Guardianship by Country: Spain

Questionnaire for the country reports

1. What legislation is relevant for the protection of adults? (If applicable, differentiation between federal law or the law of individual federal states)
In Spain, there is a general Civil Code applicable to the whole country, except for some territories that have a specific and preferential civil legislation; i.e, Catalonia (see Catalonia report).

That general Civil Code regulates in Title X of the First Book, those known as "tutelary institutions". The abovementioned Title includes articles 215 to 313 and is denominated: "*guardianship, curatorship and custody of minors or incapacitated people*". The purpose of these figures is to provide protection to certain people who, suffering from a disability, need it. Those figures are not, therefore, considered as limitations of the rights but as tuitive instruments that try to protect and assist such people.

It should be noted, however, that the adoption of the United Nations Convention on the Rights of Persons with Disabilities on 13 December 2006 has led to a certain revolution regarding the guardianship, looking for a restrictive application of the judicial procedures for modify the capacity to act based on a generalized system of representation; that is, the protective mechanism based on the global substitution of the subject in the decision-making that concerns him, whether of personal or patrimonial nature.

In this context, in Spain an interesting debate has arisen –and still persists– on the compatibility of the current Civil Code with the content of the Convention. In that debate, the Supreme Court has ruled in favor of compatibility in the well-known judgment of April 29, 2009 (RJ 2009\2901); followed later by many others.

Adding what is below, there are other laws applicable to adults with disabilities.

* Law 26/2015, of July 28, on modification of the System for the Protection of Children and Adolescents that affected the protection of adults by amending article 239 of the Civil Code.

* Law 15/2015, of July 2, of the Voluntary Jurisdiction. This Law contains the procedures that must be followed regarding several matters related to guardianship: appointment of guardian, inventory, etc.

* Royal Legislative Decree 1/2013, of November, 29, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion: it constitutes a general list of the rights of persons with disabilities in Spain. It is like a "Statute of the disabled person people".

* Law 26/2011, of August 1, on the normative adaptation to the United Nations Convention on the Rights of Persons with Disabilities.

* Royal Decree 1276/2011, of September 16, of normative adaptation to the United Nations Convention on the Rights of Persons with Disabilities.

* Law 1/2009, of March, 25, amending the Civil Registry Law on "incapacities", tutelary charges and administrators of protected patrimonies.

* Law 41/2003, of November, 18, on the Patrimonial Protection of Persons with Disabilities. In the guardianship area it introduced the figure of self-protection and preventive powers (powers of attorney).

* Law 1/2000, of January 7, of Civil Procedure, which contains the procedure for a judicially modification of the capacity to act.

In addition, there are other documents –Instructions– drawn up by the Attorney General's Office

that are of considerable interest in this area:

* Instruction 3/2010, of November, 29, of the Attorney General's Office on "the necessary individualized basis of measures of protection or support in the procedures for determining the capacity of the people".

* Instruction 4/2008, of July 30, of the Attorney General's Office on "the control and supervision by the Public Prosecutor of the guardianships of persons with disabilities".

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)

At first, a distinction between the figures appointed by a judge and those not can be done

1. Appointed by the judge
   A) Guardianship
   B) Curatorship
   C) Judicial defender

2. Not appointed by the judge
   A) De facto custody
   B) Self-protection guardianship
   C) Powers of attorney
   D) Administrative guard
   E) Pre-guardianship

1. One of the advantages of these protective mechanisms appointed by a judge is that, in an accurate interpretation, they are flexible in nature –they allow the most and the least–. In addition, certain procedures must be followed for their constitution –legality, intervention by the judicial authority, proportionality, etc.–. The legislator, therefore, configures them as adjustable figures according to the needs of the involved people.

A) Guardianship: is a stable figure that seeks to supplement the lack of capacity of persons who are not subjected to parental authority; that is, non-emancipated minors without parents or whose parents lack parental authority and persons whose capacity to act has been judicially modified. The content of the guardianship figure can cover both custody and protection, as well as the representation and administration of the patrimony.

B) Curatorship: also constitutes a stable institution but, unlike the guardianship, it does not pretend to replace the capacity to act of the persons subjected to it; it only completes their capacity. And it also does not act in a stable basis nor can have the maximum content indicated for the guardianship: it usually has the protection, but not the representation, administration or guard function. Accordingly, persons who may be subjected to curatorship are emancipated minors without parents –or parents who are not able to develop such assistance task–, those who obtain the benefit of the legal age, the prodigals, as well as persons with the capacity to act judicially modified when it is in that way indicated by the judgement.

C) Judicial defender: is not a stable figure but of sporadic activity; its purpose is to solve problems or specific situations. In fact, it constitutes an "extraordinary legal representation, occasional and limited to a specific subject", appointed only in cases of conflict of interest between the minor or a person with capacity to act judicially modified and his legal representative or curator.

The recent Law on Voluntary Jurisdiction regulates with much detail some aspects related to this figure: the cases in which it is requested (Article 27), the competent of the judicial secretary (Article

28.1), the standing (Article 28.2), the no need for a lawyer or an attorney-in-fact (Article 28.3), the effects of the request (Article 29), the audience and the resolution appointing the defender (Article 30), the cessation of the judicial defender in his functions (article 31), and, finally, the accountability, his excuse and the eventual removal (article 32).

Together with these three tuitive expressly referred to in Article 215 of the Civil Code –guardianship, curatorship and judicial defender–, Title X contains other protective institutions. Thus, it is possible to refer to the representation and defense of certain persons granted, in specific cases, to the Public Prosecutor (cf. art. 299 bis CC) –a figure sometimes called "provisional guardian"–, to the figure of the administrator (Article 227 CC), to the "guardianship of assets" (cf. article 236 CC), to the administrative guard (see articles 172 and 239 bis CC), and, finally, to the "de facto" guardian (cf. see Article 303 CC).

2. Figures or charges not appointed by the judge

A) *De facto* custody: there is a *de facto* custody when a person, voluntarily and without any legal title –guardianship, curatorship or parental authority–, takes care of and protects another person who is in a situation of minor age or in a position where his capacity can be modified judicially. The peculiar aspect is the existence of this guard without any title that bases it legally. This figure is regulated in articles 303, 304 and 306 of the Civil Code, as well as in article 52 of the Law of Voluntary Jurisdiction.

B) Self-protection guardianship: Law 41/2003, of 18 November, on the Patrimonial Protection of Persons with Disabilities, introduced the self-protection and preventive powers into the Civil Code.

Self-protection allows everyone to, managing in advance the eventual and future judicial modification of his capacity to act, configure as he wants the tutelary institution that would be then established. In order to achieve that goal, he can include those provisions deemed appropriate by him concerning his person and property –including the appointment of a guardian– and all of them must be taken into account by the judge (see articles 223 and 224 CC). It constitutes, therefore, a mechanism of self-protection of the subject before a judicial modification of his capacity, that is configured according to his personal desires and interests; and that matches perfectly with the principle of respect for the individual autonomy of persons with disabilities reflected in the UN Convention of 2006 (see article 3 CRPD).

C) Preventive powers: are a mandate that includes the will of the subject with respect to his person and/or property for when, due to incapacity, he can not decide by himself issues related to those areas. By this way, and through the empowerment of a person of confidence –relative or not–, it is possible to resolve and manage everything related to that person according to his expressed will in advance and that, logically, takes into account his circumstances or environment and preferences. This figure operates from the moment that, in fact, the capacity to act is lost and can even continue to do so after an eventual judicial declaration that changes officially his capacity to act. The preventive powers are regulated in article 1.732 of the Civil Code.

D) Administrative guard: the introduction of this figure was carried out, with respect to minors, through Law 21/1987 of November 11, amending the Civil Code, and, regarding adults, by Law 41/2003 of November 18, on the Patrimonial Protection of Persons with Disabilities.

Recently, this figure has been partially reformed regarding adults by Law 26/2015, of July 28th, on the modification of the Child and Adolescent Protection System. The new wording has not changed the purpose of the original provision (article 239 of the Civil Code): to resolve the situations of persons with disabilities –in principle, of legal age, although it can be applicable also to the minors with capacity to act judicially modified– that are in a situation of helplessness or lack of guardianship. During that time, the Public Administration will assume the guard until the appropriate final measure is adopted.

E) Pre-guardianship: apart from these institutions expressly regulated by the laws, in the doctrine and in the judicial practice a reference to the "pretutela" has also been made. This figure is making its way in the various legal forums, even if it has not yet been incorporated into the law. Its goal is to establish a relationship between a person with a disability or with a capacity to act judicially modified, his family and the guardianship entity that will ultimately carry out the ordinary guardianship of him, once such a protection measure is established by a judicial decision. Thus, the transit of parental authority or the guardianship exercised by the parents or a relative, where appropriate, to the ordinary guardianship exercised by a legal person is facilitated.

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

The decision to appoint a representative is only adopted by the judge. However, such a decision must take into account the preferences manifested, where appropriate, by the very person subjected to it through the self-protection and those issued during the procedure of establishing the tuition figures.

In order to choose the appropriate natural or legal persons for the position of guardian, articles 241 and 242 of the Civil Code indicate the requirements to be met by those who are potentially appointed as such. When a natural person is concerned, he must be in "*the full exercise of his civil rights*", while not having "*any of the causes of disability established in the following articles*".

With regard to legal persons –whether public or private– article 242 CC requires that "*they are not for profit*" and that their institutional "*goal include the protection of minors and disabled persons*" (article 242 CC).

Articles 243 and 244 CC contain, without distinction or classification, the list of situations that make every guardian ineligible for the exercise of that task. According to the first, can not be tutors: a) those who, by judicial decision, "*were deprived or suspended of the exercise of parental authority or totally or partially of the rights of custody and education*" (article 243.1 CC); b) those who have been "*legally removed from a previous guardianship*" (article 243.2 CC); and c) those " sentenced to a term of imprisonment, while they are serving their sentence", as well as those who are "*for any crime which makes one justifiably suppose that they shall not perform the guardianship properly*" (article 243.3 and 4 CC).

Article 244 CC also recognizes as causes of inability: a) persons "*who incur in absolute de facto impossibility*" (article 244.1 CC); b) "*persons who have a manifest enmity with the minor or incapacitated person*" (article 244.2 CC) or the "*major conflicts of interest*" with that one (article 244.4 CC); in order to guarantee impartiality and objectivity in the exercise of the tutelary functions, it will be also ineligible for the exercise of the task those who are "*currently in litigation against him or in an action concerning civil status or title to property, or those who should owe him considerable sums*" (article 244.4 CC); c) those of "*bad conduct*" or those with "*no known way of making a living*" (article 244.3 CC) because both circumstances prevent the proper performance of the guardianship; and, finally, d) can not be tutors "*bankrupt persons who have not been discharged, save in the event that the guardianship should only be over the ward's person*" (article 244.5 CC). According to the current Insolvency Law, only the bankruptcy declared as guilty is the one that disables to be a guardian (see article 172.2 LC). These causes of ineligibility, which are mainly thought for natural persons, are applicable to legal entities with appropriate adaptations.

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

The interest of the legislator in the early constitution of the guardianship is emphasized, among other means, by the obligations imposed to certain persons since they know the facts that can

trigger the appointment of a legal protective figure. The Public Prosecutor, the judge, relatives who may potentially be appointed as guardians and the person under whose custody the person with capacity judicially modified is found are obliged –respectively– to request, dispose or promote the constitution of the guardianship since the very moment they are aware of the existence of a person who must be subject to guardianship (see articles 228, 229 and 230 CC). According to that, is easy to notice that there are several levels of demand: public action of complaint, acting *ex officio* or at the request of a party and obligation to promote guardianship. And also, the Civil Code states that "*any person may make the Public Prosecutor or the judicial authority aware of the fact which determines the necessity of the guardianship*" (article 230 CC).

In the procedure for appointing a guardian, the judge will have to conduct the hearings that, with a mandatory character, indicates article 231 of the Civil Code, which establishes as binding, that one of the "*closest relatives*" –without delimiting the degree of proximity– and that of the person potentially under guardianship if he is over twelve years old and has sufficient reasoning, at the discretion of the judge. This last provision is in line with the text of the 2006 UN Convention, article 12.4 when states that safeguards established to prevent potential abuses "*will ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person*".

Likewise, both article 231 CC and article 45.2 LJV also authorize the judge to summon a hearing to as many people as he deems appropriate; the number and determination of who these persons are is within the judicial jurisdiction.

Once these hearings have been held –the purpose of which is, among other things, to know the personal and family situation of the guardian, as well as the dispositions, abilities and suitability of the potential tutors–, the judge will proceed to the appointment of the person who will hold that position. Article 45.3 LJV says that it shall be done "*in accordance with what is stated in the Civil Code*". In case of judicial modification of the capacity, this procedure will be initiated once there is a firm judgment, because that resolution is the foundation for such appointment (see article 222.2 CC, see also article 44 LJV). However, being it so, it is also possible to appoint the guardian in the same judgment where the capacity to act is judicially modified.

Along with which is above, it should be noted that the regulations of the Civil Code must in every case be coordinated or modulated –when possible, because there are rules with an imperative nature– with the autonomy of the will of the parents of the ward or with the provisions established by him in anticipation of his future modification of capacity. Indeed, according to the Law on the Protection of Assets of Persons with Disabilities, 2003, the Civil Code allows for such provisions, which, depending on their size, may affect the content or exercise of the powers that are recognized to any guardian. However, what is established by the ward's parents or by himself is binding for the judge "*unless the benefit of the minor or incapacitated requires otherwise*"; which will require sufficient motivation (article 224 CC). And also, the application of the content of the guardianship in accordance with the Convention carries with it a special effort to know the opinions of the guarded himself to carry them out if they prove as beneficial.

5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity?
Addendum:
In essence we are asking whether there is not only an assessment by the court or authority of the adult's abilities and his/her needs for support and protection when making an order on a measure of support and protection, but also a decision on the legal capacity of the adult removing or restricting the legal capacity of the adult. This may either be a separate order, or be just the (legal or de facto) consequence of an order on a measure of support and protection.
Although the figures established by the judge are flexible, the practical application of such a system is not as legally envisaged. Thus, it is possible to verify how, on many occasions, the principles of respect for the individual autonomy of persons with psychic disabilities (article 3 of the

CRPD), the freedom for making their own decisions and the independence of persons (art. 3 of the CRPD), or, finally, the principle of providing adequate and effective safeguards to prevent abuses (article 12.4 CRPD) –all of them recognized by the Convention and assumed by the Spanish legal order– remain empty. This happens when excessive use is made of the total "incapacitation" and the establishment of the guardianship in its broader content and without any nuance. When that is the habitual response to psychic disabilities and the tuitive mechanism is not modulated –in content and intensity– according to the specific reality of the subject, one of the basic principles of the Convention, which is the effective recognition of the "*legal capacity (of persons with disabilities) on an equal basis with others in all aspects of life*" (article 12.2 CRPD) is not respected.

Thus, and until the adaptation of the Spanish civil legislation to the aforementioned Convention is done –so that, for example, the figure of "assistance" may be included in the legal system–, the curatorship is the institution in force –and interpreted in the light of the Convention– which suits better to the principles that inform the international text. In fact, the curator "is constituted by an open and open framework of possibilities, depending on the needs and precise circumstances for decision-making", which makes it "an effective mechanism to determine the support measures that allow persons with disabilities to exercise their legal capacity". And if until now it was not easy to determine the scope of action of the curator –especially in cases of judicial modification of capacity– the extension to the personal sphere seems to grant to such figure an important role in tuitive issues in the coming years. In this sense, and aligning with the spirit of the aforementioned Convention, to "make a custom that fits" to the person –in the classic terminology of ordinary guardianship– no longer will be looked for, but to make as many "tailor made suits" that must be necessary.

A good evidence of this is that, more and more, in the jurisprudence of the Supreme Court and in the Courts of Audiencias, the trend to favor curatorship instead of guardianships seems to be consolidated. In addition, for a time to this part –in particular, after the approval of the UN Convention in 2006– the curatorships established are away from the traditional and patrimonial conception of that figure and affect more to the personal dimension of the person with capacity judicially modified. Among such "personal" curatorship are those called "of health", whose usual content is to monitor whether the person in question applies the prescribed medical or pharmacological treatment, check if he takes the medication and if he attends the consultation, or, finally, follow in an effective way the evolution of the state of health and the illness of the subject under that figure.

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

A first idea to emphasize right now is that the characteristics of the tutelary functions are common for guardianship and curatorship. In this sense, the Civil Code configures the guardianship as a task, avoidable only through the opportune excuse (see articles 217 and 251 et seq. CC). Likewise, the benefit of the ward is the guiding principle that all the decisions taken during the exercise of the guardianship must follow, whose performance is subject to judicial supervision (see article 216 CC). And also, the evident importance of the tutelary figures in the personal and patrimonial scope of those subjected to them is what explains that article 218 CC requires the need for their registration in the Civil Registry (see articles 88 et seq. LRC/1957, articles 283 and RRC and articles 72 to 78 LRC/2011).

In addition, article 221 CC includes some prohibitions with absolute character. According to them, any person who holds a tutelary position can not receive "*gifts from the ward or his successors, until final approval of his management*"; otherwise, the act will be null and void (see STS of December 23, 1997, RJ 1997\8902). Likewise, those persons cannot be "*the ward's representant when acting in his own name or on behalf of a third party in the transaction, there being a conflict of interest*", nor, finally, may acquire "*for valuable consideration property belonging to the ward or transferring property to the latter for valuable consideration*" –which is a simple application of the

previous rule because, in such case, there will be conflict of interest in the performance of the representation–.

Regarding the duties of the tutor, it is necessary to refer to the two of their dimensions: personal and patrimonial. Two are the articles the Civil Code dedicates to the personal dimension of the guardianship: articles 268 and 269 CC. The first establishes a principle of respect for the personality of the ward, as well as his physical and psychological integrity; in the second there is a general duty: "*the guardian is obliged to watch over his ward*" and there are four concretions relating to the personal sphere of the guardianship: a) "*to provide him with support*"; b) "*to educate the minor and provide him with a comprehensive upbringing*"; c) "*to promote the ward's acquisition or recovery of civil capacity and his insertion into society*"; and d) "*to inform the judge on an annual basis on the minor's or incapacitated person's situation and to render accounts of his administration on an annual basis*".

Another function of the tutor is to represent the ward legally. However, three points must be mentioned. The first: the representation of the guardian will have in any case the limit of "*such acts which (the ward) may perform by himself, pursuant to the express provision of the Law or the incapacitation judgement*" (article 267 CC). Therefore, there is no representation of the guardian over these acts.

The second: the guardian may not also represent the guardian in acts that affect assets over which there is a different administrator, named *ex* article 227 CC –the functions not conferred on that administrator will correspond to the tutor– nor when "*acting in his own name or on behalf of a third party in the transaction, there being a conflict of interest*" with the tutor (article 221.2 CC).

And the third: the setting of the scope of action of legal representation in relation to guardianship is not a peaceful matter. Indeed, although article 267 CC empowers the tutor in a generic way to represent the guardianship except for those acts that he may perform by himself, there are some that he cannot do because of his personal character –i.e. marriage– or for being prohibited to the guardianship because of his incapacity. In this context, two important resolutions that have had an impact on this area must be highlighted. On the one hand, the judgment of the Constitutional Court 311\2000 of December 18 (RTC 2000\311) recognizing the ability of the guardian to exercise a separation action on behalf of a person with a capacity judicially modified; and, on the other hand, the judgment of the Supreme Court of September 21th, 2011 (RJ 2011\6575) that entitles the guardian to file a divorce action instead of the ward.

The third general function that may include guardianship is the administration of the assets. In this regard, the principle established by the Civil Code is that it is "*the legal administrator of the patrimony of the ward*", ant that one which is the "*single guardian and, as the case may be, the guardian of the ward's property*" (article 270 CC). Likewise, the Code also indicates a criterion to act regarding that administration: it must be exercised "*with the diligence of an olderly paterfamilias*".

Having the foregoing in mind, the Civil Code, and as a precaution, requires express judicial authorization for the execution of certain acts of a patrimonial nature that are of major importance; that is, those that exceed ordinary administration. Accordingly, prior judicial authorization is required: a) "*to dispose of or encumber real estate properties, commercial or industrial undertakings, precious objects and securities belonging to minors or incapacitated persons, or to enter into contracts or perform acts which are acts of disposal and are capable of registration. The sale of preferred subscription rights relating to shares shall be excepted from the above*"; b) "*to waive rights, and to settle or submit to arbitration any matters in which the ward should have an interest*"; c) "*to accept any inheritance without the benefit of inventory, or to reject the inheritance or liberalities*"; d) "*to make extraordinary expenses in property*"; e) "*to file a claim in the name of the ward, save for urgent matters or those involving a small amount*"; f) "*to lease property for a period exceeding six years*"; g) "*to lend and borrow money*"; h) "*to dispose as a gift of property or rights belonging to the ward*"; i) "*to assign to third parties any credits held by the ward against him, or to acquire for valuable consideration any credits against the ward held by third parties*".

It is an exception allowed by the Civil Code the "*partition of the estate*" or "*division of common property*" performed by the guardian: they do not need prior judicial authorization but judicial approval after its execution (article 272 CC).

7. What role do family members play and what are the requirements imposed on them?
In order to guide the judge in the search for a guardian and to facilitate the election of that person, the legislator has carried out the preliminary task of delimiting the group of potential tutors –which constitutes the legal designation–. Thus, it has included in article 234 CC a set of potential recipients for the position of guardian, which are those in which the judge has to think firstly. Such legal preferences are based on the theoretical availability for the tuitive position and on the affective links existing between them and the protected one. Then, the task of the judge is to verify the existence of such persons and to make a specific assessment of their suitability. The calls contained in article 234 CC, which are of an orderly nature –so that they constitute a priority– are as follows: a) "*the person designated by the ward himself, in accordance with the second paragraph of article 223*"; b) "*the spouse who lives with the ward*"; c) "*the parents*"; d) "*the person or persons designated by the latter in his testamentary dispositions*"; and e) "*the descendant, ascendant or sibling designated by the judge*", without establishing any limitation as to degrees.

Likewise, article 234 CC allows the judge to "*alter*" the order of the previous paragraph or to "*dispense with all the persons mentioned therein, if the benefit of the minor or incapacitated person should require it*", "*exceptionally*" and "*in a reasoned resolution*". This provision must be supplemented by the provisions of article 235 of the Civil Code, which states that "*in the absence of the persons mentioned in the preceding article, the judge shall designate as guardian the person he considers to be most suitable, as a result of his relations with the ward and for the benefit of the latter*".

8. What role do volunteers play and what are the requirements imposed on them?
Currently there is no specific regulation regarding volunteers. As it is known, nowadays the figure of the tutelary delegates is not very used; in part, by the difficulty of finding such people as well as by the need to give them adequate training, which is not always within the reach of any legal person dedicated to taking up guardianships. In fact, volunteer work by the guardianship delegates –people who voluntarily commit themselves to establish a personalized, warm and close relationship with the ward– need a vocation of service and adequate training, especially in the field of mental illness. In this sense, given the usefulness of this figure –it constitutes a way of saving the affective distance that could exist between the ward and the legal-entity tutor–, it must be promoted. The future regulation of guardianship performed by legal persons would have to refer expressly and in a detailed way to the guardians delegates: their incorporation to the legal entity, the necessary requirements to be such, their liability, etc.

9. Are there professional supporters/legal representatives and what requirements/ qualifications do they have to satisfy?
Currently, the only guardians that can be professionalized are legal entities. The Civil Code requires that they must be "*not-for-profit legal entities*" and that their "*purposes include the protection of minors and incapacitated persons*" (article 242 CC). Thus, the first requirement meant that they do not count among one of their purposes the enrichment or profit-making; that is, the "*intention of dividing any gains between them*" (article 1.665 CC). This first requirement excludes from the guardianship, companies and mercantile companies –making profit is one of their essential elements– and includes cooperative societies as well as associations of public utility and ecclesiastical entities.

Also, it is required that the legal person is dedicated –although not necessarily exclusively– to "*the protection of minors and incapacitated persons*". This requirement is interpreted broadly to avoid a very small range of possible tutors. In this way, legal entities which have expressly recognized among their goals the care or protection of minors or "*incapacitated*", or entities in which this purpose –although not literally collected as indicated in article 242 CC–, but is included in a more general sense –such as, for example, the care of people with certain diseases that are usually at the origin of judicial capacity changes– can be appointed as guardians.

A third requirement is that legal entities must be in existence; that is, they enjoy legal personality. As a consequence, legal persons who are in the process of being created at the time of being appointed as guardian can not be tutors, nor, even more so, future legal entities.

Adding to the abovementioned, we must also take into account the causes of disability. Thus, the causes referred to in section 2 of article 243 CC –removal from a previous guardianship– in paragraphs 1, 2, 4 and 5 of article 244 CC –incur in absolute *de facto* impossibility, manifest enmity with the minor or incapacitated person and bankrupt persons– will be applicable to the legal person. It will be also applicable the content of article 245 of the Civil Code –exclusion expressed by the parents of the ward–. More doubts raise the determination of whether to include legal entities in the case contained in section 4 of article 243 CC: "*persons sentenced for any crime which makes one justifiably suppose that they shall not perform the guardianship properly*". The commission of some of the specific crimes for which a legal person can be charged –for example, article 156 bis CP on organ trafficking, article 177 bis CP on trafficking with human beings, or, in article 189 bis CP on the prostitution and corruption of minors– seems that it could be included among those which "*makes one justifiably suppose*" that ordinary guardianship will not performs well.

Likewise, it must be borne in mind that some of the causes of disqualification concurrent to physical persons can be transferred to the legal entities on which they depend. In fact, since the physical exercise of the ordinary guardianship ultimately falls on a natural person –who is a member or who is dependent on the legal person in question–, in the event of a defective exercise by those parties, such natural person must be substituted by another, in accordance with the internal statutes of the specific entity. The defective exercise will only be transferred to the legal entity when the latter, in a generalized and constant manner, violates its duty to exercise the role of guardianship: either because it does not replace the physical persons who perform poorly the charge, either by laziness or neglect in the supervision and attention to the guardians, or for other serious reasons.

The legal entities on which the position of guardian may fall can be both private and public. It should be noted that in recent years, public entities have acquired a significant importance in the area of guardianship, since they have been designated very often as guardians in the absence of a personal guardian (see article 239 bis CC).

And more specifically, it is also necessary to mention tutelary foundations: entities –usually set up with foundational juridical shaper– that have been created with the specific and exclusive purpose of the assumption of guardianships when there is no guardian and when there is a situation of helplessness. In fact, they exercise as ordinary guardians in a lot of cases.

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

That the tutelary function constitutes a duty or an obligation does not prevent it from being able to pay the guardian for its exercise. For this reason, the Civil Code includes in its article 274 CC the "*entitlement*" of the guardian to be remunerated for the role he plays in the interests of the ward.

As seems logical, such remuneration will have to be satisfied with the assets of the former, as far as his wealth permits. Otherwise, there will be no possibility of compensation as there is no compensation of a public nature in favor of those who exercise the tutelary function.

The fixing of the amount –when it exists, because it is allowed by the patrimony of the ward– and the way of perception of the retribution –time basis, if it is a fixed sum or a certain percentage of the patrimonial income or the returns– are matters included within the attributions of the judge (see article 274 CC and article 48 LJV).

However, in such a case, the Civil Code, while impelling the judge to take into account "*the work to be performed and the value and returns of the property*", recommends that insofar as possible, the "*amount of the remuneration not lower 4% or higher than 20% of the net yield of property*" (article 274 CC)

Having in mind the origin of the provision in the Civil Code, it is to some extent understandable that there is no explicit reference to the remuneration of the legal person, and less that a distinction between those of a private and public nature is not done. This could well have been regulated by the Law of Voluntary Jurisdiction even though it was not technically the most appropriate place. Setting that aside, all of them may be potential recipients of remuneration because they can be included within the term "*guardian*" referred to in article 274 CC. Contrary to the admissibility of such remuneration, it could be argued that one of the requirements for them to be appointed as tutors is that they have no lucrative purpose (see article 242 CC) and that, in addition, they have the possibility of excusing themselves for lack of material means (see article 251.2 CC)

However, in our opinion, the aforementioned reasons do not prevent the viability of remuneration for legal persons, since its existence may constitute an incentive for a better performance of the tutelary function. In addition, it can be said that it must not to be confused the remuneration for a given service with the aim or purpose of profit-making. Now, if it seems obvious that this can be the case with respect to private legal persons, what about public entities? At first glance, it seems that it would not be possible for a public entity to be compensated by the position of guardian in view of the public nature of such entities, since their sources of financing through taxes should be sufficient for their maintenance. The exercise of guardianship can be included as one of the services they must provide in accordance with the powers conferred constitutionally (articles 49 and 148.1.20 EC).

However, in our opinion, and although in practice has been never established, there would be no problem for the judges to fix a remuneration in favor of the public guardian legal person. This procedure fulfills absolutely the law, and would also encourage a greater appreciation of their activity, while at the same time would be an interesting help in the development of their mission.

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)

In the judgement through which the judge appoints the guardian, he can establish the monitoring and control measures he deems appropriate; all of them must be justified on the ward's benefit. In adopting such measures, the judge will be "bound" by the provisions that both the ward's parents or the ward himself have established with respect to the "*supervision bodies, and (..)the persons who are to integrate them*" or order "*any disposition relating to his person or property, including the designation of a guardian*" (article 223 CC).

Those mentioned measures established by the judge may be altered at any time during the exercise of the guardianship, provided that it must be done in a reasoned manner and justifying such modification on the ward's interest.

Accordingly, article 232 CC also empowers the Public Prosecutor to request the guardian when it deems appropriate –ex officio or at the request of an interested party– information on the progress of the guardianship, in its personal dimension –the guardians must report on an annual basis about the "*the minor's or incapacitated person's situation*" (article 269.4 CC)– or in the patrimonial one –

they also have to "*render accounts of his administration on an annual basis*" (article 269.4 CC)–. This is possible because, according to article 232 CC, "*the guardianship shall be exercised under the supervision of the Public Prosecutor*". Therefore, the judge is responsible for the safeguarding and control of the guardianship and the Public Prosecutor's office for its supervision (see also article 45.2 LJV).

It is also necessary to mention two measures for the constitution of guardianship: the establishment of a bond and the reports to the judge. As for the first, article 260 CC grants great freedom to the judge for its establishment and, in such case, to determine its modality and amount: "*the judge may require the guardian to provide a bond securing the performance of his obligations and shall determine the form and amount thereof*". In fact, the Civil Code makes possible to establish the bond, but it is not required in every case.

Unlike it, the realization of the inventory has no such character. Indeed, article 262 CC establishes the obligation to carry it out and does not provide for any exception: "*the guardian shall be obliged to make an inventory of the property of the ward*". The content of the inventory is also legally determined: it will cover the "*property of the ward*", according to article 262 of the Civil Code, and "*will contain the list of ward's assets, as well as the deeds, documents and important papers that are found*", indicates article 47.1 of the Law of Voluntary Jurisdiction. As regards the period for carrying out the inventory, article 262 CC states that it will be "*within sixty days, counting from the date on which he should have taken possession of his duties*" (in the same sense, see article 46.4 LJV) .

One of the obligations that rests upon the guardian at the end of his function is the final render of accounts. Together with the administration's accounts or the report on the situation of the ward that must be carried out on an annual basis (see article 269 CC) "*within twenty days*" after the anniversary of "*acceptance of the office*" (Article 51.1 LJV), the guardian "*upon ceasing on his duties*" must render a general justified account of his performance (see article 279 CC). And as stated in Article 279 CC, the accountability of the administration is characterized by being "*general*" –therefore, includes the entire administration, albeit the partial renders on an annual basis–; "*justified*" –that is, with the presentation of supporting documents, although the documents provided in the annual reports may be sent or used–; "*to the judicial authority*" –the judge of the domicile of the guardian who can not be the same with the one who, at that time, constituted the guardianship or before whom he has done the annual follow-up (see article 51.3 LJV)–; and in a "*three-month*" period –a term that may be extended "*for as long as necessary if there is justified cause*" (article 51.4 LJV)–.

The judicial authority will be the responsible of approving or not the accounts presented by the guardian (cf. art. 279 CC and 51.3 LJV). Even if such approval falls within its discretion, it must hear "*the new guardian, or, as the case may be, the conservator or the judicial defender*" and also the "*ward or his heirs*", when there is an institutional extinction of the guardianship for the causes indicated in the previous section (see article 280 CC).

Along with the presentation of an excuse that, if appropriate, the judge may accept, another way to end the exercise of the tutelary charge is through the guardian's removal; that is, the removal of the tutelary function when there is cause for it. Indeed, within the functions of the judge during the performance of the guardianship are both to verify the initial suitability of the guardian and to resolve the difficulties arisen in its exercise. In this sense, article 247 of the Civil Code establishes an appraised enumeration of causes that allow him to remove the tutor, even some of them encompass quite broad situations. Thus, the following are grounds for the removal: a) when the guardian incurs in a legal ground of ineligibility (cf. articles 243 et seq. CC); b) that "*conduct themselves ill in the exercise of the guardianship*" either for non-fulfillment of the duties that correspond to him as guardian, or because there is a notorious ineptitude in the exercise of the task; and c) if there are "*serious and ongoing problems (..) in their life together*" with the ward.

The procedure, which may culminate in the removal of the guardian, may be initiated by the same judge, *ex officio* or at the request of the Public Prosecutor, or by the ward himself –if he has

capacity enough, of course– or by another interested person (see article 248 CC and 49 LJV). In the removal procedure, Civil Code requires that the guardian must be called and heard, and at the same time establishes a ward's hearing if he has sufficient judgment without indicating, as for the constitution of the guardianship, the minimum age limit of twelve years (see article 248 CC).

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?

Article 763.1 of Civil Procedural Act states that when the internment is involuntary and because of psychic disorder will require prior judicial authorization. In case of urgency, if the internment has been carried out, the judge must be notified within 24 hours, if necessary, to ratify this measure. This provision has been declared unconstitutional for formal reasons by STC 132\2010, of December 2 (RTC 2010\132). In fact, as it affects fundamental rights (see Article 17 EC) this issue should have been regulated through an Organic Law. Therefore, the substantive content of the precept is not annulled, but the legislator –the only who can remedy such an infraction– is urged to "as soon as possible may proceed to regulate the non-voluntary detention measure by reason of psychic disorder through Organic Law". In what concerns now, and with respect to the ward, judicial authorization will be required in any case for the internments referred to in article 271.1 CC, though it seems that if the guardianship is the custody mechanism, the tutor can not decide that by himself. Likewise, "interested" decisions of the tutor or those which not respond to the greater benefit of the ward, can be avoided.

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

Although something has been mentioned, in Spain there are different legal systems in civil matters applicable to different territories. The Civil Code is applicable directly to most of the territory and also, in a supplementary way, in those territories with their own civil law. This must therefore be taken into account in determining the applicable legislation.

In the scope of the Civil Code, substantive reform is still needed to introduce new figures more suitable with the United Nations Convention, and to accommodate, if necessary, those in force. In this sense, it is possible to "adapt" some institutions already enshrined in the law to implement the ideas contained in the Convention. In practice, the courts are who are outlining the lines of action in this matter and its adaptation to the Convention.