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## **Commentary on the Judgment of the Court of Appeal in Katowice of 11 September 2015, V Aca 109/15<sup>1</sup>**

1. The interpretation of Article 13 § 1 of the Civil Code<sup>2</sup> has to be made in the spirit of Article 30 of the Constitution of the Republic of Poland stipulating that the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. The provisions of the Constitution and international law on the subject of human rights protection are subject to violation in any case of adjudicating incapacitation, either full or partial, which does not significantly improve the legal or actual situation of the incapacitated person.
2. The adjudication on incapacitation cannot be based on potential risks and threats that may relate to health or even human life in the future.

### **1. Introductory comments**

The legal regulations applicable in Poland regarding the institution of incapacitation are an example of substitute decision-making. This remark especially applies to full incapacitation, where the legal guardian appointed by the court obtains

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1 The judgment published on the website of the Katowice Appellate Area, access: 1.06.2018. The judgment was issued as a result of an appeal against the judgment of the District Court in Gliwice of 21 November 2014 (Ref. no. II Ns 29/14); The Author's theses resulting from the justification of the judgment of the Court of Appeal.

2 According to Article 13 § 1 of the Act of 23 April 1964 Civil Code, Dz. U. 2018, item 1025, as amended (hereinafter CC): "A person over thirteen years of age may be fully incapacitated if, due to mental illness, mental retardation or other mental disorder, in particular alcoholism or drug addiction, they are unable to manage their behaviour".

the right to make certain decisions for and on behalf of the incapacitated person.<sup>3</sup> The model is opposed to the concept of supported decision-making, the main advantage of which is the lack of the deprivation of legal capacity. This model assumes that the person is able to make decisions of legal significance provided they get the support which they need.<sup>4</sup>

The model of supported decision-making was best reflected in the regulations of the United Nations Convention on the rights of people with disabilities (the Convention) drafted in New York on 13 December 2006<sup>5</sup>. The Signatory States to the Convention committed to introduce in their national systems legal solutions enabling persons with a disability to make decisions on their own matters to the greatest extent possible and to be adequately supported in the process<sup>6</sup>. Although Poland ratified the Convention in 2012,<sup>7</sup> work on the amendment of the legal regulations regarding legal capacity was discontinued. The draft law strengthening the position of people with intellectual disabilities in Polish private law, including the provisions on continuing powers of attorney,<sup>8</sup> was even developed but to-date it has still to be passed through parliament.<sup>9</sup>

As the judgment of the Court of Appeal in Katowice commented on below demonstrates – regardless of the delays in the legislative work – the Convention's

3 More on incapacitation see: K. Lubiński, *Postępowanie o ubezwłasnowolnienie*, Warsaw 1979, passim; L. Kociucki, *Zdolność do czynności prawnych osób dorosłych i jej ograniczenia*, Warsaw 2011, pp. 171 et seq.; *Ubezwłasnowolnienie w polskim systemie prawnym*, Warszawa 2012, passim; M. Domański, *Ubezwłasnowolnienie w prawie polskim a wybrane standardy międzynarodowej ochrony praw człowieka*, Prawo w działaniu 2014, no. 17, pp. 7 et seq.

4 See: M. Szeroczyńska, *Wprowadzenie [in:] Jeśli nie ubezwłasnowolnienie, to co? Prawne formy wsparcia osób z niepełnosprawnością*, K. Kędziora (ed.), Warsaw 2012, pp. 8 et seq.; K. Kurowski, *Niepełnosprawność i osoba niepełnosprawna – od medycznego do społecznego modelu niepełnosprawności [in:] Najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych*, Biuletyn RPO. Źródła 2013, A. Błaszczak (ed.), no. 6, pp. 8 et seq.

5 Dz. U. 2012, item 1169. hereinafter the Convention.

6 See more on the obligations arising from the ratification of the Convention A. Błaszczak, *Zastrzeżenia i oświadczenia interpretacyjne Polski do Konwencji o prawach osób z niepełnosprawnościami [in:] Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, D. Pudzianowska (ed.), Warsaw 2014, pp. 27 et seq.

7 Based on the Act of 15 June 2012 on the ratification of the Convention on the Rights of Persons with Disabilities, adopted in New York on 13 December 2006 (Dz.U. item 882). The Convention entered into force in Poland on 25 October 2012.

8 See more: P. Machnikowski, *Pełnomocnictwo opiekuńcze w pracach Komisji Kodyfikacyjnej Prawa Cywilnego w latach 2012-2015*, Rejent 2016, no. 5, pp. 50 et seq.; I. Kleniewska, M. Szeroczyńska, *Założenia uregulowania w polskim prawie instytucji asystenta prawnego osoby z niepełnosprawnością intelektualną lub psychospołeczną [in:] Jeśli nie ubezwłasnowolnienie, to co? Prawne formy wsparcia osób z niepełnosprawnością*, K. Kędziora (ed.), Warsaw 2012, pp. 116 et seq.

9 See: M. Szeroczyńska, *Mozolna droga ku likwidacji instytucji ubezwłasnowolnienia [in:] Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, D. Pudzianowska (ed.), Warsaw 2014, pp. 180 et seq.

ratification results in a change in the paradigm of perception of people with intellectual disabilities not only in the international but also in the national legal order. In this case, however, it is not about legislative changes, but about the modification of case law developed by common courts in incapacitation cases. The Court of Appeal in Katowice, examining the use of the institution of incapacitation *in casu*, considered the superior standard of human rights protection. Unlike the District Court in Gliwice, the Court of First Instance in the referenced case, it did not accept the existence of legal premises for incapacitation (in any form, full or partial), concluding that this would lead to excessive and irreversible interference by public authorities in the rights guaranteed by both the national and the international legal order. Article 13 of the Civil Code (hereinafter: CC) was interpreted in the spirit of Article 30 of the Constitution, indicating that the incapacitation of a given person with a disability may constitute a violation of their inherent dignity.

This way of perception deserves to be approved, but before the main arguments of the Court's justification are addressed, the diametrically opposed judgement of the Court of First Instance should be presented. In turn, this ruling reflects very well the model of standard adjudication in incapacitation cases being subject to criticism in the Polish legal doctrine.<sup>10</sup>

## **2. The facts in the case and the main justification for the Court of First Instance judgment**

The person with a disability being the participant in the proceeding was affected by cerebral palsy with epilepsy and paresis accompanying this disease from birth. This young man was certified with multiple disabilities: an intellectual disability in a moderate form and motor retardation due to cerebral palsy. On the basis of a disability certificate issued on 22 May 2012, he is recognized as a person with severe disability, permanently incapable to work, requiring participation in occupational therapy, the provision of auxiliary care, rehabilitation and technical aids. Since he also requires the constant assistance of another person to compensate for a significant limitation in his ability to exist by himself on a daily basis, under the decision of the

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10 See the research conducted by students of the Law Clinic at the Faculty of Law and Administration of the University of Warsaw in the years 2000-2001, collected and developed by A. Firkowska-Mankiewicz, M. Szeroczyńska, *Praktyka ubezwłasnowolnienia osób z niepełnosprawnością intelektualną w polskich sądach. Raport z badań, Człowiek- Niepełnosprawność- Społeczeństwo* 2005, no. 2, pp. 96 et seq. ; as well as the research carried out by the Department of Common Courts of the Ministry of Justice in the years 2003-2004, see I. Kleniewska, *Postępowanie w sprawie o ubezwłasnowolnienie w praktyce sądowej* [in:] *Prawo w akcji*, vol. 1, E. Holewińska-Łapińska (ed.) Warsaw 2006, pp. 118-134.

Social Insurance Institution medical examiner of 8 June 2011, he was considered permanently incapable of independent existence.<sup>11</sup>

The proceedings on full incapacitation in this case were instituted not at the request of the immediate family<sup>12</sup> but by the prosecutor possessing the legitimacy on a general basis.<sup>13</sup> According to the justification of the judgement of the District Court in Gliwice, before the application for incapacitation was submitted, at the request of the Social Welfare Center, the verification procedure concerning the living conditions of the disabled person was opened in September 2013, largely in response to a “Blue Card” police procedure (the domestic violence police intervention protocol)<sup>14</sup> which had been conducted on the household where the participant in the proceedings stayed, and which had been ongoing since 30 June 2013. At the time, he lived in the apartment with his mother and her cohabitant who both had a tendency to abuse alcohol and while drunk they would quarrel and engage in acts of physical and psychological violence witnessed by the participant. In an environmental assessment conducted on 24 September 2013 by a probation officer at the place of residence, among others, the flat’s poor hygienic condition, alcohol consumption by the participant’s mother and her partner and related altercations were noted. There was also information on the previous criminality of the participant’s mother and rehabilitation treatment. It is worth noting that the probation officer’s assessment concluded with the suggestion of expediency in processing the participant’s incapacitation. It was this conclusion that triggered the prosecutor to initiate proceedings.

In order to issue judgment, the District Court in Gliwice, as the Court of First Instance,<sup>15</sup> had to look at the personal and family situation of the participant in the

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11 In Poland, there are two independent systems of disability certification. The first is implemented by municipal/district commissions for disability assessment (the guardianship allowance may be granted in connection with their decisions); the second is the Social Insurance Institution (Zakład Ubezpieczeń Społecznych, ZUS), which is connected with the award of disability benefits.

12 According to Article 545 § 1 of the Act of November 17, 1964, the Code of Civil Procedure (consolidated text: Dz.U. 2018, item 15, as amended, hereinafter as CCP) the persons entitled to submit the application are: the spouse of the person whom the application for incapacitation concerns, its relatives in a straight line, siblings and its statutory representative. However, the rights of relatives in a straight line and siblings are excluded, if the person concerned by the application has a statutory representative (Article 545 § 2 of CCP). In particular, this situation occurs when the application for full incapacitation applies to a person over the age of 13.

13 The prosecutor may submit the application for incapacitation if they find that there are no persons authorized to do so, or that these persons evade the application or are not able to report it themselves due to a mental illness, mental retardation, helplessness or other exceptional reasons. See § 359 of the Order of the Minister of Justice of April 7, 2016 – Rules of internal office of common organizational units of the prosecutor’s office, Dz. U. item 508, as amended.

14 The procedure of establishing the Blue Card is regulated in the Act of 29 July 2005 on preventing domestic violence (consolidated text: Dz.U. 2015, item 1390, as amended).

15 According to Arr. 544 § 1 of the CCP cases of incapacitation belong to the jurisdiction of District Courts, recognizing them in the composition of three professional judges. The Court’s local

proceedings. This procedure required to be conducted with great care since both the participant himself and his immediate family (the mother) opposed incapacitation. As stipulated in Article 554<sup>1</sup> § 1 of the Code of Civil Procedure (CCP), inquiries should first of all determine the state of health, personal, professional and property situation of the person the application refers to, the tasks the person needs to perform and the way the person satisfies his/her basic life needs.

In the course of the proceedings, it was established that the participant attended a job training school where he did very well. In the school's opinion, he was considered a friendly, smiling, kind and open student, willing to socialise both with his peers and with adults. While able to initiate and maintain verbal contact with an interlocutor, due to the occurrence of verbal stereotypes, he had problems with statement organisation. The opinion stressed that he could distinguish between good and evil but was very susceptible to the influence of others and often mimicked their behaviour. During the school year, considerable progress was observed in the participant in the area of socialisation and in becoming independent; he was very keen on joining in all kinds of practical activities and developing his independence, and he also attended revalidation classes.

In addition, the Court determined that the participant was independent in the area of basic hygiene activities, moved independently, took a minibus to school and for this purpose went by himself to a nearby bus stop. He could make a simple meal and do housework. He would not be able to take medications on his own but was able to communicate feelings of pain or discomfort. He did not understand the value of money but had his own bank account and, with the aid of his mother (who managed his money), he used a bank card. He could use a computer and an mp3 player.

Citing the information from the probation assessment of September 2013, the court undermined the credibility of the testimonies submitted by the participant's relatives (his mother and brother) who claimed that the participant had safe living conditions at his place of residence. On the basis of the documents attached to the application and described above, the court stated that the environment in which the participant lived was unfriendly toward him, mainly due to the presence of his mother's partner. It was also stressed that the participant's mother was being rehabilitated in a day-centre for alcohol abuse, which made it difficult for her to look after her son. This was also considered by the court to be a factor that posed a threat to the participant and one which in addition implied a need to place his finances under the control of a legal guardian.<sup>16</sup>

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jurisdiction specifies the place of residence (or stay) of the person to be incapacitated (Article 544 § 2 of the CCP).

16 The legal guardian for the incapacitated person is appointed by the guardianship court in a separate proceeding.

The court's considerations on the need to regulate the legal status of the participant are worth analysing. In the court's opinion, the use of the institution of full legal incapacitation was justified in order to allow for quick decision-making in administrative cases regarding the participant and to protect his financial interests. It was pointed out that the participant was easily influenced and, as he independently rode a bicycle, went for walks and met other people, he was exposed to unfavourable dispositions of his property. Furthermore, by ruling on incapacitation, the court emphasised that it was concerned that he would not be able to express effective consent to a major medical procedure should such need arise and thus, this would serve to harm the participant's interests in protecting his health and his life. The expert witnesses in the case<sup>17</sup> indicated that the participant was not a mentally ill person in the sense of psychosis, he only showed symptoms of behavioural and emotional disorders. He was only partially oriented about his own person and situation, and the current date. He could not read or count. He could write his name with misspellings but beyond this he was unable to write. His ability to understand everyday social situations, socially acceptable behaviours and their causes, and the ability to issue valued judgments, was underdeveloped. As a result, the expert witnesses stated that he was unable to independently meet the fundamental needs of life or care for his health, property and personal safety issues. In these matters, he constantly used the help of other people, most often his mother. It was established that the psychological condition prevented him from independent existence, and cognitive disorders made it impossible for him to independently determine and satisfy basic life needs.

With regard to the foregoing, the court came to the conclusion that the conditions of incapacitation as referred to in Article 13 § 1 CC applied and fully incapacitated the participant, assuming that the application of this institution was in the interest of the participant and was in accordance with his wellbeing.

Referring to the ruling made by the court, it is worth emphasising the inconsistency of the conclusions resulting from the experts' opinions with the findings made on the basis of opinions on the participant collected from his school and home environment. The community interviews seemed to indicate that the participant only required assistance in conducting certain matters, while in some cases he managed particularly well on his own. Meanwhile, the experts' opinions directly indicated that his psychological condition made it entirely impossible for him to exist independently, and his cognitive disorders prevented independent determination and satisfaction of his basic life needs. At the same time, the experts did not make it clear what the specific life needs were that the participant was incapable of satisfying. Admittedly, the information collected indicated that the

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17 The justification does not indicate in which specialty they were proficient. According to art. 553 § 1 of CCP a person subjected to the incapacitation procedure must be examined by a psychiatrist or neurologist, as well as a psychologist.

participant would probably not be able to take medications on his own and would not be able to prepare a complicated meal. Similarly, as a result of intellectual limitations, he required assistance with larger financial transactions from close relatives (he did not understand the value of money). One could also presume that due to his limited intellectual capacity, especially in the field of reading and writing, he could not be party to a civil law contract. At the same time, as the evidence collected also indicated, the participant was able to do all of these things given adequate support. He functioned properly both at school and in his home environment, and his needs were met thanks to the care of his mother and other people. Therefore, the question arises, what was the purpose of “full incapacitation” in this particular case?

The provisions of the Civil Code clearly indicate that the mental state of a natural person has legal significance, translating into two-fold protection: either by categorising circumstances causing this state as the reasons excluding or limiting legal capacity (incapacitation) or as the causes of a defect in the declaration of will namely lack of consciousness or freedom (Article 82 CC). In the latter case, the so-called abnormal psychological state of a given person is considered in the context of a specific factual situation in which the declaration of will was made and depending on the results of the examination it leads (or not) to a legal effect of the nullity of the legal transaction. In the case of incapacitation, the abnormal psychological state is considered in a longer term, the consequence of which is the indefinite deprivation of legal capacity. As a result, it becomes necessary to make decisions about the entire sphere of legal capacity.<sup>18</sup>

However, it should be noted, that if in this sphere the person does not participate or can only participate with help from others, then there is nothing to protect them from and no need to protect other transactions that may arise. Attention should also be given to the potentially “dangerous” behaviour of the participant stressed by the court. The Court indicated that the participant was easily influenced and that because he independently rode a bicycle, went for walks and met other people, he could make unfavorable dispositions with his property. At the same time, the Court of First Instance did not determine that such situations had ever taken place. Incapacitation in this case was simply being applied in a preventive sense.

The excerpt of the justification concerning the need of incapacitation due to the potential possibility of subjecting the participant to medical intervention deserves similar comment. Later the Court of Appeal rightly criticised this point of view, indicating that the ruling on incapacitation cannot be based on potential risks and threats that may arise in the future in relation to the person’s health or even to their

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18 The only exception is Article 14 § 2 of the Civil Code, according to which if a person incapable of concluding legal acts enters into a contract that is commonly concluded in minor current affairs of everyday life, the contract becomes valid at the time of execution, unless it causes serious harm to the incapable person.

life. At the time when the contested judgment was issued, there were no grounds to conclude that the participant required medical treatment of any kind or that such would be required in the near future. Moreover, in a case of emergency, a doctor can carry out necessary medical treatment without the consent of the patient, their legal representatives or guardianship court, if the delay caused by proceedings to obtain such consent would expose the patient to risk of loss of life, further injury or serious health disorder.<sup>19</sup>

Additionally, it can be supplemented with the provision of Article 32 para. 4 of the Act on the professions of doctor and dentist, which stipulates that if an incapacitated person is completely able to give an opinion on the medical examination, their consent is required along with the consent of their statutory representative. Therefore, the doctor has to take into account the opinion of the incapacitated patient if he/she has true discernment.<sup>20</sup> In turn, the case of partial incapacitation was treated in medical law in the same way as the case of an adult not being incapacitated and having so-called actual competence. In this case, such person can independently express consent to all medical interventions, including those that carry increased risk.<sup>21</sup>

To summarise the arguments presented up to this point, it is worth emphasising that the judgment of the Court of First Instance in this case, serves as a typical example of a judgment in which the court relies on experts' opinions in a quite unreflective way. Here, the experts focused on what the disabled person could not do, rather than on what their potential consists of. Despite the factual elements indicating that the participant managed well when receiving adequate support, attention was narrowed down to potential situations in which the participant would not be able to cope. The issue should also be seen in the premises of incapacitation provided in Article 13 § 1 CC. The court examines whether a person who is a participant in the proceedings affected by a mental illness, mental retardation or other type of mental disorder (in particular alcoholism or drug addiction) is, as a result of said conditions, unable to manage their behaviour. Therefore, *a contrario*, it asks experts whether the participant in the proceedings is able to manage their behaviour. This way of presenting the matter leads experts to give a negative answer. The so-called independent and exclusive competence test assessed *in abstracto* is not altogether

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19 See Article 33 para. 1 and Article 34 paragraph 7 of the Act of 5 December 1996 on the professions of doctor and dentist, consolidated text: Dz. U. 2015, item 464, as amended.

20 It concerns also the provisions of the Act of 6 November 2008 on patients' rights and the Patient's Rights Ombudsman, consolidated text: Dz. U. 2017, item 1318, item 1524, which refer to the Act on the professions of doctor and dentist. Similarly, under the provisions of the Act of 19 August 1994 on the Protection of Mental Health, Dz. U. 2018, item 138; see especially the provision of Article 22 para. 4 of this Act.

21 See e.g. B. Janiszewska, *Zgoda na udzielenie świadczenia zdrowotnego. Ujęcie wewnątrzsystemowe*, Warsaw 2013, pp. 415 et seq.



impossible for people with intellectual disabilities to pass. I also dare to say that this same test might not be passed by some people who are within intellectual norms but suffering from various types of mental disorder. Everything depends on the task the person is expected to be able to cope with.

In this context, it is also worth noting that the Polish legislator clearly separates incapacitation into two types: full and partial. By meeting the same premises (mental illness, mental retardation, other mental disorder and in particular alcoholism or drug addiction), it differentiates the effects of an abnormal mental state as: that where the person is unable to manage their behaviour (Article 13 § 1 CC) and that where the person only requires assistance in managing their affairs (Article 16 § 1 CC). It seems that, taking into account the facts in the case, it was possible to apply Article 16 § 1 CC. However, in light of the additional factual findings made by the Court of Appeal in the case, even that ruling (partial incapacitation) would have been unjustified.

### **3. The main justification for the Court of Appeal judgment**

The Court of Appeal in Katowice considered the appeal lodged by the participant himself (duly represented), as well as by the other participant in the proceedings (the mother). In the appeals, firstly the errors in factual findings were pointed out: the assumption that the participant did not have safe and peaceful living conditions and failure to adopt the state of affairs existing at the closure of the hearing as a basis for adjudication (Article 316 § 1 CCP with reference to Article 13 § 2 CC). It was also alleged that the District Court's judgment violated substantive law, i.e. Article 13 § 1 CC, and the Convention provisions.<sup>22</sup> A violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>23</sup> was also stated. The claimants requested the court to amend the judgment by dismissing the application for incapacitation or to waive the judgment and to refer the case back to the District Court. It is also worth emphasising that one of the participants in the proceedings (the mother) requested the court to present a legal inquiry to the Constitutional

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22 In particular, the claimants referred to Articles 3 and 19 of the Convention. Based on Article 3 lit. a) and c) of the Convention is an obligation to respect the inherent dignity, autonomy of a person with a disability, including freedom of choice and respect for their independence, as well as the obligation to ensure full and effective participation and inclusion of that person in society. According to Article 19 the aim is to recognize the right of persons with disabilities to live in society, including the right to make choices equally with other people, and to undertake effective and appropriate steps to facilitate the full enjoyment of the right to live in society by people with disabilities - its scope includes the right to participate in legal transactions.

23 The provision of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter as ECHR) provides for respect of private and family life. The Court of Appeal found them irrelevant.

Tribunal on the compliance of Article 13 CC with the Constitution of the Republic of Poland and the international agreements ratified by Poland before mentioned.<sup>24</sup> The prosecutor demanded the appeal to be dismissed and the judgment to be upheld, or (possibly) partial incapacitation to be adjudicated.

The Court of Appeal considered both appeals justified, stressing that the Court of First Instance, relying on information obtained from the community assessment interviews of September 2013, being the basis of the application for incapacitation, did not deliberate findings on the current situation in the participant's household existing on the date the contested judgment was handed down. In this regard, the Court of Appeal carried out supplementary evidence proceedings. The psychiatrist under whose care the participant had been for several years testified that he had never found any negligence and irregularities in the way his mother cared for him. She assessed that the participant was always well-groomed and provided with proper care (the witness used the term "taken care of properly"). Also, in the community assessment prepared by a professional probation officer on 10 January 2014, it was stated that the participant lived only with his mother, that her cohabitant had moved out in November 2013 and that she herself had maintained abstinence from alcohol and attended therapy for addicts. In the assessment, the probation officer (the one who prepared the report of September 2013) included information that the participant's situation had improved and that the Blue Card procedure initiated on 30 June 2013 had been closed on 8 November 2013 (prior to the application for incapacitation being filed). On the basis of testimony submitted to the Court of Appeal by the participant's mother, it was also established that after the participant had come of age, in relation to medical treatment and dealing with administrative matters supported by his mother, the participant had never experienced any difficulties related to his condition that were of concern to doctors and administrative officers. In terms of the medical aspects of the participant's functioning, he was subject to constant treatment assisted by his mother. The fact that this assistance was properly provided was primarily demonstrated by the position of the psychiatrist attending the participant for many years, who had not found it to be flawed in any way. Also, the participant's functioning in the social sphere raised no objections. He attended school, had a bank account, used an ATM card and carried an ID card. The fact that this was implemented with help from his mother could not disqualify him as a participant in social life. Importantly, the

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24 The Court of Appeal found them irrelevant. The Constitutional Tribunal in its judgment of 7 March 2007 (reference number K 28/05) did not assess incapacitation as an institution inconsistent with Article 30 and Article 31 of the Constitution of the Republic of Poland, but only described the procedural solution as inconsistent with the provisions of the Constitution, depriving an incapacitated person of the postulative capacity, i.e. the right to submit an application for instituting proceedings to waive or change legal incapacitation.

participant did not violate any social norms. On the contrary, he was perceived as a nice and friendly person.

Since, as demonstrated above, the participant's interests both personal and material were properly protected by the care exercised by his mother and other family members, the Court of Appeal changed the judgment of the Court of First Instance dismissing the application for incapacitation.

At the juridical level of the judgment, the Court stressed that incapacitation was a form of state aid for people who, due to specific disorders, are unable to function on their own. Incapacitation is to serve only the interests of that person and its aim is to help in dealing with personal and material matters.<sup>25</sup> Article 13 § 1 CC, ought to be interpreted in the spirit of Article 30 of the Constitution of the Republic of Poland, stipulating that the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It is inviolable, and its respect and protection constitute the responsibility of public authorities. Moreover, it should also consider the international legal order. In respect the latter, this includes the right to respect the inherent dignity and autonomy of a person with a disability, the right to an independent life and inclusion in society provided under the Convention, as well as that right resulting from Article 8 ECHR - the right to private life.

Regarding the legal consequences, the Court found that incapacitation involves deep interference with the rights guaranteed by both the Constitution and international agreements binding on Poland. In case of legal incapacitation, the whole sphere of decision-making is transferred into the hands of a guardian appointed by a court. The possibility then to participate in trade and make choices about every aspect of their functioning in social or personal life equal with all other people by persons with disabilities is significantly reduced. For this reason, incapacitation should be *ultima ratio*, i.e. a legal measure applied only if it is not possible to protect the interests of persons incapable of managing on their own in any other way. *A contrario*, it should be considered pointless whenever it is not absolutely necessary for the purpose it is to serve. Due to the conflict of values associated with legal incapacitation, the need to apply this measure has to be assessed on the circumstances of a particular case.

#### 4. Summary

The institution of full incapacitation as a measure adjudicated for an indeterminate time and not restricted to specific ranges or types of cases, having

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25 As stated by the Supreme Court in the provisions of October 27, 1976, II CR 387/76 and December 29, 1983, I CR 377/83, *Legalis*.

very serious legal consequences<sup>26</sup> should be applied exceptionally. The criterion of “inability to manage behaviour” used by the legislator should not be read in a clichéd way. The function of expert opinion is to help a court assess the life situation of the person who is to be incapacitated. In contrast to expert psychiatrists, neurologists and psychologists assessing the actual ability (competence) of a given person, the court is primarily to assess the person’s ability to participate in legal transactions and in social life. In this area, the most severe result of incapacitation takes place depriving the right to self-determination. In the decision of 5 January 1977,<sup>27</sup> the Supreme Court pointed out that if the patient’s life situation is stabilised, he or she is provided with sufficient factual care and there is no need to take any action requiring legal protection, the judgment on incapacitation would lead to disruption of the regulated actual situation. Therefore, the judgment of the District Court in Gliwice, referring only to potential threats in various aspects of the participant’s life, had to be assessed in a negative way, while the judgment of the Court of Appeal in Katowice deserved approval.

Undoubtedly, the provisions of the Convention requiring a change in the paradigm of perception of people with disabilities, especially those intellectually challenged, had a serious impact on the interpretation made by the Court of Appeal in Katowice. In place of the traditional state custody (in the form of social welfare), these provisions introduce the concept of assistance provided to a person with a disability, respecting their dignity, potential and will to exercise their own rights, i.e. the right to work, education, and electoral rights.<sup>28</sup> Although the factual situation made it clear that the premise of the need to provide “help in handling cases” was met, the court did not consider it appropriate to adjudicate partial incapacitation. It seems that it was due to the assumption that even the fulfillment of this criterion

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26 The basic effect of legal incapacitation is the deprivation of legal capacity, which means that such acts are affected by absolute nullity (the exception is provided in Article 14 § 2 CC). In addition, on the basis of family and guardianship law (the Act of 25 February 1964, Family and Guardianship Code, Dz.U. 2017, item 628, Dz.U. 2018, item 950 with amendments, hereinafter FGC) incapacitation disqualifies from the possibility of being a guardian (Article 148 § 1 FGC), a probation officer (Article 178 § 2 of FGC in reference to Article 148 § 1 of FGC), a parenthood authority (Articles 94 § 1 FGC), a person adopting a child (Article 114<sup>1</sup> FGC). In addition, a fully incapacitated person cannot enter into a marriage, and the annulment of a marriage based on this reason may be demanded by each of the spouses (Article 11 FGC). From the civil law perspective, the prohibitions refer to a plenipotentiary (Article 100 CC) and a commercial proxy (Article 109<sup>2</sup> § 2 CC); such a person cannot make a will (Article 944 § 1 CC) or be an executor (Article 986 § 2 CC). In the field of labour law, full incapacitation results in the inadmissibility of taking up employment. Incapacitated persons do not have passive and active electoral rights, and also cannot perform certain professions.

27 Ref. I CR 450/76, Legalis.

28 See J. Lipowicz, *Wprowadzenie* [in:] *Najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych*, A. Błaszczak (ed.), Biuletyn RPO. Źródła 2013, no. 6, p. 5.

does not reflect the actual need related to the functioning of this particular person. In this respect, the Court of Appeal rightly concluded that the use of the institution of incapacitation *in casu* should be considered in the context of the overriding constitutional principle of respect for the dignity of every human being, expressed in Article 30 of the Constitution of the Republic of Poland.