

## INCAPACITATION AND REAL ESTATE TRADING. A CASE STUDY

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### ABSTRACT

**Motives:** Incapacitation is presented in the literature as an important legal device for protecting the rights of the persons concerned. At the same time, in some cases (such as legal transactions with foreign countries), the legal consequences of incapacitation seem to be disproportionate to the protected interests. This overview aims to present a short case study that highlights the differences in the interests, possible views and demands of the parties in transactions involving real estate owned by incapacitated persons.

**Aim:** To initiate a debate on the degree of necessary legal protection in transactions involving real estate owned by incapacitated persons, and to analyze in a discursive manner the jurisdictional, procedural, and socioeconomic dimensions of a single problem in a short case study.



**Results:** Depending on the context, incapacitation can be both a form of protection and a difficulty in particular civil cases involving parties with limitations or residing in different jurisdictions.

**Keywords:** incapacitation, custody, real estate, legal representation, efficiency of civil proceedings

### INTRODUCTION

Incapacitation is an instrument of civil law which deprives or limits the legal capacity of a person who, due to mental illness, retardation or other disorder, is unable to manage their conduct. It is intended to protect the economic and personal interests of the incapacitated person, as well as their family. In the context of real estate transactions, incapacitation relates to a person's ability to enter into real estate contracts. A totally incapacitated person cannot conclude such agreements without the consent of the guardianship court, whereas a partially incapacitated person may conclude such agreements with the consent of their custodian. The purpose of this legal construct, often

referred to as the “protective role of incapacitation”, is to guard the interests of the incapacitated person, and it has been designed to properly conduct their vital affairs. Incapacitation has received criticism on these grounds. In view of the framework of this study (an overview) and its illustrative character, the main reasons behind the critique of incapacitation should be examined. Critics have argued that incapacitation significantly violates human dignity, the principle of equality and non-discrimination of persons with disabilities, as well as human rights and general freedoms that are guaranteed by constitutional and conventional systems. Critics have also noted that this measure is too radical and sometimes disproportionate to the needs of people with specific disorders.

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For a variety of reasons, in some cases, the interests of legally incapacitated persons can be better protected by other legal solutions, such as preventive power, assisted care, property management by a court, or other forms of support. Incapacitation has been criticized for its premise, as well as its consequences. The grounds for incapacitation are considered too general and imprecise, which leads to abuse of power and arbitrary court decisions. The effects of incapacitation are considered too far-reaching, and they deprive the incapacitated person of their legal capacity and the ability to independently shape their lives, including personal assets and real estate.

## LITERATURE REVIEW

The literature review in itself was not the main goal of this article. Nonetheless, it should be noted that incapacitation is regulated by the provisions of the Act of 23 April 1964 – Civil Code (Journal of Laws, 2022, item 1360, as amended, hereinafter referred to as the Civil Code) (in particular Articles 13–18) and of the Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws, 2021, item 1805, as amended, hereinafter referred to as the Civil Procedure Code) (in particular Articles 544–560<sup>1</sup>). The Civil Code defines the premises, scope, and effects of incapacitation, whereas the Civil Procedure Code defines the applicable procedures.

As an instrument of civil law, incapacitation fulfills many functions in the legal system. According to P. Nazaruk, doctrine and jurisprudence assume that incapacitation is applied in the interest of the incapacitated person also to create more favorable conditions for organizing that person's property relations (Judgment of the Supreme Court of 17 February 1981, II CR 11/81, LEX No. 8308). Moreover, incapacitation has been established primarily to protect the interests of a person who, for the reasons specified in Art. 13 § 1 of the Civil Code, is unable to manage their conduct, or for the reasons specified in Art. 16 § 1 of the Civil Code, requires assistance with daily life activities. Thus, incapacitation does not only benefit the applicant, but also the

applicant's family (Nazaruk, 2023). The medical grounds for incapacitation are established not only by a psychiatrist or a neurologist, but above all, by a psychologist who evaluates the person's intellectual capacity and determines their ability to participate independently in legal proceedings and direct their conduct in accordance with Art. 13 § 1 or conduct their affairs according to Art. 16 § 1 of Civil Code (Nazaruk, 2023). Thus, a mental illness or another disorder indicated in Art. 13 § 1 of the Civil Code does not always constitute sufficient grounds to rule on total incapacitation. The said illness or disorder must also be accompanied by a natural person's inability to control their own behavior for reasons of mental health (Judgement of the Supreme Court of 6 September 2017, I CSK 331/17, LEX No. 2382434).

## MATERIALS AND METHODS – A CASE STUDY

This case study describes a real-life case pending between mid-2020 and the end of 2022, which was initiated to authorize a totally incapacitated person to perform an act that exceeds the scope of ordinary administration of assets, namely the disposal of real estate owned by that person. The property in question was located in Poland, whereas the incapacitated person, his guardian, and his immediate family resided in the USA. The authorization request was brought to court mainly because the incapacitated person had been denied permanent residency status in the USA on account of his mental health and could be forced to leave the USA due to potentially high cost of medical treatment and care. Another reason was the concern that the incapacitated person's guardian would be unable to perform his legal role due to advanced age (nearly 90 years) and that the entire burden of managing the incapacitated person's affairs would fall on the remaining family members. The authorization would enable the incapacitated person to sell his dilapidated flat, which had been unoccupied for several years, and to deposit the funds from the sale in his bank account. The funds would be used to finance the incapacitated person's stay

in a care institution upon his return to Poland. It was clear from the facts that swift and expeditious action was advisable due to the risk that the incapacitated person would remain unaccompanied and without guardianship, whether in Poland or the USA. Thus, the object of the court's proceedings was in fact to assess whether the planned sale of the incapacitated person's property was legitimate.

The price of the property was also an important issue because its value could decrease significantly in the course of protracted and prolonged proceedings, as well as fluctuations on the real estate market. Therefore, even if the property transaction were to be authorized by the court as legitimate and serving the incapacitated person's interests, there was a risk that it would not be sold at the price established by the court. Due to the foreign element in the case, the court should also consider the need to apply the conflict of laws, for example, the provisions of Article 60(3) of the Act of 4 February 2011 – Private International Law (Journal of Laws of 2023, item 503). Pursuant to these provisions, the actions and measures referred to in paragraph 1 of the above legal act (guardianship, custody or other protective measures applicable to an adult) are governed by the law applicable to the territory where the affected person has their habitual residence (Kozioł, 2018). It should also be noted that court proceedings in the analyzed case lasted more than two years, despite the fact that the case was decided solely based on Polish law. The application of foreign law in any matters pertaining to the case was not the subject of the court's analysis.

## JURISDICTION OF THE COURT

Pursuant to Article 569 § 1 of the Civil Procedure Code, the court competent to hear a guardianship case of a person who is totally incapacitated is exclusively the guardianship court of their domicile, namely the court of the domicile of the person who is to be affected by the proceedings, or, if there is no domicile, the guardianship court competent for their place of residence. If the latter condition cannot be met, the competent court (that has jurisdiction)

is the district court for the Capital City of Warsaw. This provision literally refers to guardianship cases (including guardianship and custody cases); therefore, its application to persons who have been placed under guardianship due to total incapacitation does not seem to raise any doubts. At the same time, the term “exclusively” and the provisions of Article 27 § 2 of the Civil Procedure Code raise serious interpretational dilemmas. These issues have led to the adoption of two hypothetically legal procedural pathways.

The first pathway is based on the premise that the jurisdiction of the court competent for the domicile of the totally incapacitated person should be recognized, as emphasized by the term “exclusively”. This approach could be justified by the solution offered by the Supreme Court (Resolution of the Supreme Court of 21 February 1968, III CZP 105/67, OSNC 1968/10/162) that refers more broadly to incapacitated persons. According to the court, this resolution (III CZP 105/67) follows unambiguously from the provisions governing guardianship court proceedings, namely that these proceedings are dedicated entirely to persons who, due to their age or other circumstances that deprive them of legal capacity, remain (or should remain) under parental authority, guardianship or custody, which is partly regulated by Articles 599–605 of the Civil Procedure Code. Thus, the person “affected by” guardianship proceedings is the person on whose behalf the guardianship may interfere on grounds of incapacity. Otherwise, if the proceedings were to concern a person with full legal capacity, the basic premise justifying the jurisdiction of the guardianship court, rather than an “ordinary non-contentious court”, would not apply (Partyk, 2023). In this case, Article 27 § 2 of the Civil Procedure Code, which states that domicile should be established in accordance with the provisions of the Civil Code, would serve as an interpretative guideline for defining the term “domicile”, in line with the exact wording of Article 25 of the Civil Code. Pursuant to this article, the domicile of a natural person (including a person who is totally incapacitated) is a place where that person stays and takes up permanent residence. This solution appears reasonable due to the legislator's

clearly articulated intention of protecting the person concerned. However, it leads to complications in determining the existence of a person's domicile.

The second solution seems to be simpler, although, to a certain extent, it undermines the general concept of protecting the interests of a totally incapacitated person as such, and it does not eliminate problems with establishing that person's domicile. In this solution, the provisions of Article 27 § 2 of the Civil Procedure Code redirect jurisdiction from the court competent for the person affected by the proceedings to the court competent for that person's guardian. This assumption follows directly from the provisions of Article 27 § 2 of the Civil Procedure Code which state that the domicile shall be determined in accordance with the provisions of the Civil Code. These provisions not only provide guidelines for interpreting this concept, but they also lead to changes in the court's scope of jurisdiction. Under Article 27 of the Civil Code, a person under guardianship has the same domicile as the guardian. Consequently, the court with exclusive jurisdiction to hear the guardianship case of a totally incapacitated person is the guardianship court competent for the guardian's domicile. This provision refers to a totally incapacitated adult (Bagan-Kurluta, 2023). At the same time, pursuant to the provisions of Art. 27 § 2 of the Civil Procedure Code in relation to Article 25 of the Civil Code, the general local jurisdiction of the court is not determined by the defendant's registered address, but by the address where the defendant has their permanent residence (Decision of the Supreme Court of May 3, 1973, I CZ 48/73, LEX No. 7250). On the other hand, an incapacitated person's current or future registered address, their intentions regarding the place of permanent residence, as well as the fact that the guardian and the person under guardianship occupy the same premises or reside in the same town are of no significance (Judgment of the Supreme Administrative Court of 12 June 2003, V SA 529/02, Legalis). The above implies that a totally incapacitated person does not have to live with a guardian and the relationship between them can only be legal and not factual (Bagan-Kurluta, 2023).

Both solutions call for the need to interpret the term "domicile": an incapacitated person's domicile in the first solution, and the guardian's domicile in the second solution. At the same time, domicile is neither a legal relationship nor a right; therefore, its existence cannot be established based on the provisions of Article 189 of the Civil Procedure Code (Bagan-Kurluta, 2023). On the other hand, the court may request that the parties provide the address of the occupied dwelling where they intend to take up permanent residence (Bagan-Kurluta, 2023).

In domestic cases, an analysis of the domicile concept pursuant to the provisions of Article 25 of the Civil Procedure Code leads to the adoption of a concept that is composed of two elements: an objective element (*corpus/fact*) and a subjective element (*animus/intention*) as the place where the person stays (*corpus*) and takes up permanent residence (*animus*). Therefore, the literal wording of Article 25 of the Civil Code, which finds support in case law and doctrine, implies that the habitation entails a specific locality – a dwelling or a town (Judgment of the Supreme Court of June 7, 1983, II UR 4/83, Legalis).

It should be emphasized that in a general sense, including in cases with a foreign element, the *corpus* is interpreted as physical presence (habitation) in a place, whereas the *animus* is the intention to occupy that place not temporarily, but for a longer period of time, potentially permanently, and to make that place the center of one's daily life activities. A place may be a locality, a town, a state or a legal area, or a specific location with an address (Bagan-Kurluta, 2023). The above implies that in domestic cases, the emphasis is placed on the domicile aspect which binds a person to a given dwelling or location. According to the Supreme Administrative Court, permanent habitation in a specific location entails a certain state of consciousness, namely the intention to take up permanent residence (Decision of the Supreme Administrative Court of 10 February 2009, I OW 165/08, Legalis). The mere separation of objective and subjective elements, where the latter is attributed to permanence or constancy, raises doubt as to whether a totally incapacitated person is capable of conceiving

and articulating such an intention or manifesting their state of awareness through their behavior. In the opinion of the Supreme Administrative Court, the intention of permanent residence is apparent from a person's behavior and, consequently, specific behaviors reflect upon a person's state of awareness (Decision of the Supreme Administrative Court of 19 April 2012, I OW 19/12). According to S. Kalus, as a result of such behaviors, a given locality should become the stable center of a person's daily life activities (Kalus, 2018). This view was confirmed by the ruling of the Supreme Administrative Court which stated that intention results from a person's behavior and leads to the establishment of a location where that person's daily life activities are centered. However, the extent to which a person's state of awareness is permanent may also be called into doubt. The court may question whether a totally incapacitated person is in a position to permanently acquire or manifest an intention, or whether irrational or moment-driven behavior should be interpreted as authoritative for determining the existence of domicile. This issue is problematic, and it leads to different interpretations. According to P. Nazaruk, the concept and expression of intention contains elements of will (Nazaruk, 2023). In the opinion of S. Grzybowski, a natural person neither chooses nor establishes their domicile, but merely occupies a specific place with the intention of taking up permanent residence because the existence of domicile is predicated on intention, not will; therefore, the provisions concerning legal capacity cannot be applied to assess intention (Grzybowski, 1985). The second concept has been confirmed by case law, and it postulates that an individual's decision to choose their domicile acquires legal significance *ipso facto*, without the intention of producing legal effects. The expression of intention is not a legal act, and it does not constitute or require a declaration of will.

Intention should be examined within a broader temporal perspective. Habitation is a permanent, although not necessarily continuous factor, and it relates to the intention to establish permanent, rather than temporary or occasional, residence (Judgment of the Regional Administrative Court

in Gdańsk of 17 May 2017, I SA/Gd 1743/16, Legalis). However, this premise is not entirely apparent in the light of Article 25 of the Civil Code which relies on the concept of permanent residence to emphasize the subjective element in the definition of domicile. The concept of permanent residence has not been defined in civil law, and it was used only once in the Civil Code and twice in the Civil Procedure Code (in one case, as an incorrect translation of an excerpt from the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980) (Journal of Laws of 1995 No. 108, item 528, as amended) in place of habitual residence. In contrast, permanent residence has been defined in administrative law (*Population Registration Act*) as an act of dwelling in a specific location at a specified address with the intention of taking up permanent residence, which adds nothing to the interpretation of the concept in guardianship cases and further obfuscates the situation. The term "residence" (not preceded by the adjective "permanent") has not been formally defined in the Civil Code or the Civil Procedure Code, but it is widely used in the latter act and has been defined in the legal doctrine. Residence can be defined as the "physical presence" in a given place without the intention to establish permanent residence (Grzybowski, 1985). However, this approach has attracted some criticism (Bagan-Kurluta, 2023).

## COURT PROCEEDINGS

In the presented case, the District Court for the Capital City of Warsaw was regarded as the competent court because the guardian of the totally incapacitated person resides in the USA. The court with jurisdiction over an action exceeding the scope of ordinary administration over the incapacitated person's property should assess whether the guardian's application deserves to be granted, i.e. whether the property should be sold or leased in view of the incapacitated person's life situation. In the first correspondence, the court requested that the applicant submit, within 14 days from the date of receipt of the request, an appraisal of the property owned by the

totally incapacitated person (or document its value by other means), a copy of the land and mortgage register pertaining to the property in question (or the number of the land and mortgage register), and indicate the asking price of the property described in the application, for the action to be brought before court. A custodian was appointed to act on behalf of the incapacitated person, and the custodian was requested to file a response to the application and submit any evidence therein within two weeks on pain of preclusion. Pursuant to the provisions of Article 183 of the Act of 25 February 1964 – Family and Guardianship Code (Journal of Laws, 1964, No. 9 item 59, as amended; hereinafter referred to as the Family and Guardianship Code), a custodian may be appointed if a totally incapacitated person is absent, but the legal representative of that person's guardian is present during the proceedings. A custodian may be appointed for a disabled person pursuant to Article 184 (a custodian for an absent person) and Article 147 of the Family and Guardianship Code (a custodian replacing a legal representative). However, pursuant to Article 181 of the Family and Guardianship Code, a custodian is appointed for a partially incapacitated person, whereas a guardian is appointed by the court for a totally incapacitated person. Consequently, the logical conclusion is that a person who has received one form of protection does not need another. The Family and Guardianship Code does not explicitly provide for such a possibility (Łukasiewicz, 2014). The fact that Article 183 of the Family and Guardianship Code, which states that a custodian may be appointed for a disabled person who needs assistance in managing all personal affairs or specific types of affairs or settling a particular matter, does not provide a legal basis for the above is not obvious, especially in relation to the postulated changes concerning incapacitation and the terminology defining persons whose condition justifies incapacitation.

According to J. Gajda, a state of mental impairment (caused primarily by age) that cannot be classified as a mental illness under the provisions on incapacitation may be regarded as a disability pursuant to Article 183 of the Family and Guardianship Code (Gajda, 2023).

According to S. Jastrzemska's analysis of Article 600 of the Civil Procedure Code, which provides the procedural basis for appointing a custodian for an individual affected by an impairment, a state of mental infirmity, in particular due to age, which does not qualify as mental illness, mental retardation, or any other type of mental disorder that justifies legal incapacitation (Articles 13 and 16 of the Civil Code) constitutes an impairment within the meaning of Article 183 of the Family and Guardianship Code. In such a case, to protect the procedural interests of an impaired person, the adjudicating court may take steps to appoint a custodian for that person, as indicated by Article 183 of the Family and Guardianship Code (Jastrzemska, 2023). On the other hand, in the UN Convention on the Rights of Persons with Disabilities of 13 December 2006 (Journal Laws of 2012, item 1169), any type of impairment or disability, including mental, is referred to as disability, whereas medical terminology does not give grounds for incapacitation in civil law. One may also analyze the legitimacy of Article 184 of the Family and Guardianship Code, which provides for the appointment of a custodian to protect the rights of a person who cannot conduct their affairs due to absence, does not have a proxy, or when the absentee's proxy cannot perform his or her duties or performs them improperly. However, in the discussed case, there is no rationale for applying these provisions or requesting that the custodian establishes the whereabouts of an absent person and notifies them the state of their affairs. On the other hand, Article 147 of the Family and Guardianship Code provides a legal basis for protecting a person under guardianship or their property, but these measures are only temporary and cover the period of the guardianship proceedings – the custody terminates when the incapacitated person is placed under guardianship (Gajda, 2023). Therefore, the optimal solution would be to base the decision on appointing a custodian on Articles 145 § 2 and 178 of the Family and Guardianship Code or on Articles 99 § 1 and 155 § 2 of the Family and Guardianship Code. In the first case, Article 145 § 2 of the Family and Guardianship Code authorizes

the guardianship court to establish a guardianship immediately and in all cases (which is evident from the expression “as soon as”) when such a measure is legally justified. In turn, Article 178 § 2 of the Family and Guardianship Code makes a reference to guardianship to the extent that is not regulated by the provisions concerning the establishment of custody and their application. This solution was adopted by the Supreme Administrative Court in a case concerning the legal necessity to appoint a custodian in administrative court proceedings, where the procedural capacity of a party was questioned (Decision of the Supreme Administrative Court of December 2, 2015, II FSK 2968/15, *Legalis*). In turn, Article 99 § 1 of the Family and Guardianship Code, which refers to a child in parental care who cannot be represented by either parent, authorizes the court to appoint a custodian to represent the child. In turn, in the light of Article 155 §2 of the Family and Guardianship Code, the provisions on parental authority can be applied to guardianship. Due to potential conflict of interest, Article 99 § 1 of the Family and Guardianship Code (Ignaczewski, 2014) states that the court can appoint a custodian if the guardian is deemed unable to represent an incapacitated person. This scenario applies in the discussed case.

Subsequently, the guardian and the incapacitated person’s brother were questioned during pending proceedings, but instead of requesting legal aid from the Consul of the Republic of Poland, the court forwarded a list of questions and requested that the parties forward the answers by a set date. The rule postulating that an incapacitated person’s legal representative and, in more important cases, relatives should be heard before a lawsuit is decided on the merits of the case applies equally to children and persons under guardianship (Flaga-Gieruszewska, 2023).

After more than a year, the court requested that the applicant provide within two weeks information on the costs of maintaining the property in question, the costs of the incapacitated person’s stay in a care institution, and the rental prices of similar properties. The applicant was also asked to justify the claim that

the sale of property would better protect the incapacitated person’s interests than a rental agreement, and to provide documentation backing up this claim, with a reservation that these claims could be disregarded in evidence. The custodian was also given the opportunity to comment on the possible rental of the property.

In its final ruling, the court authorized the applicant to conclude a contract for the sale of residential property on behalf of the totally incapacitated person for the price specified in the order which was not lower than the price indicated by the court. In addition, the applicant was legally obliged to deposit the proceeds from the sale of the property in the totally incapacitated person’s bank account and to provide the court with a report on the undertaken actions, a copy of the notarial deed certifying the sale of the property, within one month of its execution, as well as the receipts, bank transfer statements, and a bank statement certifying that the funds were deposited in the totally incapacitated person’s bank account.

## **IMPLEMENTATION OF THE OBLIGATIONS IMPOSED BY THE COURT**

In its decision to authorize the sale of the property, the court placed the applicant under a number of obligations to ensure that the totally incapacitated person’s interests were duly protected. The purpose of these obligations was to exercise control over the transaction, to ascertain that the transaction was executed at the indicated price, and that the proceeds were deposited in the incapacitated person’s bank account. These control measures seem justified provided that the price indicated in the court order did not differ from the price achievable on the real estate market, which could change during the lengthy court procedure. It should also be noted that opening a bank account for a totally incapacitated person is not a standard banking procedure, and most banks do not provide such an option. The property transaction would be conducted in Poland; therefore, the incapacitated person’s guardian would have to be represented by a proxy (attorney), which posed

an additional problem. The power of attorney would need to be notarized with an apostille certifying the content of the document to conduct the property transaction and to open a bank account on behalf of the totally incapacitated person.

## RESULTS AND CONCLUSIONS

Incapacitation can be both a form of protection and a difficulty, in particular civil cases involving parties with limitations or residing in different jurisdictions. To expedite the proceedings, to ensure that the legally incapacitated person was not left unattended during the proceedings, and to prevent a decrease in the value of the property, the court to which the application was originally submitted (which did not have jurisdiction over the subject of action and referred the case to the Warsaw court) could have applied Article 569 § 2 of the Civil Procedure Code. This article states that in cases of emergency, the guardianship court should issue the necessary orders *ex officio*, even with regard to persons who do not fall within its local jurisdiction, and should notify the guardianship court with local jurisdiction. In the analyzed case, the court disregarded the obligation to apply conflict rules *ex officio*, which casts doubt on the correctness and legality of the issued judgment.

An analysis of the provisions relating to incapacitated persons, guardianship, and custody points to the absence of a logical and interconnected system of legal solutions that would effectively protect incapacitated persons and prevent unauthorized real estate transactions.

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