

Guardianship by Country: Spain

Introduction

The Convention on the Rights of Persons with Disabilities, concluded in New York on 13 December 2006 (hereinafter the CRPD), was ratified by Spain on 27 November 2007. Since then, the adaptation of the provisions of the Civil Code (hereinafter the CC) and of procedural legislation to art. 12 of the CRPD concerning the exercise of legal capacity of persons with disabilities has been pending. This adaptation has been brought about by *Law 8/2021, of 2 June, which reforms civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity*.

The approval of this law has meant the acceptance in our legal system of the paradigm shift in the treatment of disability introduced by art. 12 of the CRPD, which recognises that persons with disabilities *shall enjoy legal capacity on an equal basis with others in all aspects of life*. The CRPD is based on an all-encompassing concept of legal capacity that includes both the ownership of rights as well as the legitimisation or exercise of these rights, which means that, in terms of this issue, the traditional distinction between legal capacity and capacity to act will be eliminated. Hence, to say that persons with disabilities have legal capacity on an equal basis with others, in light of the interpretation given to the CRPD, means recognising that they have both legal capacity and capacity to act under the same conditions, therefore, capacity could not be modified as it had been until now by means of the procedure for modifying capacity to act (formerly incapacity procedure) which restricted the capacity to act of the person with disabilities, resulting in incapacity as the civil status of the person. Therefore, in accordance with the new regulation, neither a declaration of incapacity nor a modification of capacity will be made. In line with the foregoing, the systems of legal representation do not seem to be the most suitable for guaranteeing the exercise of legal capacity by persons with disabilities. For this reason, the institutions of guardianship (which is reserved for minors), extended parental authority and reinstated parental authority are abolished. In their place, a support system has been adopted which enables the person with a disability to fully exercise their legal capacity. Thus, we have switched from a system of authoritative guardianship to a system of support, where conservatorship, which has always been characterised by the provision of assistance, is to be implemented as the preferential measure among the support measures of a judicial nature.

It is worth noting that the preference for assistance over representation has not eliminated the possibility of the person exercising the support to be assigned powers of representation, either because the person with the disability has assigned them these powers when they adopted a voluntary support measure, or because circumstances exist as described in art. 249 III of the CC): *In exceptional cases, when, despite having made a considerable effort, it is not possible to determine the will, wishes and preferences of the person, the support measures may include representative functions [...]*.

We are dealing with a support system that must conform to the principles of necessity and proportionality (art. 249 of the CC 1st paragraph). That is to say, measures will be adopted only when necessary for the person with disabilities to be able to exercise their legal capacity and only for the acts that require support. In addition, *he who provides support must attend to the will, wishes and preferences of he who requires support* (art. 249 2nd paragraph), a criterion for action which, together with the principles of necessity and proportionality, becomes the guiding principle of the whole regulation. On this point, the Spanish regulations departs,

minimally, from the provisions of art. 12 of the CRPD, which does not refer to the “wishes” but rather the “rights” of the person requiring support. The term “wishes” is also not present in *General comment No. 1 (2014) on Article 12: Equal recognition before the law* of the Committee on the Rights of Persons with Disabilities, which only refers to the will and preferences of the person with disabilities. The manifestations that respect for the will, wishes and preferences may have in the designation and exercise of support functions will be seen in the analysis of the different aspects of the legislation. For now, it is sufficient to note that the first immediate consequence of this principle is the preference for voluntary measures of support over judicial measures of a subsidiary nature.

Although it is the subject of discussion, the preference given to the will, wishes and preferences of the person, cannot be said to have completely overridden the principle of the best interests of the person with a disability, which remains in force, on the one hand, in those cases where it is not possible to determine what the will and preferences of the person are. On the other hand, it remains in force in other exceptional situations in which the legislation itself allows the judge to decide (by means of a reasoned decision) regardless of the will expressed by the person with a disability, taking into consideration their protection, situations to which reference will be made below.

Lastly, judges and courts are entrusted with the control and supervision of the measures of support as guarantors of citizens’ rights, including those of persons with disabilities. Thus, the relevant judicial authority must adopt the necessary safeguards to avoid, using the terminology of the Convention, situations of abuse, conflict of interest or undue influence. Such safeguards must also be adopted by the notary, since he now plays a key role in the voluntary support measures that are to be granted under a notarial deed.

Furthermore, both Law 15/2015, of 2 July, on Voluntary Jurisdiction (LJV) in its art. 7 bis; and Law 1/2000, of 7 January, on Civil Procedure (LECiv) again in its art. 7 bis; as well as the Notaries Act of 28 May 1862 in its art. 25 III, provide for the execution of all reasonable adjustments and adaptations to guarantee the full participation of persons with disabilities in the respective procedures.

1. What legislation is relevant for the protection of adults? (If applicable, differentiation between federal law or the law of individual federal states)

After analysing the framework within which the new regulation is developed and before delving into the analysis of the different existing support measures, it may be useful to list the other laws applicable to persons with disabilities.

- Organic Law 2/2018, amending Organic Law 5/1985 on the General Electoral System, which recognises the right of all persons with disabilities to vote without experiencing discrimination;
- The Law on the rights of persons with disabilities and their social inclusion (Royal Decree 1/2013)
- The reform of Law 9/2017, on Public Sector Contracts, which introduces the legal obligation to establish a quota of jobs reserved for persons with disabilities;
- Organic Law 1/2017, which guarantees the non-exclusion of persons with disabilities from jury panels.
- Law 15/2015, of July 2, on Voluntary Jurisdiction, which contains the procedure for designating support as well as other issues related to the functioning of such support.

This law has been amended by Law 4/2017, of 24 June, in relation to the right of persons with disabilities to enter into marriage on equal terms.

- Organic Law 1/2015, of 30 March, which amends the Criminal Code to bring it into line with the Convention.
- Royal Legislative Decree 1/2013, of 29 November, approving the consolidated text of the General Law on the rights of persons with disabilities and their social inclusion.
- Law 26/2011, of 1 August, on regulatory adaptation to the International Convention on the Rights of Persons with Disabilities, which constitutes the first step in the adaptation of the Spanish legal system to the Convention.
- Law 41/2003, of 18 November, on the Patrimonial Protection of Persons with Disabilities.
- Law 1/2000, of 7 January, on Civil Procedure, which contains the procedure for the provision of support in the event of opposition in the voluntary jurisdiction proceedings.

2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity? (Especially private mandates or legal representatives appointed by a court/authority).

In accordance with the new art. 250 of the CC three types of measures can be identified:

1. Measures of voluntary origin. In this case it is the person with disabilities who designates who is to exercise the support, as well as the scope and control of the performance of the person exercising it.

2. Informal measures that are reduced essentially to de facto guardianship. The de facto guardian is the person who exercises functions of assistance, care, attention and management of the personal and financial affairs of the person with disabilities without this power being legally or judicially granted.

3. Measures of judicial origin. In this case the person who provides support to the person with disabilities is appointed by the corresponding judicial authority. The measures of support of judicial origin include that of conservatorship and judicial defender.

The first and second type of measures have a preferential character with regard to judicial measures of support that can only be adopted, in accordance with the provisions of articles 249 and 255 of the CC when there are no voluntary measures in place *or a de facto guardian that implies sufficient support*.

A support measure of an administrative nature can also be added to the support measures listed above; this measure is provisional and is applied in response to situations of urgency. This measure is referenced in art. 253 of the CC. This article provides that in the event that a person with disabilities lacks a de facto guardian and urgently needs support, this support can be provided by the corresponding public entity. This same art. 253 of the CC includes the obligation that falls on the public entity to inform the Public Prosecution Office of the situation within twenty-four hours so that it can provide an adequate solution.

2.1 Voluntary measures of support

With regard to voluntary measures of support, these are very broad in scope. The new art. 255 of the CC refers to the possibility that an adult or emancipated minor *in anticipation or appreciation of the concurrence of circumstances that may impede them from exercising their*

capacity may provide for and agree on measures relating to their person or property in a public deed (art. 255 of the CC). This includes present and future measures.

By future measures we mean those measures whereby a person, in anticipation of a situation in which they may need support, establishes the person they appoint to provide this support, how they should exercise their function, what powers are granted to them, whether they relate to personal or financial matters or both, as well as the controls to which their actions will be subject. In this way, the person with a disability is enabled to plan ahead. Although there may be other measures, the CC refers specifically to two: preventive powers of attorney and the deed of ward-appointed conservatorship.

A) Preventive powers of attorney (articles 256 to 262 of the CC)

The preventive power of attorney refers to a receptive unilateral declaration of will by which a person, in anticipation of a future need for support to be provided, delegates powers to another person to represent them in any matters of a financial or personal nature as stated in a public deed. It is an instrument for the future. At the time the deed is granted the individual in question does not require any support for the exercise of their legal capacity. It has been developed in the field of notarial practice and regulated autonomously as an authentic measure of voluntary support of the person with a disability in Law 8/2021, of 2 June. There are two types of preventive power of attorney:

1. The power of attorney that takes effect from the moment it is granted and subsists when the person with a disability requires support for the exercise of their legal capacity. Also called ultra-active power of attorney.
2. The preventive power of attorney that starts to take effect once the principal requires support for the exercise of their legal capacity. In order to prove that this situation exists and for the attorney-in-fact to be able to start to act, the provisions of the principal shall apply. Alternatively, article 257 of the CC establishes the possibility of the notary public drawing up a document certifying that this situation now exists and including the corresponding expert report.

B) Ward-appointed conservatorship

The deed of ward-appointed conservatorship also constitutes a measure of voluntary support which, although the law develops it when dealing with judicial support measures, we will address in this point. Through this document, a person, in anticipation of a future situation in which they may need support, may propose a person or persons who could fulfil the role of conservator, and they may also exclude those they consider unsuitable for the position. The same document *may also establish provisions concerning the functioning and content of the conservatorship and, in particular, the care provided to them, the rules for the administration and disposition of their assets, the remuneration of the conservator, the obligation to provide an inventory or its dispensation and supervision and control measures, as well as proposing the persons who are to carry them out* (art. 271.2 of the CC).

Such designation binds the judicial authority when appointing a conservator. At this point, the question that could arise is whether the corresponding judicial authority could, in any case, deviate from the designation given by the person with a disability. This possibility is only possible, pursuant to the provisions of art. 272.2 of the CC, in exceptional circumstances, which are also serious and unknown to the person with a disability, or in circumstances whereby there is a change in the causes expressed by the person with a disability which led to the original

person being proposed for the role of conservator. In any case, if the judge appoints a conservator other than the one proposed, this appointment must be made by means of a reasoned decision which duly justifies the decision. This decision, in general, will be based on the need to protect the person with a disability from possible situations of abuse, undue influence or a conflict of interest. It could be argued that, in these cases, the best interests of the person with a disability are being upheld, but there are those who understand that this is not so much a question of their best interests but rather what the will of the person with a disability would have been if they had known about the change in circumstances.

In addition, measures of voluntary support can also be present, i.e., the person that considers that they are already in a situation that prevents them from exercising their legal capacity could, in principle, as in the case described above, appoint a person as their support, as well as delimit their functions. The notary before whom the corresponding public deed is executed plays a relevant role here as they are responsible, in accordance with the provisions of art. 17 bis 2 a) of the Notaries Act *for attesting to the identity of the principals, that in their opinion they have the necessary capacity and authority, that their consent has been freely given and that the execution is in accordance with the law and the duly informed will of the principals or intervening parties*. In practice, what may occur at the time of granting the deed is that the notary assesses that the person does not have sufficient capacity to grant the deed and will therefore refuse to authorise the deed and will refer the matter to the courts. In order to assess whether the person has sufficient capacity, the notary may use expert reports, or seek the opinion of a professional or assess whether the person could give consent with the support of another or other persons. In any case, the notary is responsible for ensuring that there is no undue influence, abuse or conflict of interest, and must inform the Public Prosecution Office of such circumstances, which could lead to the appointment of a judicial defender. The notary is thus the guarantor of the respect and will of the principal.

Beyond that, other instruments and businesses could also be considered as measures of voluntary support, some of which already exist in our legal system, such as the maintenance contract, or atypical ones, such as the so-called support provision businesses.

2.2 Informal measures of support

The informal measure par excellence is the de facto guardianship, which, as we have seen above, responds to a situation in which the person with a disability is cared for by their family members and people in their environment who spontaneously take on the functions of care, guardianship and assistance. *De facto* is the most widespread measure. The explanatory memorandum of Law 8/2021, of 2 June, expressly recognises that “reality shows that in many cases the person with a disability is adequately assisted or supported in decision-making and the exercise of their legal capacity by a de facto guardian –generally a family member, since in our society the family continues to be the basic group of solidarity and support among our people, especially when it comes to its most vulnerable members–, that does not require a formal judicial investiture that the person with a disability does not want either”. Under the current legislation, the de facto guardianship is reinforced and will have a preferential character with regard to judicial measures according to the provisions of art. 255 of the CC referenced above, which states: *Only in the absence or insufficiency of these measures of a voluntary nature, and in the absence of a de facto guardianship that provides sufficient support, may the judicial authority adopt other supplementary or complementary measures.*

This is a measure which, in accordance with the provisions of art. 263 of the CC, is compatible with other voluntary measures such as preventive powers of attorney. Therefore, the de facto guardian may be authorised to represent the person with a disability in certain acts because this has been established in the relevant power of attorney. It may also be compatible with a judicial measure of support, because where the conservator has not been vested with the authority to support, the guardian may act.

The de facto guardianship regime is concentrated in four articles: 263 to 267 of the CC. The main contribution of the new regulation concerns the representative function of the de facto guardian. When it is necessary for the guardian to represent the person with a disability, it will be necessary to request judicial authorisation. This authorisation is required, in all cases, for the circumstances stated in art. 287 of the CC which includes a list of acts for which the guardian who holds powers of representation needs judicial authorisation: to alienate or encumber real estate, to waive rights, to dispose of goods or rights of the person with support measures free of charge, etc. The request for authorisation will be ruled on through the corresponding voluntary jurisdiction procedure contained in art. 52.3 of the LJV in which the judicial authority will interview the person with a disability and will examine all the reports it deems necessary.

2.3 Judicial measures of support

A) Conservatorship

Conservatorship is the judicial measure par excellence and the one with the most extensive regulation. It seeks to provide ongoing support to the person who needs it. This concept will be developed in greater detail when examining the procedure for the provision of support.

B) Judicial defender

In general, the judicial defender has exercised certain functions which, in principle, corresponded to parents, guardians or conservators; but which, for various circumstances, they did not perform adequately. There are two features that have characterised the role of the judicial defender up to now: its transitory nature and its subsidiarity. Transitory because its intervention was intended for a specific matter and was limited in time; and subsidiary, because it performed a substitute or supplementary function when there was an obstacle in the normal development of the functions of guardianship and assistance. In practice, in general, the cases in which the judicial has been appointed have usually been cases of a conflict of interest between the person whose capacity has been judicially modified and their legal representative (parents or guardians).

Currently, the figure of the judicial defender is regulated in articles 295 to 298 of the CC. Art. 295 of the CC maintains the cases in which the judicial defender intervenes as described in the previous paragraph and adds a new one in paragraph 5, which states: *When the person with a disability requires the establishment of measures of support of an occasional nature, even if recurrent.*

In light of the provisions of this precept, it can be said that the role of the judicial defender still maintains its characteristic of a transitory or temporary nature, but in contrast to what happens with the minor, the feature of necessary subsidiarity that had characterised the intervention of the judicial defender now disappears since, as the last section indicates, a judicial defender will also be appointed when the person with a disability needs support on an

occasional basis. For the appointment of a judicial defender, the provisions of art. 27 of the LJV shall apply.

3. Who decides on the appointment of a support/legal representative and what are the requirements for the respective measures?

At this point, in accordance with that indicated in the previous question:

- In the case of a voluntary measure of support, it will be the person with a disability who will have designated or will designate who will be their support in the corresponding public deed granted before a notary who will assess the identity, legitimacy and capacity of the principals.

- In the case of a judicial measure of support, it will be necessary to initiate a judicial procedure for the provision of support that will be decided through voluntary judicial proceedings regulated in Chapter III bis of *Law 15/2015, of 2 July, on voluntary jurisdiction* (hereinafter the LJV). This procedure concludes with an order in which the judge appoints a conservator or, occasionally, a judicial defender.

It must be noted that art. 275 of the CC, in terms of judicial measures, establishes a series of causes of disqualification for which a person cannot be appointed as a conservator. These causes are also applicable to the figure of the judicial defender ex art. 297 of the CC.

Two groups of causes can be distinguished. In the first group the following are highlighted as causes of disqualification (art. 275.2 of the CC):

- 1. Those who have been excluded by the person who needs support.*
- 2. Those who, under a judicial ruling, were disqualified or suspended from exercising parental authority or, in full or in part, from exercising guardianship and protection.*
- 3. Those who have been legally removed from a previous role of guardian, conservator or custody.*

The following are also disqualified from exercising the role of conservator (art. 275.3 of the CC):

- 1. Anyone who has been convicted of any offence that makes it reasonable to assume that they will not perform the role of conservator well.*
- 2. Anyone who has a conflict of interest with the person who needs support.*
- 3. Any administrator who has been replaced in their faculties of administration during bankruptcy proceedings.*
- 4. Anyone who has been found guilty during bankruptcy proceedings, unless the conservatorship refers only to the ward's person.*

This second group of causes is characterised by the fact that the judicial authority may dispense with them and appoint a person in one of these situations as conservator in exceptional cases.

Outside of these cases, the following may be appointed as conservator:

- 1. Any natural person of legal age who is suitable to perform the role.*
- 2. Private or public non-profit legal persons whose purposes include the promotion of autonomy and assistance to persons with disabilities (art. 275.1 of the CC).*

When it comes to designating a conservator, the judicial authority will appoint the person who has been proposed by the person to whom the person with a disability delegated such power under the deed of ward-appointed conservatorship referenced above. In the absence of such a proposal, art. 276 of the CC provides, in order, the persons who could be appointed for this purpose: the spouse or person in a similar de facto situation, the son/daughter or descendants, the parent or, failing that, the ascendant, the person who has been appointed by the spouse or common-law partner. Above all, the conservator assists the person in the exercise of their capacity; only in exceptional cases may powers of representation be attributed to the conservator.

4. Who is involved in the procedure of determining the need for support in legal affairs and in what capacity?

Within the scope of judicial measures of support, the following are entitled to instigate voluntary jurisdiction proceedings (art. 42 bis a) 3):

1. The public prosecution office,
2. the person with a disability,
3. the spouse of the person with a disability who is not legally or de facto separated from them (or the person in a similar de facto situation),
4. the descendants, ascendants and siblings of the person with a disability.

Regardless of who is authorised to instigate the proceedings, any person may inform the public prosecution office of *the facts that may determine a situation that requires the judicial adoption of measures of support* (art. 42 bis a) 3 LJV); such notification is mandatory for those civil servants whom by reason of their position, are aware of these facts.

In any case, the application must be accompanied by the *documents that prove the need for the measures of support, as well as an expert opinion given by professionals specialising in social care and healthcare, ...* (art. 42 bis b) 1 of the LJV). In addition, any evidence deemed necessary shall also be submitted. Once the application has been filed, the clerk of the court shall summon the Public Prosecution Office, the person with a disability, the family members and closely connected people to appear (art. 42 bis b) 2). It is typical of this procedure to hold an interview between the judicial authority and the person with a disability, in which the person with a disability is informed of the existing alternatives to judicial support, such as voluntary measures.

The problem arises when there is opposition from the person with a disability, from the Public Prosecution Office or from any of the aforementioned interested parties to the establishment of any measures of support, in which case the voluntary jurisdiction proceedings are concluded and the matter is referred to a contentious procedure as regulated in articles 756 and following of the LECiv.

Therefore, the proceedings for the provision of support will be governed by the provisions of the LECiv when, in accordance with the provisions of its art. 756, it is necessary to appoint a person to perform support functions and the following has occurred:

- Opposition has been lodged in the voluntary jurisdiction proceedings.
- Or when it has not been possible to reach a decision in the proceedings.

In this procedure, similar to what happens in the voluntary jurisdiction procedure, the judge will hold an interview with the person with a disability, will hold a hearing for family members

and closely connected people and will request the necessary expert opinions which will be given by professionals in the fields of social care and healthcare (art. 759.1.3 of the LECiv).

5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity? Addendum: In essence we are asking whether there is not only an assessment by the court or authority of the adult's abilities and his/her needs for support and protection when making an order on a measure of support and protection, but also a decision on the legal capacity of the adult removing or restricting the legal capacity of the adult. This may either be a separate order, or be just the (legal or de facto) consequence of an order on a measure of support and protection.

In both procedures, the provision of the required documentation, the examination of the submitted evidence, as well as the interview with the person with a disability, are intended to ensure the application of the principles of necessity, proportionality and respect for the will and preferences of the person with a disability; all of these principles are set forth in article 12 of the CRPD and will be reflected in the court order that concludes the proceedings. This order does not contain a declaration of incapacity or a restriction of capacity, as mentioned above, but will contain the designation of the person who is to exercise the support, as well as the acts, in particular, for which the person with a disability needs such support. The ruling is tailor-made suit that will guarantee, as stated in art. 268 of the CC, the maximum autonomy of the person in question in the exercise of their capacity. Under no circumstances may it include the mere deprivation of rights (art. 269 of the CC).

This same order will also establish the period within which the measures must be reviewed (art. 42 bis c) 1). The CC expressly states that judicial measures of support shall be reviewed within a maximum period of three years, although the judge, in a reasoned decision, may set a longer period of up to six years (art. 268 of the CC).

6. What are the responsibilities of a supporter/representative and what are the obligations and principles he/she must comply with?

Art. 249 of the CC, which is applicable to any measure of support, in its second paragraph, lists the principles that must govern the actions of anyone exercising a support function, whether this be voluntary, judicial or informal.

Firstly, they must act at all times respecting the will, wishes and preferences of the person concerned. In addition, they must promote the maximum autonomy of the person who needs the support, ensuring that *the person with a disability can develop their own decision-making process, informing them, helping them in their understanding and reasoning and making it easier for them to express their preferences* and making it possible for *the person with a disability to exercise their legal capacity with less support in the future* (art. 249 of the CC). These principles have been successively referred to throughout the regulation of the different measures of support, see, for example, art. 255 of the CC relating to voluntary support measures, articles 269 and 282 of the CC for the conservator or art. 297 of the CC in the case of the judicial defender.

Furthermore, art. 251 of the CC prohibits anyone who performs a measure of support from:

1. Receiving gifts from the person who needs the support unless these are *customary gifts or goods of little value*.

2. Intervening in those cases where there is a conflict of interest. It is precisely this prohibition that is referenced in one of the safeguards that States must adopt in all measures relating to the exercise of legal capacity, as established in art. 12 of the CRPD.
3. Transfers for consideration are also prohibited within the framework of measures of support.

In addition, the CC lists a series of special rules for when the conservator is granted powers of representation, such as the obligation to draw up an inventory (art. 285 of the CC) or the need to have judicial authorisation to carry out certain acts included in art. 287 of the CC.

7. What role do family members play and what are the requirements imposed on them?

As mentioned above, there are numerous situations in which family members spontaneously and naturally take on the care of persons with disabilities, acting as de facto guardians, a figure which has already been referred to above as the main measure of informal support. As in the case of any other measure of support, their actions must be governed by the principles set out in art. 249 of the CC, and they must also avoid the actions established in art. 251 of the CC.

8. What role do volunteers play and what are the requirements imposed on them?

A volunteer is a person who freely and in the spirit of solidarity carries out an activity of general interest, whether in the social, international development cooperation, environmental, cultural, sports, educational, socio-healthcare, leisure or free time, community or civil protections fields. In 2019, according to the data from the report *La acción voluntaria en 2020: voluntariado en tiempos de pandemia* (Voluntary action in 2020: volunteering in times of pandemic) produced by the platform for volunteering in Spain, 6.4% of the Spanish population is involved in some kind of volunteering activity. Any person of legal age, or over the age of 16 with the consent of their legal representative, can carry out a volunteering activity for the benefit of persons with disabilities. There is no specific regulation for the development of these activities beyond a general state law such as Law 45/2015, of 14 October, on Volunteering, which has been developed by some Autonomous Communities, and which aims to delimit the scope of the performance of the actions of the volunteer, of the volunteering programmes and of the entities that offer volunteering activities.

Behind this type of regulations, it is the disability and dependency associations (there are currently 1289 of these associations registered) that design training programmes for all those interested in collaborating in their activities. The help provided by volunteers is highly sought after by these associations as they offer companionship to persons with disabilities, help in carrying out basic activities of daily living and can be a good moral support for persons with disabilities.

9. Are there professional supporters/legal representatives and what requirements/qualifications do they have to satisfy?

Art. 250 of the CC excludes from the possibility of exercising any of the aforementioned measures of support those natural or legal persons who maintain a contractual relationship with the person with a disability the purpose of which is to provide assistance services or those of a residential or similar nature. A priori, this would appear to prevent a situation of a conflict of interest from arising. A reflection of this general prohibition to exercise any measure of support

is the prohibition specifically established in the CC in art. 275.1 in the case of the conservator. This article states that, in addition to the natural person, *foundations and other non-profit, public or private legal persons, whose purposes include the promotion of autonomy and assistance to persons with disabilities may be conservators.*

Several authors have questioned the fact that entities whose business activity is the provision of support services are excluded from the possibility of exercising this support under the terms of the Civil Code, especially in the case of voluntary measures of support, when it is the actual person with a disability who designates who they want to exercise this function and there is nothing to prevent them from appointing whoever is professionally qualified to do so. However, art. 250 of the CC of general application is quite clear in this regard.

10. Who bears the costs for procedures and the supporter/legal representative?

This question involves answering two different questions: the cost of the procedure and the cost of the existence of a measure of support. The procedure for the provision of support is free of charge, the only cost that the procedure may entail is the hiring of a lawyer and a solicitor whose fees will have to be paid. However, legal counsel is not compulsory in the support provision proceedings that is decided in voluntary jurisdiction. It is compulsory, however, in the event of contentious proceedings being initiated as a result of a challenge being raised in the voluntary jurisdiction proceedings for the designation of support measures, as already indicated above.

In turn, with regard to the exercise of the measure of support, we can draw a distinction between the right to reimbursement of expenses incurred and compensation for damages that the person exercising the support measure may experience in the performance of their duties and the establishment of possible remuneration for the position.

Both in the area of de facto guardianship and conservatorship, reimbursement of justified expenses and compensation for damages suffered and arising from the exercise of their duties through no fault of their own is to be provided. The expenses and possible compensation shall be charged to the estate of the person with a disability (articles 266 and 281 of the CC respectively). In contrast, art. 281 of the CC establishes the right of the conservator to receive remuneration for their position as long as the estate of the person with a disability permits it. The amount of the remuneration and the manner in which it is received shall depend on what is established by the judge, although the person with a disability is allowed to establish provisions on the remuneration of the conservator in the corresponding deed of ward-appointed conservatorship.

11. How are supporters/legal representatives supervised and what is done to ensure that the rights, the will, and the preferences of the adult concerned are respected? (Cfr. Art. 12 section 4 UN CRPD).

One issue concerns the principles that should govern the actions of the person providing the support and the prohibitions expressly set forth for any measure of support, and another concerns the means at our disposal to control the actions of the person providing the support. That is to say, what safeguards have been adopted to ensure that during the exercise of their duties there is no abuse, no undue influence and no conflict of interest. At this point, a distinction must be made between voluntary measures of support and judicial measures of support.

In the context of voluntary measures of support, it is up to the principal to determine such safeguards by establishing the control bodies deemed appropriate. This is a matter left to the principal's discretion. Therefore, for example, in the event that a preventive power of attorney has been granted, the principal may, to a lesser extent, establish guidelines, proposals by means of which the principal establishes their preferences, wishes and will in relation to the way in which the attorney-in-fact should exercise his functions; joint action could be established for 2 of 4 children or the possibility of any child acting indistinctly with the obligation to inform the rest of the siblings of the results of their action. There is also the possibility of requiring the attorney-in-fact to render an account of their actions from time to time to a third party who may also hold the authority to revoke the powers vested in the attorney-in-fact. The need may also be included to seek a professional opinion on the feasibility and appropriateness of carrying out a specific act in light of the principal's preferences. It is true that, in those cases in which the preventive power of attorney coexists with an institutional measure of support, a possibility implied in the provisions of art. 258 of the CC, the conservator may exercise this duty of supervision.

In addition to what the principal has freely established, the last paragraph of art. 258 of the CC specifically includes the possibility that *any person authorised to initiate the procedure for the provision of support and the conservator, if there is one, may judicially request the termination of the preventive power of attorney, if any of the causes foreseen for the removal of the curator apply to the attorney-in-fact, unless the principal has established otherwise.*

With regard to the de facto guardian, the possibility is established for the judicial authority, by means of the corresponding voluntary jurisdiction proceedings (art. 52 of the LJV), to, at any time, contact the guardian to request a report on the personal and financial situation of the person who requires support or to request that an account to be given of their actions, either ex officio, at the request of the Public Prosecution Office or of any interested party (art. 265 of the CC). In light of the information given by the de facto guardian, the judge may adopt the measures of control and supervision that they deem appropriate without prejudice to the fact that the corresponding proceedings for the designation of a measure of support may be initiated.

In addition, the judicial authority does have some control, which could be classed as indirect, when the de facto guardian, in accordance with what has been indicated above, needs judicial authorisation to carry out certain acts. The request for such authorisation may constitute an opportunity for the judicial authority to examine the current situation of the person with a disability.

In the context of judicial measures, the controls and safeguards are much more developed, especially in the area of conservatorship, the main judicial measure of support. Without prejudice to the periodic reviews to which those exercising these measures are subject, the judicial authority, in the corresponding voluntary jurisdiction proceedings, may establish *the control measures it deems appropriate to ensure respect for the rights, will and preferences of the person requiring support, as well as to prevent any abuse, conflicts of interest and undue influence* (art. 270 of the CC).

As far as the conservator is concerned, art. of the 270 CC itself establishes the possibility for the Public Prosecution Office to approach the conservator to request reports in order to ensure the proper functioning of the conservatorship. Furthermore, the conservator may also be required, for exceptional reasons, to post a bond to ensure the fulfilment of their duties.

Thirdly, the judge may impose the obligation to provide regular accounts regarding any actions with financial significance that they are carrying out or will carry out.

The last measure of protection for the person with a disability is the removal of the conservator which will proceed when the conservator is involved in a cause of disqualification, or displays poor conduct in the performance of their duties (for example: failure to comply with the obligation to provide accounts, failure to respect the principles that should govern their actions, etc.) or for notorious ineptitude (which includes possible health impediments). In all these cases, the conservator will be removed and replaced by a new one following the procedures applicable to voluntary jurisdiction (art. 278 of the CC). A common consequence of the removal of the conservator and the termination of the conservatorship is the general submission of accounts provided for in articles 292 and 293 of the CC of the acts of management of a financial nature carried out in the exercise of the conservator's duties. The conservator has the period of three months to submit the report after leaving the post. The procedure for submitting the accounts is established in article 51 of the LJV.

With regard to the judicial defender, the grounds for disqualification, exemption and removal of the conservator, ex art. 297 of the CC shall apply. In the case of sporadic support, they will be obliged to submit an account of their management, applying similar rules to those that apply in the case of conservatorship concerning this issue.

12. Who decides on deprivation of liberty and involuntary medical measures and what requirements does this decision underlie? Is there a distinction between self-endangerment and endangerment of others?

Firstly, with regard to involuntary commitment, and in accordance with art. 763 of the LECiv, judicial authorisation is always necessary. This authorisation must be submitted prior to commitment by the court located in the place where the person concerned resides (art. 763.1.I of the LECiv). If the commitment is urgent in nature, the request for judicial authorisation will be made immediately after the commitment by the person in charge of the centre within 24 hours. The judge has a maximum period of 72 hours from the commitment to ratify the measure or not. In this case, the competent judge is the judge of the place where the centre to which the person concerned has been committed is located (art. 763.1.II of the LECiv).

In either of the two cases, the judge shall (art. 763.2 of the LECiv):

1. Hear the person concerned, the Public Prosecution Office, any person whose appearance is deemed appropriate or who is requested to appear by the person who has been committed.
2. *Without prejudice to the examination of any other evidence that may be deemed relevant to the case, the court shall itself examine the person who has been committed and shall hear the opinion of a medical practitioner designated by the person concerned.*
3. Establish, in the corresponding ruling, the obligation of the medical practitioners to provide reports every six months, although this period may also be reduced based on the circumstances of the person requiring support. In light of the reports, the judge shall decide on the continuation of the measure.

It is also possible that the medical practitioners themselves may consider that it is not necessary to consider with the measure of commitment, and they may discharge the person concerned and inform the corresponding judicial authority (art. 763.4 last paragraph of the LECiv).

Given that commitment entails a restriction of freedom of the person with a disability, this precept has the status of organic law (see, first additional provision, in the draft given by art. 2.3 of Organic Law 8/2015, of 22 July, in compliance with Ruling of the Constitutional Court 132/2010, of 2 December).

The Spanish system of involuntary commitment has been the subject of attention by the Committee on the Rights of Persons with Disabilities. The concluding observations of both the 2011 and 2019 reports submitted by Spain warned of the need to review the procedure established in art. 763 of the LECiv on the grounds of disability, requiring, in all cases, the informed consent of the person concerned, in order to bring it in line with the CRPD. However, it should be noted that art. 763 of the LECiv does not regulate when commitment is necessary, a matter that will be requested in the medical context, but rather regulates the judicial guarantees that must be observed when commitment is requested, as occurs in any procedure that involves the restriction of fundamental rights. Even so, it is necessary to adapt our regulations to comply with the CRPD, and this adaptation, to date, remains pending. Although some work has been carried out in this regard, it did not go ahead in the end.

On the other hand, as far as actions in the field of health are concerned, in principle it is the person with a disability who must give their consent, *as any action concerning a patient's health requires the freely given and voluntary consent of the individual concerned* (art. 8 of Ley 41/2002, of 14 November, the basic law regulating patient autonomy). However, the law on patient autonomy itself, in art. 9, regulates the cases in which consent can be given by proxy. Firstly, it can be given by proxy when, in the opinion of the doctor in charge, the patient, whether due to their physical or mental condition, is not capable of making decisions – a situation that is applicable to any patient, whether they have a disability or not-.

Secondly, art. 9.3 of Law 41/2002 states that consent can be given by proxy *when the patient's capacity is judicially modified and this is stated in the ruling*. On this point, the terminology prior to the reform is maintained. If we were to interpret this precept in accordance with the new system of support, the following could be noted. Aside from those acts in which the conservator acts as support, it is possible that the judicial authority, in the corresponding court order, may have assigned duties to the conservator regarding the duty to represent the person concerned in the performance of acts of personal significance with regard to healthcare. In this case, in accordance with the provisions of art. 278 of the CC, the conservator shall require judicial authorisation.

13. Additional comments (elements of your country's system that may be of interest and are not covered above)

The system for the registration and disclosure of measures of support remains to be determined.

Both judicial and voluntary measures of support can be entered on the Register, in accordance with the provisions of articles 72 and 77 respectively of Law 20/2011, of 21 July, of the Civil Registry. However, this data is subject to restricted disclosure (art. 83 of the LRC) which means that only the registered person, i.e. in this case the person with a disability, the person exercising support and who is expressly authorised to do so, the attorney-in-fact under a preventive power of attorney and the conservator may access this data. Only these persons may directly access or authorised third parties to access the data contained in the registration (art. 84 of the LRC).

Public authorities and public officials who, in the exercise of their duties, need to access the contents of the respective entries may also do so.