

# IMPLICATIONS OF SPECIAL GUARDIANSHIP ON THE REPRODUCTIVE RIGHTS OF ADULTS WITH DISABILITIES IN USA AND ROMANIA

Larisa-Diana ONEA\*

## Abstract

*Special guardianship is a civil law measure of protection which may be instituted where a vulnerable adult suffers a total and, where appropriate, permanent impairment of his or her mental faculties and who needs to be continuously represented in the exercise of his or her rights and freedoms. Establishing such a civil law protection measure for an adult suffering from intellectual and psycho-social disabilities entails a number of major legal consequences.*

*This study aims to analyse what are the implications of special guardianship on the reproductive rights of adults with disabilities and whether Romanian legislation in this area, amended in 2022 by the entry into force of Law no. 140/2022, provides sufficient guarantees to protect the reproductive rights of adults with disabilities.*

*In order to understand whether the Romanian legislation provides sufficient safeguards to protect the reproductive rights of adults with disabilities who benefit from a civil law protection measure, this study uses a comparative look between the Romanian legislation and the USA legislation.*

*In USA, the reproductive rights of people with disabilities are an important and complex concern, involving both legal and social issues. Roe v. Wade, a landmark US Supreme Court decision issued on January 22, 1973, recognized a woman's right to choose to terminate a pregnancy, holding that prohibiting abortion in most cases violates the privacy rights protected by the 14<sup>th</sup> Amendment to the US Constitution. The ruling was based on the argument that women have the right to make decisions about their own bodies, and that state restrictions on abortion were unconstitutional. In 2022, Roe v. Wade was overturned in Dobbs v. Jackson Women's Health Organization, leaving the regulation of abortion in the hands of the states.*

**Keywords:** *vulnerable adults, disabilities, special guardianship, reproductive rights, conservatorship, guardianship.*

## 1. Introduction

In the two States under review, special guardianship has significant implications for the reproductive rights of people with disabilities. Persons with disabilities often face legal and social barriers that limit their access to sexual and reproductive health services. In the case of special guardianship, a person appointed to represent the legal interests of a person with a disability may influence reproductive decisions, raising concerns about their rights and autonomy.

In the US, the implications of special guardianship on the reproductive rights of people with disabilities are:

- **loss of reproductive autonomy:** in many cases, a person under guardianship does not have the right to make autonomous decisions about his or her health, including the right to choose to become a parent, to have an abortion, or to use contraceptive methods; the decisions of this person may be made by the legal guardian, who may have his or her own beliefs that go against the wishes of the person with a disability;
- **limited access to reproductive care:** people with disabilities may have difficulties in accessing reproductive health care. For example, certain health services, including sex education or family planning counselling, may be limited or non-existent in institutions providing care for people with disabilities;
- **discrimination and stigmatization:** people with disabilities are often victims of discrimination related to their ability to become parents; special guardianship can amplify this discrimination, and society may underestimate their parenting skills, seeing them as incapable of making informed decisions or caring for a child;
- **legal rights and protection from abuse:** in some cases, there are concerns that the special guardian may violate the reproductive rights of a person with a disability by imposing decisions that do not reflect their wishes. People under guardianship are also often more vulnerable to abuse, including reproductive abuse, such as being

---

\* PhD Candidate, Faculty of Law, „Nicolae Titulescu” University of Bucharest (e-mail: onealarisadiana@gmail.com).

forced to make certain reproductive decisions or to undergo surgery such as forced sterilization.

In USA, legislation on the reproductive rights of people with disabilities varies from state to state. However, many of these regulations do not provide sufficient protection for the reproductive rights of those under guardianship, as we will see below.

In Romania, „in the context of CCR dec. no. 601/2020 regarding the exception of unconstitutionality of the provisions of art. 164 para. (1) CC, a legislative reform was obviously necessary. After approximately 2 years from the ruling on the unconstitutionality of the provisions of art. 164 para. (1) CC by the CCR, the Romanian Parliament adopted Law no. 140/2022 which amended the legislation regarding the measures to protect people with intellectual and psychosocial disabilities.”<sup>1</sup>

At the same time, in Romania, special guardianship can have a significant impact on the reproductive rights of people with disabilities, limiting their autonomy and access to reproductive care. Although there is a legislative framework that protects their rights, a legislative framework improved by the entry into force of Law no. 140/2022, in practice, people with disabilities do not enjoy the possibility to exercise their right to sexual and reproductive health.

## 2. Special guardianship of persons with disabilities in USA

In order to understand the USA legal regulations concerning special guardianship, it is necessary to understand the concept of disability and the laws governing the rights of people with disabilities.

USA legislation is significantly concerned with the rights of people with disabilities. One of the most important laws in this regard is the Americans with Disabilities Act (ADA)<sup>2</sup>, enacted on July 26, 1990 by President George H.W. Bush. ADA is a landmark law that prohibits discrimination against people with disabilities in public accommodations, the workplace and transportation.

ADA was amended in 2008 by the ADA Amendments Act (ADAAA), which expanded the definition of „disability” to include a broader spectrum of medical conditions and strengthened protections against discrimination.

After reenactment, the ADA was published in volume 42 (referred to as „Title 42”) of the US Code. A small portion of ADA is also found in Title 47 of the US Code. Because the numbering system is different in the US Code, the titles indicate in parentheses the ADA title numbers in the form in which they were originally enacted.

ADA marked a significant moment in civil rights history, helping to promote inclusion and equality for people with disabilities in American society. It has had a profound impact on accessibility in various areas of life, including education, work and services.

The main purposes of ADA are: (i) prohibition of discrimination [the ADA prohibits discrimination against people with disabilities in several areas, including employment, public services (including public transportation), public places (such as restaurants, hotels, and stores), and housing]; (ii) accessibility (the law states that workplaces and public services must be accessible to people with disabilities, including in buildings, access routes, and other public facilities); (iii) reasonable accommodations (employers must make reasonable accommodations in the workplace to enable employees with disabilities to carry out their responsibilities; these accommodations may include changes in work schedules, access to special equipment or modifications to the work environment).

In terms of scopes, ADA applies to: workplaces (employers with 15 or more employees must comply with the law, which prohibits discrimination in hiring, promotion, and other workplace-related matters<sup>3</sup>), public services (all government agencies, as well as educational institutions, must ensure that they offer accessibility and non-discriminatory services), places of entertainment and commerce (restaurants, theatres and other public places must be accessible and not exclude people with disabilities).

<sup>1</sup> L.-D. Onea, *Protection of the adult through judicial counselling and special guardianship. General considerations and aspects of comparative law*, in CKS Journal 2024 „Nicolae Titulescu” University Publishing House, International Conference– CKS 2024 – Challenges of the Knowledge Society, Bucharest, May 17<sup>th</sup> 2024, 17<sup>th</sup> ed., p. 222-223.

<sup>2</sup> Americans with Disabilities Act of 1990, as Amended, available at <https://www.ada.gov/law-and-regs/ada/>.

<sup>3</sup> Subpart C – Employment, §35.140 Employment discrimination prohibited, available at <https://www.ada.gov/law-and-regs/regulations/title-ii-2010-regulations/#35140-employment-discrimination-prohibited>.

Another US law that regulates the situation of people with disabilities is the Individuals with Disabilities Education Act (IDEA)<sup>4</sup>. This law guarantees the educational rights of children with disabilities by ensuring that they have access to an appropriate and individualized public education. Section 1400 (Short title; findings; purposes) of the Act emphasizes that *„Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”*<sup>5</sup>

IDEA plays a critical role in ensuring equitable education for children with disabilities, promoting inclusion and supporting their academic and social development. Analyzing the content of the statutory regulation, we note that IDEA focuses on:

- evaluation and identification: IDEA provides procedures for the evaluation and identification of children with disabilities, ensuring that children with disabilities are properly identified and evaluated to determine educational needs;
- individualized Education Plan (IEP): a crucial component is the development of an IEP for each child with disabilities. IEP is a document that sets out the specific educational goals, accommodations needed, support services and responsibilities of each party involved;
- the right to education in integrated environments: IDEA promotes the idea that children with disabilities should be educated, as far as possible, alongside their non-disabled peers, promoting integration in mainstream educational settings;
- services and support: the law provides access to various support services, such as occupational therapy, speech therapy, psychological counselling and other interventions that can help improve a child's functioning and learning;
- parental participation: IDEA encourages parents' involvement in their children's education by ensuring their right to active participation in IEP meetings and decisions related to their children's education;
- monitoring and enforcement: monitoring and enforcement mechanisms are in place to ensure that schools comply with the law, including the possibility for parents to request legal remedies if they believe their child's rights are not being respected.

Also, another US federal law that aims to promote the independence and integration of people with disabilities into society is the Rehabilitation Act of 1973. This was one of the first laws to prohibit discrimination on the basis of disability in programs and activities carried out by the federal government and organizations receiving federal funds. The Rehabilitation Act focuses on:

- Section 504: this is one of the most important aspects of the law, which prohibits discrimination against people with disabilities in any program or activity that receives federal funds, i.e., schools, hospitals, universities, and community organizations;
- accessibility: the law requires entities receiving federal funds to ensure accessibility for people with disabilities, referring to accessibility of buildings, educational programs, and public services;
- rehabilitation services: the act provides a framework for the provision of vocational rehabilitation services, including education and vocational training, to help people with disabilities develop their skills and gain employment;
- providing life skills training for people with disabilities: the law supports programs that provide life skills training, helping people with disabilities to become as independent as possible;
- providing resources: the law focuses on creating rehabilitation centers and programs that provide information and resources for people with disabilities so that they know their rights and have access to the support they need.<sup>6</sup>

Therefore, analyzing the statutory provisions set forth above, we note that the term „disability” has been defined in Title 42 – The Public Health and Welfare, Chapter 126 – Equal Opportunity for Individuals with Disabilities, Section 12101 – Definition of disability of the ADA as follows:

*«The term „disability” means, with respect to an individual—*

<sup>4</sup> Individuals with Disabilities Education Act (IDEA), available at <https://sites.ed.gov/idea/about-idea/>.

<sup>5</sup> Definition of disability, available at <https://sites.ed.gov/idea/statute-chapter-33/subchapter-i/1400>.

<sup>6</sup> Rehabilitation Act of 1973, available at <https://www.eeoc.gov/rehabilitation-act-1973>.

(A) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) A record of such an impairment; or

(C) Being regarded as having such an impairment (as described in para. (3)).

(3) Regarded as having such an impairment

For purposes of para. (1) (C):

(A) An individual meets the requirement of „being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Para. (1) (C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.»<sup>7</sup>

The term „substantially limits” is interpreted *lato sensu* and is not a demanding standard. Obviously, not every medical condition meets this standard. However, there are a wide variety of disabilities, and ADA regulations do not list them all.

Thus, disabilities are often categorized into: (i) physical disabilities, which include problems with mobility, such as difficulty walking or using limbs (e.g., paralysis, amputations); (ii) cognitive disabilities which refer to difficulties with information processing, memory or reasoning (e.g., attention deficit disorder, dementia and other intellectual disorders); (iii) sensory disabilities, i.e., visual and hearing impairments (people with visual impairments may have complete or partial visual problems and people with hearing impairments may have difficulty hearing various sounds); (iv) mental disabilities, which include mental disorders that affect emotional well-being and behavior (e.g., depression, anxiety, schizophrenia and personality disorders).

In USA, special guardianship of persons with disabilities is governed by state law, and each state has its own laws and regulations concerning guardianship. It is also defined by two terms: conservatorship and guardianship. However, there are significant differences between the two terms depending on the law of the states. According to Legal Information Institute, «a conservatorship is the appointment of a conservator by the court to manage a **person's affairs** who is unable to handle them due to their mental capacity, age, or physical disability. The person under the conservatorship is referred to as „conservatee”»<sup>8</sup> and „guardianship refers to the legal role given to an individual to manage the **personal activities** (guardian of the person) or resources of another person (guardian of the estate) who cannot properly do so on their own. (...) Given that guardianship transfers legal responsibilities from one person to another, state laws regulate when and how they are used and vary greatly”.<sup>9</sup> In the state of New Jersey, the difference between conservatorship and guardianship is as follows: „a legal guardian can make a wide range of personal and medical decisions for the person in their care while a conservatorship generally grants much more limited decision-making powers. A conservator usually only has the authority to pay bills, make investments, and handle other financial matters”.<sup>10</sup> California law governs both conservatorship and guardianship. The difference between the two institutions is significant: „Conservatorship is the arrangement where one adult is appointed to manage the affairs of another adult who is unable to care for themselves. Guardianship refers to the legal authority of adults to care for the finances and physical well-being of children”<sup>11</sup>.

In the light of the above, we note that, in principle, guardianship focuses on the personal welfare and health-related decisions of the disabled adult and the minor, while conservatorship deals with the financial matters and the management of the disabled adult's assets. Thus, in guardianship, the authority extends to care decisions, while in conservatorship, the authority focuses on financial asset management:

<sup>7</sup> Definition of disability available at <https://www.ada.gov/law-and-regs/ada/>.

<sup>8</sup> Available at <https://www.law.cornell.edu/wex/conservatorship>.

<sup>9</sup> Available at <https://www.law.cornell.edu/wex/guardianship>.

<sup>10</sup> What Are the Differences Between Guardianships & Conservatorships?, Bratton Estate and Elder Care Attorneys, available at <https://www.brattonlawgroup.com/faqs/what-are-the-differences-between-guardianships-and-conservatorships/>.

<sup>11</sup> Anthoor Law Group, A Professional Corporation, Guardianship vs. Conservatorship in California, available at <https://anthoorlawgroup.com/guardianship-vs-conservatorship-in-california/>.

Institution	Guardianship	Conservatorship
Subject matter	Control over day-to-day decisions	Control over financial decisions
To whom it is imposed	Of a ward who is a minor (minor under the age of 18)	Of an incapacitate adult
Period of time	Until they come of age	Until the conservatorship is lifted

Thus, a guardian is an individual or entity, such as a private party, family member, or state employee, who is appointed by a court to make some or all decisions for an adult deemed to have diminished decision-making capacity. Guardianship is designed to protect individuals with disabilities from coercion and exploitation and is essentially an extension of the state's *parent's patriate* responsibilities. Proceedings for guardianship can be initiated by any interested party, including the disabled individual in certain states. However, the criteria for determining diminished decision-making ability, who qualifies as a guardian, and the specific duties and limitations of guardians can vary by jurisdiction.

A court may appoint a guardian to manage an adult's estate, personal affairs, or both. Many jurisdictions also allow for limited guardianships, where the guardian's authority is restricted to specific areas, though this option is often underused. The court decides which decisions the guardian can make, which decisions the individual retains control over, and which decisions require additional court approval.

### 3. Special guardianship of people with disabilities in Romania

In Romania, Law no. 448/2006 defines disability in art. 5 as „the generic term for impairments/impairments, activity limitations and participation restrictions, defined according to the International Classification of Functioning, Disability and Health, adopted and approved by WHO, and which reveal the negative aspect of the individual-context interaction”.

In Romania, there are two types of guardianship for adults with disabilities, namely legal counseling and special guardianship. These care measures can only be ordered by the court if the disabled person of full age is unable to look after his or her own interests because he or she suffers from a deterioration (temporary or permanent, partial or total) of mental faculties. This impairment is established following a medical and psychosocial assessment.

Therefore, from the analysis of art. 164 CC, we note that the measure of legal counselling is ordered when the deterioration of the mental faculties of the vulnerable adult is partial and he requires continuous counselling in the exercise of his rights and freedoms, and an adequate protection cannot be achieved by the measure newly introduced in the Civil Code by Law no. 140/2022, namely assistance in the conclusion of legal acts. By contrast, special guardianship is ordered when the deterioration of the vulnerable adult's mental faculties is total and, where appropriate, permanent, and he or she requires ongoing representation in the exercise of his or her rights and freedoms, and adequate protection cannot be achieved by instituting legal counselling or by seeking assistance in the conclusion of legal acts.

Also, the restriction, *i.e.*, the deprivation of the capacity of exercise of the adult with disabilities, concerns only the legal acts highlighted by the guardianship court in the judgment as those for which the guardian's consent/representation is required. Therefore, for other acts that are not mentioned in the judgment of the

guardianship court, the capacity to exercise the legal capacity of the adult person is not affected as a result of the introduction of the civil-law guardianship measure.

However, to what extent is the autonomy of the person with disabilities affected by the establishment of these care measures? Art. 104 CC, amended by Law no. 140/2022 to be in line with the principles stipulated by CRPD, emphasizes that these measures of protection of the person with disabilities are applied solely in the interests of the person with disabilities, taking into account his/her capacity to exercise his/her rights and fulfill his/her obligations relating to his/her person and property. At the same time, the protective measures applied to a vulnerable adult and the decisions concerning his/her person must guarantee respect for his/her dignity, rights and freedoms, as well as his/her will, needs and preferences, while protecting his/her autonomy. Protective measures for a vulnerable adult shall be applied for as short a period of time as possible, only when necessary, proportionate to the degree of impairment of mental capacity and tailored to the needs of the protected person and the specific circumstances of the protected person.

The Committee on the Rights of Persons with Disabilities (hereinafter, the Committee), the body of independent experts that monitors the implementation of CRPD by States Parties, also provides in General comment no. 5 on art. 19 – the right to live independently and be included in the community<sup>12</sup> a clearer understanding of the concept of autonomy. Thus, the Committee states that the general principles of CRPD, in particular respect for the inherent dignity, autonomy and independence of the person, and full and effective participation and integration in society, are the foundation of the right to live independently and be included in the community. Furthermore, in its General comment no. 5 on art. 19 the Committee states that „independent living/living independently means that individuals with disabilities are provided with all necessary means to enable them to exercise choice and control over their lives and make all decisions concerning their lives. Personal autonomy and self-determination are fundamental to independent living, including access to transport, information, communication and personal assistance, place of residence, daily routine, habits, decent employment, personal relationships, clothing, nutrition, hygiene and health care, religious activities, cultural activities and sexual and reproductive rights.”

In General comment no. 1 on art. 12 – Equal recognition before the law<sup>13</sup>, the Committee distinguishes between the legal capacity of the disabled person and the mental capacity of the disabled person. Specifically, the Committee states that legal capacity is „the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)”, and that mental capacity refers to „the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.” The Committee also stresses that „legal instruments such as the Universal Declaration of Human Rights (art. 6), the International Covenant on Civil and Political Rights (art. 16) and the Convention on the Elimination of All Forms of Discrimination Against Women (art. 15) do not specify the distinction between mental and legal capacity”, but art. 12 CRPD clearly emphasizes that expressions such as „unsoundness of mind” and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency). Under art. 12 CRPD, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.»

Therefore, in relation to art. 12 para. (4) CRPD, the Committee emphasizes that this paragraph sets out the appropriate and effective safeguards that any system must provide in support of the exercise of legal capacity to ensure conformity with the rights, wishes and preferences of persons with disabilities. Support or assistance in decision-making for persons with disabilities should not justify limiting other fundamental rights of persons with disabilities, such as the right to vote, the right to marry, the right to consent to intimate relationships and medical treatment, reproductive rights, parental rights etc.

In the light of the legal provisions set out above, we find that autonomy is based on the terms of freedom of choice and full recognition of that freedom.

Therefore, according to Law no. 140/2022, a person with disabilities cannot be restricted in the exercise of his/her personal rights, even if he/she has impaired mental faculties. Thus, the protected adult is recognized as having a natural capacity, a capacity which is materialized in the decisions concerning his or her private life which he or she must take at a given moment in time.

<sup>12</sup> Available at <https://www.ohchr.org/en/treaty-bodies/crpd/general-comments>.

<sup>13</sup> *Ibidem*.

In civil law, depending on the criterion of how the civil legal act is concluded, legal acts are categorized into strictly personal acts (such as marriage, will etc.) and acts which are also concluded by a representative. These legal acts are intimately linked to the person who concludes them and can be grouped into health-related acts concerning the human body of the disabled person, acts concerning the private life of the disabled person, family-related acts concerning the life and family relations of the disabled person.

As indicated above, the law recognizes this natural capacity of persons with disabilities to consent when entering into strictly personal acts. Therefore, there is a presumption of consent of the disabled person when concluding strictly personal acts.

This study focuses in particular on the legal acts concluded by the disabled person in health, private and family matters. In this context, it is necessary to clarify to what extent the autonomy of the disabled person is affected when concluding such personal acts.

It is important to emphasize that art. 23 CRPD<sup>14</sup> stipulates the measures to be taken in matters relating to marriage, family, parenthood and interpersonal relations of persons with disabilities.

The Civil Code, the common law branch to all branches of law, lays down the following principles in health matters: the right to self-determination (art. 60 CC), the guarantee of the rights inherent to the human being (art. 61 CC), the inviolability of the human body (art. 64 CC), the prohibition of certain patrimonial acts on the human body (art. 66 CC). For example, art. 68 CC stipulates in para. (1) that: „the removal and transplantation of organs, tissues and cells of human origin from living donors shall be carried out exclusively in the cases and under the conditions provided for by law, with their free, prior and express written consent and only after they have been informed in advance of the risks of the intervention. In all cases, the donor may withdraw the consent given up to the time of removal”, and in para. (2) emphasizes that: „the removal of organs, tissues and cells of human origin from minors and from living persons who are deprived of their faculties of judgment owing to a mental handicap, a serious mental disorder or for any other similar reason is prohibited, except in the cases expressly provided for by law”. Therefore, in such a case, the law expressly provides that the person lacking discernment due to a mental handicap/serious mental disorder and the minor are presumed by law (relative presumption) to be incapable of expressing their will, and therefore do not have the natural capacity to make such medical decisions regarding the removal/transplantation of organs/tissues/cells of human origin from living donors.

There are also provisions on health, privacy and family matters and in special laws, such as Law no. 46/2003 outlining rules on patient information and consent, Law no. 95/2006 containing inter alia provisions on medical decisions to be taken in certain situations and provisions on the medical or health services contract, Law no. 487/2002 containing provisions on the protection of individuals with mental disorders. In the field of health, reading the provisions of Law no. 46/2003, we notice that the rule is that the personal consent of the patient is required for obtaining medical information (art. 7<sup>15</sup> and art. 9<sup>16</sup> of the law), respectively for any medical

---

<sup>14</sup> „1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

a. The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

b. The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

c. Persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.”

<sup>15</sup> Art. 7: „The patient has the right to decide whether he or she still wishes to be informed if the information given by the doctor would cause him or her distress.”

<sup>16</sup> Art. 9: „The patient has the right to expressly ask not to be informed and to choose another person to be informed in his place.”

intervention (art. 13<sup>17</sup> of the law). If this consent cannot be given because of the patient's serious health condition, the law provides that the patient's previous consent shall be taken into account (art. 14<sup>18</sup> of the law). The law stipulates situations in which the patient's consent must be given expressly by the patient, excluding the possibility of the patient's representative giving consent (art. 18<sup>19</sup> of the law), but also situations in which consent can be given by exception by the patient's representative (art. 19<sup>20</sup> of the law). It is important to point out that the law stipulated above concerns the notion of representative *lato sensu*. More specifically, art. 1 letter f) of the law stipulates that „a legal representative means the spouse, children, parents or other relatives up to the fourth degree of kinship of the patient, the guardian, as well as any person of at least 18 years of age whom the patient designates for this purpose by a declaration made in an authenticated form, which is registered in the National Notarial Register of powers of attorney and their revocations and which shall contain the rights provided by law that may be exercised by the representative.” We note that the above-mentioned law opts for the preservation of the natural capacity of the person with a disability to make decisions concerning his or her private life, and that the consent of his or her legal representative is required only in exceptional circumstances.

Law no. 487/2002 clarifies, in art. 5, some terms that are of interest in the present study, namely what is meant by person with mental disorder and person with serious mental disorder<sup>21</sup>, mental capacity<sup>22</sup>, mental disability<sup>23</sup>, consent<sup>24</sup>, discernment<sup>25</sup>, legal representative and conventional<sup>26</sup>. At the same time, art. 11 states that „mental health assessment is made with the free, informed and informed consent of the person, except in specific situations, established by law, when the person being assessed has difficulty in assessing the implications of a decision for him/herself, in which case the person being assessed must be assisted by a legal representative or by a representative by agreement.” We note that also according to these legal provisions, the rule is the consent of the person with mental disorder, and the exception is the consent of the representative. According to art. 29 para. (1) of the law for „the establishment and implementation of the therapeutic program the psychiatrist is obliged to obtain the consent of the patient and to respect the patient's right to be assisted in giving consent”. However, para. (2) of the same article provides that such treatment may be instituted by the psychiatrist without obtaining the consent of the person with mental disorder when: „(a) the patient's behavior represents an imminent danger of harm to himself or others; (b) the patient lacks the mental capacity to understand the state of the illness and the necessity of instituting medical treatment and does not have a legal representative or is not accompanied by a conventional representative; (c) the patient is a minor or under a restraining order, in which case the psychiatrist is obliged to seek and obtain the consent of the legal representative.” Moreover, the psychiatrist „shall establish diagnostic and treatment procedures that he/she deems necessary for a limited period of time to resolve the emergency” and when the consent of the

<sup>17</sup> Art. 13: „The patient has the right to refuse or to stop a medical intervention, assuming, in writing, responsibility for his decision; the consequences of refusing or stopping medical acts must be explained to the patient.”

<sup>18</sup> Art. 14: „When the patient is unable to express his or her will, but an emergency medical intervention is necessary, the medical personnel has the right to infer the patient's consent from a previous expression of the patient's will.”

<sup>19</sup> Art. 18: „The patient's consent is mandatory for the collection, storage, use of all biological products taken from his body, in order to establish the diagnosis or treatment with which he agrees.”

<sup>20</sup> Art. 19: „The consent of the patient is obligatory in the case of his/her participation in clinical medical education and scientific research. Persons who are not capable of expressing their will may not be used for scientific research, unless consent is obtained from their legal representative and the research is also carried out in the patient's best interest.”

<sup>21</sup> „(a) a mentally disturbed person shall mean a person who is mentally unbalanced or mentally underdeveloped or dependent on psychoactive substances, whose manifestations fall within the diagnostic criteria in force for psychiatric practice;

b) a person with severe mental disorder means a person with a mental disorder who is unable to understand the meaning and consequences of his or her behaviour, so that he or she requires immediate psychiatric help”.

<sup>22</sup> «(h) „mental capacity” means the attribute of the mental state to be compatible, at a given moment, with the exercise of rights and freedoms».

<sup>23</sup> «(i) „mental handicap” means the inability of a person with a mental disorder to cope with life in society, the situation resulting directly from the presence of the mental disorder».

<sup>24</sup> „(j) consent shall mean the agreement of the person with mental disorder, if he or she is not of sound mind, or of his or her legal representative or representative by agreement, as the case may be, to the admission, diagnosis and treatment procedures; it must be free of any constraint and preceded by full information in accessible language, showing the advantages, disadvantages and alternatives to the procedures concerned, and reconfirmed whenever necessary or at the initiative of the person concerned”.

<sup>25</sup> «(k) „discernment” means the component of mental capacity which refers to a specific act and from which derives the ability of the person concerned to appreciate the content and consequences of that act».

<sup>26</sup> «(m) „legal representative” means the person appointed, according to the legislation in force, to represent the interests of a person with mental disorder;

n) „Conventional representative” means a person who agrees to assist or represent the interests of a person with mental disorder, in accordance with art. 45 para. (1)».



representative of the person with mental disorder is not/cannot be obtained [art. 29 para. (3) of the law]. However, these situations shall be notified and submitted to the commission provided for in art. 61 para. (1) of the law. Para. (4) of the same article also stipulates that „if the doctor does not have information on the existence and identity of the legal or conventional representative referred to in para. (3), he shall immediately inform the guardianship authority or, in the case of minors, the general directorate for social assistance and child protection of the administrative-territorial unit in which the patient has his domicile or residence or, if these are not known, those in whose administrative-territorial unit the medical facility is located.” Therefore, the consent of the legal representative is required for the person benefiting from the special guardianship measure in order to administer treatment.

Law no. 95/2006 stipulates, as a rule, the consent of the individual to medical acts performed in order to undergo preventive, diagnostic and treatment methods that present risks for the patient. According to art. 661 of the above-mentioned law „the legal age for giving informed consent is 18 years. Minors may express their consent in the absence of their parents or legal representative in the following cases: a) emergency situations, when the parents or legal representative cannot be contacted and the minor has the necessary discernment to understand the medical situation in which he/she finds him/herself; b) medical situations related to the diagnosis and/or treatment of sexual and reproductive problems, at the express request of the minor over 16 years of age”. Therefore, it is not clear whether letter b) of art. 661 also applies to persons benefiting from the legal guardianship (who have, according to the law, restricted capacity to exercise the acts resulting from the court judgment establishing the legal guardianship), but it is clear, according to this law, that the person benefiting from the legal guardianship of the special guardianship is required to give consent to the person or his/her legal representative in medical situations related to the diagnosis and/or treatment of sexual and reproductive problems.

Thus, in most situations concerning medical acts, the autonomy of the person with disabilities is relative, and the aim is to protect them effectively by preventing them from giving consent. Also, „the lack of access to the removal of cells, tissues, organs for therapeutic purposes, including sperm removal for the conception of a child or donation for the conception of a child, and the prohibition to donate cells, tissues, organs, are contrary to the principle of recognition of the autonomy of the disabled adult and the prohibition of any discrimination on the basis of disability, as provided for in Law no. 140/2022.”<sup>27</sup>

In matters of privacy, art. 174 para. (7) CC provides that „the guardian shall not have the right to prevent the correspondence, social relations or choice of profession of the person under guardianship. Disagreements shall be settled by the guardianship court, with the hearing of the person under guardianship”, so in this situation the autonomy of the disabled person is absolute.

In family matters, Law no. 140/2022 amended art. 276 CC, which stipulated that „it is forbidden to marry the mentally alienated and the mentally debilitated”, because this impediment to marriage was discriminatory and contravened art. 23 CRPD. More specifically, art. 23 CRPD enshrines two essential substantive conditions for the conclusion of marriage: marriageable age (marital capacity – special capacity to marry) and full and free consent. However, „in the light of the Convention, mental disability cannot per se constitute a condition incompatible with the status of married person.”<sup>28</sup> Therefore, in interpreting the provisions of the CRPD, we emphasize that the limitation of capacity to exercise the capacity to exercise the capacity to marry or the lack of capacity to exercise that capacity cannot constitute an impediment to marriage, but persons suffering from mental disabilities may enter into marriage if they meet the age of marriage requirement and if they can express free and full consent. Since marriage is an eminently personal act and falls within the scope of the principle of personal autonomy of the person benefiting from a protection measure, the (mental) illness of one of the future spouses, or the institution of a protection measure with an impact on civil capacity cannot be such as to restrict the fundamental right to marriage. The current art. 276 CC (thus after the amendment made by Law no. 140/2022) stipulates the hypothesis in which the person in respect of whom the measure of legal counseling or special guardianship has been instituted may conclude the marriage, emphasizing that he/she „shall notify in writing in advance the guardian under whose protection he/she is, of the marriage declaration, the latter being able to file an objection to the marriage under the conditions of the law”. We emphasize that the lack of

<sup>27</sup> L. Tec, R. Constantinovici (coord.), *Ocotirea majorului – Reforma legislativă realizată prin Legea nr. 140/2022*, Solomon Publishing house, Bucharest, 2023, p. 326.

<sup>28</sup> M. Avram, *Impactul Convenției ONU privind drepturile persoanelor cu dizabilități asupra căsătoriei (în perspectiva modificării Codului civil)*, in *Revista Română de Drept Privat* no. 3-4/2021, p. 15.

notification of the guardian is not sanctioned in any way, not even with relative/absolute nullity. However, art. 375 para. (3) CC stipulates that „divorce by agreement of the spouses cannot be admitted if one of the spouses benefits from legal counseling or special guardianship”.

Also in family matters, with regard to access to medically assisted human reproduction with a third-party donor, art. 442 para. (1) CC stipulates that „parents who, in order to have a child, wish to have recourse to medically assisted reproduction with a third-party donor must give their consent in advance, in conditions that ensure complete confidentiality, before a notary public who will expressly explain the consequences of their act with regard to filiation”.

We conclude that, in family matters, strictly personal acts predominate. In this respect, the person benefiting from a protection measure is presumed to have the natural capacity to take decisions concerning his or her person, but this capacity depends on the discretion of the person under protection, which is assessed at the time of consent. Therefore, the autonomy of the person who benefits from a care measure is subject to medical and psychological assessment according to the methodology approved by Order no. 2128/2022, an assessment that follows the level of understanding, awareness, and externalization of the will of the person with disabilities, and based on the medical and psychological assessment the guardianship court determines whether or not he/she needs support in the formation or expression of his/her will.

## 4. Reproductive rights of persons with disabilities in USA and Romania

### 4.1 Reproductive rights of persons with disabilities in USA

In USA, the reproductive rights of people with disabilities are an important and complex concern, involving both legal and social issues. Although US law provides some protections, actual implementation of these regulations can vary, and reproductive rights are not always clearly mentioned in disability legislation. The ADA does not directly address reproductive rights, but does protect people with disabilities from discrimination.

The reproductive rights of people with disabilities in the USA are influenced by a range of legal, social and cultural factors that affect:

- access to health services: people with disabilities may have difficulty accessing reproductive health services due to physical barriers, lack of trained staff to respond to their needs, or stigmatization;
- respecting consent and autonomy: there are concerns about the right of people with disabilities to exercise control over their own bodies;
- stigmatization and social perceptions: people with disabilities may face prejudice about their ability to be parents or to make reproductive decisions
- access to contraceptives and abortion: recent decisions, such as the overturning of *Roe v. Wade*, may influence access to abortion for all people, including those with disabilities.

*Roe v. Wade* is a landmark US Supreme Court decision issued on January 22, 1973<sup>29</sup>. The decision recognized a woman's right to choose to terminate a pregnancy, holding that the ban on abortion in most cases violates the right to privacy protected by the 14<sup>th</sup> Amendment of the US Constitution<sup>30</sup>. The decision was based on the argument that women have the right to make decisions about their own bodies, and that state restrictions on abortion were unconstitutional. *Roe v. Wade* has had a profound impact on abortion law in the United States and has generated intense debate on the ethics and legality of abortion.

Afterwards, in 2022, *Roe v. Wade* was overturned in *Dobbs v. Jackson Women's Health Organization*<sup>31</sup>, leaving the regulation of abortion in the hands of the states. Therefore, *Dobbs v. Jackson Women's Health Organization* is a decision handed down by the US Supreme Court on June 24, 2022, which overturned the

<sup>29</sup> *Roe v. Wade*, 410 U.S. 113 (1973), no. 70-18, US Supreme Court, argued December 13, 1971, reheard October 11, 1972, decided January 22, 1973, 410 U.S. 113, case-law available at <https://supreme.justia.com/cases/federal/us/410/113/>.

<sup>30</sup> AMENDMENT XIV, Passed by Congress June 13, 1866, ratified July 9, 1868, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”, available at <https://www.archives.gov/founding-docs/amendments-11-27>.

<sup>31</sup> *Dobbs v. Jackson Women's Health Organization et al. Certiorari to the United States Court of Appeals for the Fifth Circuit*, no. 19-1392. Supreme Court of the United States, argued December 1, 2021, decided June 24, 2022, available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf).

precedent set by *Roe v. Wade* in 1973. The case was based on a Mississippi law that banned abortion after 15 weeks of pregnancy, except in cases of medical emergency or where the pregnancy was the result of rape or incest. The Supreme Court ruled that the Constitution does not guarantee the right to abortion and ruled that the authority to regulate abortion rests with the states. This decision had a significant impact as it allowed states to impose restrictions or even outright bans on abortion, leading to a diversity of legislation across the different US states regarding access to abortion services.

Regarding abortion and sterilization decisions, in the US „*laws establishing a guardian's authority to consent to abortion or sterilization are often unclear and inconsistent because the authority for a guardian to consent to abortion or sterilization is not always memorialized by statute. Each jurisdiction applies its own statutes and case-law. For example, in Texas, guardians cannot consent to abortion or sterilization on behalf of individuals under their guardianship at all. Other jurisdictions, such as the District of Columbia, only allow guardians to consent to abortions or sterilizations on behalf of the adult after further judicial proceedings. (...) Illinois, Pennsylvania, and Minnesota, have also adopted their own standards regarding whether to sterilize individuals under guardian-ship, many of which rely upon the holding in Hayes.*“<sup>32</sup>

Furthermore, in case-law *In re Hayes*<sup>33</sup>, Washington established a standard for determining whether an abortion or sterilization should occur for someone under guardianship, though the case specifically involved a minor. The court set forth criteria for sterilizing a minor with diminished decision-making ability, requiring the petitioner to prove by clear and convincing evidence that the individual: (1) cannot make an informed decision about sterilization, (2) is unlikely to be able to in the future, (3) is physically capable of procreation, (4) is likely to engage in sexual activity that could lead to pregnancy, and (5) has a disability making it impossible to care for a child. Also, the petitioner must show that: (1) all less drastic contraceptive options, such as supervision or education, are ineffective, (2) sterilization is the least invasive method, (3) current medical advances do not offer reversible alternatives, and (4) scientific progress may soon provide a treatment for the disability. Procedurally, the individual must be represented by a neutral guardian *ad litem*, the court must receive an independent evaluation of the individual's medical, psychological, and social circumstances, and, whenever possible, the court must consider the individual's wishes.

In *In re Grady*<sup>34</sup>, the court ruled that the decision on whether sterilization is in the best interest of a person with intellectual disabilities should be made by a judge, not a guardian. The court established similar criteria to those in case-law *In re Hayes* and applied a clear and convincing evidence standard, as outlined in *Addington v. Texas*<sup>35</sup>.

It is important to underline that in the United States are many laws that allow forced sterilization of disabled people. Specifically, „*31 states and Washington, D.C., have laws allowing forced sterilization of disabled people. Under these laws, a judge can decide whether to sterilize someone. This happens when the judge thinks the disabled person cannot make the decision on their own. The judge can order the sterilization if they think it is the best choice for the disabled person. The rest of the states and territories do not have laws about forced sterilization. In most of these states, it is not clear if the law allows forced sterilizations. (...) In states that do not have laws, forced sterilizations might still be happening to people under guardianship. This is because many*

<sup>32</sup> Marissa Ditekowsky, *Choice at Risk: The Threat of Adult Guardianship to Substantive and Procedural Due Process Rights in Reproductive Health*, point E, available at <https://www.nlg.org/nlg-review/article/choice-at-risk-the-threat-of-adult-guardianship-to-substantive-and-procedural-due-process-rights-in-reproductive-health/>.

<sup>33</sup> *In re Hayes*, 93 Wn.2d 228 (1980), 608 P.2d 635, *In the Matter of the Guardianship of EDITH MELISSA MARIA HAYES*, no. 45612, The Supreme Court of Washington, En Banc, March 27, 1980, case-law available at <https://law.justia.com/cases/washington/supreme-court/1980/45612-1.html>.

<sup>34</sup> *In re Grady*, 85 N.J. 235 (1981), 426 A.2d 467, *IN THE MATTER OF LEE ANN GRADY*, The Supreme Court of New Jersey, argued September 8, 1980, decided February 18, 1981, case-law available at <https://law.justia.com/cases/new-jersey/supreme-court/1981/85-n-j-235-0.html>.

<sup>35</sup> *Addington v. Texas*, 441 U.S. 418 (1979), no. 77-5992, US Supreme Court, argued November 28, 1978, decided April 30, 1979 is a landmark US Supreme Court case that set a legal standard for civil commitment procedures, specifically regarding the mental competency of individuals. In this case, the Court ruled that the „clear and convincing evidence“ standard must be used when determining whether a person should be involuntarily committed to a psychiatric facility. The case involved an individual, Addington, who was facing involuntary commitment to a mental hospital. The Court held that the standard of proof required in such cases was higher than the „preponderance of the evidence“ standard, which is typically used in civil cases, but not as high as the „beyond a reasonable doubt“ standard used in criminal cases. The decision emphasized the importance of protecting individual rights, ensuring that a person's liberty could only be restricted based on solid evidence that they met the criteria for commitment. This ruling was significant in safeguarding the due process rights of individuals facing mental health commitments, requiring a higher level of proof before someone could be deprived of their freedom. The clear and convincing evidence standard has since been applied in other areas of law, including cases involving sterilization or other invasive procedures. Case-law available at <https://supreme.justia.com/cases/federal/us/441/418/>.

*guardians have a lot of power to make health care decisions for people under guardianship. They usually do not need to ask a judge before deciding what health care someone gets. In states that do not have forced sterilization laws, some guardians might be treating sterilization like any other type of health care. They might decide to have someone sterilized without asking a judge first. So, judges in these states might not even know about it when it happens.”*<sup>36</sup>

For example, the states of Iowa<sup>37</sup> and Nevada<sup>38</sup> adopted forced sterilization laws in 2019.

In 1927, the Supreme Court was asked whether there were any issues with these US laws that allow forced sterilization of disabled people in the case *Buck v. Bell*<sup>39</sup>. The Court ruled that such laws were permissible, stating that forced sterilization could be legal as long as proper procedures were followed beforehand. For instance, individuals facing forced sterilization had to be given an opportunity to present their reasons to a judge as to why they opposed the procedure.

Also, some states in the US allow forced sterilizations on disabled children (people under the age of 18) and some do not, more specifically:

- 3 states ban forced sterilizations on disabled children: (Connecticut, California, Vermont);
- 17 states say that it is allowed (Arkansas, Colorado, Delaware, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, North Dakota, South Carolina, Utah, Virginia, Washington, and Wyoming);
- 11 states and Washington, D.C., do not say anything about it;<sup>40</sup>
- regarding guardianship, some states in the US (Arkansas, Colorado, Hawai‘i, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Nebraska, New Hampshire, Pennsylvania, Utah, Virginia, Washington, Wyoming, Washington, D.C) say that only people under guardianship can be forced to be sterilized and some states (California, Connecticut, Delaware, Georgia, Idaho, Indiana, Maine, Maryland, New Jersey, New York, North Dakota, Ohio, South Carolina, Vermont) say people can be sterilized even if they are not under

<sup>36</sup> The National Women’s Law Center, *Forced Sterilization of Disabled People in the United State*, January 24, 2022, p. 15-16, available at <https://nwl.org/resource/forced-sterilization-of-disabled-people-in-the-united-states/>.

<sup>37</sup> Iowa Code 2025, Section 633.635 (51, 2), –, 633.635 Responsibilities of guardian. 3. A guardian may be granted the following powers which may only be exercised upon court approval:

b. Consenting to the following:

(1) The withholding or withdrawal of life-sustaining procedures from the protected person in accordance with chapter 144A or 1440.  
(2) The performance of an abortion on the protected person.

(3) The sterilization of the protected person.” – law available at <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=HF610>.

<sup>38</sup> CHAPTER 159 - GUARDIANSHIP OF ADULTS –, NRS 159.0806 Approval of court required before guardian may consent to sterilization of protected person; conditions for approval.

1. A guardian shall not consent to the sterilization of a protected person unless the guardian applies to the court for the authority to consent to the sterilization and obtains such authority from the court.

2. Unless an attorney or a guardian ad litem has already been appointed, after a guardian applies to the court for the authority to consent to the sterilization of a protected person, the court shall appoint:

(a) An attorney to represent the protected person; and  
(b) A guardian ad litem to make recommendations on behalf of the protected person.

3. The court must conduct a full evidentiary hearing before authorizing the guardian of the protected person to consent to the sterilization.

4. The court may authorize a guardian to consent to the sterilization of a protected person only if the court finds by clear and convincing evidence that the sterilization is in the best interest of the protected person. Before the court grants such authority to a guardian, the court must consider whether any less irrevocable and intrusive means of contraception would be suitable (Added to NRS by 2019, 84); law available at <https://www.leg.state.nv.us/nrs/nrs-159.html#NRS159Sec0806>.

<sup>39</sup> *Buck v. Bell*, no. 292 274 U.S. 200 (1927), US Supreme Court, argued April 22, 1927, decided May 2, 1927, was a US Supreme Court case that upheld the constitutionality of forced sterilization laws. The case involved a woman named Carrie Buck, who was institutionalized at the Virginia Colony for Epileptics and Feeble-minded. She was ordered to be sterilized under a Virginia law that allowed the sterilization of individuals deemed to be “unfit” to reproduce, based on their mental condition. Carrie Buck’s sterilization was approved by the state after she was labelled as “feeble-minded”, despite her claim that she was not mentally incompetent. Her case reached the Supreme Court, where Justice Oliver Wendell Holmes Jr. delivered the majority opinion, ruling that forced sterilization did not violate the US Constitution. The Court reasoned that such laws were permissible, provided they followed certain procedures, and it concluded that sterilization could be a valid means of preventing the reproduction of individuals considered to be genetically inferior. Justice Holmes famously wrote, “Three generations of imbeciles are enough”, justifying the procedure under the idea that it would benefit society by preventing the birth of children with similar conditions. This decision legally validated eugenics-based policies, which led to widespread forced sterilizations in the United States, particularly targeting marginalized populations, including those with disabilities. *Buck v. Bell* is often cited as a dark chapter in American legal history, and its legacy is controversial, given its support for eugenic practices and its violation of individual rights. The decision has never been explicitly overturned, though eugenics-based sterilization laws have been largely discredited and abandoned; case-law available at <https://supreme.justia.com/cases/federal/us/274/200/>.

<sup>40</sup> The National Women’s Law Centre, *Forced Sterilization of Disabled People in the United State*, January 24, 2022, p. 34, available at <https://nwl.org/resource/forced-sterilization-of-disabled-people-in-the-united-states/>.

guardianship;<sup>41</sup>

- according to statistics from The National Women's Law Centre: „Between 2006 and 2010, doctors sterilized almost 150 women in prison in California; Some judges have pressured people into getting sterilized by telling them that they would get less jail time; Until 2020, a doctor pressured or forced women to get sterilized in an immigration detention center (a type of prison where the government forces some immigrants to stay).”<sup>42</sup>;

- it is important to note that the United Nations, in its report entitled „Sexual and reproductive health and rights of girls and young women with disabilities” of July 14, 2017, underlined that „sterilization neither protects them against sexual violence or abuse nor removes the State's obligation to protect them from such abuse. Forced sterilization is an unacceptable practice with lifelong consequences on the physical and mental integrity of girls and young women with disabilities that must be immediately eradicated and criminalized.”<sup>43</sup>;

- so, state guardianship laws primarily address reproductive decision-making in the context of sterilization; some states completely prohibit guardians from consenting to sterilization, except in cases of medical necessity; others allow guardians to petition the court for permission to authorize sterilization; these varied and often unclear approaches to sterilization decision-making under guardianship statutes offer little certainty about the rights of adults under guardianship and provide few definitive limits for guardians;

- another situation where the consent of women with disabilities is affected is abortion; women with disabilities who become pregnant can face legal actions aimed at forcing them to terminate their pregnancy; legal cases in this area often focus on whether the woman is capable of providing meaningful consent and whether abortion would be in her best interest; in these cases, abortion may be pursued if there is concern that pregnancy, childbirth, and parenting could cause significant harm to the woman; the rationale behind a guardian or caretaker seeking court-ordered abortion authority often mirrors arguments found in sterilization cases; specifically, they may argue that women with disabilities are more vulnerable to sexual assault, which increases the likelihood of pregnancy;

- for example, *Department of Children & Families, Division of Youth & Family Services v. T.B.*<sup>44</sup> is a legal case that involved the rights of a woman with disabilities in relation to reproductive decision-making and the state's role in intervening in her choices. In this case, the New Jersey Division of Youth and Family Services (DYFS) sought to have a woman, T.B., undergo an abortion against her will. T.B. was a woman with intellectual disabilities, and the state argued that she was unable to make an informed decision regarding her pregnancy. The case centered on whether the state could override T.B.'s right to make decisions about her pregnancy and whether she had the capacity to consent to an abortion. The court ruled that, while the state had an interest in protecting the health and well-being of individuals under guardianship or with disabilities, the woman's constitutional rights to make decisions about her reproductive health were paramount. The court held that the state could not compel an abortion without clear and convincing evidence that T.B. lacked the ability to make such a decision herself. This case highlighted the complexities of balancing the rights of individuals with disabilities against the state's interests in protecting them from harm, especially when it comes to reproductive rights. It also emphasized the importance of ensuring that individuals with disabilities have the opportunity to make informed decisions, whenever possible, about their own health and reproductive choices. The court's decision reinforced the principle that, in such cases, any intervention by the state must meet a high standard of proof and must respect the individual's constitutional rights;

- *In re Guardianship of J.D.S. v. Department of Children and Families*<sup>45</sup> is a legal case that involves the rights of a woman with disabilities in relation to her reproductive decision-making, specifically regarding the question of whether a guardian can consent to an abortion on behalf of an individual under guardianship. In this case, J.D.S. was a woman with intellectual disabilities, and the Florida Department of Children and Families (DCF) sought court authorization for her guardian to consent to an abortion on her behalf. The case focused on whether J.D.S. was capable of making an informed decision about her pregnancy and whether her guardian,

<sup>41</sup> *Idem*, p. 56.

<sup>42</sup> The National Women's Law Centre, *Forced Sterilization of Disabled People in the United State*, *op. cit.*, p. 24.

<sup>43</sup> United Nations, *Sexual and reproductive health and rights of girls and young women with disabilities*, July 14, 2017, p. 12, report available at <https://docs.un.org/en/A/72/133>.

<sup>44</sup> *Department of Children & Families, Division of Youth & Family Services. v. T.B.* (A-21-10) (066294), argued February 28, 2011, decided August 8, 2011, Supreme Court of New Jersey, case-law available at <https://law.justia.com/cases/new-jersey/supreme-court/2011/a-21-10-opn.html>.

<sup>45</sup> *In re GUARDIANSHIP OF J.D.S. Jennifer Wixtrom v. Department of Children and Families*, no. 5D03-1921., 5D03-1921, Florida District Court of Appeals, case-law available at <https://case-law.vlex.com/vid/in-re-guardianship-of-886483243>.

acting in her best interest, could consent to the abortion. The Florida court, in its decision, emphasized the importance of respecting the individual rights of persons with disabilities, particularly their constitutional right to make reproductive choices, including the decision to terminate a pregnancy. The court ruled that, because J.D.S. was unable to provide informed consent due to her intellectual disability, the guardian could seek permission for the abortion. However, the court also made it clear that such decisions must be carefully scrutinized to ensure that they are made with the individual's best interests in mind, and the decision should not be taken lightly. The court highlighted the necessity for a thorough examination of the woman's capacity to make decisions and emphasized that any action taken should align with her rights and dignity. This case illustrates the complex legal and ethical issues surrounding reproductive rights for individuals with disabilities, particularly when it comes to guardianship and the role of the court in determining what is in the best interest of the individual. It also underscores the importance of ensuring that any medical decisions involving individuals with disabilities are made with careful consideration of their rights and well-being;

- *Lefebvre v. North Broward Hospital District*<sup>46</sup> is a legal case that centers on the issue of whether a guardian has the authority to make decisions regarding reproductive health for an individual under guardianship, specifically in the context of sterilization. In this case, the plaintiff, Lefebvre, was a woman with developmental disabilities who had been placed under a legal guardianship. The guardian sought court approval to consent to a sterilization procedure on Lefebvre. The issue in the case was whether a guardian could authorize a sterilization without the woman's explicit consent and, if so, under what conditions. The court ruled that, under Florida law, a guardian does not have the authority to consent to a sterilization procedure for an individual under guardianship without following specific procedures and obtaining court approval. The decision emphasized that sterilization is a significant and irreversible medical procedure, and thus, requires heightened scrutiny and careful consideration of the individual's rights and well-being. The case highlighted the complex legal and ethical concerns surrounding reproductive rights for individuals with disabilities, especially when those individuals are under guardianship. It reinforced the principle that any decision affecting a person's fundamental rights, including reproductive rights, must be made with careful attention to their best interests and should include due process protections to ensure that the individual's rights are upheld. In the end, the court's ruling underscored the importance of legal safeguards to prevent the potential for abuse or coercion when making decisions about reproductive health for individuals who may be unable to make those decisions themselves due to their disabilities;

- the case *In re Jane Doe*, 533 A.2d 523 (R.I. 1987)<sup>47</sup> is a decision by the Supreme Court of Rhode Island involving the issue of parental consent for an abortion for a minor. In this case, a 15-year-old minor (Jane Doe) sought to obtain an abortion but was unable to obtain the consent of at least one parent. She petitioned the court to allow her to undergo the procedure without parental consent, under the legal doctrine of judicial bypass. The court held that a minor has the right to obtain an abortion without parental consent if the minor demonstrates to the court that she is sufficiently mature to make the decision independently, or if the court finds that the abortion is in the minor's best interests. The decision in this case addressed the application of the judicial bypass procedure, allowing minors to have access to abortion services even when parental consent is not available, provided they meet certain criteria set by the court. The case is significant because it underscores the balancing act between a minor's right to make personal decisions regarding reproductive health and the state's interest in parental rights and the protection of minors. The court also elaborated on the procedural standards and the role of the judiciary in deciding whether a minor can bypass parental consent;

- therefore, analyzing the case-law set out above, we conclude that women with disabilities are especially vulnerable to biased care standards, coercion, and false information regarding their reproductive rights. Courts have made rulings related to the capacity to consent to procedures such as sterilization and abortion, as well as the role of a guardian in making reproductive health decisions in the individual's best interests;

- thus, in US, guardianships limit the ability of disabled individuals to make their own decisions, including those related to reproductive health care.

<sup>46</sup> *Lefebvre v. North Broward Hosp. Dist.*, no. 90-1985, 566 So.2d 568 (1990), District Court of Appeal of Florida, Fourth District, august 22, 1990, case-law available at <https://www.leagle.com/decision/19901134566so2d5681957>.

<sup>47</sup> *In re Jane DOE*, no. 87-374-Appeal, 533 A.2d 523 (1987), Supreme Court of Rhode Island, case-law available at <https://law.justia.com/cases/rhode-island/supreme-court/1987/533-a-2d-523.html>.

## 4.2. Reproductive rights of people with disabilities in Romania

In Romania, in the *National Strategy on the Rights of Persons with Disabilities „A Fair Romania”, 2022-2027 elaborated by NAPRPD within the MLSS*, a statistic<sup>48</sup> on the reproductive rights of persons with disabilities is included. Also, among the specific objectives of this national strategy we identify Specific Objective 2, which refers to ensuring the realization of the right to sexual and reproductive health (SRH) of persons with disabilities and provides for measures such as:

- 7.2.1. organize in-service training programs on how to adapt the Health Education curriculum to the needs of students with disabilities with a deadline for implementation: 2022-2027 annually;
- 7.2.2. adoption of a national SRH strategy that includes measures to fulfill the right to sexual and reproductive health of persons with disabilities with implementation deadline 2022 (adopted);
- 7.2.3. adoption of practice guidelines for the provision of SRH services to persons with disabilities with implementation deadline 2023 (Guidelines for the provision of SRH services to persons with disabilities developed; Percentage of schools in which the guidelines are distributed – implementation deadline: 2023-2027);
- 7.2.4. inclusion of modern contraceptives on the list of medicines and health devices reimbursed by national public health programs with implementation deadline 2023 (National public health program on modern contraceptives – implemented);
- 7.2.5. amendment of the specific mandatory minimum quality standards for social services in order to introduce the obligation for specialized staff in public and private social services to be specifically trained to provide information and knowledge about the exercise of SRH rights among persons with disabilities with implementation deadline 2022 (Specific mandatory minimum quality standards for social services – amended).<sup>49</sup>

It is important to emphasize that, although some of these measures have been developed/implemented, as outlined in the strategy, this implementation has only been done at a theoretical level, on paper, and not at a practical level. For example, modern contraceptives are not included in the list of medicines and health devices covered by the national public health programs (the Government has not allocated funds in the budget for this purpose).

## 5. Conclusions

In Romania, special guardianship can have a significant impact on the reproductive rights of people with disabilities, limiting their autonomy and access to reproductive care. While there is a legislative framework in place to protect their rights, this framework needs to be improved to ensure that people with disabilities can make their own decisions about their reproductive health and to prevent abuse. The person who is the beneficiary of a protective measure is presumed to have the natural capacity to make decisions about his or her person, but this capacity depends on the discernment of the person under guardianship, which is analysed at the time of consent. Therefore, the autonomy of the person who benefits from a guardianship measure is subject to medical and psychological assessment according to the methodology approved by Order no. 2128/2022,

<sup>48</sup> „The resources (information, education, services) for exercising the right to sexual and reproductive health available to people with disabilities are limited. Among women of reproductive age (15-49 years) with limitations, 26% reported that the decision to use contraception was primarily their own and 36% reported that it was a joint decision that they made with their partner. In comparison, 36% of women without limitations say they make contraceptive decisions on their own. The proportion of women who make contraceptive decisions on their own is higher in urban areas and the more educated they are. The use of contraceptive methods by sexually active women in the last two years was reported in similar proportions by both limited (16%) and unlimited (20%) respondents. 16% of women with limitations and 14% of women without limitations reported that they do not have the freedom to refuse sexual intercourse with their partner. Access for people with disabilities to information and education, access to the same range of SRH services, and training of professionals to meet the specific needs of people with disabilities are limited. There are no policy documents to facilitate increased access for people with disabilities to information-education and SRH services or to sensitize and train SRH professionals on the needs of people with disabilities. Children and young people with disabilities have limited access to SRH information and education in schools. Out-of-school interventions also do not target children with disabilities and/or CES or adults with disabilities. People with disabilities do not have access to free contraception. People with disabilities have reduced access to breast and cervical cancer screening and HPV vaccination. Medical and psychosocial staff in disability services are insufficiently trained to provide SRH counselling. Limited access to SRH services is caused not only by structural problems in service provision, but also by a cultural context dominated by prejudice.” (<https://sintact.ro/#/act/17020165?cm=DOCUMENT>).

<sup>49</sup> 2022 National Strategy on Disability Rights „A Fair Romania” 2022-2027, date of act: 06.04.2022, issuer: Romanian Government, available at <https://anpd.gov.ro/web/wp-content/uploads/2022/12/Strategia-nationala-privind-drepturile-persoanelor-cu-dizabilitati-%E2%80%9EO-Romanie-echitabila-2022-2027.pdf>.

which follows the level of understanding, awareness, and externalization of the will of the person with disabilities, and on the basis of the medical and psychological assessment the guardianship court determines whether or not the person needs support in the formation or expression of his/her will.

In US laws governing a guardian's authority to consent to abortion or sterilization are often ambiguous and inconsistent because such authority is not always clearly outlined in statutes. Different jurisdictions have their own laws and case-law on the matter. Numerous US laws permit the forced sterilization of disabled individuals. Specifically, 31 states and Washington, D.C., have laws that allow judges to authorize sterilization if they believe the person cannot make the decision for themselves. The judge can order the procedure if they determine it is in the best interest of the disabled individual. In other states and territories, there are no specific laws on forced sterilization, and it is unclear whether such practices are legally permitted. In states without explicit laws, forced sterilizations could still occur for individuals under guardianship, as many guardians hold significant authority over healthcare decisions for those they care for. Typically, guardians do not need to seek judicial approval before making healthcare choices. In these states, some guardians might treat sterilization as any other healthcare decision, potentially opting for sterilization without consulting a judge. As a result, judges in these areas may not even be aware when such procedures are carried out.

Therefore, in both countries analysed in this study, special guardianship influences the reproductive rights of persons with disabilities. Although at a theoretical level, Romania seems to align itself with the principles stipulated by the CRPD through the adoption of Law no. 140/2022, the practical reality is far from achieving this goal. In the US, people with disabilities may have difficulties accessing reproductive health services due to physical barriers, lack of trained personnel to respond to their needs or stigmatization, there are concerns about the right of people with disabilities to exercise control over their own bodies, people with disabilities may face prejudice related to their ability to be parents or to make reproductive decisions and recent decisions such as the overturning of *Roe v. Wade*, may affect access to abortion for all people, including those with disabilities.

## References

### *Treatises, courses, monographs*

- Boroi, G., Anghelescu, C.A., Nicolae, I., *Fişe de drept civil*, 7<sup>th</sup> ed., revised and added, Hamangiu Publishing House, Bucharest, 2022;
- Constantinovici, R. (coord.), *Ocotirea majorului – Reforma legislativă realizată prin Legea nr. 140/2022*, Solomon Publishing House, Bucharest, 2023.

### *Articles*

- Anthoor Law Group, A Professional Corporation, *Guardianship vs. Conservatorship in California*, available at <https://anthoorlawgroup.com/guardianship-vs-conservatorship-in-california/>;
- Avram, M., *Impactul Convenției ONU privind drepturile persoanelor cu dizabilități asupra căsătoriei (în perspectiva modificării Codului civil)*, in *Revista Română de Drept Privat* no. 3-4/2021;
- Bratton Estate and Elder Care Attorneys, *What Are the Differences Between Guardianships & Conservatorships?*, available at <https://www.brattonlawgroup.com/faqs/what-are-the-differences-between-guardianships-and-conservatorships/>;
- Ditzkowski, M., *Choice at Risk: The Threat of Adult Guardianship to Substantive and Procedural Due Process Rights in Reproductive Health*, available at <https://www.nlg.org/nlg-review/article/choice-at-risk-the-threat-of-adult-guardianship-to-substantive-and-procedural-due-process-rights-in-reproductive-health/>;
- Onea, L.-D., *Protection of the adult through judicial counselling and special guardianship. General considerations and aspects of comparative law*, in *CKS Journal* 2024, „Nicolae Titulescu” University Publishing House, The International Conference – CKS 2024 – Challenges of the Knowledge Society, Bucharest, May 17<sup>th</sup> 2024, 17<sup>th</sup> ed., available at <https://cks.univnt.ro/articles/18.html>;
- The National Women's Law Center, *Forced Sterilization of Disabled People in the United State*, January 24, 2022, available at <https://nwlc.org/resource/forced-sterilization-of-disabled-people-in-the-united-states/>.

### *Legislation*

- 2022 National Strategy on Disability Rights „A Fair Romania” 2022-2027, date of act: 06.04.2022, Issuer: Romanian Government;
- Americans with Disabilities Act of 1990, as Amended;
- Chapter 159 – Guardianship of adults – no. 159.0806, The State of Nevada, available at <https://www.leg.state.nv.us/nrs/nrs-159.html#NRS159Sec0806>;



- Convention of 26 September 2007 on the rights of persons with disabilities;
- Education for All Handicapped Children Act (Public Law 94-142), now known as the Individuals with Disabilities Education Act (IDEA);
- Iowa Code 2025, Section 633.635 (51, 2), available at <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=HF610>;
- Law no. 140/2022 regarding some protection measures for people with intellectual and psychosocial disabilities and the modification and completion of some normative acts;
- Law no. 287/2009 on the Romanian Civil Code (CC);
- Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities (Romania);
- Law no. 46/2003 on patients' rights;
- Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania, no. 409/10.06.2011;
- Order no. 2128/2022 on the approval of the methodology and the report on the medical and psychological assessment of persons with intellectual and psychosocial disabilities in the context of the provision, extension, replacement or lifting of the measure of protection;
- Rehabilitation Act of 1973;
- Romanian Constitution, republished in the Official Gazette of Romania no. 767/31.10.2003;
- The Hague Convention of 13 January 2000 on the international protection of adults;
- United Nations, *Sexual and reproductive health and rights of girls and young women with disabilities*, July 14, 2017, available at <https://docs.un.org/en/A/72/133>.

### Case-law

- *Addington v. Texas*, 441 U.S. 418 (1979), no. 77-5992, US Supreme Court, argued November 28, 1978, decided April 30, 1979, available at <https://supreme.justia.com/cases/federal/us/441/418/>;
- *Buck v. Bell*, no. 292 274 U.S. 200 (1927) US Supreme Court, argued April 22, 1927, decided May 2, 1927, available at <https://supreme.justia.com/cases/federal/us/274/200/>;
- CCR dec. no. 601/2020;
- *Dobbs, State Health Officer of the Mississippi Department of health, et al. V. Jackson Women's Health Organization et al. Certiorari to the United States Court OF Appeals for the Fifth Circuit*, no. 19-1392, US Supreme Court, argued December 1, 2021, decided June 24, 2022, available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf);
- *In Re Grady*, 85 N.J. 235 (1981), 426 A.2d 467, in the matter of Lee Ann Grady, The Supreme Court of New Jersey, argued September 8, 1980, decided February 18, 1981, available at <https://law.justia.com/cases/new-jersey/supreme-court/1981/85-n-j-235-0.html>;
- *In re GUARDIANSHIP OF J.D.S. Jennifer Wixtrom v. Department of Children and Families*, no. 5D03-1921, 5D03-1921, Florida District Court of Appeals, available at <https://case-law.vlex.com/vid/in-re-guardianship-of-886483243>;
- *In Re Hayes*, 93 Wn.2d 228 (1980), 608 P.2d 635, in the Matter of the Guardianship of EDITH MELISSA MARIA HAYES, no. 45612, The Supreme Court of Washington, En Banc, March 27, 1980, available at <https://law.justia.com/cases/washington/supreme-court/1980/45612-1.html>;
- *In re Jane DOE*, no. 87-374-Appeal, 533 A.2d 523 (1987), Supreme Court of Rhode Island, available at <https://law.justia.com/cases/rhode-island/supreme-court/1987/533-a-2d-523.html>;
- *Lefebvre v. North Broward Hosp. Dist.*, no. 90-1985, 566 So. 2d 568 (1990), District Court of Appeal of Florida, Fourth District, august 22, 1990, available at <https://www.leagle.com/decision/19901134566so2d5681957>;
- *Roe v. Wade*, 410 U.S. 113 (1973), no. 70-18, US Supreme Court, argued December 13, 1971, reargued October 11, 1972, decided January 22, 1973, 410 U.S. 113, available at <https://supreme.justia.com/cases/federal/us/410/113/>.

### Websites

- <https://anpd.gov.ro>;
- <https://anthoorlawgroup.com/>;
- <https://lege5.ro>;
- <https://sintact.ro>;
- <https://sites.ed.gov/idea/about-idea/>;
- <https://www.ada.gov/law-and-regs/ada/>;
- <https://www.eeoc.gov/rehabilitation-act-1973>;
- <https://www.law.cornell.edu/>;
- <https://www.who.int>;
- <https://sgg.gov.ro/1/>;
- <https://supreme.justia.com/>;
- <https://www.archives.gov/founding-docs/amendments-11-27>;

- *chrome-extension://efaidnbmnnnibpcajpcgiclfindmkaj/https://www.supremecourt.gov/opinions/21pdf/19-1392\_6j37.pdf*;
- *https://www.nlg.org/nlg-review/article/choice-at-risk-the-threat-of-adult-guardianship-to-substantive-and-procedural-due-process-rights-in-reproductive-health/*.