and safety in special care must be maintained and promoted.[29] The Act was recently amended. The amendments that enter into force on 1 January 2025 require, *inter alia*, that examination in the special care unit or decision on involuntary treatment can only take place after the opinion of the adult themselves is heard. Their legal representative or close persons (if the adult does not have a guardian) also have a right to be heard (Section 33).[30]
Finally, the Disability Benefit Act[31] contains a provision that is close to *ex lege* representation. If an adult is unable, due to illness, old age or any other such reason, to apply for disability benefit or otherwise take care of their rights and does not have a guardian, a family member approved by the Social Insurance Institution (*kansaneläkelaitos*) or another person who primarily cares for the adult may have a right to apply for the benefit on behalf of the adult (Section 15).

2.3 Negotiorum gestio in personal and financial matters

In principle there are two ways in which *negotiorum gestio* plays a role in representing adults in Finland. There is a way that is directly acknowledged in the legal system and then there is an 'unofficial' way. *Negotiorum gestio* is in use in representation in personal matters when adults are represented in social services and health care. However, in financial representation its scope is much more limited, but in particular online services have extended its 'unofficial' use.

28 Amendment 981/2008.
29 Amendment 381/2016.
30 Amendment 676/2023.
31 *Laki vammaisetuuksista* (2007/570).

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The Supreme Administrative Court case KHO 2016:111 offers an interesting example of the informal, but often in practice significant, and legally acknowledged role, played by a family member in the Finnish health care and social welfare system. In this case the social welfare authority had made a decision on matters related to the organization of individual special care for an adult with an intellectual disability. The Social Welfare Client Act does not establish a right to speak on behalf of a family member, and at the time of the complaint, the adult's sister had not yet been appointed as a guardian. However, the sister made a complaint on the special care decision to the Regional State Administrative Agency on the adult's behalf. The adult himself had not signed the complaint or participated in the handling of the case, nor had he authorized his sister in any way to file the complaint. In the case at hand, concerning his special care the adult involved did not have the mental capacity to assert his interests before a court or other authority or authorize anyone to do so, nor did he yet have a guardian. Hence, the Supreme Administrative Court decided that the adult's sister had competence based on *negotiorum gestio* to make a complaint against the social welfare authority's decision.

The significance of informal support and its interplay with the Patient Act and Social Welfare Act is highlighted by the practice of the parliamentary ombudsman. In Spring 2020, due to the COVID-19 pandemic, visiting care facilities was prohibited. The parliamentary ombudsman held that the right to be supported in accordance with the Patient Act and Social Welfare Act was compromised. Adults who need support from family members in respect of health care and social welfare decision-making were unable to get the necessary support due to visiting restrictions.[32]

In respect to personal matters but also financial matters, online platforms have opened up a new space for *negotiorum gestio*. In Finland, e-identification is done by using online banking codes in the vast majority of cases.[33] In practice, this means, for instance, simply giving access to one's online banking codes (user ID and password).[34] Tokens for e-identification are personal.[35] In principle, banks cancel

32 See Parliamentary Ombudsman EOAK/3232/2020, 18 June 2021 (Restrictions on the elderly during the COVID-19 pandemic). Furthermore, prohibitions have led to breaches of the right to privacy and family law because, among other things, they prevented older spouses from living with each other and family members visiting care facilities. Parliamentary Ombudsman OAK/4070/2020, 17 December 2020 (Right of elderly to live together and right to family life during the COVID-19 pandemic). Administrative Court of Eastern Finland (*Itä-Suomen hallinto-oikeus*, 16 October 2020, 20/1059/1).

33 Other identification tokens being mobile certificates issued by mobile phone operators and ID Cards issued by police, including the Citizen Certificate. E-identification is regulated by the Act on Strong Electronic Identification and Electronic Trust Services (*Laki vahvasta sähköisestä tunnistamisesta ja sähköisistä luottamuspalveluista* (617/2009). Available in Finnish and Swedish at https://www.finlex.fi/fi/laki/ajantasa/2009/20090617. The English translation with amendments up to 412/2019 is available at www.finlex.fi/en/laki/kaannokset/1929/en19290228.

34 In recent years, many online platforms have been developed in such a way that it is possible to mandate another person to handle one's affairs. In these cases, the authorization corresponds to a private mandate given in accordance with the Contracts Act.

35 This is stipulated in the Act on Strong Electronic Identification and Electronic Trust Services, Section 23(2): The identification means holder shall not make the use of the means available to any other person.

the online banking codes of an adult, if they notice that the adult concerned lacks full mental capacity or if they suspect that someone else is using the adult's online banking codes.[36] However, it may also be that it is known, *e.g.*, among public officials that one's online banking codes are used by someone else, but the situation is quietly accepted. Furthermore, an adult can of course be assisted in use of digital services and it may be that the line between 'assisting' and 'representing' the adult may not be that clear in practice.

Online banking codes give access to bank accounts and in this vein can be used, in addition to daily affairs, for significant juridical acts. However, the same online banking codes also give access to many public services. Some of them are related to handling personal matters and daily affairs, accessing health care records (*omakanta.fi*), and scheduling medical appointments (depending on the municipality). Others handle official and private financial matters such as taxes (*vero.fi*), car taxes or transferring ownership of vehicles (*traficom.fi*) as well as receiving official communications online (*suomi.fi*).

As the decision of the Helsinki Court of Appeal (HHO 6.11.2020, 1546) illustrates, significant transactions can be done privately by using online banking codes and official platforms. In the case of a father who donated two real estate properties to his son after he had suffered a massive stroke, a donation was conducted using the online service platform provided by the National Land Survey of Finland and took place at the father's kitchen table. It was undisputable that the father had given his online banking codes to his son by the time of the donation. The court held that the father had sufficient legal capacity to understand the meaning of the donation. However, the court considered that under the given circumstances the donation was incompatible with honour and good faith (Contracts Act, Section 33[37]).

The case highlights challenges that can arise in respect to *negotiorum gestio* taking place on online platforms. Importantly, it also shows how significant the scope of *negotiorum gestio* can be when transactions take place more and more online. Use of online banking codes is quietly accepted and the adult is, in principle, responsible for transactions taking place through their online banking codes.[38] This is obviously problematic from the perspective of necessary safeguards. Undue influence and conflict of interest may be an issue and often is left in the shadows, at least in cases where an adult does not have more than one person taking care or their matters. However, on the other hand, one may also argue that the will and preferences of the adult can be respected in accepting *negotiorum gestio* happening on online

36 Act on Strong Electronic Identification and Electronic Trust Services, Section 26 (amendement 533/2016) lays down that identification service provider may suspend or revoke the use of an identification means if, among other, the identification service provider has reason to believe that someone other than the person to whom the means was issued is using it or the identification service provider has reason to believe that the safe use of the means is at risk.

37 Amendment 956/1982.

38 There are many difficult and unresolved questions in respect to third party protection, liabilities and damages when e-identification is used and family members are involved. These questions fall outside that scope of this article. See e.g. Mia Hoffrén, Keskinäinen luottamus ja kolmas. In: K. Weckström & others (eds.), *Modernit perhesuhteet ja oikeus*, Alma 2021, p 291-317.

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platforms. It may be, and often is, the will of an adult as well as in their interest that matters are handled as simply, cheaply and privately as possible.

3. Officially confirmed representation

3.1 Continuing power of attorney

Voluntary measures are at the core of the CRPD. The Committee on the Rights of Persons with Disabilities states that all persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others.[39] In Finland, the Act on the Continuing Power of Attorney entered into force in 2007 and is intended both to promote the individual's will and preferences and to reduce the burden on the general guardianship system in an ageing society.[40] It aims to allow a person to organize their matters in advance in case they later become incapable of handling them due to illness, mental disability or other similar cause.[41] Under the Act, a CPA is a private mandate and in terms of its basic infrastructure draws from the Contracts Act, but its purpose and legal effects are essentially the same as those granted under the Guardianship Service Act. As highlighted below, the Act protects adults' current will and preferences well but leaves open how their will and preferences are respected when granted powers are used.[42]

3.1.1 Granting and confirming a continuing power of attorney

The capacity to grant a CPA is directly connected to the content of the particular CPA in question. Under Section 5 of the Act on the Continuing Power of Attorney a person of at least eighteen years of age can give a CPA if they are capable of understanding the meaning of the granted powers (Contracts Act, Section 31). An adult may be able to stipulate that an attorney can handle their daily financial matters, but they cannot grant powers to sell real estate. In addition, an adult may still be capable of granting powers under a CPA even if their existing capacity is such that it fulfils the conditions for its confirmation. In such a case, confirmation can be sought immediately after the CPA has been signed by the grantor.[43]

A CPA is granted when an express provision is contained in the mandate to the effect that the granted powers enter in force in the event that the grantor becomes incapable of handling their affairs (Section 6(2)).[44] The provision must be in written

39 Convention on the Rights of Persons with Disabilities, General Comment No. 1 (2014), para 17.

40 See *Hallituksen esitys Eduskunnalle laeiksi edunvalvontavaltuutuksesta sekä holhoustoimesta annetun lain ja eräiden muiden lakien muuttamisesta* (Government proposal 52/2006), p. 8-9, 14-15.

41 *Hallituksen esitys Eduskunnalle laeiksi edunvalvontavaltuutuksesta sekä holhoustoimesta annetun lain ja eräiden muiden lakien muuttamisesta* (Government proposal 52/2006),, p. 11-12.

42 K. Karjalainen, 'Nykyinen minä, tuleva minä ja laki edunvalvontavaltuutuksesta', *Lakimies* 2023, no. 3-4), p. 416-439, p. 432-437.

43 See, *e.g.*, Mäki-Petäjä-Leinonen 2013, p. 174-175.

44 The expression used in a CPA does not need to correspond to the formulation contained in the Act on the Continuing Power of Attorney. In ambiguous cases, whether the grantor had intended the mandate to take effect in the event that they become unable to manage their affairs for a reason specified by law is a matter that must be interpreted by reference to the wording of the CPA.

form and the document must be signed by the grantor in the simultaneous presence of two witnesses (Section 6). The witnesses must be aware that the document is a CPA but not of its contents.[45] No formal requirements (*e.g.*, legal education) are set for witnesses other than they must have a legal capacity, be unbiased and cannot be close relatives of the grantor or the attorney (Section 8). CPAs are not registered in any way or officially stored at this point. A CPA ceases to be valid if the grantor cancels it (Section 11). The grantor can cancel the CPA if they understand the meaning of the cancellation. At this stage, when the CPA has not yet entered into force, there are no formal requirements for the cancellation.

Confirmation of the powers is sought by the appointed attorney from the DPSA only after the grantor's mental capacity has diminished.[46] The appointed attorney must provide the original mandate and a medical certificate or other assessment in which it is stated that the grantor is unable to manage the affairs covered in the mandate due to illness, disturbed mental faculties, diminished health, or another comparable reason (Section 24). The powers are not confirmed if a guardian has already been appointed for the grantor in respect of matters covered by the CPA.[47] Finally, in order for the CPA to come into force, it must be entered into the Register of Guardianship Affairs.[48] After entry into force, the CPA ceases if (a) the grantor cancels it and the cancellation is confirmed by the guardianship authority (see Section 28), (b) the grantor dies, (c) the attorney resigns from the task, or (d) a guardian is appointed to the grantor and the guardianship decision covers the same tasks as the CPA.

3.1.2 An attorney, tasks and legal effects

The Act on the Continuing Power of Attorney lays down that the attorney must be a natural person, which is why neither a public guardian (a civil servant working as a guardian) nor a lawyer's office can be appointed to act as an attorney, but a named lawyer or attorney-at-law can be. The law also provides for appointment of a secondary and a substitute attorney (Section 4). A secondary attorney is needed, for example, if the primary attorney does not accept the role or is permanently prevented from performing the tasks in other ways. A substitute attorney is needed if the primary one is disqualified in respect of a certain task or temporarily prevented from performing it.[49]

The Act on the Continuing Power of Attorney does not specify in detail the powers a grantor can grant to an attorney. They may vary depending on the grantor's

45 Government Proposal 52/2006, p. 11.

46 See, *e.g.*, Mäki-Petäjä-Leinonen 2013, p. 174-175.

47 According to the DPSA it takes about three months to get a CPA authorized.

48 At the end of 2022 there were 17,513 confirmed and registered CPAs in Finland. Publicly accessible statistics show that the number is rising. At the end of 2021 the number of confirmed and registered CPAs was 14,569 (Open data DPSA).

49 The remuneration of an attorney depends on the provisions of the CPA. However, if no agreement has been made concerning the attorney's fee and reimbursement of costs and the grantor has not ordered them to be paid, the attorney has the right to receive, from the grantor's funds, reimbursement for their necessary costs and a fee that is reasonable in view of the nature and scope of their mandate (Section 22).

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wishes, needs and decision-making capacity. The granted powers may relate to representation of the grantor in relation to financial or personal matters or both. A CPA may provide for daily management of monetary affairs, the sale of a property and gift-giving under certain conditions, or the provision of a medical authorization (Section 2). In principle, the granted powers cannot extend beyond the powers of a guardian under the Guardianship Service Act.[50] This means, *inter alia*, that in relation to personal matters, representation is governed by the same principles as under the Guardianship Service Act (Section 29(2)). The decision is made by the grantor if they are capable of understanding the content of the decision at the moment the decision is made, even if the CPA covers representation in relation to personal matters.[51] Furthermore, similarly to the Guardianship Service Act, the attorney is not competent, on behalf of the grantor, to give consent to a marriage or adoption, to acknowledge paternity, to consent to acknowledgement of paternity, to make or revoke a will, or to represent the grantor in any other comparable personal matter (Section 2(3)).

A confirmed CPA does not impact on the legal capacity of the grantor, but the law is ambiguous in its division of competences as between attorney and grantor. Section 16 of the Act on the Continuing Power of Attorney provides that when acting on behalf of the grantor the attorney must conscientiously look after the rights of the grantor and act in their best interests. The attorney is to seek the opinion of the grantor before making a decision on a matter falling within the scope of their mandate, if the matter is to be deemed important for the grantor and the consultation can take place without considerable difficulty. It is unnecessary to consult the grantor if they are incapable of understanding the significance of the matter. One may argue that this section and the interests of an adult must be understood in the light of the CRPD, meaning that the adult's own will and preferences are to be given priority. However, as the law is not very clear, it may depend on the attorney as to whether the will and preferences of the grantor are taken sufficiently into consideration.[52]

The DPSA supervises the attorney's performance when the CPA concerns managing the grantor's financial matters (Act on the Continuing Power of Attorney, Sections 30-33). The attorney may be asked to present a report of their actions. However, consistent supervision is dependent on the instructions given in the CPA. The attorney is obliged to compile an inventory of the client's property covered by the mandate and to keep a record of assets and liabilities and transactions carried out during the financial period, so that they can retrospectively establish the acts performed on behalf of the client.

50 Government Proposal 52/2006, p. 11, 19-20. A. Saarenpää, *Henkilö- ja persoonallisuusoikeus*, in: M.-L. Niemi (ed.), *Oikeus tänään Osa II*, Lapin yliopiston oikeustieteellisen julkaisuja, Sarja C 63 2015, p. 203-430, p. 290-291.

51 See, *e.g.*, T. Antila, *Edunvalvontavaltuutuslaki*, Sanoma Pro, Helsinki 2007, p. 17-18.

52 See Karjalainen 2023, p. 432.

3.2 Guardianship Service Act

The Guardianship Service Act lays down involuntary, state-ordered, adult protection measures.[53] In addition to appointing a guardian in exceptional cases, the legal capacity of an adult can be partially or wholly restricted if merely appointing a guardian does not suffice to protect the interests of the vulnerable adult.[54] The CRPD was not considered to push for reforms to guardianship legislation.[55] The main reason for this was that, as early as 2009, Section 8(1) of the Guardianship Service Act was specifically clarified.[56] Guardianship can only be used if a vulnerable adult's matters cannot be handled in any other way.[57]

3.2.1 Appointing a guardian

In respect to requirements for appointing a guardian, the Guardianship Service Act lays down three aspects that are important from the perspective of the CRPD: (1) subsidiary of guardianship, (2) flexibility of assessing the need for a guardian, and (3) the adult's right to be heard.[58]

First, one may argue that the subsidiary nature of guardianship is very much in line with requirements set in the CRPD. As emphasized in the previous section, the prerequisite for guardianship is that the vulnerable adult's affairs are not otherwise adequately managed and cannot be managed by other less intrusive means (Section 8(1) of the Guardianship Service Act). A guardian cannot be appointed when an adult is sufficiently supported unofficially by, *e.g.*, their family members (*negotiorum gestio*) or when the adult has granted sufficient powers beforehand in accordance with the Contracts Act or a continuing power of attorney (CPA).[59] This approach in which the will and preferences of the adult are at the core of representation of adults was established by the Supreme Court in case KKO

53 As laid down in the Guardianship Services Act, a guardian can be appointed for a person who cannot take care of their financial matters themselves, due to incompetency, illness, absence or another reason (Section 1). Hence, the Act also covers representation of children and absent persons in financial matters.

54 On the basis of the statistics at the end of 2022 there were in total 70,748 guardianships in force, in which 59,529 cases the person under guardianship was 18 or over. To compare: at the end of 2021 the total number of guardianships was 65,378 and the number of adult guardianships 51,051. These statistics are available on the open data webpage of the DPSA: https://dvv.fi/mare (last accessed 21 November 2023).

55 This matter is relatively widely contemplated and reasoned in the relevant Government proposal. *Hallituksen esitys eduskunnalle vammaisten henkilöiden oikeuksista tehdyn yleissopimuksen ja sen valinnaisen pöytäkirjan hyväksymisestä sekä laeiksi yleissopimuksen ja sen valinnaisen pöytäkirjan lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta ja eduskunnan oikeusasiamiehestä annetun lain muuttamisesta* HE 284/2014, p. 41-43.

56 Amendment 576/2008.

57 *Hallituksen esitys Eduskunnalle laeiksi holhoustoimen edunvalvontapalveluiden järjestämisestä sekä holhoustoimesta annetun lain 8 §:n ja valtion oikeusaputoimistoista annetun lain 6 §:n muuttamisesta* (Government proposal 45/2008), p. 17.

58 General guardianship was abolished when the Guardianship Services Act entered into force and the old guardianship act was revoked. See J. Tornberg, 'Edunvalvonta, itsemääräämisoikeus ja oikeudellinen laatu', *Lapin yliopistokustannus* 2012, p. 172.

59 See, *e.g.*, J. Tornberg & M. Kuuliala, *Suomen edunvalvontaoikeus*, Talentum 2015, p. 28–31; Mäki-Petäjä-Leinonen 2013, p. 265-266.

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2009:7.[60] In the case, A, who had significant assets, was no longer capable of taking care of his interests. A opposed the appointment of a guardian under the Guardianship Service Act. The management of A's property was mainly organized in ways decided earlier by him. A's investments were managed by a commercial bank and an investment company. In addition, A had authorized his son E to manage his running monetary affairs. The Supreme Court held that it had not been shown that the interests of A had been jeopardized. The assets of A were properly handled in the manner he himself had planned in advance. The Court stated that the fact that A was no longer in a position to supervise the management of his assets was not in itself a reason to make a different assessment.

Second, the Guardianship Service Act provides a flexible framework for evaluation of need of a guardian. The need is not bound, for example, to a certain age or to illness, but to *de facto* decision-making capacity of an adult. The Guardianship Service Act stipulates that a court may appoint a guardian for an adult if they, owing to illness, disturbed mental faculties, diminished health or another comparable reason, are incapable of looking after their interests or taking care of personal or financial matters in need of management (Section 8(1)).[61] Furthermore, a guardian is to be appointed if the vulnerable adult's affairs cannot be handled in any other way, appointing a guardian is in their interests and the vulnerable adult does not oppose it. If they object to the appointment of the guardian, the appointment may nonetheless be made if, taking their state and need for a guardian into account, there is no sufficient reason to uphold the objection (Section 8(2)).

Third, a vulnerable adult should always be heard when deciding on appointing a guardian, taking into account their individual circumstances. In principle, this means that the adult should be heard if it is possible, taking into account their individual condition and decision-making capacity. The Supreme Court decision 2019:109 concerned a hearing of an adult. In the case, a guardian was sought by the district register office (guardianship authority before DPSA) for a 21-year-old, A, who had an intellectual disability. The district register office had heard A in person, and A had signed a consent for appointment of a guardian. Attached to the application was a medical certificate made two months after the hearing. The certificate stated that A's mental capacity was at the level of an 8-year-old. The district court had not served A or A's representative and failed to give them an opportunity to be heard. The appointment of the guardian was revoked, and the matter was returned to the district court.[62]

Finally, in principle one may argue that the process leading to guardianship follows the requirements set in the CRPD. It provides safeguards for adults' will and preferences and entails court assessment in the majority of cases as well as right to appeal. Appointment of a guardian or limitation of legal capacity can be sought from the local district court in addition to the guardianship authority (DPSA) by

60 *E.g.*, see Aalto 2020, p. 222. The case was referred in Section 2.3 (*negotiorum gestio*).

61 In practice, a guardian is often appointed for a person with dementia, an intellectual disability or a mental disorder, or for one who suffers from substance abuse. Aalto-Heinillä & Mäki-Petäjä-Leinonen 2021, p. 226.

62 The decision was made by majority vote.

the vulnerable adult themselves, their guardian, parent, spouse, child or other close person to an adult (Guardianship Service Act, Section 72(1)). The majority of applications are filed by the guardianship authority.[63] The statute includes the right, notwithstanding professional confidentiality, to notify the DPSA of a person needing a guardian (Section 91). Hence, such notification can be made by health-care personnel or a social welfare authority.[64] Upon receiving the notification, the DPSA takes measures to determine the need for a guardian, and if necessary, files an application to the court for the appointment of the guardian. However, in accordance with Section 12 of the Guardianship Service Act, the DPSA may itself appoint a guardian for an adult if they have requested it, and there is no need to restrict their legal capacity.

3.2.2 A guardian, tasks and legal effects

A suitable person who consents to the appointment is eligible to serve as a guardian. In assessing suitability, *inter alia*, the skill and experience of the nominee and the nature and extent of the task are taken into account (Guardianship Service Act, Section 5). Suitability must be approached in terms of expertise, proximity, and independence in the way in which the nature of the tasks is considered.[65] If the guardian is temporarily prevented from performing their tasks due to illness, conflict of interest, or if the counterparty of the planned transaction is the guardian themselves, a court may appoint a substitute guardian (Sections 11 and 32).

Importantly, the wishes of the vulnerable adult must be considered in respect to who will be the guardian, for example, by appointing their attorney (in accordance with their continuing power of attorney). The approach of the Guardianship Service Act is to appoint a private person as a guardian, which is essential when the relationship between the guardian and the client requires constant communication or when the confidentiality of the relationship is significant in relation to the performance of the tasks. A public guardian ought to be appointed only as a secondary option.[66] However, it has been estimated in the legal literature that approximately two-thirds of adult guardianships are public guardianships.[67] In practice, this inevitably means that guardians may not have much information on the will and preferences of their clients.

A guardian can be appointed in respect of financial or personal matters or both. The guardian's competency may be either general or specific, and the tasks may be restricted to cover only a given transaction, property, or matter (Guardianship

63 See Tornberg & Kuuliala 2015, p. 168-169.

64 See also Section 9 of the Social Welfare Clients Act, which correspondingly states that the guardianship authority can be notified notwithstanding professional confidentiality about a person in obvious need of guardianship.

65 Välimäki 2013, p. 67-75. See also Tornberg & Kuuliala 2015, p. 303-306.

66 Tornberg & Kuuliala 2015, p. 306.

67 Estimation of J. Aalto based on statistics for 2019. See Aalto 2020, p. 77. The statistics do not separate minor and adult guardianships, meaning that the exact number of public guardians used in adult guardianship is difficult to assess. According to the available statistics, at the end of 2022, the number of public guardianships was 38,336, including minor guardianships. See Open Data DPSA.

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Service Act, Section 8(3)).[68] The legal effects of guardianship depend on whether the focus is on financial or personal matters and whether the client's legal capacity has been limited.

- Financial matters

The definition of financial matters provided in the Guardianship Service Act is comprehensive: it comprises financial interests and rights and legal measures that can significantly impact the client's economic circumstances.[69] These may include, for instance, deciding on a client's place of residence, rehabilitation and hiring domestic help.[70] A guardian must ensure that the client's care is properly arranged. Hence, the guardian must thoroughly understand the vulnerable adult's circumstances and is responsible for seeing to it that the client is treated, cared for and rehabilitated in the best possible way, taking into account their wishes and circumstances.[71] That means that the guardian is not obliged to arrange these matters themselves per se, but must ensure that they are properly arranged.[72] This obligation does not depend on whether the guardian is appointed only in relation to financial matters or whether the client's personal matters also fall within their remit.[73]

The guardian manages the client's financial matters and sees to their economic interests. Section 29(1) of the Guardianship Service Act provides that the guardian is competent to represent the client in transactions concerning the client's property and financial matters unless the appointing court has otherwise ordered or there are special provisions elsewhere in the law stipulating otherwise. The Guardianship Service Act enumerates measures that the guardian cannot perform without the guardianship authority's consent. Other measures can be performed without permission from the guardianship authority as long as the transactions are within the guardian's competency. Transactions that are more significant than average and include risks from the client's point of view according to general experience are subject to permission.[74]

The guardian must manage the client's property in a manner that allows the property and the revenue to be used for the benefit of the client and to meet their

68 According to the law, the appointment of a guardian shall be valid for the time being or for a period set in the appointment (Section 15). The appointment shall remain in force until the task is performed if a guardian has been designated for a specific task. The tasks may be altered, if necessary. *Hallituksen esitys Eduskunnalle holhouslainsäädännön uudistamiseksi* (Government proposal 146/1998), p. 35.

69 Government Proposal 146/1998, p. 42.

70 See Välimäki 2013, p. 22. Mäki-Petäjä-Leinonen 2013, p. 274.

71 Government Proposal 146/1998, p. 50-51.

72 See Government Proposal 146/1998, p. 51; Välimäki 2013, p. 30-31.

73 The guardian needs to be authorized to manage the principal's personal matters, if not designated for personal matters.

74 Amongst other things, conveying real property gratuitously, handing property over as a lien, taking out or giving a loan, beginning to pursue a business in the name of the client, renouncing inheritance, and conveying an apartment are subject to permission, which the supervisory guardianship authority can grant (Guardianship Service Act, Sections 34, 46 and 47). The authority may give permission if the transaction for which permission is sought is in the client's interests (Section 35). See Tornberg & Kuuliala 2015, p. 435, Välimäki 2013, p. 112.

personal needs. In performing this task, the guardian must respect the client's will and preferences as well as take conscientious care of the client's rights and promote their interests (Sections 37 and 43). In all matters that are deemed important for the client, the guardian should ask the client's opinion before making a decision on a matter falling within the scope of their task. However, the law states that the client's opinion is heard only if it is possible without significant problems and the client understands the significance of the matter in question (Section 43). Whether and to what extent the will and preferences of a client are followed depends in addition on the circumstances of the case and on the views of the guardian, as the legislation is ambiguous in this regard.[75]

The main principle of the Guardianship Service Act is that the appointment of a guardian does not disqualify the client from administering their own property or entering into transactions (Guardianship Service Act, Section 14). The guardian's role is to support the client unless otherwise provided in the guardianship decision. However, the Guardianship Service Act does not directly bind the guardian's competency to manage the client's financial matters explicitly with the client's legal capacity (Section 29(1)). Furthermore, the Guardianship Service Act grants the guardian management of the client's bank account(s).[76] The guardian notifies the credit institution of those who are eligible to withdraw funds from the client's account. A receivable that belongs to the property managed by the guardian may be repaid only to the guardian or an account of the vulnerable adult designated by the guardian (Section 31).[77] Section 31 has been criticized in the legal literature for not meeting the standards of precision and being insufficiently clearly defined. It may *de facto* lead to a result that the client will lose all competency over their financial matters.[78]

In practice, deficiencies in Section 29(1) and Section 31 mean that, on the one hand, the client's freedom of action depends on the guardian's discretion, and, on the other, that the client does not *de facto* has powers to handle their assets. The guardian's competency has often prevailed and been interpreted to be independent from the client's competency. The practice of the Finnish Parliamentary Ombudsman shows that guardianship clients whose legal capacity is not restricted have been prevented from using their assets or have otherwise been deprived of financial capacity.[79] In addition to the guardian's discretion, the client's competency may *de facto* be restricted, because where a person is under guardianship third parties, usually banks, require the guardian's intervention despite the fact the

75 See, empirical study covering the issue Aalto-Heinilä & Mäki-Petäjä-Leinonen 2021, p. 228-229. On views of public guardian, T. Leilas, 'Yleisen edunvalvojan havaintoja päämiehen itsemääräämisoikeudesta', *Defensor Legis* 2019, no. 1 , p. 69-76, 70.

76 The repayment is effective, even if it was made to the client, if the debtor did not know and, under the circumstances, could not be expected to know, that the repayment should have been made to the guardian (Guardianship Service Act, Section 31(1) and Saarenpää 2012, p. 273-274).

77 However, the client must always have sufficient funds to meet daily needs (Section 38). See Government Proposal 146/1998, p. 49. See Saarenpää 2015, p. 256-257.

78 Tornberg 2012, p. 196; Mäki-Petäjä-Leinonen 2013, p. 292-298; Tornberg & Kuuliala 2015, p. 7-8.

79 See, *e.g.*, Parliamentary Ombudsman EOAK/1993/4/06, 21 December 2007 (Paying funds to meet daily means as goods); Mäki-Petäjä-Leinonen 2022, p. 221.

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adult would have the right to handle the matter themselves. Hence, one may argue that in respect to handling of financial matters there is room for improvements in the Finnish Guardianship Service Act when evaluated from the perspective of the CRPD.[80]

The guardianship authority (DPSA) supervises the guardian's activities, in which context the guardian has an obligation to provide the necessary information (Guardianship Service Act, Section 46). Thus, the guardian must administer an inventory of the client's assets and liabilities of which they are in charge. In order to perform this task, the guardian has to keep a record of the client's assets, liabilities, and transactions during the financial period and annually provide an account to the guardianship authority. Similarly, a guardian assigned to carry out a task other than the management of financial matters is required to keep a record of the measures they have undertaken in the course of carrying out their duties. Supervision of guardians' activities is an important aspect of protecting vulnerable clients' interests. However, one may argue that problematically, combined with ambiguous provisions on financial representation, it may lead to overcautiousness in respect to protection versus respecting the will and preferences of the client themselves. Roughly, 'over-protection' of client's funds will hardly be compromised by the DPSA.

- Personal matters

As laid down in the Guardianship Service Act, a guardian may have the competency to represent the client in matters pertaining to their personal matters (Section 29(2)). Unlike in financial matters, in personal matters the guardians' competency is always explicitly secondary and considered on a case-by-case basis. The client decides themselves if they have sufficient mental capacity to understand the significance of the matter at the moment of decision-making.[81]

A guardian appointed for personal matters has a competency in social and health care representation in accordance with the Patient Act and the Social Welfare Client Act and the right to have sufficient information to make decisions that serve the interest of the client. A guardian appointed for personal matters must see to it that, among other things, the client is provided with the treatment, care, and therapy deemed appropriate considering their need for care, wishes, and other circumstances (Section 42), but the guardian does not assist the vulnerable adult with daily matters.[82] The guardian can be a legal representative within the meaning of the Patient Act (Section 6), and they may participate in medical decision-making. This may sometimes be problematic as the guardian can be an outsider who is unable to convey the patient's wishes to the attending doctor. For instance, a public guardian, as a civil servant, does not generally have the necessary understanding of

80 It has been emphasized in the legal literature that the amount of funds to be available is the most problematic aspect of guardians' handling of matters concerning the client. The client's right to information, sale of property and cooperation with the guardian are the next most problematic aspects with regard to the guardian's role. Aalto 2020, p. 214-215.

81 M. Helin, 'Edunvalvojan päätösvallan rajoista', *Lakimies* 2001, no. 6-7, p. 1070-1088, p. 1084-1085; Government Proposal 146/1998, p. 29.

82 Government Proposal 146/1998, p. 31.

the patient's values and way of thinking. After all, the guardian might not have even have met the vulnerable adult in question.[83]
As explained in the context of CPA, the guardian is not competent to represent the client if the matter is particularly personal in nature (Section 29(3)). However, circumstances may support the guardian's representation in some exceptional cases, even if the matter is particularly personal in nature. That may be illuminated by the fact that a guardian is, for example, able to file for divorce on behalf of the client if there is no personal relationship between the spouses and the spouse exploits the client financially.[84]

3.3 Restricting adults' legal capacity

The legal capacity of an adult may, exceptionally, be restricted. The restriction may only concern financial matters. An adult's legal capacity cannot be in any way restricted in relation to personal matters. In addition, the restriction must be exhaustively necessary in order to safeguard the rights and interests of the individual. Hence, legal capacity may not be restricted if other options suffice, nor may it be restricted more than necessary in order to safeguard the individual's interests.
The provision of the Guardianship Act of the restriction of legal capacity describes the exceptional and final nature of the measure. If an adult is unable to take care of their financial matters and their property, livelihood or other important interests are thereby endangered, and the appointment of a guardian is not in itself sufficient to safeguard their interests, a court may restrict their legal capacity (Guardianship Service Act, Section 18(1)). Legal capacity may be restricted either so (1) they can enter into given transactions or administer given property only in conjunction with the guardian; or (2) they are not competent to enter into given transactions or to administer given property. The adult can also be declared incompetent (Section 18(2)).
The restriction of legal capacity is justified only when a vulnerable adult actively seeks to act in relation to their property despite their circumstances, and the action is objectively assessed to be particularly harmful.[85] Supreme Court case 2005:2 illustrates the situation. The guardianship authority requested that an adult (A) is to be declared incompetent. A had been appointed a guardian because he was unable to take care of his financial matters. The Supreme Court held that the fact that A was reluctant to cooperate with his guardian and was difficult to reach did not mean that his financial position and important interests had been jeopardized. Declaring A incompetent was not justified. The mere appointment of a guardian bestowed the necessary powers to protect his interest because 'in principle guardian can make transactions even though client had not approved them in advance, nor accepted them afterward' (para. 9).
This case is significant as its interpretation is connected to problems caused by the fact that the competency of a guardian is not sufficiently stipulated in the

83 See Pahlman 2003, p. 220; Helin 2001, p. 1086.
84 Government Proposal 146/1998, p. 43; Helin 2001, p. 1087; Tornberg & Kuuliala 2015, p. 419-427.
85 Government Proposal 146/1998, p. 36.

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Guardianship Service Act (see above Section 29(1) and Section 31). In the legal literature it has been criticized that the case has been interpreted – contrary to the legislator's original intention – in a way that a vulnerable adult's legal capacity almost never needs to be restricted because guardians can rely on the fact that they can decide on behalf of their client, even when this goes against the client's will. It has even been suggested that since the law misleadingly 'appears to indicate that the mere appointment of a guardian does not affect the client's legal capacity when in reality it does affect', it would be more reasonable to widen the use of partial restrictions on clients' legal capacity. In this case, it would be clearer whether a client or a guardian has decision-making powers. However, it is acknowledged that this option is likely contrary to the objectives contained in the CRPD.[86]

In principle, it is obvious that from the perspective of the CRPD restricting adults' legal capacity is problematic. In particular, this is the case in respect to declaration of incompetency.[87] However, one may argue that in some cases partial restrictions on the client's legal capacity can be justified. The restriction must be bound to *de facto* circumstances of the adult, used as a last resort and when the adult themselves actively acts against their interests. In this way, it can be understood as a measure preventing further deprivation of the adult's situation or the adult's individual capabilities.[88] When it comes to the 'unfashionable' suggestion to widen the use of partial restrictions on clients' legal capacity as the guardian's competency is not sufficiently stipulated in the Guardianship Service Act, maybe it should be considered and further evaluated. It is a concrete suggestion to clarify the now problematic and shady relationship between guardians' and clients' competencies that may at best enhance autonomy (will and preferences) of adults as it would set a clear line to the guardian's competency. In all other cases, adults themselves would have the competency.

4. Conclusions

The Finnish legal framework mostly fulfils the minimum thresholds of the CRPD. Representation of vulnerable adults can be set in the format of a step-by-step approach and private representation and voluntary measures are favoured. However, whether the will and preferences of an adult are a primary consideration in officially confirmed representation depends on the matter in question.

One may argue that *negotiorum gestio* nowadays plays a significant role in representing vulnerable adults in Finland where many issues can be handled in online platforms with online banking codes. It highlights the role of family members and serves most likely, in the majority of the cases, the will and interest

86 Mäki-Petäjä-Leinonen 2022, p. 220. See also Leilas 2019, p. 75-76.

87 Noteworthy, the provision is nowadays hardly ever applied. At the end of 2022, the number of adults whose legal capacity had partially been restricted was 540 and the number of adults who had been declared incompetent was 455. The number is declining yearly. Compared to the statistics on guardianships in force the number shows that approximately only 1% of the adult guardianships are such that competency of the adult has been restricted. See Open Data DPSA.

88 See, J. Wolff& A. de-Shalit, *Disadvantage*, Oxford University Press 2007, p. 173.

of an adult. However, possible malpractices are left in the shadows and the issue how to provide necessary safeguards in line with the CRPD has not been resolved. *Negotiorum gestio* is acknowledged in matters of health care and social welfare. At the same time renewed legislation, and legislation under development, in these matters give more and more room for adults' will and preferences as well as the role of family members in representing vulnerable adults. Extending the scope of private representation serves to fulfil human rights obligations. However, at the same time, one must acknowledge that it is beneficial from the perspective of public savings in an aging society.

Finland is an aging society with high divorce rates. Private representation may not be as feasible an option in reconstituted families as it is in nuclear families. The recent statistics show a steady rise both in adult guardianships as well as in numbers of confirmed CPAs. Protection based on CPA has yet to displace the appointment of a guardian. However, the newest numbers, not yet confirmed, from the year 2023 indicate that the number of confirmed CPAs is finally growing more compared to adult guardianships.[89]

Both the Guardianship Service Act and the Act on the Continuing Power of Attorney highlight that safeguarding adults' will and preferences is easier in personal matters where there are less interests involved. In personal matters, balancing needs to be done between adults' will and preferences and their own interests. In financial matters, issues related to ensuring market predictability and capability as well as the interests of the third parties are also at stake. If these are not fully scrutinized and balanced in evaluating the issue of adult protection, there may be a risk for indirect discrimination of vulnerable adults.

The acts clearly state that in personal matters, guardians' and attorneys' competency is always secondary. In principle, this is also true in respect to financial matters. However, under the acts, the representative's competency to manage the adult's financial matters is not explicitly linked to their mental capacity, meaning that in practice it is often left to the representative's discretion as to how they respond to the adult's will and preferences. As the legislation in respect to competencies is ambiguous, in practice, third parties may require the guardian or attorney to intervene in legal transactions despite the fact that the adult themselves has sole competency in the matter. These provisions of the Guardianship Service Act or the Act on the Continuing Power of Attorney could be interpreted and – perhaps often, in practice, are interpreted – in accordance with the requirements set in the CRPD. However, the task of the guardianship authority DPSA is simply to protect property of a vulnerable adult. Roughly, how to safeguard the will and preferences of an adult is not part of the task, which inevitably means that in practice it is simpler and easier for a guardian or an attorney to emphasize protection of property.

There is an obvious need for overall assessment in the legal system on how adults should be represented and how their will and preferences can be respected. It is of utmost importance that the representation system is understandable to everyone, including its clients – that is, vulnerable adults and their representatives.[90] The

89 See Open data DPSA.

90 Leilas 2019, p. 75.

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old-fashioned concepts and the oversights of the Guardianship Service Act should be reviewed.[91] There is a need to underline the premise of support for exercising decision-making instead of substituted decision-making as well as to highlight the will and preferences of adults as primary consideration in officially confirmed representation. The current system resonates, somewhat unintentionally, the old ideology, giving emphasis on safeguarding and saving of adults' property, even at the expense of adults' justified and reasonable will and preferences.

91 Aalto 2020, p. 220.