

## CUSTODY: AN UNPLANNED TREND

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### SUMMARY

In the last decade, the world has seen an increase in the age of people. In Brazil, the proportion of elderly people over 60 years of age almost doubled between 2000 and 2023, according to data from the IBGE. This is the result of several factors from scientific studies carried out in the areas of physical and mental health, nutrition and well-being, culminating in a longer lifespan. However, if there is no daily care for one's health and in the elderly group, there may be a possibility of having some limitations such as mental or physical incapacity. In order to have a fuller and more enjoyable end of life, there is a need to have a responsible person who manages one's financial and social life. With this, there was the creation of guardianship, a legal institution that arose as a consequence of interdiction, a judicial procedure that investigates the inability of a person to express their wishes. The guardianship is the document that establishes who the guardian will be and what their responsibilities will be, ensuring the good reception, comfort and convenience of the person under guardianship, taking into account that the guardian has duties to perform such as: accounting and information on Income Tax for the management of assets and remuneration of the person under guardianship. This measure can be requested by parents, spouses, any relative, the Public Prosecutor's Office or the interested party themselves. There has been an increase in the procedural request for this purpose, however it is still a very timid evolution, due to the magnitude of growth of the elderly population and the lack of information or inadequate planning by the parties makes it difficult to properly initiate the process and the duration of its completion.

**Keywords:** Longevity, Guardianship, Disability, Age Growth

### 1. INTRODUCTION

Over the centuries, humanity has sought ways to achieve longevity and in the 21st century it is noted that people live longer, on average 125 years, than in the past. This result is the result of several factors that have been studied, proven to be beneficial and passed on regularly, among which we can mention: diet, despite the great advertising of processed foods (which have undergone some process)

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(by changing its original composition to increase its durability) people are aware that natural items contribute to a healthier life; another relevant issue for a long life is the advancement of health technology, today there is attention to the medicinal area with the purpose of minimizing diseases. These issues significantly increase people's years, according to data from the 2022 Census reported by IBGE, in 12 years the Brazilian population aged 65 or over grew by an average of 57.4%, with this it is noted that the median age of Brazilians increased by six years, going from 29 years in 2010 and reaching 35 years in 2022.

With this new population disposition, there is a need for demand to serve this public, such as the creation of the Elderly Statute recommended in Law 10.741/2003, which protects the rights of the elderly, ensuring their dignity, respect and support in various areas such as health, transportation and leisure. However, the subject of this study is regulated in the Civil Code, in articles 1.767 to 1.783, in which there has been the greatest growth in the search for legal proceedings is Curatorship by interdiction, used as a protective measure for the elderly who does not have full conditions to perform acts of civil life, due to presenting mental, intellectual or physical incapacity that prevents them from acting without the necessary protection of another person, whether for a limited time or even permanently. With the main objective of helping people manage their assets and take care of their interests, who are not fully capable of performing acts of civil life, due to some type of mental, intellectual or physical incapacity that restricts the citizen from conducting themselves without due protection from another person, this measure must be sought through a due judicial process. It is important to note the figure of the curator, the person responsible for the person under guardianship, who must be aware that his or her purpose in the process is to meet the wishes and needs of the person under guardianship, safeguarding the well-being and legitimate rights of the elderly. It is interesting to note that due to the age growth of the global elderly population and the population's awareness of the well-being and protection of others, thanks to quick and direct access to the media, there is no awareness of this portion of the population that may have some restriction in the future and that they plan how they will live if they do not fully understand, informing family members and close people about a possible measure of Guardianship. Despite the increase in requests for this duty, there is still a high level of inefficiency and lack of basis on how to proceed.

## 2. THEORETICAL FRAMEWORK

Life expectancy is increasing worldwide, but many people do not reach this age with full consciousness or physical strength to enjoy their final days, and the possibility of an inability to manage the acts of civil life can be supported through Guardianship. This topic requires a basic structure based on discussions and research carried out by several authors in the area, scientifically qualifying the topic. This basis will be provided through theoretical foundations, in which the important points, discoveries in the area and possible analyses of identified problems will be presented.

### 2.1. IMPORTANCE OF CUSTODY

Guardianship is a legal institution in which a person appointed by a judge in a lawsuit has the obligation to look after the interests of another person who is unable to do so. According to Aurélio (2010), capacity can be defined as: ... Particularity of a person who is capable, competence... Physical, mental or intellectual aptitude of a person..., that is, a person who is under restrictions that may affect their ability to make decisions in their life needs a guardian who will allow them to fully enjoy their day-to-day life. In the Brazilian civil code, we have the support of the term capacity expressed in Law 10406/2002, as follows:

Art. 1 Every person is capable of rights and duties in the civil order. Art. 2 The civil personality of a person begins at birth; but the law protects the rights of the unborn child from conception.

All people have legal capacity and civil personality, which involves legal capacity, being worthy of being the holder of rights and obligations, and legal agency consists of exercising these. Being able to make decisions about one's own life, such as: voting, getting married, having a profession, managing assets, deciding to have children. However, the inability to exercise something due to some physical or mental limitation must be taken into consideration, and the Civil Code, also mentioned in Law 13146/2015, comments:

Art. 4º The following are incapable, in relation to certain acts or the manner of carrying them out:  
I - those over sixteen and under eighteen years of age;  
II - habitual drunkards and drug addicts;  
III - those who, for temporary or permanent reasons, are unable to express their will;  
IV - the prodigals.

Guardianship is suggested for people who do not show the ability to decide, verification carried out through an expert medical assessment, provided for in Brazilian law as expert evidence for assessing capacity and because these people are unable to make decisions about certain areas of their own lives, whether temporarily or permanently, and may be persons under guardianship: those who, due to illness or mental deficiency, do not have the necessary discernment for acts of civil life; those who, for a long-term reason, are unable to express their will; the mentally disabled, habitual drunkards and drug addicts; exceptional individuals without full mental development; and the person who spends or disposes of their assets or property – the so-called prodigals. Guardianship is a substitute decision-making task, that is, a person represents the decision of someone who is incapable of making it, and is an extraordinary measure, proportionate to the needs of the person under guardianship. It is noted that this measure can be described as: Guardianship of the Unborn Child - the person's civil personality begins at birth with life; However, the law protects the rights of the unborn child and the guardianship of the absent person from conception - if a person disappears from his/her home without any news of him/her, if he/she has not left a representative or attorney to administer his/her assets, the judge, upon request of any interested party or the Public Prosecutor's Office, will declare the absence and appoint a guardian. It is interesting to note that the guardianship of an elderly person with restricted full capacity is carried out through an Interdiction process. It is mandatory to prove, within the process, the cause generating the incapacity and with this the judge establishes the degree of incapacity taking into account the degree of mental impairment of the person. Then a guardian is appointed, the judge verifies who is best able to perform the task and who has a relationship of affection and affinity with the incapacitated (or relatively incapacitated) person. The guardian will be obliged to administer the assets of the ward and to render accounts within a certain period defined in the process by means of an accounting report with proof of expenses.

## 2.2 BENEFITS X DISADVANTAGES OF CUSTODY

The purpose of Curatorship is to protect people who are unable to manage their own interests due to illness, disability or other conditions. It can be temporary or permanent, depending on the situation of the person under guardianship. Since it is an act of caring for a person's life, there is care and attention to the consequences that may result in the guardian and the person under guardianship, which may be positive or negative. As stated in Law 10406/2002, article

1781: The rules regarding the exercise of guardianship apply to curatorship. These rules are set out in the following articles:

Art. 1,740. The guardian is responsible for the person of the minor:

I - direct his education, defend him and provide him with food, according to his assets and condition;

II - to demand that the judge provide, as he sees fit, when the minor requires correction....

Art. 1,742. To supervise the guardian's actions, the judge may appoint a pro-guardian.

There is concern about preserving the protection of the rights and interests of the person under guardianship, protecting the property of the person under guardianship and ensuring the livelihood of the person under guardianship. It is noted that in order to ratify these benefits, a position by the judge is required, which is based on article 1744, which describes: I - direct and personal, when the person has not appointed the guardian, or has not done so in a timely manner; and II - subsidiary, when the person has not demanded legal guarantee from the guardian, nor removed him, so much so that he has become suspicious. However, it is necessary to observe the negative points for the person under guardianship: there is a limitation of the rights of the person under guardianship, which do not extend to rights such as privacy, health, work and voting.

For the curator in the same Law 10406/2002 in art. 1.752. The guardian is responsible for the losses that, through fault or fraud, he causes to the ward; but he has the right to be paid for what he actually spends in the exercise of the guardianship, except in the case of art. 1.734 and to receive remuneration proportional to the importance of the assets administered. There is an emphasis on the obligation of the curator to be responsible for the resources of the ward and in order to have this supervision, Law 10406/2002 informs in articles:

Art. 1,755. Guardians, even if the parents of the wards have agreed otherwise, are obliged to account for their administration.

Art. 1,756. At the end of each year of administration, the guardians shall submit the respective balance sheet to the judge, which, once approved, shall be attached to the inventory records.

Art. 1,757. Guardians shall render accounts every two years, and also when, for any reason, they cease exercising guardianship or whenever the judge deems it appropriate.

Accounting in guardianship is a bureaucratic process that consists of presenting statements of expenses for a period of time. The guardian is obliged to provide accounts when: the court decision determines, the exercise of guardianship is ceased, the replacement or removal of the guardian occurs.

curator. It is understood that the curator also has other responsibilities with the authorization of the judge explained in Law 10406, as per the article below:

Art. 1,748. The guardian is also responsible, with the authorization of the judge: I - to pay the minor's debts; II - accept inheritances, legacies or donations, even if with charges; III - compromise; IV - sell movable property, the preservation of which is not appropriate, and real estate in cases where permitted; V - to file lawsuits in court, or to assist the minor in them, and to take all steps for the benefit of the minor, as well as to defend him in lawsuits brought against him.

## 2.3 THE ROLE OF THE CURATOR

Curatorship can be considered a task assigned by the judge to a capable adult person, to plan, guide, take responsibility for, watch over, guard and manage the assets of the person under guardianship. The guardian must be a person who will have responsibilities over the guardian, ensuring the well-being and safety. According to article 1775 of the Civil Code, of Law 10406/2002, the guardian is a decent person, appointed by the judge, being:

The spouse or partner, not separated legally or in fact, is, by law, the guardian of the other, when interdicted.  
§ 1º In the absence of a spouse or partner, the legitimate guardian is the father or mother; in their absence, the descendant who proves to be most capable.  
§ 2 Among descendants, the closest precede the most remote. § 3 In the absence of the persons mentioned in this article, the judge shall be responsible for choosing the guardian.

It should be noted that during the proceedings the judge must observe the wishes and preferences of the person under guardianship, the absence of any conflicts or intrigues between the person under guardianship and the potential guardian, and the way of life and possible suitability of the person under guardianship's circumstances. After these checks, the judge will appoint the guardian who will assume responsibility, with the Public Prosecutor's Office as the supervisory body and under the terms proposed by the judge. With this, it can be seen that the guardian will have rights and responsibilities, based on Law 10406/2002, art. 24. The judge who appoints the guardian will establish his powers and obligations, according to the circumstances, observing, where applicable, the provisions regarding guardians and guardians.

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One of the most important obligations is the rendering of accounts, in which a spreadsheet containing all income and debts is suggested, preferably in chronological order and the corresponding balance. This process must include proof of salary receipts, withdrawals or bank transactions, rent receipts and receipts,

as well as expenses reported on the invoice. In addition, the curator must file an annual Income Tax Return, observing cases of exemption from payment of tax, when necessary. It is interesting to note that Law 10406/202, art. 1,741 states that . . . it is the responsibility of the guardian, under the supervision of the judge, to administer the assets of the ward, for the benefit of the latter, fulfilling his duties with zeal and good faith. If it is noted that the ward has assets of considerable value, the judge will order the curator to provide security and guarantees for the execution of the activity. Another important responsibility is the duty to declare any and all debts that the ward has with the curator, under penalty of being unable to collect them during the period in which he is exercising the curatorship. The only exception to allow the collection of the debt will occur if the curator proves that, upon assuming the responsibility, he was not aware of the debt. It is important to note that the curator must: care for the health of the person under guardianship, provide conditions for a good quality of life, regularly report to the judge and be responsible for any damages caused to the person under guardianship. The rights of the curator are observed in the right to reimbursement of expenses demonstrably incurred with own resources for the benefit of the ward; possible remuneration proportional to the importance of the assets to be administered, upon request made to the judge. The curator must have in his/her purpose towards the person under guardianship the assistance nature and the biases of inclusion of this person, allowing him/her to have a certain autonomy and freedom, maintaining his/her right to coexist among people, whether family or in society, never leaving him/her on the margins of society.

## 2.4 DIFFERENCE BETWEEN SUPPORTED DECISION MAKING AND GUARDIANSHIP

It is understood that guardianship exists to safeguard and protect people who are unable to manage their own lives, even after reaching the age of majority, due to some legal incapacity to express their will. Patricio comments that: The States Parties undertake to ensure and promote the full exercise of all human rights and fundamental freedoms by all persons with disabilities, without any type of discrimination based on their disability. This measure is a legal guarantee that citizens can have an alternative for well-being, as enshrined in art. 5 and § 3 of the 1988 Constitution of the Republic, which states:

Art. 5º All are equal before the law, without distinction of any nature, guaranteeing Brazilians and foreigners residing in the country the right to

inviolability of the right to life, liberty, equality, security and property, under the following terms:

[...]

§ 3º International treaties and conventions on human rights that are approved, in each House of the National Congress, in two rounds, by three-fifths of the votes of their respective members, will be equivalent to constitutional amendments.

With this we have a perfect quote from Carlos Edson do Rêgo Monteiro Filho, affirming his collaboration in the blurb of Abreu's work (2009), he states:

[...] in the contemporary scenario one must not (rectius: one cannot) neglect the valorization, with maximum priority, of the protection of the human person in concrete, with institutes such as curatorship being instruments for the promotion of their dignity, according to the specificities of each case, and also the search for giving axiological content to the general clauses provided for, based on parameters of the legal system itself, in line with overcoming the idea of empty spaces of the judge's discretion (MONTEIRO FILHO apud ABREU, 2009).

But there is also another group of elderly people who have active cognitive capacity, but need assistance care. For this scenario, Supported Decision Making emerged, which consists of supporting a person with difficulty in their decision-making capacity about events that have occurred in their own life. The Supported Decision Making is formed by 2 people chosen by the person in need of assistance and support. It can be seen in Law 13146/2015, article 1783-A, as follows:

Supported decision-making is the process by which a person with a disability chooses at least 2 (two) suitable people, with whom they have ties and who enjoy their trust, to provide them with support in making decisions about acts of civil life, providing them with the elements and information necessary for them to exercise their capacity.

The TDA is a measure that gives the elderly person the right to autonomy for the rest of their life and, with a certain intellectual impairment, chooses supporters they trust who will help them make decisions about civil acts. Thus, the Curatorship process, TODA has procedures to be followed and, as also informed in article 1783-A, we have:

§ 1º To formulate a request for supported decision-making, the person with a disability and supporters must present a document stating the limits of the support to be offered and the supporters' commitments, including the term of validity of the agreement and respect for the will, rights and interests of the person they must support.

§ 2 The request for supported decision-making will be requested by the person to be supported, with express indication of the people able to provide the support provided for in the caput of this article.

§ 3 Before ruling on the request for supported decision-making, the judge, assisted by a multidisciplinary team, after hearing the Public Prosecutor's Office, will personally hear the applicant and the people who will provide him/her with support.

§ 4 The decision taken by a supported person will be valid and have effects on third parties, without restrictions, as long as it is within the limits of the agreed support.

If the requested person no longer has confidence or well-being in the supporter, article 1783-A emphasizes:

§ 7 If the supporter acts negligently, exerts undue pressure or fails to fulfill the obligations assumed, the supported person or any person may file a complaint with the Public Prosecutor's Office or the judge.

§ 8 If the complaint is upheld, the judge will dismiss the supporter and, after hearing the supported person and if it is in their interest, appoint another person to provide support.

§ 9 The supported person may, at any time, request the termination of an agreement signed in a supported decision-making process.

§ 10. The supporter may request the judge to exclude his/her participation in the supported decision-making process, with his/her exclusion being conditional on the judge's opinion on the matter.

§ 11. The provisions regarding the provision of accounts in the guardianship process apply to supported decision-making, where applicable.

Considering the differences between Supported Decision Making (SDC) and Guardianship, it is clear that the first person has the autonomy to make decisions, but is guided by supporters, while in the second, the person under guardianship does not make their own decisions. SDC is a new procedure created in 2016, and can be applied to people with mental or intellectual disabilities, or even to people with other disabilities who demonstrate the need for a supporter. Guardianship, in turn, instituted since 2002, can be temporary or permanent, depending on the condition of the applicant, and the guardian is required to regularly report to the judge on the administration of the assets and the care of the person under guardianship.

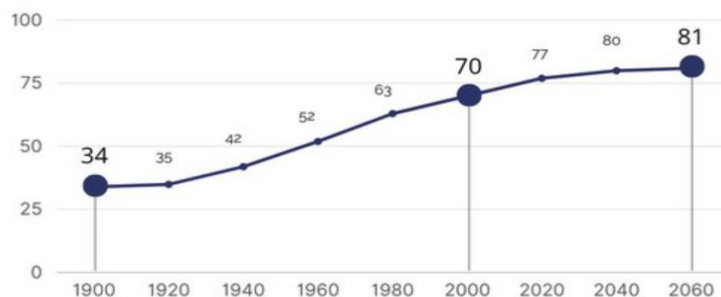
### 3. RESULTS

According to data from IBGE, the life expectancy of Brazilian citizens continues to grow. At the beginning of the century, the life expectancy was 34 years. In the 2000s, this average increased

leap, with a person in the country living until the age of 70. The projection made by the Institute for 2060 is that a person in Brazil could live on average until the age of 81, as can be seen in the image below:

## ENVELHECIMENTO NO BRASIL

EXPECTATIVA DE VIDA AO NASCER (EM ANOS)

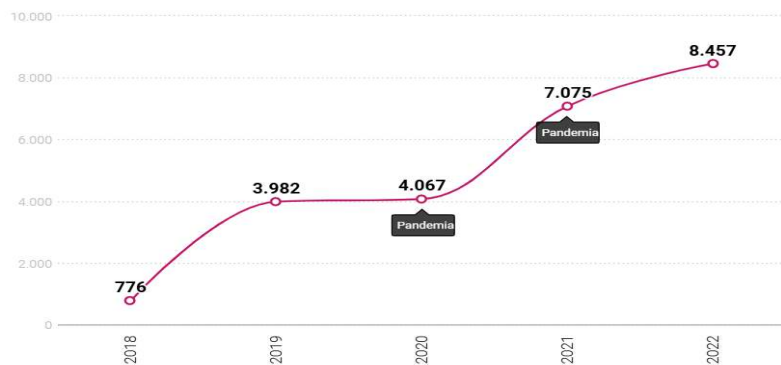


Source: IBGE, 2023.

And this has an impact on the lifestyle and finances of this current generation, and one of the highlights is the growing demand for guardianship. Information on the GHZ website reports the growing demand for guardianship in Rio Grande do Sul, as indicated by the Court of Justice of Rio Grande do Sul. The survey carried out by GZH shows that, in four years, the number of these processes has increased more than tenfold. As can be seen in the figure below, in 2018, there were 776. In 2022, there were 8,457, an increase of 989%.

## NÚMERO DE CONSULTAS À DEFENSORIA PÚBLICA PARA PEDIDOS DE CURATELA

Dados de 2018 a 2022



Source: Public Defender's Office, 2023

Despite the increasing demand for the Guardianship process, many family members do not close the appeal because they end up not taking it forward, either due to resignation or because the defender qualifies that there would be no need to file a lawsuit.

#### 4. DISCUSSION OF RESULTS

It can be seen from what was explained in this study that Curatorship is indicated for individuals who do not demonstrate the ability to make decisions, and this assessment is carried out through a medical examination, as stipulated by Brazilian legislation as expert evidence for the analysis of capacity. These people may not have the necessary autonomy to make decisions about certain areas of their lives, whether temporarily or permanently.

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