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LEGAL GUARDIANSHIP OF THE PSYCHIATRIC PATIENT - PSYCHIATRIC AND FORENSIC PERSPECTIVES

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Abstract: *Background and aim.* An interdiction process is a legal process where a court is asked to determine, whether a person is capable, due to an infirmity or an illness, to consistently make decisions regarding his person and/or his property, or to communicate those decisions. If such a finding is made, the court appoints someone to make these decisions for him. Therefore to establish the mental capacity of a person the court will appoint a forensic service to make a full psychiatric expertise. In forensic practice, the psychiatric expertise is a complex activity that has been increasingly sought in recent years due to the awareness of the importance of this expertise in the legal steps to protect the person and his assets. The main reason for these kind of expertise is the objective of putting a person under a judicial ban, generating a conservatorship or a guardianship measure. The main purpose of this study is to present those medical situations with a psychiatric component in which it is necessary to place a person under judicial interdiction and establish a guardianship measure.

Method. We performed a descriptive, restorative, observational study on patients undergoing a forensic psychiatric expertise in a mandatory examination for the establishment of conservatorship or guardianship, during January-December 2017. The cases were selected from the Institute of Legal Medicine Cluj-Napoca database.

Results. From a total of 249 cases registered, 183 cases were subject to judicial interdiction for guardianship measure. The ability to be a capable person implies the integrity of the cognitive intellectual and volitional-cognitive capacities of the mature personality, including discernment. In relation to this definition, we note that the mental capacity in our study, was absent in 88% of the cases, these being also the cases where it was indicated the interdiction procedure in the incapacitated persons, and only in 12% of cases the person's diagnosis did not influenced its mental capacity, the mental capacity being present.

Conclusion. Main psychiatric diagnoses or associated co-morbidities may lead to the interdiction of a person in cases of conservatorship or guardianship. There is an association between psychiatric diagnoses and the age of individuals. The most frequent psychiatric pathologies responsible for putting a person under the ban are severe or moderate mental retardation and mixed dementias or Alzheimer's. The forensic psychiatric expertise is mandatory in cases of judicial interdiction and is a complex interdisciplinary examination.

Key words: psychiatric expertise, court ban, forensic expertise, legal guardian, guardianship.

INTRODUCTION

In our literature, placing a person under interdiction with the establishment of or guardianship measure is a legal concept and is dealt in the judicial field. The forensic and psychiatric implications have an indirect influence on this aspect. The psychiatric forensic expertise is being considered as a complementary but mandatory examination in determining the mental state of a person, if that person is incapacitated or not. Any person can file a petition for judicial commitment that state facts that a person is suffering from a mental illness which contributes or causes that person to be a danger to himself or others or gravely disabled. If, after a court hearing, the judge concludes by clear and convincing evidence that the person is dangerous to himself, dangerous to others, or is gravely disabled as a result of substance abuse or mental illness, the court may render a judgment of commitment to a treatment facility which is medically suitable and the least restrictive of the person's liberty [1].

A full interdict person lacks the capacity to make

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a juridical act. A juridical act is a lawful act or expression of will intended to have legal consequences. For example, a full interdict does not have the capacity to enter into or sign a contract. A limited interdict lacks capacity to make a juridical act pertaining to the property or aspects of personal care that the judgment of limited interdiction places under the authority of his curator. A judgment of interdiction may preserve some rights for the interdict. For different reasons a person can be incapacitated, or as we say it, that persona does not have the exercise capacity of understanding the meanings of his deeds. The exercise capacity is the ability of a person to complete by herself any civil legal acts. The banning action is established to that person that is incapacitated or does not have the exercise capacity due to a medical pathology [2].

As a definition, the banning action is a complex of measures with a civil law enforcement ordered by the court for incapacitated people because of alienation or a mental debility, consisting in the loss of their exercise capacity and subsequently the need for guardianship or conservatorship. Currently, banning is a commonly used way of protecting certain individuals and their property [1]. This protection can be achieved by establishing guardianship, conservatorship or parental protection if we speak of minor persons. To decide whether someone is incapacitated, the court holds a hearing and looks at all the facts. It will find that a person is incapacitated if the facts show that the person cannot: understand the facts about his or hers financial, health care, or living situation well enough to make decisions about any or all of those matters, or clearly communicate his or hers wishes about any or all of those matters. If the court decides to appoint a guardian or conservator for an incapacitated person, the incapacitated person is called the ward. In this article we will refer to the protection of people with certain psychiatric disorders in terms of putting them under a court ban [3].

In Romania the banning action, the conservatorship or guardianship is regulated by the Civil Code, Book I, Title III - which refers to the protection of the individual by Articles 924 to 930. In addition to the protection of persons with psychiatric disorders through the prohibition measure, the Romanian legal system also provides other measures for the protection of the individual, by: Law no. 487/2002 of the mental health and protection of the persons with mental disorders, Law no. 17/2000 of the social assistance of elderly persons, as well as the Law 272/2004 on the protection and promotion of the rights of the child or the Romanian citizenship law no. 21/1991 [4].

Referred to Law 487/2002 on mental health and the protection of persons with mental disorders this represents some certain measures for the protection of persons with psychiatric pathology, these should not be understood as mandatory measures or their need of overlapping with the prohibition requirement, these should be considered as the measures provided by the law that are rather health-related and refer to the need for medical treatment or medical hospitalization in specialized centers. In this respect, the conservatorship or gurdianship is imposed only by the court, whereas the medical institution is obliged to determine the medical treatment and hospitalization of the person by administrative means [5]. At the same time, the prohibition means there is a incapacitated person with the establishment of guardianship or conservatorship, whereas the obligation to treat without the consent of the patient and his or her involuntary internment are not related to the existence or inexistence of his or her mental capacity. However, these different procedural protection measures, prohibition and measures under Law no. 487/2002, having totally different purposes, may nevertheless be applied simultaneously to the same person [6, 7].

As mentioned above, the guardianship is a measure that protects the person and his assets. In relation to individuals and their mental or physical capacity, we have several classification criteria.

Depending on the presence or absence of exercise capacity we distinguish:

- persons without exercise capacity (minors under the age of 14 and persons under judicial interdiction);
- individuals with limited exercise capacity (minors between 14 and 16 years of age);
- individuals with full exercise capacity.

While in Romania, France, England, Republic of Moldova and Switzerland, the individual is considered to have acquired full exercise capacity at the age of 18, in other countries such as Germany, the person is fully capable from the last day of the age of 18 years. In Japan, full exercise capacity occurs at the age of 20, and in the United States, depending on the federal state, the age at which the person increases occurs varies between 18 and 21 years. Virtually all legal systems provide that the individual becomes fully capable of a certain age established by law [8].

The conditions for putting a person under the ban in Romania

Not every person can be placed under a ban, he must meet certain conditions mandatory and

cumulatively. First of all, it is imperative that the person wishing to be placed under interdiction is deprived of his/hers exercise capacity, this quality being proved at trial by a psychiatric forensic expertise at the request of the court [9].

The second criteria refers to the existence of a mental alienation or debility, which must lead to an alteration of the individual's behavior and personality. The probation of alienation or mental debilitation is evident in the psychiatric examination through the same expertise. It should be noted that people with periods of lucidity will also be banned if it is not possible to monitor strictly the applicability of their medical treatment. The moment of occurrence of these disorders is not important in setting the ban, which may be of a genetic nature, existing since the person's birth or later occurring throughout life [1]. Determination of alienation and mental debility is determined by the psychiatrist specialist within the commission of expertise. Mental debility is the pathology with the lightest implications where intellectual and mental deficiency can be seen in the individual's ability to understand, store, generalize and abstract information. It is worth mentioning that physical development is relatively normal with a change only at the level of thinking, having a childish character, and who would not manage in society without the guidance of an adult, even if there are situations where he can earn his own life by doing some activities that do not require advanced thinking [10].

The third criterion is the existence of a causal link between the mental alienation or debility transposed by lack of psychic capacity or mental competence and the inability of the person to self-control his interests or to understand the social and legal consequences of his actions. At the same time, a cause that prevents an individual from self-control for his or her interests, such as illness, old age or physical infirmity, can`t expressly lead to the prohibition. Art.164 paragraph 2 from the Civil Code states that "Minors with limited exercise capacity may also be placed under the ban" [11].

In summary, the incapacitated person to perform mandate acts, to manifest themselves with free will, does not have the psychic capacity of critical judgment on the content and social consequences of his actions, can`t preserve his capacity for self-induction, self-care and administration of own property will be placed under a court order and a conservatorship or guardianship will be named [12].

Interdiction policy

In this moment, there is a low level of protection for the elderly persons that are unable to manage their own goods and to take care of their own interests and for those who have suffered various physical or mental trauma that have resulted in temporary loss or total mental loss of their capacity [13]. These categories of people are the victims of individuals who seek to obtain unlawful benefits having knowledge of the state they are in, even temporarily. Therefore, the banning procedure is strictly regulated to guarantee the rights of the persons involved in the process and to respect the general interest imposed in such situations [10].

The procedure of banning a person has two phases as they are presented in Romanian law, namely the non-contradictory phase, prior to the judgment and the contradictory phase, of the proper judgment. In the first stage the registration of the request for banning can be introduced by any interested person, the president of the court has the responsibility to take measures that this application together with the other documents submitted to the case file be communicated to the prosecutor. The prosecutor is then required to request a specialist medical examination of the health of the person concerned. In this matter, a forensic psychiatric expertise will be required to establish the psychiatric pathology and, at the same time, if that person has the mental capacity to understand the social legal consequences of his deeds. The second procedural phase, namely the contradictory one, of banning, is to deflate an ordinary civilian process, tainted by certain peculiarities. At this stage, the court has the obligation to listen to the person whose ban is required to find out his mental state, from a judge point of view [14].

After receiving the conclusions of the prosecutor, the opinion of the doctors through the psychiatric forensic expertise, the president of the court shall fix the time limit for the trial by summoning the parties involved. Within these deadlines, the participation of the prosecutor is mandatory, as is the hearing of the defendant. If he does not want to be questioned and the court can not take this step but has at this first stage sufficient evidence to prove the mental condition of the person concerned, he can only judge on the basis of whether it is necessary to prohibit him [2]. The contradictory phase is considered to have been concluded with the final ruling on the court ruling. In such a case, the judgment has the effect of prohibiting the person, from the date of its final stay. The court bans affect third parties from the time of the transcription of the judgment in the designated registry, except when

they have been banned otherwise [15].

The court may waive the prohibition if the causes that have provoked the ban have ceased, at the suggestion of the procuration that drew the conclusions requesting the lifting of the measure, considering that it is no longer necessary [16]. The request for lifting the ban may be made by the person who has been banned if he considers that he or she does not meet the necessary criteria, the guardian, or the conservator, the prosecutor or any other person interested in the matter. This means that it is not enough for the mental state to disappear in order to secure the lifting of the measure, but it is necessary for the court to find that all the causes that led to the prohibition have ceased. The procedure for lifting the ban is identical to that of banning, which means that a new psychiatric forensic expertise will be required to assess the person's mental capacity [11].

The notion of guardianship

In Romania this terms of guardianship or conservatorship as they are written in the law mean almost the same thing. In general, guardianship is applicable to a minor who doesn`t have a parental protection, but it can also be applied to people who have no capacity of exercise, who lacks capacity to make a juridical act, meaning, those under the legal prohibition [17]. Guardianship is in fact a responsibility assumed by a person capable, in fact and in law, of having the purpose of ensuring the personal protection of a minor or a ward, to administer his property and the exercise of his civil rights.

Guardianship is a free and, at the same time, mandatory duty, by virtue of which a person called a guardian is called upon to assure and exercise parental or other rights and obligations towards a minor without parental care or against a ward. The law clearly establishes the cases of establishment, appointment of the guardian and his obligations or the circumstances of termination the guardianship [18].

The choice of the guardian's person is not conditional on the existence of special qualities of the guardian, it being sufficient for him to have the full exercise capacity [1]. The principal duties and foundations of the guardian are represented by the protection of the person related to the legal social criteria and the protection of the patrimony of the person concerned. The care of the juvenile or the person under judicial interdiction is classified as property management, representation or assistance in the closure of legal acts with civil implications [19].

The psychiatric forensic expertise

The psychiatric forensic expertise is carried out only within the framework of the forensic medicine institutions at national level, whether it is the regional services or the larger forensic medicine institutes [20]. The forensic examination procedure is generally governed by the Code of Criminal Procedure as far as possible under Article 184.

The psychiatric forensic expertise has as its main purpose the provision of information useful to the judiciary department, the establishment of the mental capacity of a person, the attestation of the mental state of health in the civil legal situations [14]. From a procedural point of view, the psychiatric forensic expertise is carried out in a multidisciplinary commission composed of a forensic physician who is also chairman of the committee and two psychiatrists, mentioning that the examination of minors must necessarily involve a psychiatrist with the specialization of infantile psychiatry [21, 22].

In civil cases, the objectives of the court usually require the establishment of psychiatric or other disorders; if the person examined has the psychic ability to critically assess the social legal consequences of his deeds; if there is a causal link between the psychiatric pathology and the lack of mental capacity; whether the person examined had mental competence at any time, the time of the signature of the act or at the date of the examination; if it is recommended to ban the person examined; if it is recommended to establish guardianship or conservatorship, as the case may be, or if a re-assessment is required at a later date [23].

The forensic psychiatric expertise carried out on the living persons implicitly presupposes the examination of the person, and in this sense the commission carries out a psychiatric examination that presents the mental state of the person concretized through a diagnosis [24] This review records data on the person's mental development, consciousness or impairment of consciousness. With the report of the deed or situation, the committee examines also clothing, hygiene, facial, mimic and pantomime, attitude, verbal contact, dialogue, language, perception, attention, memory, consciousness, affectivity, activity, will and instinct. by methods specific to the psychiatric specialty. In special cases, a psychological examination may be required with the use of tests to indicate the degree of cognitive impairment [25, 26].

After examining the documentation present in the case file and the person, the forensic commission formulates conclusions in response to the objectives submitted by the institution that requested the forensic

report. These conclusions must be concise and answer the questions asked as precisely as possible [27]. First of all, it is mentioned the identification of the person examined with the presentation of his or hers psychiatric pathology or the symptomatological framework [28]. Later, the committee reference is made to the existence or lack of mental capacity. Also, if considered necessary, recommendations can be made as to the need to be placed under a court order, the final decision being within the jurisdiction of the court [15].

MATERIAL AND METHOD

We have performed a retrospective, descriptive, observational study, referring to the guardianship cases registered in 2017 at the Institute of Forensic Medicine in Cluj-Napoca. The forensic characteristics of the psychiatric pathology found in the forensic psychiatric expertise reports were considered.

In this study, only the psychiatric forensic expertise, were taken into account, where a total of 249 cases were recorded, of which 183 cases were subject to judicial interdiction.

Inclusion criteria consisted of forensic psychiatric expertise, the study period was January-December 2017, the main objective of the expertise was the interdiction that needed to be established on major persons, since juvenile expertise does not justify the interdiction them being incapacitated already, without the capacity to exercise his decisions.

The exclusion criteria consisted in other expertise reports or some traumatic forensic reports or other psychiatric forensic expertise, psychiatric forensic certificates, or psychiatric examinations on aggressors in rape offenses.

For the statistical analysis of the study the data from the psychiatric forensic expert reports were compared according to certain parameters as follows: sex, age, forensic goals, environment of origin, psychiatric diagnosis, existence of psychic capacity, commission recommendation of guardianship and implicitly the recommendation to place that person under a court ban, the existence of associated pathologies, IQ value and MMSE in the case of psychological tests, if the person is interned in a placement center and finally if a correlation can be highlighted between all these parameters.

RESULTS

The requirements of psychiatric forensic expertise is steadily increasing, as compared to the annual statistical data of the Romanian National Institute of Forensic Medicine, trying to meet the increasingly demanding requirements from the court institutions. We underline the fact that, as the literature suggests, psychiatric forensic expertise is more frequently encountered in civil matters than in criminal cases. This is evident and supported by the present work, although the case law is limited over a period of one year, where out of a total of 249 expert reports 183 were of a civil nature having the objective of interdiction. This disproportion between the expertise in criminal and civil matters is given precisely by the numerous requests for establishing the exercise capacity of a person, if it is incapacitated, with a desire to establish the interdiction of certain persons. A major limitation of this work is the impossibility of pursuing cases in the legal system in order to be able to compare the recommendations of the forensic expert commission with the final court's decision.

In the case of the general gender distribution, we have a slight predominance of male sex of 55%. This may be due to a more active lifestyle, with more intense mental wear or a more frequent cardio-cerebral pathology, which makes the demands for psychiatric forensic expertise more frequent in these cases.

From the distribution by age of the studied group, the highest incidence is observed in the 20-30 age category, 46 cases where the most common pathology is the mental retardation associated sometimes with sequelae infantile encephalopathy. The age pattern tends to reflect differences in somewhat characteristic psychiatric pathology. In particular, if mental retardation is more common in younger ages, Alzheimer's mixed dementia and vascular disease are specific for older ages where we report a predominance between 70 and 90 years. Concerned is also the high value of the psychiatric expertise performed on people under the age of 20 where 22 cases were recorded.

The distribution according to the environment of origin reveals an increased incidence in the urban 112 cases, related to the rural areas with 71 cases, which are explicable due to the easier access of the urban persons to the services of the Institute of Forensic Medicine and the education of the persons requesting the courts to put under ban a person which requires a forensic expertise for completion.

The mental capacity is a set of mental, cognitive, intellectual, and affective-volitional characteristics of a person that can provide performance in conducting an activity and motivate this activity, determined by personality and degree of maturity and translated

through facts and quantifiable results. The ability to be a capable person implies the integrity of the cognitive intellectual and volitional-cognitive capacities of the mature personality, including discernment. In relation to this definition, we note that the mental capacity in our study, was absent in 88% of the cases, these being also the cases where it was indicated the interdiction procedure in the incapacitated persons, and only in 12% of cases the person's diagnosis did not influenced its mental capacity, the mental capacity being present.

Of the total number of requests for forensic psychiatric expertise compared with the distribution of cases where this measure of interdiction was not imposed, that is those 12%, reported by gender we have a male predominance of 54%. Thus, in the women cases that 46%, there were 2 cases for which the curator was ordered, and in the case of men 5 cases of the curator's recommendation, and in 2 other cases the recommendation was made to remove the patients from the judicial interdiction measure by the improvement of their health state.

DISCUSSIONS

The forensic expert commission determines the characteristics of the mental capacity after the diagnosis established by the person's psychic examination. The lot in this study presented a variety of psychiatric pathologies, of which the most common are Severe Mental Delay, Mixed Dementia, Alzheimer's Dementia and Moderate Mental Delay. The lack of mental capacity, the incapacitated, correlated with these pathologies has been demonstrated to be due to: 33% cases of severe mental retardation/ delay, 25% of mixed dementia and 14% of cases of Alzheimer's Dementia. In practice, these pathologies are frequently associated with other diseases that aggravate or are predisposing factors for these psychiatric pathologies. The distribution of associated pathologies is predominantly the neurological causes most commonly encountered is sequelae infantile encephalopathy.

Of the total associated pathologies, 32 cases were diagnosed with infantile sequelae encephalopathy, followed by 11 cases of a history of ischemic stroke with or without hemiparesis. Behavioral disorders 6 cases along with the diagnosis of epilepsy in other 8 cases. In the study, we noticed an association of two pathologies, namely in 29 cases, severe mental retardation was associated with sequelae infantile encephalopathy. Also from cases with civil implications 10% persons came from specialized institutions for placement. Of the total of 26 patients undergoing a forensic expertise, they come from these specialized centers for rehabilitation and mental retrieval, of which 24 have been considered on the basis of the expertise and on the basis of the diagnostics, without exercise capacity, incapacitated, implicitly with a prohibition recommendation, and for the other two had been recommended a curator because they are having the mental capacity to understand the social legal consequences of their deeds, but they can not take care of themselves.

In conclusion, most psychiatric forensic expertise performed at the Cluj-Napoca Institute of Forensic Medicine were requested in cases of civil nature. The forensic psychiatric expertise is mandatory in cases of judicial interdiction and it is a complex interdisciplinary examination. The incidence of psychiatric expertise in cases of conservatorship or guardianship reported at the age of the patients is higher at the intervals of 20-30 years, respectively 70-90 years. The correlation between age and psychiatric diagnosis reveals association with the diagnosis of mental retardation at the age of 20-30 years, while at the age of 70 and over, predominant diagnostics are mixed, vascular or Alzheimer's dementia. There were two situations in which people were removed from the ban interdiction and three cases where this measure was continued when a psychiatric re-evaluation of the banning measure was requested.

In this civil cases of judicial interdiction in 88% of cases the persons examined in the forensic psychiatric expertise were incapacitated, they were without mental capacity. The most frequent psychiatric pathologies responsible for putting a person under the ban are severe or moderate mental retardation and mixed dementias or Alzheimer's. In cases of interdiction, the psychiatric pathologies established in the forensic expertise were accompanied by 46.4% of other associated pathologies, most of which were neurological in nature.

There was a correlation between sequelae infantile encephalopathy and serious mental retardation at young ages where a number of 29 cases were reported. At least 10% of the cases were the psychiatric forensic expertise was requested for interdiction purpose come from specialized rehabilitation and recovery centers.

Conflict of interest

The authors declare that they have no conflict of interest.

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