

Dementia and Legal Competency

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ABSTRACT

The legal competency or capability to exercise rights is level of judgment and decision-making ability needed to manage one's own affairs and to sign official documents. With some exceptions, the person entitles this right in age of majority. It is acquired without legal procedures, however the annulment of legal capacity requires a juristic process. This resolution may not be final and could be revoked thorough the procedure of reverting legal capacity – fully or partially. Given the increasing number of persons with dementia, they are often subjects of legal expertise concerning their legal capacity. On the other part, emphasis on the civil rights of mentally ill also demands their maximal protection. Therefore such distinctive issue is approached with particular attention. The approach in determination of legal competency is more focused on gradation of it's particular aspects instead of existing dual concept: legally capable – legally incapable. The main assumption represents how person with dementia is legally capable and should enjoy all the rights, privileges and obligations as other citizens do. The aspects of legal competency for which person with dementia is going to be deprived, due to protection of one's rights and interests, are determined in legal procedure and then passed over to the guardian decided by court. Partial annulment of legal competency is measure applied when there is even one existing aspect of preserved legal capability (pension disposition, salary or pension disposition, ability of concluding contract, making testament, concluding marriage, divorce, choosing whereabouts, independent living, right to vote, right to decide course of treatment ect.). This measure is most often in favour of the patient and rarely for protection of other persons and their interests. Physicians are expected to precisely describe early dementia symptoms which may influence assessment of specific aspects involved in legal capacity (memory loss, impaired task execution, language difficulties, loosing perception of time and space, changes in mood and behaviour, personality alterations, loss of interests and initiative). Towards more accurate determination of legal competency the psychometric tests are being used. The appliance of these tests must be guided with basic question during evaluation: „For what is or is not he/she capable?« In prediction of possible dementia development, the modern diagnostic procedures are used as help for potentially demented individuals in order to plan own affairs and by oneself determine future guardian. This ensures the maximal respect and protection of rights among persons with dementia in order to independently manage life one step ahead of progressive illness. Finally, it is to be distinguished medical concept of legal capacity which is universal and judicial concept which is restricted by rules of national legal system differing from country to country.

Key words: dementia, legal competency, capability to exercise rights

Introduction

Dementia is a brain syndrome characterized with disruptions in memory, orientation, judgement, executive functions and communication with surroundings. The most common cause of dementia is Alzheimer's disease even though other brain disorders are known to also cause dementia. Regardless the cause, impaired mental function within dementia syndrome is being crucial for assessment of legal capacity. Today, individuals affected

with this disorder are being often subjected to medical expertise regarding legal capability due to growing number of affected people, emphasising the human rights of mentally ill and demanding their maximal protection. For example, more than 4,5 million of Americans today are burdened with Alzheimer's disease. Although, Alzheimer's disease being the most recognized form of dementia, overall number of people with dementia is much

higher in USA. The legal capability is right given to all in birth and the capacity to exercise rights (known also as legal competency) with majority usually when turning 18 years old. Legal capability is imprescriptible human right which can not be taken away and is terminated with death of individual irrespective to ability or disability in performing designated rights, obligations or legal actions. The capacity to exercise rights is being manifested through one's volition. With some exceptions, it is entitled in majority of age. Although, no legal action is needed in acquiring capacity to exercise rights, the termination of this right undergo a legal procedure in order to protect rights and obligations of individual and thereby one's legal status. For this reason, appointing a legal guardian is being coupled with above mentioned processes ensuring further rights and obligations for individual with terminated rights.

Seemingly simple, this procedure has become particularly demanding, complicated and ethically challenging for expert psychiatrist due to increasing number of demented patients in general population and greater need for protection of their human rights. The precise assessment of remaining cognitive functions and the tasks which demented patient surely could not perform is being expected from psychiatric expert accentuating the partial deprivation of capacity to exercise rights. The dementia could not be interpreted as a synonym of a individual with deprived capacity to exercise rights. In significant number of demented persons with moderate cognitive impairment the capacity to exercise rights has never been questioned. Psychiatric expertise on remaining capacity to exercise rights has been needed in only a minor portion patients with dementia. A person with dementia may display incapability in concluding a business arrangement as a result of diminished function in higher levels of cognition and simultaneously be capable of: making or retrieving last will and testament, for marriage, choosing permanent residence, consent on medical procedures and right to vote. For patients with dementia the starting point has been represented as legal competency with all given rights and privileges which could be confirmed by psychiatric medical expertise. Such approach is being in accordance with increasing need to protect the human rights of this growing category in modern society^{1,2}.

Historical Review on Legal Competency

The capacity to exercise rights is legal category implicating ability to conclude legal documents, making legally validated decisions and taking over obligations with legal severity. In history, this issue has been prone to changes congruently with social development.

The Roman law

According to basic norms of Roman Law, the females who were not under authority of their fathers or were not married, had been considered incapacitated to exercise rights and were assigned a guardian/tutor. The tutor had been given the right to withhold the capacity for cer-

tain issues and affairs of such women although such right was not absolute. The Roman Law had distinguished two types of guardianship: tutela (tutelage) and cura (curatory). The cura was the type of custody for adults who had been unable in managing own property but not just that. The curator was supposed protect property, health and life of the protégé. A special type of curatory had been the „cura furiosi« established for organized care over mentally ill patients. The Roman Law had been based on the how the mentally ill person (furiosus) had no free will, in legal sense, and therefore could not have been accounted for criminal actions, legally valid affairs or marriage. Interestingly, the Roman Law had accepted the lucid phases (remissions) of mental disease as the period of legal competency³.

The Austrian general civil Code

The Austrian general civil Code from the year 1811., came into effect in Croatia and Slavonia in the year 1853. In this Code, based on the Roman Law, were found similar solutions for legally incapable persons but were adjusted for contemporary 19th century. According to Section 273. of the Code, the distraught or weak-minded was one proclaimed by the court after hearing the physicians, designated by the court, about one's behaviour and state. If the individual had been pronounced inept for capacity to exercise rights the guardian was designated by the court order. The court was then required to publicize such decision in order to conduct further legal actions through one's guardian^{4,5}.

Fundamental law of guardianship

Instead of general Civil Code, the fundamental law of guardianship had been put into effect in Croatia in year 1947. During ex-Yugoslavia it had been changed and updated several times. The Section 3 stipulated: „If there had been found circumstances, by supervisory authorities, which indicated the necessity for deprivation of one's capacity to exercise rights and guardianship the procedure was going to be initiated through competent court«.

In so doing, the Section 31. lists those arguments: mental illness, chronic alcoholism, dementia and prodigality. The fundamental Law of guardianship had recognized only two categories in evaluation of legal competency: one being capacitated or incapacitated, so that point of view was followed in forensic psychiatry^{4,5}.

Family law

The legal competency was defined, in Croatia, by Family law from year 1998. With two existing categories, this law introduces the new third category – of partial capability to exercise rights. With this measure, the responsibility of psychiatric expert have been increased due to necessity for precise evaluation of each issue one was incapable of doing. In the new Family Law from year 2003., the specific measures of inability to exercise rights have not been mentioned but mental disorders in general. For this reason, the Section 159. stipulates: »person

with mental disorder or illness, mentally insufficient person, alcohol dependant individual, drug addict or person with other mental disorders.« However, nor the Family Law nor the Law of Mandatory Relations recognizes the phases of remission in course of mental illness as a possibility for restoring the legal capacity^{6,7}.

Basics of Legal Competency in Dementia

Having the capacity to exercise rights means being able to:

- understand aquired informations
- to make a decision based upon aquired informations after evaluating the possible positive and negative outcomes
- argumentatively discuss final decision with other individual

Legal incompetence in dementia emerges from disruption of mental functions within dementia syndrome disabling one in carrying out above mentioned steps. In dementia, the four broader areas of mental functioning are being most severely damaged:

1) Conciousness and attention

The four levels of conciousness are being described: vigilance, somnolence, sopor and coma. Level of attention is being significantly dependant on the level of conciousness but not only that.

2) Information processing

The memory impairment is vital for faulty information processing. This could provoke the damage in working memory, short-term memory and long-term memory.

3) Thought process

The ability for receiving and processing informations is being of great influence on the thought process. Key psychopatological symptoms obstructing these abilities are illusions, hallucinations and over-valued ideas. Misunderstood and misprocessed informations could be represented as the source of askwed belifes and dishonest intentions of family members, legally binded persons and guardians.

4) The ability in affective modulation and affective reaction

The affect is being changed in dementia distinctivley. Affective expression could be reduced, unstable, inadequate or ability to control emontional reactions might be diminished often leading to emotional incontinence. The demented individuals are often being buredened with adjustment challenges when alterations in lifestyle, whe-reabouts, loss of a close person occur leading to sever affective alterations. Those individuals could be highly susceptible even without significant cognitive impairment.⁸

Diagnosis of dementia does not imply inability to exercise rights. It is important to bear in mind how dementia is a process with various stages of development in affected individual. Early mental deficites in Alzheimer's

disease are often subjective interference for the patient or the surroundings, but do not necessarily imply legal incompetence.

The Alzheimer's Association put together a list of 10 early signs of this disease:

1. Memory loss

One of the most common signs is forgetting recently learned informations and it is usually irrecoverable.

2. Difficulties in completing familiar tasks

Persons with Alzheimer's disease are often having difficulties in completing daily tasks which were known and done before easily (cooking, cleaning etc.).

3. Difficulties in language and speaking

Finding the appropriate words, calling things by the wrong name or substituting words is representing obstacle for these patients.

4. Confusion in time and place

People with Alzheimer's disease can lose track of not only day, month or year but place, forgetting where they were.

5. Decreased or poor judgement

In comparison with time needed for everyday decision making when dealing with money, business, etc., the capability of judgement could be decreased.

6. Difficulties in abstract thinking

Understanding the meaning of money, numbers or abstract concepts is being lost with impairments of abstract thinking.

7. Misplacing things

The items are being misplaced without possibility of retracing them through logic deduction of steps. (eg. the wallet in the refrigrator, house keys in trash cans, etc.)

8. Changes in mood and behaviour

People with Alzeheimer's could have sudden mood swings without obvious external reason or the reason is unsuitable for the mood swing.

9. Changes in personality

In Alzheimer's disease drastic alterations in personality could be found. Sometimes, tolerant and serious individual may have become suspicious, fearful and dependent on family members.

10. Loss of interest and iniciative

People with this disease could become slow, passive, apathetic, without interest in everyday activities.

At first, these signs are subtle, varying in intensity depending on daily mood and level of fatigue, but in time they worsen questioning the aspects of capability to exercise rights. All mentioned signs could be found in mental deterioration and in other forms of dementia. In concrete patient, their intensity and representation would be dependent on the cause and localisation of the brain process⁹.

Assessing Mental Deficiency in Dementia

The cognitive tests are being used in evaluation of mental deficits. Disruptions of higher mental functions responsible for control of initiative, motivation, ability to make plans, ability to control impulses, capability for abstract thinking and efficiency in appraising situation, could be monitored with rather small amount of tests. These tests may be auxiliary instrument for psychiatric expert in evaluation of cognitive capabilities but could not be used for diagnostics in dementia or evaluation the capability to exercise rights.

Most frequently used are: Mini Mental State Examination (MMSE) and Clock-drawing test¹⁰.

Mini Mental State Examination (MMSE)

The MMSE is known as most frequently used test for cognitive screening in the world. It allows standardized assessment of seven cognitive areas/functions with maximal score of 30 points: orientation in time (5 points), orientation in place (5 points), three words recognition (3 points), concentration and calculating (5 points), word recall (3 points), speech (8 points), visual and spatial abilities (1 point). With this test we can quickly assess cognitive impairments, although it is insufficient for appraisal of frontal and executive brain functions, orientation assessment, short-term memory and speech capability. When using it, we must know the diagnostic limitations of this test. The score under 26 is being considered indicative for cognitive impairments and this score could be influenced by primary language, education, premorbid IQ, etc.¹¹.

The clock-drawing test is represented as the second cognitive test widely used. It consists of standardized circle and following instruction: »This is the face of a clock. Write down the numbers to form a clock within.« Patient is then asked to set the time: »5 minutes to 10 o'clock«. This test encompasses evaluation of many cognitive functions from intellectual to perceptive capabilities: planing, visual memory and graphic reconstruction, visual and spatial abilities, motor programming and execution, numeric knowledge, abstract thinking, concentration and tolerance on frustration¹².

In persons whose mental functions deteriorated with dementia, the above mentioned tests could be a good support for psychiatrist expert in defining certain aspects of legal competency.

The population of elderly is being expected to grow over the years so these tests would be used even more often in assessment of cognitive functions in order to avoid or to validate subsequent psychiatric medical expertise. Evaluation of legal competency is far more complexed procedure than just screening for cognitive disruptions with described tests¹⁰.

Procedure for Deprivation of Legal Competency

The legal competency is decided by court thorough extra-contentious procedure. Procedure is initiated on the

motion of Social welfare Centre or family member. According to Section 160. of Family Law the Social welfare Centre must be informed about the person who had become unable to take care of oneself, own rights, interests or who is endangering oneself or surroundings. In practice, having the appropriate legal and medical documentation this motion is taken in court by Social welfare Center. All medical institutions are obligated to provide the data about mental disorder of a person for who the motion is being proposed to court according to paragraph 2 of Section 160. Family Law.

The court could demand, from the applicant, to submit the medical assessment about one's capability to exercise rights or assign medical expert to evaluate state of the named person. During court's hearing, the summoned are: applicant (usually the Social welfare Center), person in question and all subjects who could testify about circumstances regarding capability to exercise rights, including psychiatric expert. Towards Section 160. of Family Law, in order to protect the rights, interests and to avoid possible misuse of legal institute the Social welfare Center is obliged to assign guardian for a individual in this procedure until it comes to a conclusion. The influence of mental deficiency of an individual to protect own rights and interests without endangering others is being reported in written statement of psychiatric expert. The person in the procedure has the right to participate in the procedure by bringing evidence and exclaiming opinion. When all evidence had been gathered and evaluated the court renders a decision whether legal competency should be fully or partially deprived or kept intact. The court then decides, after examining acquired evidence, about the affairs and actions which could not be independently performed if the capability to exercise rights has been partially deprived.

In case of partially deprived legal competency, the court than decides which remained actions and affairs the person is capable of doing. Decision regarding terminated capability to exercise rights is being delivered to applicant and to the person in procedure if is able to understand the outcome and legal consequences of decision. Within thirty days of valid judicial verdict the Social welfare Center has the obligation to name permanent guardian who is to protect and plead the protégé in legal issues, rights and interests. The guardian has the duty to inform Social welfare Center of all proceedings and to ask permission from the Centre when performing significant actions concerning person deprived. The legal competence and mental competence are two separate issues, however persons deprived of legal competence usually have diminished or no mental competence of their actions. Individual deprived of rights is unable to take any legal actions in legal proceeding because of discursive inability although this must be verified during medical expertise. When debating the partially deprived rights, the courts restrictions are valid only for precisely listed actions. For all legal and other actions not included in courts decision the person has the right take action by itself. Deprivation of capability to exercise rights may be in-

terim decision eventhough declared for undetermined time period. If the person deprived of rights or the Social welfare Center tables a motion, then Court of Law may reconsider the motion in order to revert prior decision. According to new Family Law the general practice physician has the obligation to deliver the health and review of capability to exercise the rights of deprived person which also alleviates the legal procedure in decision reversal. The legal competency would be fully or partially restored if the court had determined the absence of reasons preceded deprivation of rights. The Social welfare Center would then relive guardian of duty and notify the registration and land-registry office^{1,6,7}.

Negative Outcomes of Deprived Legal Competency – Avoided by Planing the Lifestyle in Dementia

As the mental functions in dementia slowly deteriorate the person becomes no longer able to dispose with finances but can still be able to decide on medical treatments and testament. In time the mental functions would have extremely deteriorate causing severe disturbances in capability to exercise rights with possible consequences for material loss or adverse business arrangements. Depriving demented person for capability to exercise rights and desiganting a guardian, the juridical ability to exercise rights would have been legalized. On the other hand, it is questionable in which extent actions done by guardian are congruent to one's person would have made by oneself. These circumstances may reflect discontent of the individual or relatives, conflicts in family and needless judicial procedures. The new legal sloutions, in developed western countries, are being more appreciative towards human rights of persons with dementia. Legal framework development in planing lifestyle for people with dementia would have represent one of new measures. By choosing the permanent representative this planing would be made possible. Unlike guardian, the permanent representative is being chosen, at first signs or in clinical phase of dementia recognized with specific bio-markers or psychological parameters, by the patient. This representative is being chosen among trustworthy persons (close family members, close friend) well-known to the patient and who would be capable in conduting patient's will during this deteriorating illness. This solution has advantages because possible supervision of assigned representative by the person with dementia until the legal competency deteriorates. This way patient has the opporunity to guide and refuse certain decisions of the representative until it becomes deprived in legal competency thus ensuring good cooperation with representative (around financial access, medical treatment, shopping according to habits of the patient, managing real estates). Permanent representative could be revoked until the person is deprived for legal competency. Furthermore, a certain fragment of life's decision could be made in writing and binding for permanent representative after patient is deprived of his rights. Written decision may

concern: what types of medical treatment are accepted (in conformity with religious and other convictions), voting in elections, when to take up a driving licence, when to deprive for the right to make last will and testament or changing it. Described concept assumes each person to have someone trustworthy and capable in representing one's right and interests after loosing the capability to exercise rights. Surely, this legal opportunity oriented on human rights of persons with dementia, would took place on our ground as have happened in world and european integration processes^{13,14}.

Final Ethical Disscusion on Deprived Legal Competency in Dementia

The ethical issues

In evaluating legal competence, as in other medical professions, the ethics is being based upon tradition: deontological and teleological. The deontic tradition emphasises physicians obligations towards the patient and is the source in forming best legal and ethical norms within the patient-doctor relationship. Regardless the normative, deontic ethics allows lower level of care, the consequences of physicians performance for a patient in actual clinical situation are questioned in teleologic tradition with expectation for best possible patient care. In practice, good ethical decisions include both traditions¹⁵. Four leading ethical principles are being accentuated: respect the anatomy, do not harm, to benefit, to ensure equity. During interview with a patient, not just symptoms of dementia, but long-term system of values, life's hopes, convictions, fears and long-term goals must be analyzed by medical expert. Physician is able to evaluate the capability to exercise rights when being convinced in compatibility of patients decisions and life values. Evaluation should result in: decision with maximal respect to anatomy of a person with dementia, is not being hramful due to deprivation of rights, ensures welfare and fair treatment of the patient. The evaluation of legal competency is very demanding and ethically extremely problematic activity due to different levels of mental functioning needed for making specific actions. Therefore, the representation of medical expertise must be transparent, straightforward and conclusive. Eventhough, the category of partial capability to exercise rights and possible re-institution of deprived rights ensure ethics in evaluation of prior dualism: capable – incapable, our judicial system has not yet incorporated mentioned options during lucid phases of dementia often seen in initial states of illness and in combination with (addiction, hear failure, psychotic states, etc.). With development of psychopharmacotherapy a question of capability to exercise rights in dementia and other mental disorders has become a topic of interest especially in phases of remission. Hystorically, the Roman Law had recognized the phases of remission during illness as intervals for capability to exercise rights¹⁶.

Specific ethical questions

Besides usual evaluations of capability to exercise rights for legal purposes, the concerns in medical expertise of persons with dementia had become capability to conclude an agreement, to marry and ability to make last will and testimony. Due to increasing number of these requests many ethical issues arised. The capability to make a consent on certain therapeutic procedures has become frequently asked question wheter the patient has deprived or present legal competency. Today's standpoint honors the patients wishes and stands if they are in conformity with persons prior system of life values before being deprived of legal competency. Ethicaly, most questionable have become medical interventions briefly prolonging life expectancy when given consent from patient's guardian but refused by the patient. Informed consent for participation in drug research is particularly complicated ethical issue¹⁶⁻¹⁹.

The right to vote, for pepole with dementia, has become not only ethical but also legal issue with possible consequetial abuse from relatives of a patient¹⁸. Elderly persons, with cognitive and physical disorders, present jeopardy while driving a motor vehicle similarly to younger full age drivers. While making a final conclusion about capability to drive a motor vehicle the four basic ethical rights have to be implemented¹⁶. Our legal system does not approve of suicide and euthanasia. Assisted suicide has been authorized in some countries of USA (eg. Oregon) however not in others. Euthanasia has been authorized in one european country – Switzerland. Never-

theless, this issue had been contested from ethical and legal standpoints¹⁶.

Oftly debated is the issue on should life expectancy be artificially aided or is it acceptable to perform nutrition thorough artificial pathways with no hope in independant organ functioning²⁰. During treatment of people with dementia frequently imposed question is disclosing the truth about one's mental abilities. This is especially important in early stage of dementia when the person, based on disclosed truth, would be able to manage of legal affairs, choosing future representative, to write last will and testament and make instructions for when deprivation of capability to exercise rights occurs. Persons with dementia could display unpredictable behaviour with possible outcomes such as driving accidents, fire and other damage to self and environment thus the question of one's autonomy and freedom being one of important issues. Another ethical issue is genetic risk assesment screening for dementia oftly requested from patients relatives especially because the screening does not have predictive assurance and shows probability in percentage. The use of physical restraints during agitation in persons with dementia is also one of the ethical issues. In such situations the current algorithms of using physical restraints must be carried out.

The conflict of interest while providing services in care and treatment of persons with dementia has been ethicaly debated due to potential misuse of mental defficiency in these individuals^{10,16}.

REFERENCES

1. MURRAY B, JACOBY R, *Advances in Psychiatric Treatment*, 8 (2002) 271. — 2. MOYE J, MARSON DC, *Focus*, 7 (2009) 88. — 3. ROMAC A, *Izvori rimskog prava*, (Informator, Zagreb, 1973). — 4. ALINČIĆ M, BAKARIĆ-MIHANOVIĆ A, *Porodično pravo* (Zagreb, 1976). — 5. *Izvorni tekst*. NN (Zagreb, 11/78). — 6. ALINČIĆ i sur., *Obiteljski zakon – novine, dvojbe i perspektive*, NN, (2003) 89. — 7. FOLNEGOVIĆ-ŠMALC V, *Poslovna sposobnost duševnih bolesnika*, Medix, accessed 15.02.2011. Available from: <http://www.plivamed.net>. — 8. FITZSIMMONS P, *Legal mental capacity: a psychiatrist's perspective*, Expert Pages, accessed 15.02.2011. Available from: http://www.expertpages.com/news/legal_mental_capacity.htm. — 9. *Alzheimer's association*, Washington D.C., accessed 15.02.2011. Available from: <http://www.kvantum-tim.hr/index>. — 10. SHULMAN KI, COHEN CA, KIRSH FC, HULL IM, CHAMPINE PR, *Am J Psychiatry*, 164 (2007) 722. — 11. SHULMAN KI, HERRMAN N, BRODATY H, CHIU H, LAWLOR B, RITCHIE K, SCANLAN JM, *Int Psychogeriatrics*, 18 (2006) 281. — 12. SHULMAN KI, *Int J Ger Psychiatry*, 15 (2000) 548. — 13. MACE NLM, RABINS PV, *The 36-hour day* (Forth edition. Financial and legal issues, Wellness Central, New York

Boston, 2008). — 14. *Alzheimer's Australia*. Living with dementia, accessed 15.02.2011. Available from: <http://www.alzheimers.org.au/legal>. — 15. LOLAS F, *Int J Bioethics*, 7 (1996) 53. — 16. DRICKAMER MA, Chapter 4 – legal and ethical issues, accessed 15.02.2011. Available from: <http://www.geriatricsreviewsyllabus.org/content/agscontent/legal16>. — 17. MEULENBROEK O, VERNOOIJ-DASSEN M, KESSELS RPC, GRAFF MJL, SJÖGREN MJC, SCHALK BWM, HOOGSTEEN-OSSEWAARDE ME, CLAASSEN JAHR, MELIS RJF, OLDE RIKKERT MGM, *European Geriatric Medicine*, 1 (2010) 58. — 18. KARLAWISH JH, BONNIE RJ, APPELBAUM PS, LYKETSOS C, JAMES B, KNOPMAN D, PATUSKY C, KANE RA, KARLAN PS, *JAMA*, 292 (2004) 1345. — 19. SADLER IZ, BERNSTEIN BE, MARSON DC, *Legal and ethical aspects*. In: WEINER MF, LIPTOM AM (Eds) *Dementia: Diagnosis, management and research* (Washington DC, American Psychiatric Publishing Inc., 2003). — 20. *The Hastings center*, *Guidelines for the termination of life-sustaining treatment and the care of the dying* (Bloomington IN, Indiana University Press, 1987).

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DEMENCIJA I POSLOVNA SPOSOBNOST

S A Ž E T A K

Poslovna sposobnost je svojstvo da se očitovanjem vlastite volje stječu prava i obveze. Uz neke iznimke, ona se stječe automatski s punoljetnošću. Za njezino stjecanje nije potreban nikakav pravni akt ali je za ukidanje potrebno provesti postupak oduzimanja poslovne sposobnosti. Odluka o oduzimanju poslovne sposobnosti nije konačna, jer se ista može vratiti kroz postupak vraćanja poslovne sposobnosti – potpune ili djelomične. Osobe s demencijom danas su vrlo često predmet vještačenja poslovne sposobnosti, jer je s jedne strane sve više osoba s demencijom, a s druge strane sve više se naglašavaju građanska prava mentalno oboljelih i zahtijeva se njihova zaštita do maksimalno mogućih granica. Zato se ovom osjetljivom području danas prilazi s osobitom pozornošću. Umjesto dualnog koncepta: poslovno sposoban – poslovno nesposoban sve više se inzistira na gradaciji sposobnosti, odnosno, preciznom utvrđivanju pojedinih aspekata poslovne nesposobnosti. Pri tome je uvijek polazna pretpostavka da je dementna osoba poslovno sposobna i da treba uživati sva prava, privilegije i obveze kao i drugi građani. Tek se u postupku ocjene utvrđuju i pojedinačno navode oni aspekti poslovne sposobnosti koji se zbog zaštite prava i interesa uskraćuju oboljeloj osobi i prenose na skrbnika kojeg određuje sud. Djelomično oduzimanje poslovne sposobnosti je mjera koja se primjenjuje uvijek kada postoji makar i samo jedan aspekt očuvane poslovne sposobnosti (raspolaganje imovinom, raspolaganje plaćom ili mirovinom, sklapanje ugovora, sastavljanje oporuke, sklapanje braka, razvod, izbor mjesta boravka, samostalan život, pravo glasa, pravo na odluku o liječenju itd). To je mjera koja se najčešće poduzima u interesu pacijenta, a rjeđe u cilju zaštite drugih osoba i njihovih interesa. Zato se danas od liječnika očekuje precizno opisivanje svih ranih simptoma blage demencije koji mogu imati utjecaja na procjenu pojedinih aspekata poslovne sposobnosti (gubljenje pamćenja, teško izvršavanje poznatih zadataka, problemi s jezikom, gubljenje u vremenu i prostoru, oslabljena sposobnost procjene, problemi s apstraktnim mišljenjem, gubljenje stvari, promjene u raspoloženju i ponašanju, promjene osobnosti, gubitak interesa i inicijative). U cilju što preciznijeg utvrđivanja poslovne sposobnosti, danas se sve više koriste psihometrijski testovi. Ali i njihova primjena mora se voditi temeljnim pitanjem pri ocjenjivanju, a ono glasi: »Za što nije sposoban ili sposobna?«. Mogućnosti modernih dijagnostičkih postupaka za predviđanje razvoja demencije koriste se kao pomoć potencijalno dementnoj osobi da sama unaprijed planira svoje poslove i da sama odredi budućeg pomoćnika u rješavanju zadaća koje neće ubuduće moći sama izvršavati. Ovim se osigurava maksimalno poštovanje i zaštita prava osoba s demencijom da sami kreiraju svoj život korak ispred progressa demencije. Na poslijetku, treba razlikovati medicinski koncept poslovne sposobnosti, koji je univerzalan, od pravnog koncepta, koji je ograničen regulativom nacionalnog pravnog sustava pa se od zemlje do zemlje unekoliko razlikuje.