



## Reply to questionnaire for the country reports – Argentina

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

In Argentina, the legal protection of older people is part of the Elder Law. Among others questions, it covers the legal system of capacity as part of personal autonomy and the legal regime of adult guardianship, support systems, assistance and representation for adults.

These issues have been recognized by the National Constitution (NC), by the International Treaties and the Inter-American Conventions on Protecting the Human Rights ratified by Argentina. All of them are constitutional instruments that force the rest of the legal sources (Codes, Acts, Judgments, contracts, etc.) to adjust to their content because of their hierarchical superiority (NC Art. 75 inc. 22 and 23).

Until now, the most important document of this constitutional group is the UN Convention on the Rights of Persons with Disabilities. However, at present, the National Congress is evaluating the ratification of the new Inter-American Convention on Protecting the Human Rights of Older Persons, approved by the General Assembly of the Organization of American States (OAS), on June 15, 2015.

In addition, it should be mentioned the new Argentine Civil and Commercial Code that came into force in August 2015, the National Rights of Patients Act (No. 26,529, 2009), the National Mental Health Act (No. 26,657, 2010); the National and the Locals Protection Acts against domestic violence (N° 24.417, 1994), the National Act to prevent, punish and eradicate violence against women (N° 26.485, 2009); and the Local Act to prevent, punish and eradicate violence against older people from Buenos Aires city (N° 5420, 2016), among others.

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

First of all, it is important not to confuse disability with incapacity or with restricted capacity. As the *UN Convention on the rights of persons with disabilities* states: *disability is an evolving concept and results from the interaction between persons with impairments (long-term physical, mental, intellectual or sensory impairments) and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others* (Art. 1). For these reasons in principle *persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life* (Art. 12). But also, they can exercise their rights by representatives designated by themselves.

So, in Argentina, they can establish living wills for personal issues concerning health or property (CCC - Art. 60). They can conclude contracts for mandate or give general or special power of attorney to

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act in special or all legal or financial matters. Another possibility is the substitution carried out by family members. It comes into effect automatically (*ex lege*), when a full aged person suffering from a mental disability is not able to take care of their own issues and there is no judicial process about their capacity. Family members -and therefore possible substitutes- are: the spouse, the cohabiting partner, consanguineous relatives within the fourth grade (such as parent, child, and grandparent. great-grandparent). The State can also act to protect the person at risk (*parens patrie*) by the Public Ministry (CCC - Art. 102).

When autonomy is affected significantly due to a cognitive impairment that puts personal life and property at risk, according to the new Civil and Commercial Code, a judge can order three types of restraints concerned with legal capacity (of exercise): partial restrictions to specific areas of personal autonomy; inability because of prodigality and incapacity or total incompetence in extreme situations.

In these cases, as a general rule judges should designate appropriate support system for decision-making, personal assistants, legal representatives, or guardians (only for severe mental disabilities), specifying their functions based on the needs and circumstances of the person. In any case, they should promote the autonomy and the decisions that respond to the preferences of the protected person. (CCC Art. 31, 32, 43; 100 and 101).

During the judicial procedure referred to capacity of exercise, judges should choose between appoint a representative, a personal assistant or a guardian “ad litem” or temporary. They can also select between a guardianship of the person, a conservatorship of the property and a full guardianship. At the end of the trial, they have to designate the definitive one.

The revision of this declarative sentence can take place at any time, at the request of the person concerned. But, the sentence must be reviewed by the judge in a period not exceeding three years, on the basis of new interdisciplinary opinions and mediating the personal interview with the applicant (ACCC, Art. 40).

The judge can finish his declaration if the person is completely recovered.

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

Only judges can decide the appointment of a supporter/legal representative or a guardian. There are several personal conditions and requirements for the judicial procedure (ACCC, Articles 22 and 32):

Personal conditions:

- 1) Drugs and alcoholic addictions, or a permanent or prolonged mental impairment of sufficient severity.
- 2) The absolute impossibility to act and make choices by themselves (f.e. in terminal illness).
- 3) The risk of damaging their lives or their property.

Requirements for judicial procedure:

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- 4) Interdisciplinary assessments that can prove those personal conditions.
- 5) Personal interview of the judges to the alleged incapable person.
- 6) The judicial sentence should indicate: a) diagnosis and prognosis; b) period in which the situation is manifested; c) personal, family and social resources; d) protection regime, supports or guardians that promote the greatest possible autonomy.

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

According to ACCC art, 33, the legitimate parties to request a judicial declaration of restricted capacity, inactivity or incapacity are:

- a) The person concerned.
- b) The spouse or the cohabiting partner while cohabitation has not ceased.
- c) Relatives within the fourth degree (grandparents, parents, sons or grandsons); if they were affinity, within the second degree (parents in law, sons in law),
- d) The Public Ministry

Besides, the judicial procedure takes place with the necessary participation of the Public Ministry (ACCC - Art. 103), but the rules of this procedure varies in each province, because Argentina is a Federal Republic.

#### 5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity?

Legal capacity is a general person's attribute recognized by Law in the ACCC (articles 21 and others) and it could be understood in sociological, normative and values terms. From a sociological dimension, legal capacity is the real ability to comprehend and put into practice competences, skills or prerogatives that the law grants to each person equally and it constitutes their sphere of individual liberty. Normatively, legal capacity is defined as every person's ability to acquire rights and to assume obligations (ACC, Article 22). In axiological terms, legal capacity is justified owing to the end-in-itself condition that every person has.

There are two types of legal capacity: A) the capacity of enjoyment: the person's prerogative to be entitled to enjoy rights and to fulfill duties; B) the capacity of exercise, which is referred to the ability to exercise these rights and assume these duties.

Concerning human beings, legal capacity (capacity of enjoyment and exercise) is acquired gradually, until the person reaches the age of majority at 18 years (ACCC, Article 22 and 25). Once acquired, it cannot be lost due to the mere passage of time. **Only severe causes, or situations that pose a risk to their lives or their properties, might allow restrictions on an individual's right to exercise their own legal capacity to act and make choices** (ACCC, Articles 22 and 23). **Moreover, such restrictions may be set only by a judge.**

In sum, legal capacity is the full -personal capacity of enjoyment and personal capacity of exercise ability- of all rights and duties according to law and it is strongly protected in the Inter-American Convention on Protecting the Human Rights of Older Persons, especially in Articles 12 and 19.

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

Guardianship (supporter or representative) is a legal institution, to safeguard the welfare or the property of an older person whose intellectual or mental impairment prevents them from making responsible decisions. In general, the term 'guardianship' is used to describe the substitute decision-making for both person and property.

The new Argentine Civil and Commercial Code recognizes several types of guardianship (Articles 32-43 and 100-140). It provides for representative and personal assistants, other supports, reasonable safeguards, guardianship ad litem or temporary guardianship; definitive guardianship; guardianship of the person; conservatorship of property, and full guardianship

The guardian (supporter or representative) assists restricted persons only in relevant acts, previously specified by the court. He can be responsible for patrimonial matters and for another functions such as: giving assistance in health care, housekeeping, or entertainment, if the person is not able to perform these functions autonomously. He must report back to the court all about his acts (ACCC, Art. 130 to 134) each year.

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

During the judicial procedure, family members should contribute to make the process carry on without delays. When it is necessary to take urgent actions before the judicial decision, some of them can be designated by court as a “guardian to property” to conservation patrimonial actions. It is a precautionary measure to protect only the person’s estate.

At the end of the trial, the court appoints the definitive guardian of the ward. This person could be one or more relatives; preferably the wife, husband or an adult child (ACCC, articles 100-1033). This guardian is designated to render assistance, support or representation to anyone whose capacity is restricted and this function ends when the person dies or when the person regains legal capacity (ACCC, article 1384). Otherwise, a capable person can appoint a person as their future guardian with a living will (ACCC, article 139).

## **8. What role do volunteers play and what are?**

In Argentine Law, volunteers (with complete legal capacity, ACCC. Art. 110) can make complaints to the public ministry on dangerous situations that a person could live and they can give support to provide decision- making to conduct their person, to manage their property and to perform any required legal acts in general. The person concerned may also propose to judge the appointment of one or more persons in their confidence to give it.

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

In Argentina professional supporters, legal representatives or guardians are part of the judicial procedure. Before any judicial decision, the court must appoint one of them as a 'temporary

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<sup>3</sup> *Id. art. 14:* 53-54.

<sup>4</sup> *Id. art. 14:* 168-170.

guardian' –or a 'supported decision-maker', whose mission is to control the legitimacy of the process (ACCC articles 34 to 375).

This 'temporary guardian' must be a lawyer, who is appointed to intervene from the beginning to the end of the process. They can be a private attorneys or public lawyers for people without resources. Private attorneys have been previously registered in the Court of Appeal.

In the judicial instance, the role of the 'temporary guardian' can never be assumed by a family member or by the person who files the incapacity lawsuit, because there could be a conflict of interest between the petitioner and the respondent. So, the designation of this third party (the guardian ad litem) ensures the effective protection of the respondent in court.

The appointment of a special guardianship to property during the process occurs only when it is necessary to take urgent action, before the judicial decision. It is a precautionary measure adopted when it has been shown that, if urgent conservation action is not taken, the person's estate will be adversely affected. This function may be performed by a family member and it is not necessary that they be a lawyer. However, if it is not possible or desirable, the function can be assigned to a public or a private attorney.

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

If the person has sufficient resources, the court appoints a private attorney, who is selected from a list of professionals who have been previously registered in the Court of Appeal. Their fees are met from the person's assets, unless the application is rejected and, in that case, the fees should be covered by the petitioner.

When the person has no adequate resources to meet the potential costs, the judge will designate a public lawyer, as a temporary or, maybe, as a definitive guardian. In each province, the role of the public guardian (temporary or definitive), for people without resources, is allocated to the Poor and Absent Defenders and their salaries, obviously, are paid by each State.

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

Every year, the guardian, supporter or legal representative have to present a complete report at court, specifying all activities performed. The duty of report is individual and its judicial approval only frees who fulfills it (ACC, Art. 130 to 140).

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

In Argentine, only a court can decide on deprivation of liberty and involuntary medical measures and:

a) It must be based on an evaluation of an interdisciplinary team, which points out the reasons for it and the absence of effective alternative less restrictive for freedom.

b) It comes only to the existence of certain and imminent risk of harm to the protected person or another one.

c) It is considered a therapeutic resource and restrictive shortest possible time. It should be monitored periodically.

d) It must be guaranteed the judicial due process and the right to immediate defense through legal assistance.

e) The judgment must specify the purpose, duration and frequency of the review.

In any case, every person with mental illness enjoys fundamental rights and its extensions (ACCC, Article 45).

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

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