

LEGAL PERSPECTIVE ON THE ASSESSMENT OF THE STATE OF CONSCIOUSNESS IN A PERSON SUFFERING FROM DEMENTIA OR ANOTHER DEMENTING DISORDER

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ABSTRACT

Subject of research – The considerations undertaken in this study focus on the issue of assessing, from a legal perspective, the state of consciousness of a non-incapacitated adult suffering from dementia or other dementing disorders.

Main thesis – A diagnosis of dementia or other dementing disorders is insufficient to render a declaration of will made or a legal act performed invalid in every case. The model of supported decision-making, especially the institution of a registered power of attorney, which would produce effects only from the moment when at least two doctors (a neurologist and a psychiatrist) establish that the ill person is in a state precluding conscious decision-making, is a desirable and necessary solution in the Polish legal system. In view of the plans to abolish the institution of incapacitation, this solution would be an expression of the legislator's genuine concern for the protection of the rights of persons affected by dementing disorders.

Purpose of the research – The purpose of the considerations in this study is to indicate the heterogeneity of the legal provisions and the difficulties of interpretation in the area of the issues raised herein, as well as to attempt to answer the question of whether the legal regulations currently in force guarantee sufficient protection of the rights of a person suffering from dementia or another dementing disorder with regard to their right to self-determination.

Nature of the article – The article is a review. The cognitive value of the considerations made in the article, based on an analysis not only of legal doctrine, but also of medicine in the field of dementing disorders, may be of importance both for science and for practice, especially as regards the interpretation of the legal regulations currently in force.

Methods used – The study uses theoretical-legal and dogmatic-legal methods, based on an analysis of the substantive content and views of representatives of legal and medical doctrine,

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as well as on an extensive analysis of the body of jurisprudence. A problem-based analysis of the issue under study was carried out.

Conclusions – The issue addressed in this study is important not only legally but also socially. In view of the progressing demographic changes in Poland, the need to develop a comprehensive model for the protection of the rights of persons suffering from dementia or other dementing disorders is increasingly urgent in Polish law. Each dementing disorder has a significant impact on human consciousness. Within the framework of the right to self-determination, every person should be able to decide on their own affairs in the event of a deterioration in their health. The current gap in the law regarding the possibility of deciding that a third party will manage the affairs in the future of a patient who has only just been diagnosed with a dementing disorder may be filled by introducing into the legal system a registered power of attorney (also referred to in other countries as a ‘preventive’ or ‘guardianship’ power of attorney), the effectiveness of which will be triggered only after authorised doctors have established that the patient has lost awareness. In this way, under the Polish legal system, a person suffering from dementia or other dementing disorders will be genuinely guaranteed the right to self-determination, without doubts as to possible excessive state interference in the sphere of individual rights.

Keywords: lack of consciousness, dementia, dementing disorder, power of attorney, capacity to perform legal acts

INTRODUCTION

The right to self-determination, the right to decide on one’s personal life, and decision-making autonomy are among the fundamental human rights derived from human dignity. The freedom to make decisions and express one’s will, and the capacity to perform legal acts, as provided for by law, are expressions of their realisation. However, it is necessary for the decision-maker to have adequate discernment and an understanding of the consequences of the actions taken. In the case of dementing diseases, in which memory problems and impaired cognitive functions are inherent elements of the progressive disease process, it is particularly important to have legal arrangements in force that do not completely remove the capacity to perform legal acts, but provide for the possibility of supporting the person in the process of making the best possible decision for them. This also includes the possibility for the ill person to decide on their own affairs for the future. This issue is particularly important at present, when long-awaited changes are planned to be introduced into the Polish legal system, consisting in the replacement of total incapacitation with a model of supported decision-making.

In view of the progressing demographic changes in Poland, the need for comprehensive regulation of the legal situation of persons suffering from dementia is becoming increasingly urgent in Polish law. The number of people affected by dementing disorders is steadily increasing, and the need to develop a comprehensive model of protection is increasingly recognised in legal doctrine.¹ According to the

¹ B. Giesen, ‘Prawo cywilne wobec potrzeby ochrony osób z demencją – analiza z perspektywy prawa niemieckiego’, *Studia Prawno-Ekonomiczne*, 2019, Vol. CXIII, pp. 31–51.

Central Statistical Office, the number of older people in the Polish population is steadily increasing. As at the end of 2021, the number of people aged 60 and over was 9.7 million. According to the forecast of the Central Statistical Office, the population aged 60 and over in Poland is expected to increase to 10.8 million in 2030 and to reach 13.7 million in 2050. Older people will constitute approximately 40% of Poland's total population.² It therefore seems necessary to review the current legal regulations in the context of assessing the consequences that neurodegenerative diseases, inherently associated with age, have for a person's capacity to perform legal acts.

The considerations undertaken in this study focus on a non-incapacitated adult suffering from dementia, Alzheimer's disease or another dementing disorder, also referred to as dementing disorders or neurodegenerative diseases. The aim of the analysis undertaken is to attempt to answer the question of whether the legal regulations currently in force realistically protect these persons' right to self-determination, and to what extent the diagnosis of dementing disorders and the progressive disease determine the legal effects of declarations of will made and legal acts performed by that person within the framework of the capacity to perform legal acts. In the legal regulations currently in force, general terms are used, e.g. 'a state excluding the conscious making of a decision or expression of will' (Article 82 of the Civil Code, Article 945 § 1(1) of the Civil Code),³ 'incapacity to consciously give consent' (Article 32 of the Act on the Professions of Physician and Dentist,⁴ Article 39 of the Act on the Protection of Mental Health⁵), as well as the term repeatedly used in case law: 'lack of consciousness'. In turn, in Article 86 of the Law on Notaries, the legislator introduces a prohibition on a notary performing a notarial act if the notary has doubts as to whether a party to the notarial act has the capacity to perform legal acts.⁶ J. Pobocho rightly points out that the provisions of the Polish Civil Code, i.e. Article 82 CC and Article 945 CC, which define the invalidity of a declaration of will made by a person who, for any reason, was in a state excluding the conscious or free making of a decision and expression of will, not only do not define such concepts as 'conscious', 'free expression of will' or 'decision', but also do not provide for gradations of the capacity to perform legal acts, only for its possible exclusion.⁷ The above regulations may be related to an ill person deciding on legally significant matters, e.g. property matters, entrusting the management of their personal affairs to a third party, residence in a social welfare home, consent to a medical procedure, etc. Preventing that person from taking such

² Główny Urząd Statystyczny, *Analizy statystyczne. Sytuacja osób starszych w Polsce w 2021 r.*, Warszawa–Białystok, 2022, p. 10.

³ Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws of 2024, item 1061), hereinafter referred to as the 'CC'.

⁴ Act of 5 December 1996 on the Professions of Physician and Dentist (consolidated text, Journal of Laws of 2023, item 1516, as amended).

⁵ Act of 19 August 1994 on Mental Health Protection (consolidated text, Journal of Laws of 2024, item 917).

⁶ Act of 14 February 1991, Law on Notaries (consolidated text, Journal of Laws of 2024, item 1001).

⁷ J. Pobocho, 'Prawne aspekty otępienia', in: Leszek J. (ed.), *Choroby otępienne. Teoria i praktyka*, Wrocław, 2003, p. 513.

actions, in the opinion of third parties – for their own good – constitutes serious interference with human rights. However, the need to take action on behalf of that person when they lose awareness as a result of illness is also significant. It is therefore worth recognising the seriousness and importance of this issue, as well as the difficulty of balancing the legitimacy of possible court interference with human rights. This raises questions about the need to clarify in law such an important area of protection of individual rights. For, as the analysis of this issue from the medical point of view shows, the assessment of the state of awareness of an ill person is not simple or unambiguous, and there are no schemes that can be applied to individual diseases causing dementing disorders. Moreover, the diagnosis of a disease does not at the same time imply a state excluding consciousness. All the more so, in view of the general terms used in law, interpretative difficulties may arise in determining whether, in the case of a given non-incapacitated adult who has full capacity to perform legal acts but suffers from dementia or another dementing disorder, there has in fact been a limitation or complete abolition of decision-making competence at a given stage of the disease.

At the outset of these considerations, therefore, it should be stated that the mere confirmation of the occurrence of memory and consciousness disorders in connection with a diagnosed dementing disease is not sufficient to declare a declaration of will made or a legal act performed invalid. There is a need to introduce into the Polish legal system solutions that express the protection of the rights of persons suffering from dementia or other dementing disorders with regard to their exercise of the capacity to perform legal acts. The model of supported decision-making, and particularly the institution of a registered power of attorney, producing effects only from the moment when at least two doctors (a neurologist and a psychiatrist) confirm the lack of awareness on the part of the ill person, are desirable and necessary solutions in the Polish legal system. These are solutions which, in view of the plans to abolish the institution of incapacitation, will constitute an expression of the legislator's genuine concern for the protection of the rights of persons affected by dementing disorders.

DEMENTING DISORDERS

In order to properly assess the effects that dementing diseases may have from a legal perspective, it is necessary to analyse basic information about the course of these diseases. According to data compiled by the World Health Organisation (WHO), the number of people with dementia worldwide currently exceeds 50 million, with the incidence of new cases reaching almost 10 million per year. According to these data, the most common causes of dementia include neurodegenerative and cerebrovascular diseases. It is estimated that around 60–70% of all dementia cases develop in the course of Alzheimer's disease.⁸

⁸ A. Klich-Rączka, K. Piotrowicz, H. Kujawska-Danecka, P. Zagożdżon, M. Mossakowska, 'Zaburzenia funkcji poznawczych', in: Błędowski P., Grodzicki T., Mossakowska M., Zdrojewski T.

In turn, according to data published by Alzheimer's Disease International (ADI), the international federation of Alzheimer's associations, the number of people with dementia is projected to increase, doubling to 74.7 million cases in 2030 and rising to 131.5 million by 2050.⁹

The most common types of dementia occurring in older people are Alzheimer's disease and vascular dementia.¹⁰ Alzheimer's disease is a neurodegenerative disorder characterised by irreversible mental degradation.¹¹ The disease is also the most common cause of memory loss and loss of awareness. It was first described by the German neuropathologist Alois Alzheimer in 1906.¹² Alzheimer's disease accounts for 50–75% of all dementia cases.¹³ G. Opala, making an epidemiological prognosis in the light of demographic forecasts, emphasises that if the incidence of dementing diseases is inextricably linked to age, then an increase in older age groups in the population will inevitably lead to the spread of dementing syndromes. Solving the problems that this phenomenon will cause in society is certainly one of the challenges of the modern world, and it also clearly poses a significant challenge for the legal system.¹⁴ J. Rymaszewska and A. Kiejna point out that only in the last decade have several studies assessing the prevalence of dementing disorders in the population been conducted in Poland.¹⁵

Dementia is defined in the literature as a syndrome of symptoms in which cognitive impairments, observed across several domains, play a central role. These disorders cause difficulties in carrying out daily activities and limit the ability to work or interact with others.¹⁶ Dementing disorders, also known as dementia, cause, among other issues, problems in a person's cognitive functioning, which are of the greatest significance from the perspective of that person's ability to make decisions with legal consequences. Cognitive functions are, in other words, functions involving the correct reception of signals, selection, accumulation and storage of information (memory), as well as operations on that information, i.e. recognition,

(eds), *PolSenior 2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem*, Gdańsk, 2021, p. 293.

⁹ Alzheimer Disease International (ADI), *World Alzheimer Report 2015: The Global Impact of Dementia. An Analysis of Prevalence, Incidence, Cost and Trends*, London, 2015; <https://www.alz.co.uk/research/WorldAlzheimerReport2015.pdf> (accessed: 1 August 2024).

¹⁰ R. Motyl, 'Otepienie – kryteria diagnostyczne', *Polski Przegląd Neurologiczny*, 2007, Vol. 3, No. 2, pp. 43–60.

¹¹ C. Żekanowski, A. Przyłuska-Fiszer, M. Barcikowska, 'Choroba Alzheimera: pomiędzy diagnostyką, ekonomią i etyką', in: Leszek J. (ed.), *Choroby otepienne. Teoria i praktyka*, Wrocław, 2003, p. 37.

¹² R. Tanajewska, 'Nie pamiętam dokąd idę, ale wiem, że jestem – o zdolności do czynności prawnych osób z zaburzeniami pamięci i świadomości', *Pogranicze. Studia Społeczne*, 2016, Vol. XXVIII, pp. 149–161.

¹³ G. Opala, 'Epidemiologia otepień w perspektywie prognoz demograficznych', in: Leszek J. (ed.), *Choroby otepienne. Teoria i praktyka*, Wrocław, 2003, p. 21.

¹⁴ *Ibidem*.

¹⁵ J. Rymaszewska, A. Kiejna, 'Przegląd badań nad występowaniem zaburzeń otepiennych w Polsce', in: Leszek J. (ed.), *Choroby otepienne. Teoria i praktyka*, Wrocław, 2003, p. 27.

¹⁶ R. Motyl, 'Otepienie...', op. cit., p. 44; A. Mosiołek, 'Metody badań funkcji poznawczych', *Psychiatria*, 2014, Vol. 11, No. 4, p. 215.

reasoning and abstract thinking.¹⁷ The function of human cognitive processes is to receive, process and store information. Brain damage due to disease leads to disorders of cognitive activity, as well as of emotional and control processes.¹⁸ The medical literature identifies four problem areas in the functioning of a person with dementing disorders, i.e. A – activities of daily living, B – behaviour, C – cognitive functions, and D – demands for care.¹⁹ The phase preceding the onset of dementia is the period of mild cognitive impairment. As the authors state, the patient is then anxious about changes in cognitive performance, but retains independence in daily functioning and is not diagnosed with dementia. Indeed, according to the DSM-IV diagnostic criteria for dementia of the Alzheimer's type, issued by the American Psychiatric Association (APA), one of the criteria is that the cognitive deficit does not occur concurrently with a disturbance of awareness.²⁰

The medical literature indicates that Alzheimer's disease (AD), which is a neurodegenerative process, is the greatest cause of dementing diseases of old age. T. Zyss states that the diagnostic criteria for Alzheimer's disease were developed by a working group of the National Institute of Neurological Disorders, Verbal Communication Disorders and Stroke and the Alzheimer's Disease and Related Disorders Association, and are known as the 'NINCDS-ADRDA criteria'.²¹ Depending on the occurrence of specific clinical symptoms, dementia is diagnosed as possible, probable or definite.²² A characteristic feature of this disease is the progression of cognitive deficits, especially memory.²³ According to K. Swakowska and A. Staniszevska, Alzheimer's disease is a degenerative brain disease caused by the deposition in the brain of pathological beta-amyloid protein, tau protein and alpha-synuclein, causing atrophy of neurons and their connections. As further neurons in areas of the brain atrophy, symptoms appear, including difficulties with planning, an inability to solve problems, difficulties with word retrieval, and behavioural disorders. From a legal perspective, it is very important to note that the AD disease process begins several decades before the clinical symptoms of dementia appear. Indeed, forms of vascular dementia (VD) are preceded by a pre-clinical period lasting many years. In AD, by contrast, there is a marked acceleration in the increase of cognitive disorders approximately three to four years before the diagnosis of dementia.²⁴

According to R. Motyl, dementia with Lewy bodies is probably the second most common cause of dementia after AD. It is a neurodegenerative disease in the course

¹⁷ J. Vetulani, J. Leszek, 'Neurochemia zaburzeń procesów poznawczych. Perspektywy terapeutyczne', in: Leszek J. (ed.), *Choroby otępienne. Teoria i praktyka*, Wrocław, 2003, p. 167.

¹⁸ S. Kotapka-Minc, 'Funkcje poznawcze i ich zaburzenia', in: Szczudlik A., Liberski P., Barcikowska M. (eds), *Otępienie*, Kraków, 2004, p. 15.

¹⁹ See P. Calabrese, M. Lutz, 'Diagnostyka i ocena przebiegu otępienia', in: Zyss T. (ed.), *Leczenie zespołów otępiennych*, Wrocław, 2005, p. 71.

²⁰ K. Swakowska, A. Staniszevska, 'Choroba Alzheimerera: klasyfikacja oraz kryteria rozpoznania choroby', *Journal of Education, Health and Sport*, 2021, Vol. 11, No. 7, pp. 22–29.

²¹ See P. Calabrese, M. Lutz, 'Diagnostyka i ocena...', op. cit., p. 51.

²² Ibidem, p. 52.

²³ K. Swakowska, A. Staniszevska, 'Choroba Alzheimerera...', op. cit., pp. 22–29.

²⁴ M. Bidzan, L. Bidzan, 'Objawy neurobehawioralne we wczesnych postaciach otępień typu Alzheimerera i naczyniopochodnych', *Psychiatria Polska*, 2014, Vol. 48, No. 2, p. 327.

of which pathological changes occur in the central nervous system, resulting in dementia. This type of dementia appears after the age of 75 and is accompanied by progressive psychopathological disorders. Importantly, memory impairment is not always present in the early stage of dementia.²⁵

The criteria for diagnosing dementia are based on the two most commonly used classification systems, i.e. ICD-10 (currently ICD-11), the International Classification of Diseases, and DSM-IV, the Diagnostic and Statistical Manual of Mental Disorders. Pasquale Calabrese and Martin Lutz note, however, that, in terms of dementia diagnosis, the differences between ICD-10 and DSM-IX are minor.²⁶ A tool used to carry out the initial assessment of the severity of dementia is the MMSE (Mini-Mental State Examination), which involves asking the examined person 30 questions and commands grouped into 11 categories, enabling the assessment of such functions as orientation in time, orientation in place, memorisation, attention and calculation, recall, naming, repetition, comprehension, reading, writing and drawing.²⁷ One point is awarded for each correct answer. According to B.A. Kaczmarek, scores below the 26-point cut off and above 23 points indicate a high risk of dementia; in the MMSE test, this range is associated with mild cognitive impairment. A score below 24 points indicates a very high probability of dementia.²⁸

The above makes it possible to take the position that, from a legal perspective, a document containing a diagnosis of a neurodegenerative disease does not at the same time serve as exclusive evidence of the existence of a state excluding that person's consciousness. It is a specific feature of dementing disorders that they may, to varying degrees, affect the patient's ability to make decisions at different stages of the disease. Assessing the competence of a patient suffering from dementia is a major challenge and depends on the severity of the disease symptoms. P. Zurzycka and T. Radzik consider that it must be related to the patient's current clinical situation and the prospect of disease progression.²⁹ It is also worth bearing in mind the fact pointed out by the Court of Appeal in Wrocław, which stated that, in states of senile dementia, patients may retain a so-called 'mental facade', whereby, in certain circumstances, the patient may maintain an appropriate attitude, and contact with them may appear to be proper. In short-term contact, this facade may mask the patient's true state, namely their lack of ability to assess reality properly and critically.³⁰

²⁵ R. Motyl, 'Otepienie...', op. cit., p. 44.

²⁶ P. Calabrese, M. Lutz, 'Diagnostyka i ocena...', op. cit., p. 51.

²⁷ B. Kaczmarek, 'Zastosowanie Krótkiej skali oceny stanu psychicznego w przesiewowej ocenie funkcjonowania poznawczego osób starszych. Ograniczenia tzw. korekty Mungasa w ocenie deficytów', *Neuropsychiatria i Neuropsychologia*, 2021, Vol. 16, No. 3-4, p. 176.

²⁸ *Ibidem*, p. 176.

²⁹ P. Zurzycka, T. Radzik, 'Autonomia decyzji pacjenta cierpiącego na zaburzenia otepienne – zarys problematyki', *Problemy Pielęgniarstwa*, 2015, Vol. 23, No. 2, p. 270.

³⁰ Judgment of the Court of Appeal in Wrocław of 28 May 2013, ref. no. I ACa 488/13, LEX No. 1369451.

STATE EXCLUDING CONSCIOUSNESS – INTERPRETATIONS IN LAW

Limitation or loss of awareness is an inherent element of progressive neurodegenerative disease. Bearing in mind that every non-incapacitated adult has the capacity to perform legal acts, this fact is not insignificant for the effectiveness of legal acts performed by a person with dementing disorders.³¹ Renata Tanajewska rightly poses the question: where is the boundary of memory and awareness of the human mind? The author points out that a person with memory and awareness disorders may, at the time of performing a legal act, have the will to perform it and, after it has been performed, declare that they do not remember the moment of its performance or did not consent to its performance. That person may confirm the conformity of the declaration of will with the legal act performed, but a third party may challenge the performance of the legal act.³²

The issue of the validity of a declaration of will made by a person who has lost awareness is governed by the provisions of civil law. As Article 82 CC provides:

‘A declaration of intent made by a person who, for any reason, is in a state which precludes the conscious or free making of a decision and declaring of intent is invalid. This applies in particular to mental illness, mental retardation or other, even temporary, mental disorder.’

When interpreting the above regulation, legal doctrine emphasises that the reasons for the exclusion of consciousness or freedom to make a decision and express one’s will are irrelevant, as the legislator indicates possible causes of loss of consciousness or freedom only by way of example.³³

Bearing in mind the content of the above regulation, it should be emphasised that the legislator lists four factors determining the effects of a legal act: the will of the parties, the law, the rules of social co-existence and established customs. A declaration of will is therefore an essential element of a legal act determining its effects. In legal doctrine, the common view is that ‘a declaration of will is only an act the purpose of which is to perform a legal act, i.e. a conventional act aimed at creating, changing or abolishing a civil-law relationship’.³⁴

It is worth adding that, from the perspective of persons suffering from dementia, the content of Article 60 CC is also important. According to that provision, subject to the exceptions provided for by law, the will of a person performing a legal act may be expressed by any behaviour of that person which reveals their will sufficiently. On this issue, the Supreme Court expressed its view in the statement of reasons for the judgment of 23 January 2003, stating that:

³¹ See A. Wilk, ‘Prawne aspekty podejmowania decyzji przez członków rodziny w zastępstwie za osobę, u której doszło do osłabienia umysłowego wywołanego wiekiem lub chorobą – zagadnienia wybrane’, *Wychowanie w Rodzinie*, 2023, Vol. 30, No. 4, pp. 49–77.

³² R. Tanajewska, ‘Nie pamiętam dokąd idę...’, *op. cit.*, pp. 149–161.

³³ K. Osajda (series ed.), W. Borysiak (vol. ed.), *Kodeks cywilny. Komentarz*, 32nd ed., Warszawa, 2024, Legalis.

³⁴ *Ibidem*.

'Whether a declaration of will is made in a given case depends not only on whether the will is expressed, but also on whether a given entity (its body) is aware of this and wants what it declares to be treated as its declaration of will, which is to produce specific effects in the sphere of civil-law relations.'³⁵

In turn, Article 56 CC provides that a legal act produces not only the effects expressed in it, but also those that result from the law, the rules of social co-existence and established customs. According to the Supreme Court, therefore, when assessing whether a declaration was made and what its content was, the decisive factor should be its external perception, and not the internal intention that actually guided the person making the declaration.³⁶ However, if one of the parties to a legal act makes a declaration of will in a state excluding the conscious or free making of a decision or expression of will, the consequence is the absolute invalidity of the act.³⁷ The legal act then does not produce the intended legal effects.³⁸ Declarations of will affected by a defect of this kind are not subject to convalidation or conversion; nor are the reasons for the exclusion of consciousness or freedom relevant. From the point of view of legal effects, the reasons for the exclusion of consciousness or freedom are also irrelevant.³⁹

It is therefore extremely important to correctly determine the state of a person with a dementing disorder at the time of making a declaration of will or performing a legal act. An example of such a situation is the need for a notary to assess whether, at the time of performing a legal act or making a declaration of will, the consciousness of a person suffering from a dementing disease is entirely excluded or merely limited due to the consequences of the disease. This issue has been the subject of case law, which points to the practical difficulties of assessing the state of awareness of an ill person by persons who are not medical professionals.

It is worth beginning the discussion on this topic by citing the view expressed by the Supreme Court in its decision of 30 April 1976. The Supreme Court explained that a state excluding consciousness is 'a lack of discernment, an inability to understand one's own behaviour and the behaviour of others, and a failure to realise the significance of the consequences of one's own conduct'.⁴⁰ Similarly, the Supreme Court indicated in a 1999 judgment that 'Mental dysfunction alone does not cause a loss of the capacity to perform legal acts or a loss of procedural capacity, although it

³⁵ Judgment of the Supreme Court of 23 January 2003, ref. no. III RN 6/02; <http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20RN%206-02.pdf> (accessed: 9 September 2024).

³⁶ Judgment of the Supreme Court of 7 May 2014, ref. no. II CSK 481/13; <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20CSK%20481-13-1.pdf> (accessed: 20 August 2024).

³⁷ K. Osajda (series ed.), W. Borysiak (vol. ed.), *Kodeks cywilny. Komentarz*, 31st ed., Warszawa, 2023; Pietrzykowski K., in: Pietrzykowski K. (ed.), *Kodeks cywilny. Tom I. Komentarz. Art. 1-449¹⁰*, 8th ed., Warszawa, 2015, p. 381.

³⁸ J. Wajdzik, 'Brak świadomości albo swobody jako wada oświadczenia woli', *Edukacja Prawnicza*, 2011, No. 3, p. 19.

³⁹ Cf. P. Nazaruk, in: Ciszewski J. (ed.), *Kodeks cywilny. Komentarz*, 2nd ed., Warszawa, 2014, p. 189.

⁴⁰ Order of the Supreme Court of 30 April 1976, ref. no. III CRN 25/76, *OSP i KA*, 1977, No. 4, item 78.

may constitute a defect in the declaration of will.⁴¹ This understanding of the concept of a state excluding consciousness is also present in current decisions of the Supreme Court.⁴² The Court of Appeal in Szczecin, in its judgment of 28 March 2019, clearly emphasised that, for the application of Article 82 CC, it is necessary that the medical condition be the cause that led to the effect of excluding the possibility of consciously or freely making a decision or expressing one's will. It is not sufficient to show that the person making the declaration of will suffered from a given illness that could affect the psychological processes related to the understanding, or awareness, of the meaning and content of the declaration of will made. The Court rightly notes that:

'Not every impairment of the cognitive functions of the brain caused by Alzheimer's disease must indicate the occurrence of the prerequisites under Article 82 of the Civil Code. Only when the condition of the ill person is such that it cannot be assumed that they act with awareness of external circumstances, or when the nature of the act, the circumstances in which it is performed, its content or effects, is so complex or surprising for the ill person that they are unable to assess them consciously, should the existence of the defect in the declaration of will referred to in Article 82 of the Civil Code be established. The mere diagnosis of the illness, however, does not entitle one to formulate such a thesis.'⁴³

Moreover, as stated by the Court of Appeal in Białystok, the existence of a state excluding the consciousness of persons who are mentally ill or mentally deficient cannot be assumed, even when they are fully or partially incapacitated, as they may act with sufficient discernment at a given moment.⁴⁴

Interpretative doubts about the term 'state excluding consciousness' concern, among other issues, whether the legislator envisaged in Article 82 CC complete or partial exclusion of consciousness as a basis for recognising the possible validity of a declaration of will. Different views are expressed in this regard in case law. For example, the Supreme Court, in its judgment of 7 February 2006, declared that

'The state excluding conscious decision-making and expression of will cannot be understood literally, and therefore does not have to mean the complete elimination of consciousness and cessation of brain function.'⁴⁵

The Supreme Court further reiterated the view expressed in 1976 that, for a state excluding conscious decision-making to be deemed to have occurred, it is sufficient that there is a lack of discernment, an inability to understand one's own actions and the actions of others, and a failure to realise the significance and consequences of one's own conduct. In its decision of 14 June 2005, by contrast, the Supreme Court held that other disorders of mental functions must be of a magnitude that completely excludes

⁴¹ Judgment of the Supreme Court of 23 September 1999, ref. no. II UKN 131/99, *OSNP*, 2001, No. 7, item 77.

⁴² Judgment of the Supreme Court of 18 May 2016, ref. no. V CSK 578/15; <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/v%20csk%20578-15-1.pdf> (accessed: 9 September 2024).

⁴³ Judgment of the Court of Appeal in Szczecin of 28 March 2019, ref. no. I ACa 612/18; <https://www.saos.org.pl/judgments/376514> (accessed: 9 September 2024).

⁴⁴ Judgment of the Court of Appeal in Białystok of 15 October 2015, ref. no. I ACa 491/15, *Legalis* No. 1359130.

⁴⁵ Judgment of the Supreme Court of 7 February 2006, ref. no. IV CSK 7/05, *LEX* No. 180191.

conscious decision-making.⁴⁶ Divergence of views in this regard can also be observed in legal doctrine. Indeed, the view is expressed that, for the application of Article 82 CC, the law does not require the existence of a state excluding consciousness in general, that is, a state of unconsciousness, but rather a state excluding conscious decision-making and expression of will, and therefore excluding the ability to discern and to recognise the meaning of one's own actions and those of others. This state does not have to be permanent; it may exist only temporarily.⁴⁷ However, there is no shortage of positions according to which Article 82 CC provides for consequences only in the case of complete exclusion of consciousness, without the possibility of taking into account the so-called 'partial discernment' of the person making the declaration of will.⁴⁸ P. Nazaruk, in turn, points out that if the loss of consciousness occurs to a degree less than significant, the occurrence of a defect in the declaration should be examined in terms of whether the person making the declaration has discernment as to their action and undertakes that action in accordance with their will.⁴⁹ The problem indicated above results from the fact, pointed out by Z. Radwański, that the provisions of the Civil Code do not introduce gradation of the state of unconsciousness, and yet this state may occur with varying intensity.⁵⁰ One must agree with the author that the assessment of whether, at the moment of declaring their will, a given person acted with sufficient discernment falls within the competence of the court in pending judicial proceedings. Diagnosis of the illness, medical documentation, examination by an expert in psychiatry, psychology or a specific medical specialisation, and witness statements are certainly essential evidence in cases of this kind. As rightly emphasised by the Court of Appeal in Kraków, the state of consciousness of a given person at a given time is a factual determination made by the court on the basis of an assessment of the evidence, taking into account all the circumstances that may have influenced the declaration of will. A correctly established factual basis enables a legal assessment in terms of fulfilment of the prerequisites set out in Article 82 CC, which is the exclusive prerogative of the court.⁵¹

As has already been mentioned in this study, the diagnosis of a dementing disease alone does not constitute sufficient evidence to conclude that, in the given circumstances, the ill person was in a state excluding consciousness. A similar situation would arise in the case of a diagnosis of depression, which does not result in a chronic state of unconsciousness, as noted by the Court of Appeal in Gdańsk. According to the Court:

⁴⁶ Order of the Supreme Court of 14 June 2005, ref. no. V CK 691/04; <http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/V%20CK%20691-04-1.pdf> (accessed: 9 September 2024).

⁴⁷ See P. Machnikowski (ed.), *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC*, Vol. I, Warszawa, 2022, Legalis.

⁴⁸ Cf. J. Strzebińczyk, in: Gniewek E., Machnikowski P. (eds), *Kodeks cywilny. Komentarz*, Warszawa, 2011, p. 225; S. Rudnicki, in: Dmowski S., Rudnicki S. (eds), *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa, 2009, p. 401.

⁴⁹ P. Nazaruk, in: Ciszewski J. (ed.), *Kodeks cywilny...*, p. 193.

⁵⁰ Z. Radwański, in: Radwański Z. (ed.), *System Prawa Prywatnego. Tom 2. Prawo cywilne – część ogólna*, Warszawa, 2008, p. 385.

⁵¹ Judgment of the Court of Appeal in Kraków, I Civil Division, of 9 January 2020, ref. no. I ACA 1129/19, Legalis No. 2357672.

'A declaration made by a person in a state of depression is not automatically invalid as made in a state excluding the conscious or free making of a decision and expression of will. A state of depression is not tantamount to a permanent lack of awareness of the decisions made. In order to determine whether a declaration of will made by a person in a state of depression was effective, it is necessary to examine whether, at the time of making that declaration, that person was in a state enabling them to make a conscious and free decision and express their will'.⁵²

Case law has clearly indicated that a presumption of lack of awareness on the part of the person performing a legal act is inadmissible.⁵³ The Supreme Court emphasised that mental illness or another type of disorder does not automatically mean that a person who has made a declaration of will should be deemed to have made that declaration in a state excluding the conscious or free making of a decision and expression of will. It is necessary to establish whether, at the time of making the declaration, that person acted with sufficient discernment. This view was expressed by the Court of Appeal in Szczecin, in whose opinion:

'Not every impairment of the cognitive functions of the brain caused by Alzheimer's disease must indicate the occurrence of the prerequisites under Article 82 of the Civil Code. Only when the condition of the ill person is such that it cannot be assumed that they act with awareness of external circumstances, or when the nature of the act (the circumstances in which it is performed, its content or effects) is so complex or surprising for the ill person that they are unable to assess them consciously, should the existence of the defect in the declaration of will referred to in Article 82 of the Civil Code be established. The mere diagnosis of the illness, however, does not entitle one to formulate such a thesis.'⁵⁴

The Court of Appeal in Białystok, in turn, clearly emphasised that:

'Mental illness or another type of disorder does not automatically mean that a person who has made a declaration of will should be regarded as making that declaration in a state excluding the conscious or free making of a decision and expression of will. It is necessary to establish whether the person acted with sufficient discernment at the moment of making the declaration. This is because it is not excluded that, despite the mental illness or other disorder, the declaration was made by a person acting consciously and freely.'⁵⁵

The following analysis of several examples of court decisions concerning persons affected by dementing diseases provides grounds for concluding that it is often impossible for, e.g. a notary or members of the immediate family to determine whether a person is fully aware of the legal acts performed. As a result, declarations of will relating to asset management are accepted from an ill person and are then

⁵² Judgment of the Court of Appeal in Gdańsk of 9 March 2011, ref. no. I ACa 1506/10, *Legalis*.

⁵³ Order of the Supreme Court, Civil Chamber, of 29 July 2015, ref. no. II CSK 854/14, *Legalis* No. 1460727.

⁵⁴ Judgment of the Court of Appeal in Szczecin of 28 March 2019, ref. no. I ACa 612/18; <https://www.saos.org.pl/judgments/376514> (accessed: 30 April 2026).

⁵⁵ Judgment of the Court of Appeal in Białystok of 15 October 2015, ref. no. I ACa 491/15; [https://orzeczenia.bialystok.sa.gov.pl/content/\\$N/15050000000503_I_ACa_000491_2015_Uz_2015-10-15_002](https://orzeczenia.bialystok.sa.gov.pl/content/$N/15050000000503_I_ACa_000491_2015_Uz_2015-10-15_002) (accessed: 9 September 2024).

verified in court proceedings in terms of invalidity, precisely due to an erroneous assessment of the state of consciousness of a person diagnosed with a dementing disease. It is also worth noting that in some cases the decisive evidence is an expert opinion in the field of psychiatry, in other cases in the fields of psychology and psychiatry, while in still others the court bases its decision on the assessment of a three-person team of specialists in neurology, psychiatry and forensic medicine. It seems reasonable to postulate the harmonisation of this issue in law as well, since evidence from an expert examination of the ill person is crucial for the court in cases of this kind.

One example of such rulings is a case heard by the Court of Appeal in Warsaw concerning a determination that a donation agreement concluded in a notarial deed was null and void. In this case, the Regional Court found that, on the date on which the aforementioned agreement was concluded, the donor was in a state excluding conscious decision-making and expression of will.⁵⁶ According to an expert psychologist, the donor was in the second stage of senile dementia, moderate and bordering on the third stage. At this stage, there are periods of well-being and deterioration. In the opinion of the psychiatric experts, she may already have had profound dementia, and it was certainly of at least a moderate degree. This degree of dementia did not allow her to make decisions and express her will consciously and freely in complex matters, which included the abolition of co-ownership of the premises. The Court of Appeal in Warsaw, taking into account the evidence gathered by the Regional Court in the case, confirming that the mental state of that person, due to the existing dementing syndrome of at least moderate degree, did not allow her to make decisions and express her will consciously and freely, dismissed the appeal.

The Court of Appeal in Szczecin provides an additional example. In 2014, it heard a case concerning the claimant's request for a declaration of invalidity of a donation agreement under which his mother had donated a residential unit to her daughter and the claimant's sister. The claimant argued that, on the date on which the deed was drawn up, his mother was seriously ill and did not have the capacity to make conscious decisions, and that the defendant sought deliberately to deprive him of the share of his mother's inheritance due to him. The Regional Court in Koszalin held that the notarial donation agreement concluded in this case was invalid. A witness was present when the deed was drawn up and wrote the donor's full name next to her fingerprint. The donor, due to her severely shaking hands, was unable to sign on her own. The notary did not notice any irregularities in her behaviour. She was not informed that the donor was suffering from Alzheimer's disease. Already earlier, on the day of the claimant's wedding, which his mother attended, her behaviour clearly indicated a lack of awareness of what was happening and where she was. The claimant found out about the donation on the day of his mother's funeral. The court-appointed expert in psychiatry in this case established that, on 27 March 2008, the donor, D.A., lacked the capacity to make a conscious and free decision concerning the disposal of her property in the form of a notarial

⁵⁶ Judgment of the Court of Appeal in Warsaw of 26 September 2018, ref. no. VI ACa 613/17; <https://www.saos.org.pl/judgments/374025> (accessed: 21 August 2024).

agreement. She was diagnosed with a dementing syndrome. The Court came to the conclusion that, at the time of signing the disputed donation agreement in favour of the defendant, D.A. did not act with discernment under Article 82 CC. Indeed, she had no awareness of what she was doing, and her illness at that time absolutely excluded her freedom to decide to dispose of the property and to express her will in that respect. The Court of Appeal considered that a comprehensive expert opinion was necessary in this case; such an opinion was issued in the present case by the Department of Forensic Medicine in B. by a three-person panel consisting of specialists in neurology, psychiatry and forensic medicine, who reached an identical conclusion. The specialists found that D.A.'s state of health did not allow her, on 27 March 2008, to make a conscious and free decision on concluding, in the form of a notarial deed, a donation agreement concerning the residential unit owned by her. Consequently, the Court of Appeal dismissed the appeal.⁵⁷

In this case, it is possible to discern not only the unworthy conduct of family members, but also the incorrect determination of the facts by the notary, who, in the absence of knowledge of Alzheimer's disease, accepted from the donor the declaration necessary to donate the flat, despite the visible symptoms of the donor's lack of awareness. It may therefore be assumed that the notary's assessment of the donor's state of consciousness would have been based solely on the diagnosis of the disease, had it been disclosed, without an assessment of the person's actual state of consciousness, which would have been completely at odds with the considerations made in this study. In the context of the effects produced by dementing diseases, defects in declarations of will are of exceptional importance in the case of legal acts performed by elderly persons. As M. Nowocień rightly points out, a notary must exercise particular caution when performing notarial acts involving elderly persons. Their state of consciousness may be impaired not only due to age, but also due to illness or fatigue.⁵⁸

Another example is the case considered by the Court of Appeal in Wrocław, which, by judgment of 28 May 2013 in a case concerning the invalidation of a donation agreement, dismissed the defendant's appeal.⁵⁹ On 1 July 2004, S.W. drew up a will in the form of a notarial deed in which she appointed the claimant A.M., her sole guardian, to inherit her entire estate. In addition, S.W. disinherited all other statutory heirs because, as she indicated, they showed no interest in her and did not fulfil their family obligations towards her. After 2005, S.W.'s dementing disorders intensified, manifesting mainly in memory impairment. On 25 April 2007, at a notarial office, S.W. and the defendant Z.W. concluded a donation agreement in the form of a notarial deed. At the time of making the declaration of will concerning the donation on 25 April 2007, S.W. was in a state excluding the conscious making of a decision and expression of will. At that time, she was suffering from a mixed-type dementing

⁵⁷ Judgment of the Court of Appeal in Szczecin of 30 June 2014, ref. no. I ACa 448/12; <https://www.saos.org.pl/judgments/64445> (accessed: 21 August 2024).

⁵⁸ M. Nowocień, 'Nieświadomość jako przyczyna odmowy dokonania czynności notarialnej', *Monitor Prawniczy*, 2013, No. 24, p. 1300.

⁵⁹ Judgment of the Court of Appeal in Wrocław of 28 May 2013, ref. no. I ACa 488/13, LEX No. 1369451.

syndrome of significant severity and a chronically progressive course. She denied having made the aforementioned donation. The Court of First Instance held that the action for invalidation of the donation deserved to be upheld and was based on Article 82 CC. In this case too, the Court of First Instance took the view that the evidence gathered in the case showed convincingly that, at the time of the act performed before the notary, S.W. was in a state excluding the conscious and free making of a decision and expression of will due to her existing mixed-type dementia of significant severity and chronically progressive course.

MODELS OF SUPPORTED DECISION-MAKING INSTEAD OF TOTAL INCAPACITATION OF A PERSON WITH A DEMENTING DISORDER

Despite the fact that international human rights standards provide guarantees for respecting the dignity of a person regardless of their age, there is a lack of regulations sufficiently guaranteeing the protection of the rights of older persons.⁶⁰ In order to promote, protect and ensure the enjoyment of human rights and fundamental freedoms by older persons, the Recommendations of the Committee of Ministers of the Council of Europe to Member States on the Promotion of the Rights of Older Persons have been developed.⁶¹ According to the recommendation set out in point 12, older persons have the capacity to perform legal acts on an equal basis with others. As stated in point 13 of the Recommendation, older persons should be able to receive assistance in making decisions and exercising their legal capacity if they feel they need such assistance. This includes the possibility of appointing a third party to support them in making decisions.

From the perspective of the issue discussed in this study, the recommendation resulting from point 14 is particularly important, according to which Member States should, in their national legislation, give older persons the opportunity to regulate their affairs in the event that they are unable to express their instructions at a later stage. In addition, it follows from the recommendation in point 15 that Member States should provide an appropriate and effective system of safeguards to prevent abuse in every aspect related to the exercise of legal capacity.

Taking into account the above recommendations, it is worth asking whether the total incapacitation of an older person due to dementia or other dementing disorders is not an institution that goes too far and, contrary to its assumptions, does not serve the purpose of legal protection. It is also worth considering whether

⁶⁰ A. Tworkowska-Baraniuk, 'Realizacja idei praw człowieka wobec ludzi starych', in: Halicka M., Halicki J., Kramkowska E. (eds), *Starość. Poznać, przeżyć, zrozumieć*, Białystok, 2016, pp. 165–174.

⁶¹ Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons, adopted by the Committee of Ministers on 19 February 2014 at the 1192nd meeting of the Ministers' Delegates; Annex to Recommendation CM/Rec(2014)2; <https://search.coe.int/cm?i=09125948801ddbe4> (accessed: 8 August 2024).

the institution of incapacitation truly fulfils its role in view of the legal, economic and social changes that have taken place over the past several years.

The institution of incapacitation, in view of the growing need to introduce changes, has rightly been criticised in legal doctrine for many years. Doubts have been raised as to the admissibility of applying this institution in a modern legal system. One must agree with the position of M. Balwicka-Szczyrba and A. Sylwestrzak that a fully incapacitated person completely loses independence in the legal sphere and becomes subject to interference by the legal guardian in the sphere of that person's integrity.⁶² Some authors explicitly ask whether the institution of incapacitation is still needed, since the consequences of depriving an incapacitated person of the capacity to perform legal acts, or even limiting that capacity, are not in a rational and proper proportion to the purpose which incapacitation is intended to serve.⁶³

The view is expressed that there are currently two competing approaches to treating persons who encounter difficulties in making decisions independently: substitute decision-making and supported decision-making. However, the authors emphasise that, over the years, criticism has grown according to which a substitute approach to decision-making in directing persons is contrary to fundamental freedoms and human rights. An alternative to guardianship solutions is the model of supported decision-making.⁶⁴ As M. Zima-Parjaszewska emphasises, there are many diverse forms of support provided for in the legal systems of other states which, while ensuring the protection of the legal interests of persons with intellectual disabilities, do not deprive them of the right to self-determination and to influence their own lives.⁶⁵

Alternative methods, in relation to total incapacitation, of assisting in the exercise of the capacity to perform legal acts were discussed as early as 2012 by M. Szeroczyńska. At that time, the author gave examples of solutions adopted by other countries, i.e. solutions requiring court intervention as well as out-of-court solutions based solely on the will of the principal, including the institution of an attorney introduced into the German legal system in 1999 (*Vollmacht*), the power of attorney in Swedish law, and solutions adopted in 2007 in England and Wales in the Mental Capacity Act, which regulates the principles of representation of incompetent persons, i.e. persons who do not have the actual capacity to make a specific decision or take action independently at the time when that decision should be made or that action should be taken. This Act provides for the possibility

⁶² M. Balwicka-Szczyrba, A. Sylwestrzak, 'Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz konwencji ONZ o prawach osób niepełnosprawnych', *Gdańskie Studia Prawnicze*, 2018, Vol. XL, p. 159.

⁶³ I. Markiewicz, J. Heitzman, A. Pilszyk, 'Ubezwłasnowolnienie – instytucja wciąż potrzebna?', *Psychiatria*, 2014, Vol. 11, No. 4, pp. 203–210.

⁶⁴ A. Drabarz, M. Kubalski, K. Kurowski, M. Szeroczyńska, M. Zima-Parjaszewska, *Asysta prawna jako element systemu wsparcia korzystania ze zdolności do czynności prawnych*, Warszawa, 2022, p. 11.

⁶⁵ Cf. M. Zima-Parjaszewska, *Ubezwłasnowolnienie w świetle konstytucji RP oraz konwencji o prawach osób z niepełnosprawnościami*, Warszawa, 2010, p. 15; https://ptpa.org.pl/wp-content/uploads/2024/10/ekspertyza_osi_-_ubezwlasnowolnienie.pdf (accessed: 8 August 2024).

of appointing a lasting power of attorney, who will make decisions on behalf of an incompetent person when that person loses the capacity to decide independently.⁶⁶

In view of the legitimacy, long signalled in Poland, of considering the abolition of or the introduction of changes to the institution of total incapacitation, work has recently been undertaken, following the example of other states, to introduce changes into Polish law. Activities in this area, although undertaken several times in the past, have so far failed to produce the desired solution. The latest Draft Act amending the Civil Code and Certain Other Acts (draft No. UD80) provides for solutions that represent a proposal to adapt Polish law to international standards for the protection of the rights of persons with disabilities.⁶⁷ This obligation arises from Article 12(3) of the Convention on the Rights of Persons with Disabilities,⁶⁸ which provides that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. The proposed amendments also take into account the content of the Strategy for Persons with Disabilities, adopted on 16 February 2021 by the Council of Ministers, which envisages replacing incapacitation with a model of supported decision-making, consisting of enabling a person to make decisions on their own behalf to the greatest extent possible.⁶⁹ It is emphasised in doctrine that the concept of supported decision-making in the context of Article 12(3) of the Convention is based on the principle that all human beings are autonomous individuals who develop and retain the capacity to make decisions, even if they need support at a certain level. Models of supported decision-making are based on the assumption that an individual receives support from a trusted person, a network of persons or an entity in making personal, financial and legal decisions.⁷⁰

In the Draft Act amending the Civil Code and Certain Other Acts (draft No. UD80), one of the proposed solutions is a registered power of attorney, modelled on the preventive power of attorney functioning in many European countries, including in the German legal system.⁷¹ The introduction of such a solution into the Polish legal system should be assessed positively, although it is worth mentioning that work in

⁶⁶ M. Szeroczyńska, 'Ubezważnowolnienie i alternatywne formy pomocy w realizowaniu zdolności do czynności prawnych osób z niepełnosprawnością intelektualną, w regulacjach międzynarodowych oraz w prawie obcym, na przykładzie Estonii, Niemiec, Szwecji, Wielkiej Brytanii i Kanady (stanu Manitoba)', in: Kędziora K. (ed.), *Jeśli nie ubezwłasnowolnienie, to co? Prawne formy wsparcia osób z niepełnosprawnością intelektualną*, Warszawa, 2012, pp. 17–61.

⁶⁷ Draft Act amending the Civil Code and Certain Other Acts; <https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-cywilny-oraz-niektorych-innych-ustaw4> (accessed: 8 August 2024).

⁶⁸ Convention on the Rights of Persons with Disabilities, drawn up in New York on 13 December 2006.

⁶⁹ Uchwała nr 27 Rady Ministrów z dnia 16 lutego 2021 r. w sprawie przyjęcia dokumentu *Strategia na rzecz Osób z Niepełnosprawnościami 2021–2030 (Monitor Polski, 2021, item 218)*.

⁷⁰ A. Drabarz, M. Kubalski, K. Kurowski, M. Szeroczyńska, M. Zima-Parjaszewska, *Asysta prawna...*, op. cit., p. 11.

⁷¹ According to § 1896(2) BGB (German Civil Code): 'A guardian may only be appointed to the extent that this is necessary. A guardianship is unnecessary if the affairs of the adult can be dealt with by an attorney (...) just as well as by a guardian.' Powers of attorney are registered by the German Federal Chamber of Notaries (*Bundesnotarkammer*).

this respect had already been undertaken, unsuccessfully, in 2015.⁷² This solution allows a person to decide to grant a power of attorney in the event of possible impairment of their mental or physical abilities in the future, which is of particular importance from the perspective of persons with dementing disorders at an early stage of the disease. Importantly, granting a power of attorney would not result in the loss of the capacity to perform legal acts. The possibility of choosing a trusted person in the event of deterioration in the health of a person with a progressive dementing disorder would be an expression of care for that person's dignity and their right to self-determination, which certainly cannot be said of the currently applicable institution of total incapacitation and the appointment of a legal guardian by the court. Information on the prepared draft amendment to the provisions of the Civil Code also indicates a proposal to introduce the institution of a supporting curator and a representing curator, as well as legal assistance. These solutions are already in force in many European countries and are also expected in the Polish system. The legal situation of persons diagnosed with a dementing disease, but who still retain full consciousness, will thus be legally guaranteed the possibility of taking care of their own interests in accordance with their own will, also in the event of deterioration or complete loss of awareness.

SUMMARY

Neurodegenerative diseases cause a weakening of a person's mental condition. In medical terms, the disease processes affecting the state of awareness are progressive rather than sudden. With self-awareness and knowledge of successive stages of the disease, the patient may prepare, also in legal terms, for the stage at which loss or significant limitation of consciousness will occur.

This important issue, however, reveals a clash of values between the need for state interference in the rights of the individual for that person's own good and respect for the will of the individual. An analysis of the views expressed in doctrine and case law confirms the thesis that the mere diagnosis of a dementing disease is not sufficient to deprive an ill person of the possibility of exercising their capacity to perform legal acts. Nor is it sufficient to conclude that a declaration of will made or a legal act performed is inherently invalid. On the other hand, however, the fact that an adult is not incapacitated does not mean that they may exercise their capacity to perform legal acts to an unlimited extent, acting, in fact, against that person's best interests. It is worth clearly emphasising that, having regard to the right to self-determination, the right to decide on one's personal life, and decision-making autonomy, even a person affected by dementing disorders has the right to have their will respected. The essential issue remains only the legal ordering of that person's affairs, in accordance with their will expressed while still in a state of full consciousness. The decisive factor is not the will of family members or their interests, but the possibility of shaping the legal situation of an older person suffering, for

⁷² See A. Wilk, 'Prawne aspekty...', *op. cit.*, pp. 49–77.

example, from dementia in a manner that will be the best solution for that person. Any form of legal guarantee of respect for the will expressed in full consciousness therefore appears highly desirable.

There is no doubt that each of the dementing disorders, including senile dementia and Alzheimer's disease, significantly affects a person's consciousness. The legal regulations in force require that, in order for a declaration of will or a legal act to be deemed invalid, such consciousness must be excluded. The legal regulations currently in force in the Polish legal system do not contain definitions of consciousness, a state excluding consciousness, incapacity to give consent, etc., since the determination of these states should fall within the competence of doctors, who, relying exclusively on medical knowledge, determine the patient's state of awareness. At this point, it should be emphasised that the intention is not to criticise the current legislation in its entirety, but only to indicate the possibility of improving it. A certain legal vacuum regarding the decision that a third party will manage in the future the affairs of a patient who has only just been diagnosed with a dementing disease may be filled by a registered power of attorney, also referred to as a preventive power of attorney, the effectiveness of which will be triggered only after authorised doctors have established that the patient has lost awareness. The demographic processes that we are currently experiencing, and the steadily increasing number of older people in society, rightly necessitate the introduction of such solutions. Indeed, the issue of age-related disorders is becoming an increasingly common problem in contemporary society.

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