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ADVANCE DIRECTIVES IN LEGISLATIVE AND THEORETICAL FRAMEWORKS OF FAMILY LAW

After appearing only in medical law for a long time, advance directives and other forms of voluntary measures are increasingly also being recognised as an effective protector of the right to self-determination in family law. The aim of the paper is to consider the Croatian model of advance decision making in family law, observing it in the context of European, international and comparative law. In this sense, the paper first provides an overview of relevant international and European documents, then briefly analyses different solutions to the discussion in question that exist in the national legislations of the selected European countries, namely, Germany, Slovenia, the Czech Republic, Serbia, and finally a detailed analysis of Croatian law. The paper aims to point out certain doubts and ambiguities that exist in Croatian law, give suggestions for improving the legislation, and encourage the continuation of scientific research in this legal field.

Key words: *Legal (in)capacity. – Support. – Advance directive. – Guardianship*.

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1. INTRODUCTION

Right to self-determination is the right to manage our lives and decide for ourselves in the different aspects and levels of importance of personal and property matters, such as where to live, what medical procedures are used for our health protection, how to manage our property, how to spend money, as well as with whom to have close relationships, how to dress, which cultural or sports events to attend, etc. In other words, the right to self-determination guarantees everyone to 'live their own way', in accordance with their own wishes, interests and preferences. But the question arises, how to protect right to self-determination if we become a vulnerable person who has lost the ability to make decisions on some or all these issues. In accordance with international and European standards in this area, national legislators have started to promote voluntary measures as a primary means of protecting and empowerment of vulnerable persons, as they contribute to protecting the individual's personal autonomy and right to self-determination: in other words, a person's ability to govern their life choices (Karjalainen 2022, 66–67). In this sense, various advance planning models have been developed for such circumstances in which we may not be able to make certain decisions ourselves, to ensure that these decisions reflect our (previously expressed) wishes and needs. Advance plans allow persons to provide instructions on how to deal with future emotional crises and/or to appoint a person to support them in those particular circumstances (UN Special Rapporteur 2017 par. 32).

This paper primarily discusses advance directives as a form of voluntary measures, but also some other voluntary measures, such as continuing (or enduring) powers of attorney, because certain legal systems, namely Croatian, have not clearly delineated them. Moreover, some institutes have been developed that include elements of several different voluntary measures. The principles of autonomy and self-determination place advance directives in the ambit of the human rights approach to mental health law (Morrissey 2010, 11; Weller 2010, 3), but also of human rights approach that goes far beyond mental health law. Advance directives are widely recognised as vehicles for the principles of participation, non-discrimination, acceptability and accessibility (Morrissey 2010).

The paper begins with an analysis of international and European documents that directly or indirectly protect the right to advance decision making. This is followed by a discussion of the protection of this right in the legal systems of Germany, Slovenia, the Czech Republic and Serbia. A special chapter is devoted to the regulation of the right to advance decision making in Croatian law, highlighting the problems that the Croatian system

has in legislation and implementation. Certain suggestions for improving legislation in this area are provided, as is an incentive for further research that will result in the creation of new proposals for effective protection of the right to self-determination through a system of advance directives. It should also be noted that this paper primarily deals with advance directives in the field of family, linking them to brief observations on advance directives in other legal areas.

2. INTERNATIONAL AND EUROPEAN LAW

As one of the responses to the long history of social neglect and prejudice, and even abuse of people with disabilities (Stein *et al*. 2007), international organisations have recognised advance care planning as one of the necessary measures to ensure that people with disabilities receive care and support in accordance with their personal wishes and needs. The United Nation's Convention on the Rights of Persons with Disabilities[1] (CRPD) 'was required due to the failure of human rights instruments to fully ensure the human rights and fundamental freedoms of persons with disabilities in order to achieve a society accessible for all' (Bianchi 2020, 2). The CRPD can be interpreted as promoting various forms of supported decision making including advance directives (Reilly, Atkinson 2010). Namely, under Article 12 of the CRDP, States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law and requires themselves to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. In this regard, 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.[2] The importance of self-direction is at the core of Article 12, ensuring that the exercise of legal capacity respects the rights, will and preferences of the person (Keys 2017, 267). The Committee on the Rights of Persons with Disabilities in its General Comment No. 1 points out that support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and that 'for many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes

1 UN 2006, Annex I.

3 UN 2006, Article 12.

to others'.[3] In that sense, applying an advance directive is an important example of support to exercise legal capacity (Flynn 2019, 50). The terms 'will' and 'preferences' are not defined in the CRPD. Arstein-Kerslake and Flynn (2016, 483) clarify that in general, an individual's 'will' is used to describe the person's long-term vision of what constitutes a 'good life' for them, whereas an individual's 'preferences' tends to refer to likes and dislikes, or ways in which a person prioritises different options available to them. Although it should not always be so difficult for someone close to the person who is unable to decide for themselves to determine what that person's will and preferences would be, advance directives certainly prevent wrong conclusions when there is a dilemma. However, the importance of advance directives is even greater in situations where there is a danger that decisions will be made contrary to the person's will and preferences, even though there is no doubt about what they are. The determination when an advance directive comes into force, as well as when it ceases to have effect, should also be the decision of the person issuing it and such a determination should be an integral part of the advance directive as well; the assessment that a person lacks mental capacity is certainly not a basis to follow.[4]

Speaking of the European context, it is evident that the Council of Europe also strives, especially through the practice of the European Court of Human Rights, to encourage a paradigm shift in the status and protection measures of persons with disabilities, emphasising their autonomy and human rights in national legislation (Hrabar *et al*. 2021, 396). The right of an individual to decide certain aspects of their private and family life on their own, without the intervention of the authorities or at least with the intervention reduced to the minimum possible derives from Article 8 par. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedom[5] (ECHR). The European Court of Human Rights has cut the link between the right to autonomy and the right to privacy, as protected by Article 8, and has stated that based on the ECHR in general and through the concept of human dignity, a right to autonomy can be deduced from the ECHR (Goffin 2012, 133). Although they are, of course, not explicitly mentioned as such in the ECHR, the European Court of Human Rights has in its practice discussed advance directives (mainly in the context of bioethical and religious issues) based on the said right to autonomy.

3 UN Committee on the Rights of Persons with Disabilities 2014, para 17.

4 *Ibid*.

5 Council of Europe 1950.

The Council of Europe first recognised advance directives in its documents regulating decision-making issues in biomedical matters. The most important of these documents is the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine[6] (Oviedo Convention), the only international legally binding instrument on the protection of human rights in the biomedical field. Article 9 of the Oviedo Convention proscribes that 'previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account'. This provision is certainly important as it marks the first recognition of the value of advance directives in a common European binding instrument. Although the wording 'previously expressed wishes' is used instead 'advance directives', the latter expression, which also does not appear in the Convention's Explanatory Report[7], was not included on the ground that it presupposes the binding nature of such documents (Andorno 2012, 76–77). The Explanatory Report states that the expression 'taken into account' does not mean that previously expressed wishes should unconditionally be followed and provides some examples to demonstrate the exemptions.

Aware that the issue of adults with incapacity was arguably the most topical issue of family law at the time at both the national and international level (and that it would be in the following years as well) and concerned with the fact that, despite the overall improvement in the protection of human rights, this area of law was underdeveloped or even completely neglected in a number of member states, the Council of Europe adopted Recommendation CM/Rec (2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity[8]. The Recommendation is based on principle of promotion of self-determination, which is mentioned five times in the Recommendation and clearly embodies the key value of this document (Andorno 2012, 78.). In accordance with this principle, the Council of Europe recommended that member states give voluntary measures priority over involuntary measures of protection. 'Continuing powers of attorney and advance directives constitute two methods of self-determination for capable adults for periods when they may not be capable of making decisions. Both are anticipatory measures which subsequently have a direct impact on granters' lives during periods when their capacity to make decisions is

6 Council of Europe 1997.

7 Council of Europe 1997.

8 Council of Europe 2009.

impaired'[9] (Council of Europe 2011, 17). Continuing power of attorney is defined as 'a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter's incapacity'[10] and advance directives are defined as 'instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity'[11]. The Recommendations do not limit the application of advance directives to specific strictly defined personal and/or property issues. Moreover, it is prescribed quite generally that advance directives may apply to health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian, should one be appointed.[12] The Recommendation leaves room for States to determine the (non)binding effect of advance directives, but still do not allow the State to completely deprive the advance directive of its character of a strong protector of a person's wishes. In this sense, in accordance with the Recommendation, States should decide to what extent advance directives should have binding effect but at the same time the Recommendation determines that if advance directives do not have binding effect they should be treated as statements of wishes and given due respect. States should also consider what form and other provisions or mechanisms may be required to ensure the validity and effectiveness of advance directives, but in any case, it should be revocable without any formalities.[13] As can be seen, despite the legally non-binding character of the Recommendation, it certainly represents the European direction regarding the use of advanced instructions as an important instrument of protection and social respect of incapable adults (see also Morrissay 2010, 13).

3. COMPARATIVE LAW

A number of relevant comparative studies have shown great and significant differences in the legal regulation of advance directives in national legislations (see Atkinson 2007; Goffin 2012; Lack, Biller-Andorno, Brauer 2013; Veshi, Neitzke 2015). These studies are mainly from the field of biomedicine and (mental) health protection; there are still not a significant number of family law studies in this regard. The Family Law in Europe

[9] Council of Europe 2011.

[10] Council of Europe 2009, Principle 2.1.

[11] *Ibid.*, Principle 2.3.

[12] *Ibid.*, Principle 14.

[13] *Ibid.*, Principles 16–17.

(FL-EUR)[14] academic organisation is currently intensively working on the analysis of national legislations in the field of protection and empowerment of vulnerable adults within family law, including advance directives as a voluntary measure, and this is a promising project that is expected to bring valuable knowledge in this area.

In order to show the different approaches of European legislation to what is under discussion, the relevant legislation of Germany, Slovenia, Czech Republic and Serbia will be analysed below. German legislation because it served as a model for the Croatian legislator when introducing advance directives into the family law system in 2014 (Rešetar 2022, 505) and because it provides answers to some open questions that still exist in Croatian legislation at the present. Slovenia is an example of a country that abandoned the institution of deprivation of legal capacity, but still provides protection for persons with disabilities through the institution of guardianship. However, advance decision making is recognised only in the area of guardianship for minors. The Czech Republic is specific insofar as some forms of advance decision making, recognized by some other European countries as family law mechanisms, are recognised as status law mechanisms in Czech law. Serbia belongs to the group of European countries whose family law, as well as status law legislation does not recognise any form of advance decision making, and Serbian legal theory has criticised that even in other branches of law they have not taken root as they should.

Since the boundaries between continuing powers of attorney and advance directives are not always completely clear in the considered legal systems, the former are also partially included in the discussion below.

3.1. Germany

Voluntary measures that serve as protection of the autonomy of the vulnerable adult in Germany are mostly regulated by the German Civil Code[15] (BGB). A vulnerable adult can issue powers of attorney in accordance with general provisions of civil law to take care of their affairs and through this they can authorise a self-chosen representative/support person. The appointment of a custodian is generally not necessary if such attorneys can

[14] FL-EUR currently gathers 34 eminent experts from the academic community and practitioners in the field of family law, from 31 European jurisdictions. More information at *https://fl-eur.eu/*, last visited April 12, 2024.

[15] *Bürgerliches Gesetzbuch*.

legally manage the affairs of a vulnerable adult (Dethloff, Leven 2023, 46). A precautionary power of attorney for possible circumstances that would require assistance is called continuing power of attorney (*Vorsorgevollmacht*), which is defined in BGB Vol. 4, dedicated to family law.

The fourth volume of the BGB also regulates living will and custodianship directive. The adult can specify in a living will (*Patientenverfügung*), in case of their incapacity to consent in writing, whether they consent to or prohibit certain examinations of their state of health, medical treatments or operations that are not yet imminent at the time of the specification[16] (Dethloff, Leven 2023, 47).

A custodianship directive (*Betreuungsverfügung*), which is legally defined in § 1816 (2) BGB, can specify which person the court should choose as the custodian, but also who should not be the custodian under any circumstances. It concerns in particular the suggestion of a specific custodian who can then make decisions regarding the affairs of the vulnerable adult, within certain limits but in this directive the vulnerable adult can also express their wishes regarding the management of their affairs (Dethloff, Leven 2023, 47). Germany is an example of a European country where citizens are advised in different ways and in simple language on how the custodianship directive can be given and on which issues. Using the Internet and various other sources, citizens are advised of what is possible to specify in a custodianship directive, such as, that grandchild should receive a certain amount of money for their wedding, to be cared for at home as an outpatient for as long as possible (Verbraucherzentrale 2024[17]), where and how to live, whether to undergo certain medical procedures (e.g., the insertion of a gastric tube), that relatives should receive presents for Christmas (Familienratgeber 2024[18]), etc. It is also possible to determine general criteria for appointment of a custodian without specifying a particular person, e.g., whether the custodian should be appointed by a church institution, a care association or a welfare organisation, or whether a woman or a man as custodian is preferred (Göbel, Hünefeld 2020, 8), etc.

It is important to point out that there are no special requirements in terms of form and capacity to understand when it comes to a custodianship directive; a declaration by the vulnerable adult is sufficient (Dethloff, Leven

[16] See BGB § 1827.

[17] Explanation available at *https://www.verbraucherzentrale.de/wissen/gesundheit-pflege/aerzte-und-kliniken/vorsorgevollmacht-und-betreuungsverfuegung-warum-sie-so-wichtig-sind-46972*, last visited April 13, 2024.

[18] Explanation available at *https://www.familienratgeber.de/rechte-leistungen/recht-gesetz/betreuungsverfuegung*, last visited April 13, 2024.

2023, 49; Göbel, Hünefeld 2020, 14). However, it is safer to write it when person is still fully capable for understanding because problems can arise if relatives or friends do not agree with decisions made in the custodianship directive. They may then try to have the custodianship directive declared void in court (Familienratgeber 2024).

The custodianship directive must be transmitted to the custodianship court without delay by a person in possession of such a document, when the custodianship proceedings are initiated (Dethloff, Leven 2023, 49–50). The court and the custodian are generally bound by what is stated in custodianship directive, provided that: a) it does not conflict with the best interests of vulnerable person, b) it is reasonable for the custodian to accept it, and c) it is not apparent that the wishes have changed in the meantime (Göbel, Hünefeld 2020, 8).

Custodianship directives (as well as continuing powers of attorney and living wills) can be registered in the Central Register of Continuing Powers of Attorney (*Zentrales Vorsorgeregister*). Dethloff and Leven clarify that this registration is neither a prerequisite nor proof of effectiveness, but instead serves the purpose of discoverability (Dethloff, Leven 2023, 51).

In the context of making advance binding declaration in relation to the child guardian, it is important to note that the BGB foresees the possibility of appointment or exclusion guardian for child by parents (*Benennung und Ausschluss als Vormund durch die Eltern*).[19] It is proscribed that parents may, by means of a last will and testament, name a natural person as guardian or spouses as joint guardians or exclude them from guardianship if they are entitled to care for the child's person and property at the time of their death. The will is a unilateral act, so the parents cannot declare it jointly. The question then arises as to what happens if the parents in their wills state conflicting wishes about the person of the child's guardian. The BGB proscribes that if the parents have made contradictory last wills and testamentary dispositions to name or exclude guardians, the disposition made by the parent who died last applies.[20]

The possibility of appointment or exclusion of a guardian for a child by parents is not recognised as a form of advance directive of vulnerable persons in German family law probably because it can only be declared in a will and because it is declared for case of death, not for case of impossibility of exercising parental responsibility during one's lifetime.

[19] BGB § 1782.

[20] BGB § 1782 (2).

3.2. Slovenia

Protection of vulnerable adults in Slovenia is mainly regulated in the Slovenian Family Code[21] (DZ). Novak (2023, 2) highlights that new family legislation in Slovenia pays special attention to the protection of vulnerable adults. The new regulation has brought great changes in this area, the most notable of which is the abandonment of the possibility of deprivation of legal capacity. Vulnerable persons are still protected through the institution of guardianship for adults, but only and exclusively in those areas where they really need guardianship assistance and protection. As the purpose of guardianship for adults DZ determines the protection of their personality, which is realised primarily by arranging matters that these persons cannot do alone, and by striving for treatment and training for independent living as well as the protection of their property and other rights and interests.[22] The court places a person under guardianship and appoints a guardian if, due to a disorder in mental development or mental health problems or another cause that affects the ability to reason, that person is unable to take care of their rights and benefits by themselves without harming themselves.[23]

Slovenian family law does not provide for any form of a binding directive given in advance referring to the appointment of a guardian. Regarding respect for the will of the ward, it is only prescribed that when appointing a guardian, the social welfare centre or the court take into account the wishes of the ward, if they have expressed them and if they can understand their meaning and consequences, and if it benefits the ward.[24]

Article 144 of the DZ provides for the prior expression of the will of the parents, in the event of death or permanent incapacity to exercise parental responsibility, by which the parents express their will in advance regarding:

- the person entrusted with the care and upbringing of their child;
- the relative who will have parental responsibility;
- the adopter; or
- the guardian.

[21] Družinski zakonik (DZ), *Official Gazette of the Republic of Slovenia* Nos. 15/2017, 21/2018, 22/2019, 67/2019, 200/2020, 94/2022, 5/23.

[22] DZ Art. 239 paras. 2 and 3.

[23] DZ Art. 262 par. 1.

[24] DZ Art. 243.

The validity of the parents will expressed in advance is evaluated in the same way as the validity of the will in accordance with the law regulating inheritance, and if the expressed wishes of the parents are different, the court decides on the validity of the will. A precondition for the court to take into account the will of the parents expressed in advance is that the will of the parents does not conflict with the interests of the child.

As can be seen, when it comes to the expression of the parent's will in advance regarding the person responsible for the child, Slovenian legislation, unlike the German one, provides for giving such an advance statement also in the case of the impossibility of exercising parental responsibility, not only in the case of death. However, Slovenian legal theory also does not consider it as an advance directive in the sense of a voluntary measure for vulnerable adults (see Novak 2023, 30–34; Ahlin Doljak 2023).

3.3. Czech Republic

In order to have a clearer understanding of Czech law in this area, it is first important to emphasise that the protection of vulnerable adults in Czech by the institution of guardianship is not regulated in the second book of the Czech Civil Code[25] (hereafter: OZ) which refers to family law matters but in Book I – General Provisions. Králíčková *et al.* (2023) point out three options of voluntary measures for empowerment of vulnerable adults regulated in a first Book of the OZ, Title II (Persons), Chapter 2 (Natural persons): continuing power of attorney (*předběžné prohlášení*)[26], assisted decision-making (*nápomoc při rozhodování*), and representation by a household member (*zastoupení členem domácnosti*). The authors do not label any of these measures as advance directives. However, continuing power of attorney has elements of what is considered in some legislation to be an advance (guardianship/custodianship) directive.

When it comes to continuing power of attorney, Králíčková *et al.* (2023, 67–77) state that it functions as a preventive measure. It is a unilateral legal act of an individual who anticipates their own future inability (which may or may not occur) to make legal acts autonomously. A continuing power of attorney can include both property and personal matters. A person can

[25] *Občanský zákoník*, 89/2012 Sb.

[26] Czech institute *předběžné prážní* authors Králíčková *et al*. (2023) translate as continuing power of attorney, so we also use the same translation of this term later in this paper.

express their will as to how or by whom their affairs are to be managed if they are unable to express such a will in the future. The range of issues on which it is possible to express will is diverse and can include: housing and residence, property, health care, social care, business plans, taxes and fees, representation before courts, authorities and other institutions. A person can express the wish to live in their own house, or, conversely, an instruction to rent out their house and be placed in a facility providing social care services. It is also possible to express preference regarding a specific social care service that the person wants or does not want to receive (Kittel 2018, 16). It is not possible to authorise, or designate, any person to act in matters related to conclusion or dissolution of marriage, the exercise of parental responsibility and disposition *mortis causa*, including disinheritance.

Whether a person will be limited by the court in their autonomy is not as important as the fact that they will lose the ability to legally act independently and manage their affairs (Kittel 2018, 13). The cause of the loss of legal capacity is also not decisive. It can be a mental disorder, but also a physical illness or injury. Kittel further explains that it is not necessary for a person to anticipate loss the legal capacity for a specific reason, as it might seem from the diction of Article 38 of the OZ. It could be a person who is in the early stages of a disease with a prognosis of losing the ability to act legally (e.g. Alzheimer's disease, dementia), and a completely healthy person who wants to adjust the management of their affairs in the case of an unexpected event (e.g. severe head injury during sports). It can be made by a person with full legal capacity, 'but legal doctrine also allows for the power of attorney to be made by a minor without full legal capacity, or an adult who is already experiencing symptoms of a mental disorder, but whose condition still makes it possible for him or her to make the power of attorney, since he or she is fully aware of its effects' (Králíčková *et al.* 2023, 72).

A continuing power of attorney must be in a written form, as a public document, i.e. a notary deed, or a private document attested by two witnesses.[27] Legal theory recommends a notarial deed because it 'constitutes full proof of the will against everyone and because, in addition, the writing of the notarial deed is associated with the provision of legal advice, and the expression of will is formulated by a legally educated expert' (Kittel 2018, 15, translated by author). A continuing power of attorney written in the form of a notarial deed will be deposited with the drafting notary, who can also issue copies to persons designated in the notary deed. This reduces the risk of the document being lost and improves the ability of its intended circulation. If the content of a notarial deed is the determination of the person who is to

[27] OZ Art. 39 par. 1 and Art. 3026 par. 2

become the guardian, such declaration will additionally be registered in the List of declarations on the appointment of a guardian kept in digital form by the Chamber of Notaries of the Czech Republic (Kittel 2018, 16; Králíčková *et al.* 2023, 73).

3.4. Serbia

Serbia is an example of a European country whose family legislation does not recognise any form of advance directives. It is pointed out in legal theory that even in the field of health care they have not taken root and that the notion of self-determination needs to be revisited in Serbian law. Speaking in the context of protecting patients' rights, Mujović (2020, 137–145) explains that Serbian law recognises the condition of progressive diseases, where it is understood that in such circumstances the patient loses the ability to decide for themselves, so it is possible to appoint a substitute decision maker, i.e. to write an advance directive. However, the author criticises the vagueness and ambiguities of the law. She points out that it is necessary to adopt legislation that will be more precise with regard to the circumstances and condition of terminally ill patients and that will foresee a clear and unequivocal obligation of health professionals to inform their patients about advance directives. 'Although there are some provisions for advance directives in Serbian law, these provisions need to be revisited and strengthened, because as it stands, many patients are not aware of the option of creating advance directives, and many physicians are confused about whether and how to apply them. As a result, they are rarely implemented' (Mujović 2020, 144).

In the family law context, it is important to stress that the Serbian Family Code[28] (PZ) recognises the institute of guardianship for the protection of vulnerable persons, but as previously stated, it does not recognise any form of making advance binding statements as the measure of their empowerment (see Kovaček Stanić, Samardžić 2023, 36–39). The PZ proscribes that a child without parental responsibility (minor ward) or an adult who has been deprived of legal capacity (adult ward) will be placed under guardianship.[29] A ward that has reached the age of 10 and is capable of reasoning has the right to propose a person, who will be appointed as their guardian,[30] but it is not prescribed in what form and before which authority such a proposal

[28] *Porodični zakon*, *Official Gazette of the Republic of Serbia* Nos. 18/2005, 72/2011 – other law, and 6/2015.

[29] PZ Art. 124.

[30] PZ Art. 124.

can be stated, nor to what extent is it binding. Thus, in terms of family law, the protection of the right to self-determination through the institution of advance directives or other forms of voluntary measures is completely neglected in Serbia. However, Serbia is not an exception when viewed in the European context. Some other European countries have also not developed, or have just started developing, the institute of advance directive in their family legislation. It is to be expected that the Serbian legislator will also introduce standards for the protection of the right to self-determination in future amendments to family legislation, and that advance directives will not remain restricted only to medical law for very long.

4. CROATIAN LAW

In Croatian legislation, as well as in legal theory, there are no clear terminological demarcations between different forms of anticipated decision-making. Legal theory generally tends to call them advance directives (*anticipirane naredbe*), which include various forms of decision-making in advance (on issues of health protection and medical matters, issues of appointing a guardian for an adult or a child, etc.) regardless of whether such directives are given in case of impossibility for independent decision-making due to, for example, loss of legal capacity, or in case of death.

However, as in many other legal systems, in the Croatian legal system regulation of advance directives first developed in other areas of law, and later in family law. Outside the Family Act[31] (FA), certain forms of advance directives are still recognised by other regulations. Thus, for example, the Act on the Protection of Patients' Rights[32] provides for the right to accept or refuse a diagnostic procedure, and the Ordinance on the consent form and declaration form on the refusal of a particular diagnostic procedure[33] prescribes the mandatory content of such statements.

[31] *Obiteljski zakon*, *Official Gazette of the Republic of Croatia* Nos. 103/15, 98/19, 47/20, 49/23, 156/23.

[32] *Zakon o zaštiti prava pacijenata*, *Official Gazette of the Republic of Croatia* Nos. 169/04, 37/08.

[33] *Pravilnik o obrascu suglasnosti te obrascu izjave o odbijanju pojedinog dijagnostičkog, odnosno terapijskog postupka*, *Official Gazette of the Republic of Croatia* No. 10 /08.

Furthermore, the Act on the Transplantation of Human Organs for Medical Purposes[34] and the Act on the Use of Human Tissues and Cells[35] are guided by the assumption that every person is a potential donor after their death, unless the potential donor during his lifetime, in writing, validly objected to the donation. Such a written statement can be given by any adult, legally capable person, to their chosen doctor of medicine of primary health care or to the ministry responsible for health (for persons who do not have legal capacity, the written statement should be given by the legal representative or guardian, who must submit the statement to be solemnised by a notary public).

Speaking outside the context of family legislation, it is particularly important to mention the Act on the Protection of Persons with Mental Disabilities[36] (APPMD), which regulates the so-called binding statements (*obvezujuće izjave*). This Act stipulates that each person can authorise only one person, who agrees to do so, to act as a trusted person on their behalf, after the legal prerequisites are met, to give or withhold consent to certain medical procedures.[37] A binding statement applies only if the person who gave it is no longer capable of giving consent for the medical procedures specified in that statement. The purpose of binding declarations is that a person who is temporarily incapacitated due to illness or mental disorders is not deprived of legal capacity and placed under guardianship only for the purpose of treatment. A binding statement can be made by any person, regardless of whether or not they have a diagnosed mental disorder, if the person is not deprived of legal capacity to make decisions about medical procedures.[38]

Family law theorists have emphasised the need to introduce advance decision making into family legislation, in order to guarantee that a person's wishes will be respected and taken into account as long as they are capable of expressing them (Korać Graovac, Čulo 2011, 10; Milas Klarić 2010, 473 and 479). The institute of advance directives was first introduced into family

[34] *Zakon o presađivanju ljudskih organa u svrhu liječenja*, *Official Gazette of the Republic of Croatia* No. 142/12.

[35] *Zakon o primjeni ljudskih tkiva i stanica*, *Official Gazette of the Republic of Croatia* No. 144/12.

[36] *Zakon o zaštiti osoba s duševnim smetnjama*, *Official Gazette of the Republic of Croatia* No. 76/14.

[37] APPMD Art. 68.

[38] APPMD Art. 72.

legislation by the Family Act of 2014,[39] and the same forms of advance directives are recognised by the current FA, which will be discussed in the continuation of this chapter.

4.1. Advance Directives in Family Legislation

Under the term '*anticipirana naredba*', the FA recognises four types of advance directives: the advance directive for the appointment of a guardian for a child, the advance directive for the appointment of a guardian in case of legal incapacity, the advance directive for the appointment of a special guardian, and the advance directive for undertaking medical procedures.

4.1.1. Advance Directive for the Appointment of a Guardian for a Child

Article 116 par. 5 of FA proscribes that '[a] parent who exercises parental responsibility can during his lifetime in a will or in the form of a notary document (advance directive) name the person he/she believes would best take care of the child in the event of his/her death'.[40] When a guardian is named for a child in the event of a parent's death, the will of the parent expressed in the advance directive is taken into account, unless it is assessed that this would not be consistent with the child's welfare.

Although this is a parent's statement, in which they express their opinion and preferences about the person of the child's guardian in the event of their own death, and not in the case of the impossibility of exercising parental responsibility, in legislation and legal theory it is designated as an advance directive. Therefore, this form of advance directive does not correspond to the concept of advance directive in the sense of the Recommendation. It should be emphasised that the right of the parents to express their preferences about the guardian for the child in the event of their death also appears in other European legal systems. However, in 2018 the European Committee on Legal Co-operation commissioned a report on the follow-up actions by member states in regard to the implementation of the Recommendation (Ward 2018). In this report, only Croatia was mentioned as a country where an advance directive may be applied to appoint a person to look after their

[39] *Obiteljski zakon*, Official Gazette no. 75/14.

[40] Translated by author.

children in the event of their death (Ward 2018, 62). It can be assumed that this is so precisely because in other systems such statements by parents are not defined as advance directives.

The FA does not give a clear answer to the question whether the granting of an advance directive is reserved only for one parent exercising parental responsibility independently (because the other, for example, is not alive or is deprived of parental responsibility or the legal capacity to exercise parental responsibility) or whether both parents who jointly exercise parental responsibility can declare an advance directive. If both parents exercising parental responsibility can declare an advance directive, then the question arises as to whether they must declare it together. Furthermore, if each parent can declare their own directive, and if in those directives they designate different persons as potential guardians of the child, the question arises as to which of these persons should appointed as the guardian of the child by the competent authority.

4.1.2. Advance Directive for the Appointment of a Guardian in Case of Legal Incapacity

The FA regulates the institute of guardianship for adults, as a measure for protecting vulnerable persons.[41] An adult who is deprived of legal capacity will be placed under guardianship. A guardian is a person appointed by the Croatian Institute for Social Work who has the qualities and abilities to perform guardianship and who agrees to be a guardian, if it is in the welfare of the ward. More than one guardian can be appointed to the ward, and it is possible to appoint a deputy guardian.

Article 247 par. 5 of the FA proscribes that '[i]f the person deprived of legal capacity, prior to the deprivation of legal capacity, in the form of a notarial document, designated a person or more persons whom they would like to be appointed as guardian or guardians, as well as persons whom they would like to be appointed as their deputies (advance directive), the Institute for Social Work shall appoint that person or persons as a guardian or guardians and deputy guardians, if the other requirements for appointment as a guardian prescribed by this Act are met'.[42]

41 FA Art. 232–269.

42 Translated by author.

4.1.3. Advance Directive for the Appointment of a Special Guardian

The Croatian Institute for Social Work will propose to the court the initiation of proceedings for deprivation of legal capacity when it assesses that this is necessary due to mental disorders or other reasons that render the person unable to take care of any of their rights, needs or interests, or that threatens the rights and interests of other persons. A special guardian is appointed for a person for whom proceedings to deprive them of legal capacity have been initiated, unless the person has authorised an attorney.[43] Article 236 par. 6 of the FA proscribes that 'if the person in relation to whom the procedure for the deprivation of legal capacity is conducted has designated in the form of a notary document, the person they want to represent them in the procedure for the deprivation of legal capacity (advance directive), the Institute for Social Work will appoint that person as a special guardian if they fulfil the other prerequisites for the appointment of a guardian prescribed in this Act'.[44]

4.1.4. Advance Directive for Undertaking Medical Procedures

The FA specifically prescribes which medical issues cannot be decided by the guardian, but only by the court in a non-litigation procedure, and only at the proposal of the ward. Pursuant to Article 260 these are: a) sterilisation of the ward, b) donation of tissues and organs of the ward, and c) life support measures. In the same provision, it is prescribed that a court decision is not required 'if the ward, at the time they were legally competent, decided on the procedures and measures from paragraph 1 of this Article, in the form of a notary document (advance directive)'.

The importance of the legal regulation of this form of advance directive in Croatian family legislation is unquestionable, but the relationship between the provisions of family legislation and legislation in the field of medical law remains open when it comes to giving advance orders related to medical procedures.

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[43] On the problems of applying the provisions of the FA regulating the institution of a special guardian for children (and at the same time adults), see Lucić 2021.

[44] Translated by author.

4.2. Content and Registration of Advance Directives

In accordance with the Ordinance on the manner of keeping records and case files of persons under guardianship, the manner of inventory and description of their property, submission of the guardian's report on the work and submission of the report on property management, and the content and form of advance directives,[45] the advance directive is drawn up in the form of a notarial deed and must contain:

- personal data of the provider of the directive;
- a statement specifying the person whom they would like to be appointed as a guardian, i.e. a deputy guardian in the case of deprivation of legal capacity, or a statement by the parents on the choice of a guardian, if the prerequisites for the appointment of a guardian for the child are fulfilled;
- a statement agreeing to appoint this person as their special guardian;
- a statement by the order provider regarding medical procedures and measures;
- personal data of the named person.[46]

In the legal sense, this provision is not precisely defined because its wording implies that every anticipated order must contain all the listed elements, which is not the case because this provision refers to different types of anticipated orders and their content will certainly not be the same.

In the case of advance directives for the appointment of a guardian for the child, this regulation does not resolve the doubt as to whether such a directive can be given only by the parent who is exercising parental responsibility independently or by both parents, individually or jointly. The determination that the mandatory content of such a directive is the parents statement on the choice of a guardian is also problematic 'in the case where the prerequisites for the appointment of a guardian for the child are fulfilled'.[47] The FA foresees the possibility of declaring such a directive only when, in the event of death, there is a need to appoint a guardian for the child, and not if such a need arises due to some other reasons.

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45 *Pravilnik o načinu vođenja očevidnika i spisa predmeta osoba pod skrbništvom, načinu popisa i opisa njihove imovine, podnošenju izvješća i polaganju računa skrbnika te sadržaju i obliku anticipiranih naredbi*, Official Gazette no. 19/21.

46 FA Art. 27.

47 Translated by author.

An advance directive may be revoked at any time, using the same form in which it was given. The 2017 Decision on the organisation of the register of advance directives and powers of attorney in electronic form[48] established the register as an electronic database, 'which contains records of binding statements that are kept for persons who have given or revoked a binding statement'.[49] This document also contains evident terminological inconsistency likely caused by the need to enter all types of pregiven binding statements into a same register –those recognised by the FA, as well as by other regulations. However, this document should definitely be clearer and more precise in its wording.

5. CONCLUSION

Like many other European countries that respect international standards of protection of the right to self-determination and autonomy of will, Croatia has developed the institute of advance directives in its national law. The development of this institute began in medical law, and after family legal theory called for its introduction into the family law system, this was done with the family law reform of 2014/2015. In addition to the obligations assumed by international and European treaties, when introducing advance directives into family law, the Croatian legislator was also guided with good practices that other family law systems, such as the German and the Austrian, already had at that time (Rešetar 2022, 505).

Although the Croatian system of advance directives can be considered good in many respects, there is still plenty of room for further improvement. First of all, it is necessary to harmonise the various regulations governing advance directives. Namely, if we look at the Croatian system of advance decision making as a whole, we will conclude that there is a lack of clarity between regulations and a lack of terminological uniformity. Different regulations provide solutions for making advance decisions, and these solutions are sometimes mutually exclusive, while at the same time the legislation does not say anything about the legal relation between them. In the context of family legislation, it is necessary to consider providing the possibility for a parent to appoint a guardian for a child, by way of an advance directive, in the event of their inability to provide parental responsibility, not only in the

[48] *Odluka o ustroju registra anticipiranih naredbi i punomoći u elektroničkom obliku*, Official Gazette no. 20/17.

[49] Decision, Art. 1 par. 3. Translated by author.

event of their death. Likewise, it is necessary to specify in the legislation whether only one or both parents can declare an advance directive, together or separately. A model for further reforms in this area could be German legislation, which gives both parents the option of appointing a guardian for the child in the event of their death, and the competent authority then chooses the guardian appointed by the last deceased parent.

In addition, it is important to point out what other authors have already noted that advance directives are not used as much as they could be. After almost ten years of existence of advance directives in family legislation, and much longer in other branches of law, they have not sufficiently taken root in practice. We believe that further efforts are necessary to promote advance directives, familiarise the public with what they are, how they can be declared, and how they contribute to the protection of a person's right to self-determination.

Attention is also drawn to the fact that Croatia lacks sufficient scientific interest in this area. The importance of developing clear and harmonised mechanisms for respecting personal wishes and needs, in situations when the ability to decide for oneself becomes questionable, is undeniable. The most important part of the path to building a system of empowering vulnerable persons is scientific research, which should precede future more intensive legislative changes. In this sense, it is important to give advance directives more attention in legal theory, in order to provide proposals for a clearer and consequently more efficient system of advance deciding.

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