



PRIVATE CLIENTS

LEGAL FRAMEWORK ON CAREGIVING FOR ADULTS

The law creates a new legal framework applicable to Caregiving for Adults. It repeals the interdiction (persons incapable of managing their life and property) and incapacitation (persons incapable of managing their property) legislation and seeks to reduce considerably the stigma associated with that legislation.

Law 49/2018, which was published on August 14, creates a new legal framework applicable to Caregiving for Adults. It repeals the interdiction (persons incapable of managing their life and property) and incapacitation (persons incapable of managing their property) legislation and seeks to reduce considerably the stigma associated with that legislation. The new law also introduces numerous changes to other related matters, in particular, non-marital partnerships, medically assisted procreation and mental health.

The caregiving rules are intended to ensure the well-being, recovery, full exercise of rights and observance of the duties of the adult person under care, focusing on the person and not especially on his or her property.

This legislation is limited to the minimum necessary for the self-determination and capabilities of the beneficiary to be assured, under the circumstances in question. Indeed, there will be no caregiving if the duties of assistance and co-operation suffice for the protection of the person.

WHO MUST HAVE A CARER

Any adult who, for reasons of health, disability or their conduct, is unable to exercise their rights fully, personally and consciously or to fulfil their duties, benefits from this new legislation.

WHO CAN APPLY FOR CAREGIVINGO

It is the court that decides on the caregiving, which must be requested by the person under care in question or, with his or her authorisation, by the spouse, by the non-marital partner, by any relative, or, regardless of authorisation, by the public prosecutor. The beneficiary's authorisation may be provided by the court.

Caregiving may be applied for within the year prior to the coming-of-age of the beneficiary, to take effect from that date on, or at any time in adulthood. Should it be applied for minors, the parental or guardianship responsibilities will continue until there is a final and unappealable decision on the caregiving.

Caregiving may be applied for within the year prior to the coming-of-age of the beneficiary, to take effect from that date on, or at any time in adulthood.

WHO MUST THE CARER BE

Appointment of the carer, an adult in full enjoyment of his or her rights, is done judicially, and is chosen by the person under care or by his or her legal representative.

In the absence of selection, caregiving is entrusted to the person who best protects the interests of the beneficiary, and the following order of preference, not binding, is determined: spouse not separated legally or de facto; non-marital partner; either parent; person appointed by the parents or by the person exercising parental responsibilities; adult children; person indicated by the institution where the person under care is accommodated; representative on whom the person under care has conferred powers of representation; or other appropriate person.

As a rule, the spouse, descendants and ascendants cannot excuse themselves and the law determines that more than one carer may be designated at the same time, with different duties.

The carer is duty-bound to refrain from acting in conflict of interest with the person under care.

SCOPE OF THE CAREGIVING

Caregiving will be limited to the minimum necessary. However, in the light of each case and regardless of the request, the court may assign to the carer the duties associated with the following: exercise of parental responsibilities or the means of ensuring them; general or special representation with express indication of the categories of acts for which it may be necessary; full or partial management of property; prior authorisation for certain acts or categories of acts and other duly-detailed interventions.

The carer must ensure the well-being and rehabilitation of the person under care, keeping in contact with him or her at all times. Visits must be at least monthly or such other frequency considered appropriate by the court.

The caregiving process is of an urgent nature and the rules of voluntary jurisdiction apply to it, adapted as necessary.

The person under care may freely exercise his or her personal rights and conduct business of his or her everyday life, unless there is a provision of the law or court order to the contrary.

PERSONAL RIGHTS AND EVERYDAY BUSINESS

The person under care may freely exercise his or her personal rights and conduct business of his or her everyday life, unless there is a provision of the law or court order to the contrary. The following, in particular, are considered personal rights: the rights to marry or constitute non-marital situations; to procreate; to foster or adopt; to take care of and educate their children or adopted children; to choose a profession; to travel in the country or abroad; to fix domicile and residence; to establish relationships with those they deem fit; and to bequeath their property.

Hospitalisation of the adult person under care is dependent on the authorisation of the court. In case of emergency, hospitalisation may be immediately requested by the carer, subject to ratification by the judge.

If a court order so determines, the person under care may not sign a will. The person under care is also denied the right to make use of medically-assisted procreation techniques.

TERMINATION AND MODIFICATION OF THE CAREGIVING

Caregiving ceases or is altered by a court order that recognises the termination or modification of the causes that gave rise to it, and the effects of the decision may be retroactive to the date on which the termination or modification in question occurred.

REMUNERATION OF THE CARER AND RENDERING OF ACCOUNTS

Caregiving is free of charge, the grant of possible expenses notwithstanding, depending on the situation of the person under care and of the carer. The carer must render accounts to the person under care and to the court, during or upon ceasing his or her duties, or if the court determines this.

REMOVAL AND EXONERATION OF THE CARER

The removal and exoneration of the carer are subject to the same rules as for the removal or exoneration of a guardian. Therefore, a carer who fails to comply with the duties of the position or is seen to be unfit to perform them may be removed.



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LUÍS COQUENÃO
Estudo de Tinta II, 2000

Óleo s/tela
70 x 50 cm

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PUBLICITY

Publicity of the start, the conduct and the final decision of the caregiving process is restricted to what is strictly necessary to protect the interests of the person under care and of third parties, and is decided by the court, taking into account the specific circumstances of the case. Publicity may vary, depending on whether the process is beginning, being conducted or at the stage of the final decision.

Acts performed that are not in keeping with the caregiving measures are voidable, when subsequent to the registration of the caregiving, or after the announcement of the beginning of the process, provided there is a final decision to this effect and the acts are detrimental to the person under care.

THE ACTS OF THE PERSON UNDER CARE

Acts performed that are not in keeping with the caregiving measures are voidable, when subsequent to the registration of the caregiving, or after the announcement of the beginning of the process, provided there is a final decision to this effect and the acts are detrimental to the person under care.

PERIODIC REVIEW

The court must review the caregiving measures with the frequency established in the court order and at least every five years.

THE MANDATE WITH A VIEW TO CAREGIVING

In the expectation of a possible future need for caregiving, the adult may conclude a mandate to manage his or her interests. This mandate may be concluded with or without powers of representation. It follows the general and specific rules on the rights involved and the scope of the possible representation, as well as any other elements or conditions for its exercise. The mandate is freely revocable by the principal.

When caregiving is ordered, the court takes advantage of all or part of the mandate, and takes it into account in the definition of the scope of protection and in the appointment of the carer.

However, the court may terminate the mandate when it can reasonably be presumed that the will of the principal was to revoke it.

CASES OF EXPIRY OF THE MANDATE

If there is a mandate and it has also been granted in the interest of the representative or of a third party, the death of the principal or the caregiving order does not determine expiry of the mandate.

THE CARER AND LEGAL ADMINISTRATOR OF PROPERTY

A disposition by the adult person under care in favour of his or her carer or legal administrator of property is null. However, a disposition is valid when the carer or the legal administrator of property are descendants, ascendants, relatives up to the third degree, the spouse of the testator or the non-marital partner of the adult person under care.

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