

# ACTIVE LEGAL CAPACITY IN CIVIL LAW\*

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## Introduction

Expertise – an independent legal institute, covering the concept of the expert as a natural person engaged in the process of research and expert examination of the concept of action as an expert, and expert opinion is a separate kind of evidence in court cases. The conclusion of experts – the result of their activities in a court case.

Expertise – research of objects, are carried out on the basis of the decision, in order to address issues arising in the process of investigation and consideration of criminal or civil proceedings. Conducting forensic medical examination identified a number of specific articles of the Criminal, Criminal Procedure, Civil, Civil Procedure Code. Forensic medical examination called the use of medical and biological knowledge to resolve issues that arise in the practice of bodies of inquiry, investigation and trial on the basis of the general provisions of laws and codes. With respect to the judicial examination developed and put into operation all-union instructions, rules and guidelines on the production of forensic medical examination, approved by the Ministry of Health (Order N 694 of July 21, 1978).

Below we will look at the role of the forensic psychiatric examination, as one of the components of forensic medical examination in civil proceedings.

Article 17 part 2 of the Civil Code of Kazakhstan defines ability to act as “the ability of citizens by their actions acquire and exercise civil rights, to create for himself civic duties and perform them”<sup>1</sup>.

The most significant elements of the content of citizens’ capacity is the ability of independent making deals (transaction ability) and the ability to carry an independent financial liability (tort ability). Civil Code as an element of citizen capacity allocated as an opportunity to engage in intelligent citizen (Article 22 of Part 3 of the Civil Code) and business activities (Art. 22,

Part 1 of the Civil Code). The peculiarity of the business activities by citizens is the need of the state registration of the citizen as an individual entrepreneur, on the one hand, and the law establishing rules on insolvency (bankruptcy) of an individual entrepreneur, on the other (Art. 22, Part 4 of the Civil Code). Isolation of the individual elements of capacity has no practical significance. The theoretical value of such categories as the ability of the transaction, the ability of the tort, the right to individual entrepreneurship is associated with a separate analysis of the issues making deals and responsibilities. Crushing capacity at the individual from committing any action is not justified. In contrast, for example, capacity, capacity is related to the commission of a national voluntary action, which implies the achievement of a certain level of mental maturity. Article 17 of the Constitution as a criterion for the possibility of achieving a citizen’s own actions to acquire for themselves the rights and obligations provided age<sup>2</sup>. Full capacity is recognized for by the citizens, that is, less than 18 years of age. Allows two exceptions to this rule: the full legal capacity may be a citizen and under 18 years of age in the case, first, the marriage a person under 18 years of age, if he is in the manner prescribed by law the age of consent was lowered, water Secondly, emancipation (art. 27 of the Civil Code).

Emancipation – the announcement of a minor who has reached 16 years if he works under an employment contract or with the consent of the parents involved in business activities, fully capable. These actions are proof enough that the minor is able to make their own decisions on

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property and other civil law matters that is, reached a level of maturity, usually intrudes upon reaching adulthood. Emancipation takes place by decision of the guardianship authority if there is consent of both parents and the court if the parents or one of them does not agree to it. The goal of emancipation is to give minors a full civil and legal status. It should be borne in mind that the individual rights and obligations arise only after a certain age, such as the right to acquire firearms. In accordance with Article 40 paragraph 25 of the Resolution of the Plenum of the Supreme Court dated 29 September 1994 (as amended on January 17, 1997) emancipated minor has the full civil rights and obligations (including yourself liable for the obligations arising from the infliction of harm), except for those rights and obligations for the acquisition of which Article 22 of Part 1 of set age limit.

Of course, you cannot just give everyone a minor amount of civil capacity, without giving him the opportunity to gradually get used to commit self-willed actions. The law provides for certain age stages, with the onset of which is minor given the broader elements of capacity. This is manifested in two major areas of capacity: the possibility of transactions and property self-responsibility.

Minors under 14 years of age (juvenile), as a general rule are incapacitated; all transactions on their behalf commit only their parents, adoptive parents or guardians. However, fourteen years – sufficiently long period for the establishment of a juvenile mentality, his intellectual maturity. It is hardly possible to compare the level of awareness of the actions committed by a year-old child and a teenager of thirteen. Therefore, the law provided for the possibility of making certain transactions minors. From 6 to 14 years – the first age interval with which the law binds a certain stage of maturity. In this age of juvenile has a right to make small everyday transactions; transactions aimed at obtaining gratuitous benefits that do not require notarization or state registration; transactions for the disposition of funds provided by the legal representative or with the consent of a third party for a specific purpose or for free disposal (paragraph 1.2 Art. 23 of the Civil Code).

Juvenile, despite having the possibility of undertaking certain transactions are not self-responsibility, being incapacitated. The responsibility for their actions, including the transactions that they have the right to make their own, are their parents, adoptive parents or guardians in full, they're also responsible for the

harm caused to minors. In general, although the article of the Civil Code and is called “capacity of minors,” the citizens who have not attained 14 years of age, are incompetent. Providing them with the possibility of a law of individual transactions are strictly exhaustive and are an exception to the general rule. In addition, it is impossible to talk about the person of legal capacity, if it does not bear sole responsibility for their actions.

With the achievement of 14 years of age the minor shall have the right to make any transactions on their own, subject to the written consent of his legal representatives. Consent may be obtained as to the transaction, and be held already written approval of the transaction. Minors under the age of fourteen to eighteen years of age may independently and without the consent of the legal representatives, in addition to the transactions made by minors, dispose of their own earnings, scholarships or other income; to exercise the rights of the author of works of science, literature or art, invention, or other legally protected result of their intellectual activity; in accordance with the law to make deposits in credit institutions and dispose of them, and on reaching the age of 16 to be members of cooperatives (Art. 22 of the Civil Code). The right to commit these transactions means empowering minors certain amount of capacity that allows us to speak about their partial legal capacity. This is also confirmed by the laying on of independent property responsibility of juvenile prisoners of transactions, as well as for injury. Partial capacity allows minors to assess their level of maturity in more detail, ready for independent participation in civil turnover. The most essential element of a minor part of capacity is the right to dispose own earnings, scholarships and other income. In this case, the minor works in its sole discretion and uses equipment purchased them yourself. This brings the maximum position of underage and fully capable person.

However, it is possible that when a minor is unwise spending earnings. In this case, the legal representative or guardianship authority has the right to intervene and ask the court to limit or deprive the juvenile's right to dispose of earnings or scholarships. For example, the salary minor spends on the purchase of CDs with recordings of his favorite songs, leaving nothing for other purposes. In contrast, smart spending, justified their investments allow parents to put before the guardianship authorities the issue of early vesting of the minor, if provided for in the law conditions, full legal capacity – emancipation.

With the achievement of 18 years, as well as in the previous case, there is a capacity of citizens in full. On the content of a capacity not affect age-related factors, but a citizen's ability to deliberate willful action may be impaired due to illness or abuse alcohol or drugs. In the presence of these manifestations is necessary to protect the property interests of the citizen, or the interests of his family. This goal is the recognition of a citizen as incapable and restricting legal capacity, abusing alcohol or narcotic substances<sup>3</sup>.

### **Limited capacity and incapacity – the legal aspects**

The capacity of the citizen is the most important element of his legal status. No one may be restricted in legal capacity or deprived thereof except in the cases and in the manner prescribed by law. The Act provides (as applicable), the recognition of a citizen as incapable (Art. 27 of the Civil Code) or restriction deemed incapable or incompetent by a court in the manner of special proceedings (art. 302 CCP). Incapacity of the citizen can be recognized, which is due to a mental disorder may not understand the significance of his actions or control them.

In this case, the citizen has no right to make any sort of transactions, including smaller domestic, on behalf of all transaction commits his guardian (p.1 art.302 CPC).

Of limited dispositive capacity citizen can be recognized that as a result of abuse of alcohol or drugs puts his family in a difficult financial situation.

A limitation of capacity installed monitoring by a specially appointed person – the trustee – over transactions, including the receipt of wages and other income and dispose of them, a citizen, and the court limited in capacity. In contrast to the recognition of the person incapacitated, by limiting the capacity citizen has the right to carry out all transactions, provided that the consent of the trustee. Only one category of transactions, he is entitled to do, without asking permission, – small everyday transactions. The list of grounds for limiting legal capacity of citizens in the law comprehensive, however, experience has shown the need to introduce additional grounds, in particular, to put in a difficult financial situation the family can and gambling and risky conduct of business and unintelligent collecting etc. At the same time, limit the citizens on such grounds cannot be capacity.

The nationals, which are recognized by the court as incapable placed under guardianship, of limited competence – guardianship (Article 302 Part 1 of the CPC)<sup>4</sup>.

To protect the rights and interests of incapable or partially capable citizens, the law introduced the institute of the guardianship and custody (Art. 1 Chapter 15 of the Law on Marriage and Family of the RK). Guardianship is established over minors, and also over citizens recognized as incapable. Guardianship – over minors aged from 14 to 18 years old and citizens, limited in capacity as a result of abuse of alcohol or narcotics. Guardians and caregivers only adult capable citizens may be appointed. As legitimate representatives of the ward, trustees and guardians have the right to dispose of the income of a citizen of the ward them yourself, if these costs are aimed at the content of the ward. In all other cases, custodians are required to obtain prior permission of the guardianship authorities, especially for transactions involving a decrease in property of the ward: the alienation of property, renting it for rent, pledge, gratuitous use, etc.

If the ward has a real and valuable movable property, which requires special care and management, guardianship authorities can determine the control and conclude with him a contract of trust management of such property (art. 925 of the Civil Code).

Guardianship can be installed not only on the part of citizens and limited competence, but also on the capable persons, who for health reasons cannot independently exercise and protect their rights and duties, for example, on the visually impaired. This form of guardianship is called patronage<sup>5</sup>.

The trustee of an adult capable citizen appointed by the guardianship and guardianship with the consent of an adult, and carries out its functions on the basis of an agency contract or of the Trust Deed. The contract is a trustee of a person over who established patronage.

Since the limitation of capacity and recognized the person completely incapacitated affects the property rights and an interest of the individual, the law provides that the right to the initiation of proceedings has a limited number of individuals and organizations. The case can be instituted at the request of family members, trade unions and other public organizations, the public prosecutor, the guardianship authority, a psychiatric hospital (n. 8, Art. 129, paragraph 2, Art. 221 CCP). In a statement on the recognition of citizen partially

capable outlines circumstances indicating that the person is abusing alcohol or drugs and thereby puts the family in a difficult financial situation. In a statement on the deprivation of legal capacity set out the circumstances testifying about the mental disorder as a result of which a person cannot understand the significance of his actions or control them (Art. 26 CPC). In addition to the applicants, the exciting thing is to participate in the case of recognition of a person as incapable or partially capable involved "persons concerned". Among them, first of all, are those concerning the legal status of which a criminal case. These individuals are in direct material and legal interest, since the decision on the case directly affects their legal position.

The law obliges to consider cases on restriction of legal capacity with the obligatory participation of persons with respect to whom these cases are brought (Art. 1, Art. 27 CPC). A person against whom a criminal case of incapacity, are involved in the case as "interested person" if it is possible for the state of his health (Art. 2, Art. 926 CCP). The Prosecutor must be involved in the case and to give an opinion, even if it is not to prosecute. Be sure to participate in the case and the guardianship authorities, due to the exercise of public functions for citizens' rights and interest's protection (Art. 302 CPC).

Application for recognition of a person partially capable or incapacitated submitted to the court at the place of residence of that person, and if it is placed in a psychiatric hospital - then the location of the medical institution (st.302 GIC). Preparing the case of recognition of a person partially incapable mainly consists in the taking of evidence from persons involved in the case. The Court must identify the witnesses to give evidence about the behavior of a person against whom a criminal case. It is necessary to attach to the case the acts of police officials, decision-governmental organizations and other documents. Training on recognition of cases of incapacity is an expert examination to determine his mental state. In preparation for the case when sufficient evidence of mental illness or dementia judge appoints citizen to determine his mental state forensic psychiatric examination. Appointment of the examination on the recognition of the person incapacitated case necessarily. The absence in the act of judicial-psychiatric examination is considered in the jurisprudence of both absolute grounds for annulment. If the person against whom a criminal case has evaded the examination, the

court in the hearing with the participation of the prosecutor and the psychiatrist may issue a ruling on its forced direction of the forensic psychiatric examination (art. 335 CCP), that is the question of forced direction of the examination is not it can be solved by a single judge.

The case of the recognition of the citizen court considers partially capable with the obligatory participation of the citizen, as well as the prosecutor and a representative of the guardianship and trusteeship body.

In cases where the citizen, against whom a criminal case, willfully refuses to appear in court, refuses to accept the summons, etc., the court may consider the case in his absence, given that according to Art. 133 Code of Civil Procedure "refusal to accept the agenda is not an obstacle to the consideration of the case". During the trial, the court determines whether the citizen is really abusing alcohol or drugs, whether he puts the family in a difficult financial situation.

The case of the deprivation of legal capacity the court considers the mandatory participation of the prosecutor and a representative of the guardianship and trusteeship body. A citizen of that incapacity recognition treated matter is called in the trial, if it is possible for the state of his health (art. 302 CPC). The law does not provide for a mandatory call to trial expert psychiatrist. However, in cases where the court there is reason to doubt the validity of the conclusion of the forensic psychiatric examination, especially in cases where the person against whom a criminal case of incapacity, for health reasons can testify, and called to court, participation in the hearing must be an expert. The Court examines all the material available in the case; hear the conclusion of the prosecutor and the court makes a decision. Disposition of the recognition of a person partially capable or incapacitated may be appealed on a common basis in cassation lodged by the prosecutor.

Deprivation of legal capacity is a separate category of special proceeding cases. Since the recognition of the person incapacitated or limited legal capacity is not indefinite, as the mentally ill, recognized incapacitated, can recover, and who abuses alcohol or drugs, change their behavior, there is a need to restore the legal status of the citizen. Recognition of a capable person, previously recognized as incapable or partially capable, carried out in a separate process at the request of interested parties, under consideration by the general rules of procedure. The application

is submitted by the rules of jurisdiction established by Art. 302 Code of Civil Procedure (by place of residence of a citizen, and if he was placed in a psychiatric hospital – at the location of the institution). Thus, applications for recognition of a person capable not necessarily consider the court that rendered the decision on recognition of a person as incapable or partially capable. The case is considered with the obligatory participation of a prosecutor and a representative of the guardianship and trusteeship body.

The law provides that the recognition of legal capacity of a citizen may, if the grounds on which the citizen was declared incapable, have ceased to exist (Art. 27 of the Civil Code). The case can be instituted at the request of the trustee, as well as individuals and public bodies listed in Art. 302 Code of Civil Procedure. The most common question about recognition citizen capable pose psychiatric hospitals. Having an application to production, the court in the manner of preparing the case for trial must reclaim and to file a copy of the decision by which a citizen has in his time, recognized as incapacitated. Appointment of judicial-psychiatric examination when deciding on the legal capacity necessary. in this case, the examination shall be assigned by the general rules of a court decision (ch.3.st. 27 law SFEA). Participation of the person against whom a criminal case on the recognition of his legal capacity is particularly desirable.

Having established that a person who has been declared incapacitated, recovered or his health has been a significant improvement,

with the result that the citizen understands the significance of his actions and could control them, the court shall decide on the recognition of a person capable. On the basis of a court decision canceled installed on citizen guardianship (Art. 22 part 2 CPC). The case of the recognition of a person incapable can be initiated if a citizen, recognized by a court decision partially capable, stopped abusing alcohol or drugs. The initiation of proceedings to abolish capacity restrictions possible in the case when, acknowledged limited person capable family ceased to exist (divorce, death, family separation, etc.) and, therefore, no longer the duty of that person to provide funds for its maintenance.

### Conclusion

Application for recognition of incapacity may be filed by a citizen, his guardian, as well as government entities and organizations listed in Article. 302 part 1 CPC. During the preparation of the case to the trial court collects materials testifying that partially capable really stopped abusing alcohol and drugs. The case is considered by the general rules of civil proceedings to challenge all interested persons. If these circumstances are confirmed by the statement of case materials the court shall decide on the abolition of restrictions citizen capacity and recognition of its legal capacity. On the basis of a court decision established over the citizen trusteeship canceled (Art. 2, Art. 22 CPC)<sup>6</sup>.

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### References

- <sup>1</sup> The Civil Code of the Republic of Kazakhstan dated December 27, 1994.
- <sup>2</sup> The Constitution of the Republic of Kazakhstan, 1995.
- <sup>3</sup> Civil law. Textbook. Part 1 / Ed. Sergeev A.P. – M.: “Prospect”, 1997, 600 p.
- <sup>4</sup> Civil Procedure Code of the Republic of Kazakhstan (rev. And ext.) On July 11, 1999, №411-1.
- <sup>5</sup> Preparation investigator materials for forensic psychiatric examination: a practical guide. 5<sup>th</sup> edition. Moscow, 2010.
- <sup>6</sup> Forensic psychiatry. Textbook. / Ed. prof. Shostakovich B.V. – M.: “Mirror”, 1997, 385 p.

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### Anotācija

Raksts veltīts fizisko personu rīcībspējas īpatnību izpētei Kazahstānas Republikas civiltiesībās. Autori analizē rīcībspējas saturu un pazīmes, norādot, ka rīcībspēja rada gan tiesības, gan arī pienākumu atbildēt par radīto kaitējumu. Rakstā īpaši akcentēti nepilngadīgu personu rīcībspējas

aspekti. Secināts, ka rīcībspēja ir neatņemama cilvēktiesību sastāvdaļa, kuras ierobežošana var notikt tikai īpašā, likumā noteiktā kārtībā.

### Аннотация

Целью работы является рассмотрение дееспособности граждан (физических лиц). Задачи работы – рассмотреть понятие и сущность гражданской дееспособности; дать понятие правосубъектности; изучить разновидности дееспособности; изучить основные положения о дееспособности в гражданском законодательстве Республики Казахстан.

Обладать дееспособностью – значит иметь способность лично (через представителя) совершать различные юридические действия: заключать договоры, выдавать доверенности и т. п., а также отвечать за причиненный имущественный вред (повреждение или уничтожение чужого имущества, повреждение здоровья и т. п.), за неисполнение договорных и иных обязанностей.

Эмансипация – объявление несовершеннолетнего, достигшего 16 лет, если он работает по трудовому договору либо с согласия родителей занимается предпринимательской деятельностью, полностью дееспособным. Указанные действия служат достаточным доказательством того, что несовершеннолетний в состоянии самостоятельно принимать решения по имущественным и иным гражданско-правовым вопросам, т. е. достиг уровня зрелости, обычно наступающего по достижении совершеннолетия.