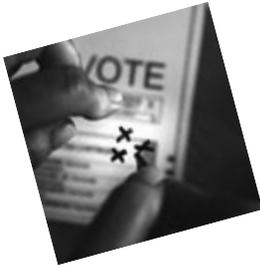




Guardianship and Human Rights in Georgia

Analysis of Law and Policy



I was under guardianship for twenty years. I wasn't allowed to use my own money, or decide where to live. I wasn't even allowed to work or vote. I wanted to make my own decisions.



MDAC advances human rights.

We respect the privacy of our clients,
so we have chosen models, not clients, to appear in these photographs.

Mental Disability Advocacy Center

Guardianship and Human Rights in Georgia

Analysis of Law and Policy
2007



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EXECUTIVE SUMMARY

This report is the first work of its kind to look in any depth into laws and practice relating to guardianship in Georgia. It was possible to obtain a detailed understanding of legislation impacting on the guardianship process. However, the opportunity to gain a comprehensive understanding of actual practice was denied to MDAC. The reason was quite simple: access to vital sources of information was refused on the grounds of confidentiality. Consequently, this report offers only an insight, albeit an important insight, into how the guardianship process fully works.

While Georgian legislation contains positive elements such as the Law on Social Security of People with disabilities¹ which provides people under guardianship with the right to work in any type of legal entity, and which prohibits the denial of employment to individuals under guardianship by any employer on the grounds of limited capacity, and the fact that, still much remains much to be done in this area to bring such law in line with current human rights standards. It is these standards, and the compliance of Georgia with them, in legislation and in practice that form the focus of this report. The legal and moral imperatives on Georgia to amend its guardianship laws are demonstrated in this report, a report that is particularly timely in view of the recent adoption of the UN Convention on the Rights of Persons with Disabilities, which Georgia has signed.² This Convention calls for a paradigm shift to more humane models where support and assistance are provided, but in which legal rights remain intact.

This report offers an analysis of domestic legislation on guardianship, such legislation being viewed through the lens of human rights standards. This legislation does not exist in a single codified form, but is scattered in a number of different statutes and regulations. The report examines whether adequate safeguards are provided in these laws, safeguards required to ensure a legal system that fully respects international human rights standards.

The outcome of this examination indicates that although the Georgian Constitution provides for respect for the human rights of people in general, these principles are rarely mentioned, let alone applied, with respect to people with psycho-social (mental health) or intellectual disabilities, and are little understood by professionals involved in the guardianship process. Further, a series of legislative weaknesses have resulted in a number of deficiencies throughout the law. These weaknesses are reflected in the practice of the process itself. Indeed, the main findings of the report reveal that Georgia is failing in its obligation to protect the rights of people under guardianship, indicating that reforms are required urgently. The most important of these findings are:

¹ Chapter V, art. 21.

² Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 12.

There are an estimated 23,000 adults who are deprived of legal capacity in Georgia.

- All adults under guardianship are under plenary (all encompassing) guardianship. These people are subject to significant, arbitrary and automatic deprivations of their human rights. These include a deprivation of their right to property, to family life, to marry, to vote, and to access courts. Even if not specifically deprived of certain rights, a lack of procedural capacity ensures their inability to enforce them.
- Guardianship is Georgia's only legal response to people who require assistance to make decisions. There are no alternatives available, such as supported and assisted decision making (where someone provides help in a structured way), advance directives (where an adult specifies his or her wishes in the event of future functional incapacity) or powers of attorney (where an adult specifies a person to take decisions in the event of future functional incapacity).
- Adults subject to the guardianship process are provided with insufficient access to adequate advice and representation to assist them through it.
- Professionals involved in the guardianship process have little understanding of its human rights implications.
- There are no alternatives to guardianship (for example, advance directives, supported decision-making) for people with disabilities who need support in making certain decisions.

Based on its findings, MDAC urges the Georgian government to reform all its laws that impact upon guardianship.

This report sets out a series of principled recommendations designed to improve guardianship law and practice and thus better respect the human rights of people with disabilities in Georgia. MDAC specifically urges the government to adopt and implement a National Disability Programme, and encourages the government to carry out its reform process in a way that actively involves and respects people with psycho-social disabilities (mental health problems) and intellectual disabilities, as well as their local and national organisations.

RECOMMENDATIONS

This report suggests that Georgian guardianship law and practice fails to meet a number of the basic requirements of the international law of human rights. The clear implication of this failure is that the lives of over 23,000 people currently under guardianship in Georgia could be significantly improved. This will only happen if the government commits to further reform the legislative landscape and support those involved in implementing those reforms. With this in mind, MDAC makes below a number of recommendations to the Georgian government, which if followed would bring the law and practice in line with basic international standards.

The indicators referred to (and shown in brackets) below, are 29 basic guarantees required for a human rights compliant guardianship system. They are given here to direct the reader to their more detailed analysis in the main sections of the report. MDAC recommends the following:

1. **Provide alternatives to guardianship:** The Georgian government should require use of least restrictive alternatives that promote the independence as well as protect the adult by:
 - ⇒ Creating supported decision-making services. Such services should be based on the following basic principles:
 - The adult retains full legal capacity whilst receiving services from a support person/network.
 - A support person/network should not be appointed without the adult’s consent.
 - There must be a relation of trust between the adult and the supporting person/network. A court should therefore not create such relationship, only recognise its existence.
 - The support person/network should not act on behalf of the adult unless specifically instructed, but merely provide the adult with support and assistance in making and communicating decisions.
 - There must be safeguards in place to protect the adult against abuse and exploitation.
 - ⇒ Providing the right to create legally-binding advance directives (where an adult specifies his or her wishes in the event of future functional incapacity) and powers of attorney (where an adult specifies a person to take decisions in the event of future functional incapacity) (Indicator 26).
 - ⇒ Abolishing plenary guardianship (Indicators 20 and 27).
 - ⇒ Requiring that that guardianship is used only as a last resort (Indicator 26).
2. **Maximise autonomy:** The Georgian government should ensure that adults subject to guardianship retain the right to make decisions in all areas of life in which they have functional capacity by:

- ⇒ Removing the automatic ban on people under guardianship from exercising fundamental rights as the right to property, the right to marry, and the right to vote (Indicators 13, 14, 16).
 - ⇒ Requiring guardians to seek the least restrictive living arrangements for adults (Indicator 21).
- 3. Improve procedures:** The Georgian government should provide sufficient guarantees to ensure the right of adults to meaningful participation throughout the guardianship process from the beginning of the process and for as long as the adult is under guardianship by:
- ⇒ Ensuring State-funded legal representation during all guardianship procedures, including appeals. Law should provide for a regular legal representation in guardianship cases, of a minimum standard that is provided in other areas of law (such as criminal law and mental health law) (Indicator 4).
 - ⇒ Introducing training to lawyers on the practicalities of the guardianship process and offering specialist training on how to represent clients whose functional capacity may be diminished (Indicator 4).
 - ⇒ Requiring guardians to regularly visit all adults for whom they are guardian, and to discuss all relevant issues with them. In the event of the adult not being able to express his or her wishes the guardian should be obliged to make decisions, and record such decisions, following the adult's previously known wishes and in line with the adult's known belief system and life narrative (Indicator 23).
 - ⇒ Removing the loopholes in the law allowing the option of detaining adults during the process for determining incapacity (Indicator 5).
- 4. Prevent abuse:** The Georgian government should reduce the potential for abuse of the guardianship relationship by:
- ⇒ Clearly prohibiting people who have conflicts with the interests of the subject adult from serving as guardian (Indicator 11).
 - ⇒ Establishing objective criteria for conducting incapacity assessments, made by a multi-disciplinary team (not just a psychiatrist), and establishing clear grounds for limiting an adult's legal capacity (Indicators 7 and 8).
 - ⇒ Viewing guardianship as a temporary measure by ensuring that there is compulsory review of guardianship, and apply this to retrospective reviews (Indicator 28).
 - ⇒ Establishing a regularly updated database of all guardians.
 - ⇒ Providing training to guardians, evaluating such training, and requiring continuous professional development of guardians.
 - ⇒ Ensuring that adults under guardianship retain full legal capacity in any dealings with guardianship offices of local authorities (eg. Complaining about the guardian), and enabling adults under guardianship to obtain legal assistance to judicially review decisions by the guardianship authority which are unlawful or unreasonable.
 - ⇒ Obliging guardianship offices of local authorities to establish an effective and accessible complaints system which adults under guardianship can directly

access; and obliging such guardianship offices to provide information in an understandable format to all adults under guardianship (Indicator 25).

MDAC believes that the implementation of these recommendations would significantly improve the quality of the Georgian guardianship system by strengthening the protection of the human rights and interests of adults subject to guardianship.

1. INTRODUCTION

1.1 Guardianship

This report is about guardianship of adults and does not deal with legal arrangements for children. MDAC defines ‘guardianship’ as a legal relationship established by a court process between an adult who is deemed to lack the requisite legal capacity to make personal decisions and the person appointed to make decisions on that adult’s behalf.³ The legal mechanism of guardianship exists in some form in almost every jurisdiction in the world. It is widely accepted as a means of protecting individuals who are deemed incapable of managing their personal affairs as a result of a mental health problem (psycho-social disability), intellectual disability, degenerative disease or profound physical or sensory disability.

Guardianship is usually established through court proceedings, or a combination of court and administrative processes, during which adults are found to either partially or completely lack capacity to make decisions on their own behalf. The outcome of such findings could be that an adult is ‘legally incapacitated.’⁴ The court (or an administrative authority) then appoints a guardian to act on that adult’s behalf. The guardian’s specific authority is defined either by law or by court order. Generally, guardians have both decision-making authority over the adult and an obligation to protect the adult’s welfare. The effectiveness of guardianship as an institution heavily depends on certain personal qualities of each guardian, such as their competence, diligence and conscientiousness.

Guardianship has a profound effect on the lives of those placed under its protective status. MDAC research carried out in several countries has revealed that in many cases adults who are placed under guardianship lose their right to make even the most basic decisions as well as the right to exercise other fundamental human rights. Abuse and neglect of an adult can result from a guardian failing to carry out the obligation to protect or from making decisions that are contrary to the desires and/or interests of that adult. To be effective therefore, guardianship systems must oversee the actions of guardians and have an efficient accountability system.

³ The English language terminology used throughout this report was arrived at after much debate. Presumably, there will be, or already are similar debates in other languages. To help the reader understand the terminology in these reports, a brief glossary of terms can be found in Annex A.

⁴ Throughout this report, MDAC uses the term ‘legal capacity’, as defined in the Glossary at p. 57. Different jurisdictions use different terminology to define the legal inability to act on one’s own behalf, such as, for instance, ‘incapable’ or ‘incompetent’. Some laws provide for a finding of partial or limited legal capacity.

As the global disability rights movement gains momentum, the guardianship model, as a means of providing protection and assistance to people with mental disabilities, is coming under increased criticism. The principle criticism is its failure to provide adequate due process protections in establishing and administering guardianship and ensuring the right of self-determination.⁵ In a small number of jurisdictions, such as in Canada and the UK, guardianship laws have been reformed, and alternative means of providing protection and assistance have emerged. Possibly the most notable of these is supported decision-making.⁶ As a result, legislators and courts in these countries see the guardianship model as a last resort that is to be used only after all other less restrictive measures of support and protection have been exhausted.

Guardianship, rather belatedly, has been formally recognised in international human rights law and as a pressing issue internationally. In the newly adopted United Nations Convention on the Rights of Persons with Disabilities (Disability Convention), legal capacity, a concept integral to guardianship, is specifically dealt with in Article 12 which states:

Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or

⁵ Canadian Association for Community Living (CACL) report. Task Force on Alternatives to Guardianship, August 1992, available at: http://www.worldenable.net/rights/adhoc3meet_guardianship.htm.

⁶ See the Glossary at p. 57 for a definition of supported decision-making.

inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

These provisions directly implicate guardianship. Further they add credence to MDAC's call for an immediate paradigm shift away from the arbitrary removal of the human rights of those under guardianship, towards the adoption of national policies and laws which will make the provisions of the Disability Convention, and those in Article 12 in particular, a reality. It is MDAC's wish and intention that this report will influence both the direction and speed of this paradigm shift.

1.2 Researching Guardianship

In many of the countries where MDAC works, guardianship laws have remained relatively unchanged for decades. However, they are likely to undergo substantial reform as countries continue to bring their legislation in conformity with international human rights standards. To highlight guardianship as an area in need of urgent reform, MDAC initiated its guardianship project to identify the strengths and weaknesses of existing legislative regimes. The project has two stages. The first is an examination of specific legislative regimes that impact on guardianship. As legislation and reality frequently diverge, the second stage examines this reality, by reviewing the implementation, or otherwise, of this legislation and how it effects individuals facing guardianship proceedings and life thereafter.

MDAC started stage one of its guardianship research in late 2004 by examining the legislative structure of guardianship systems in a number of countries. The focus was initially on four: Bulgaria, Hungary, Serbia and Russia. In 2006, MDAC began research in an additional four countries: Croatia, the Czech Republic, Georgia and Kyrgyzstan. A separate initial report has been prepared for each country researched.

The specific aim of stage one research is to examine the degree of compliance of national guardianship legislation in these countries with international human rights law, standards and best practices, in order to highlight any areas in need of reform. As with many research projects that serve as the first exploration of uncharted territory, the resultant reports may raise more questions than they answer. This is particularly true as the guardianship project is not a statistical survey, but, rather, a comparative legal analysis. The initial reports, of which this is one, present legislative analysis alone. They are to be followed by comprehensive reports incorporating the research findings of stage two, the manner and degree to which this existing legislation is implemented in practice.

1.3 Acknowledgements

Research was carried out by lawyers from each of the target countries. The researchers conducted all of the in-country research, wrote the first drafts of the country reports and participated in the editorial process. The researchers were Slavka Kukova (Bulgaria), Alexandra Korac and Petar Sardelić (Croatia), Zuzana Benešová and David Kosar (Czech Republic), Nina Dadalauri (Georgia), Dániel Kaderják (Hungary), Meder Dastanbekov (Kyrgyzstan), Anna Smorgunova (Russia), and Vidan Hadži-Vidanović (Serbia).

Beginning in February 2003, long before the guardianship project field research began, MDAC's Oliver Lewis gathered a select group of individuals to form the Guardianship Advisory Board. This group has been involved in an active capacity in the conception, design and implementation of both stages of the project, its members generously contributing their time and expertise. The Guardianship Advisory Board consists of five internationally recognised experts in the field of mental health, guardianship and human rights law:

- **Dr. Robert M. Gordon**, Director and Professor, School of Criminology, Simon Fraser University, Vancouver, Canada;
- **Dr. Georg Høyer**, Professor of Community Medicine, University of Tromsø, Norway;
- **Dr. Krassimir Kanev**, Chairman, Bulgarian Helsinki Committee, Sofia, Bulgaria;
- **Mr. Mark Kelly**, Director, Irish Council for Civil Liberties, Dublin, Ireland; and
- **Dr. Jill Peay**, Professor of Law, London School of Economics, London, UK.

MDAC would like to extend its warmest gratitude to the Guardianship Advisory Board for the individual and collective contributions they have made to this project. Any errors remain solely those of MDAC. MDAC's former Research and Development Director Marit Rasmussen developed and managed this project for over two years. Interns Priscilla Adams, Jill Diamond, Jill Roche and Nicholas Tsang helped with background research and István Fenyvesi designed and laid out the reports.

The Georgia report was drafted by Nina Dadalauri. Rusudan Nanava and Grigol Giorgadze provided extensive comments. István Fenyvesi, Sarah Green and Oliver Lewis produced the final version.

1.4 Method

This report is a *de jure* study of the legislative texts, rather than how they are applied. The study examines the types of protective arrangements available under national laws as well as any other relevant national legislation by:

- Studying the legal procedures for obtaining or terminating guardianship and the rights of the parties to such procedures.
- Examining the evidentiary standards in guardianship proceedings.
- Documenting the rights of the person alleged to lack capacity throughout the guardianship process.
- Assessing which rights are taken away after a finding of incapacity has been made.
- Analysing the power and authority of guardians, their accountability and how they are monitored, as well as the processes, if any, for bringing complaints against guardians.

1.5 Indicators for a Human Rights-Based Assessment of Guardianship

Throughout the project, MDAC has used 29 indicators against which legislation is analysed.⁷ These indicators come from the key European document concerning guardianship and supported decision-making, namely the Council of Europe Committee of Ministers' Recommendation No. R(99)4 'Principles Concerning the Legal Protection of Incapable Adults.' Further indicators were derived from the Recommendation's explanatory memorandum,⁸ as well as from a review of guardianship legislation in jurisdictions in Europe, the United States and Canada. MDAC has formulated its indicators bearing in mind that, with the exception of Kyrgyzstan, all countries under review have ratified the European Convention on Human Rights and, as Member States of the Council of Europe, there is an expectation that they will comply with its 'soft law',⁹ such as Recommendation No. R(99)4.

MDAC's indicators capture basic safeguards necessary for a person-centred guardianship system that respects human rights. The intent was to keep the indicators relatively simple and concise even where the underlying issues are anything but straightforward.

The indicators are not exhaustive, but do highlight critical issues faced by adults in guardianship systems. Omission of a particular point or issue from an indicator does

⁷ See Annex B for a table-summary of all 29 indicators.

⁸ See the full text of the memorandum at <https://wcd.coe.int/ViewDoc.jsp?id=407333>.

⁹ 'Soft law' refers to rules, recommendations, guidelines or broad principles that while not strictly legally binding are nonetheless legally significant. Black's Law Dictionary (8th Ed. 2004). Soft law implies a certain degree of political and moral commitment on the part of states and is a useful tool for interpreting existing legally binding norms. Recommendations of the Committee of Ministers of the Council of Europe are soft law; however, the Committee is empowered to ask Member States to inform it of the action taken by them on recommendations, thereby giving the Recommendations significant political force.

not mean that the issue is not important or does not pose a problem in the legislative framework of the country in question. By standardising the investigation and analysis of guardianship systems, MDAC aims to create a means for people to compare and contrast guardianship systems in different countries.

2. GUARDIANSHIP LAW AND POLICY IN GEORGIA

2.1 Introduction

Georgia (called Sakartvelo in Georgian) is a country in the Caucasian region of Eurasia, and is bordered on the west by the Black sea, on the north by Russia, on the south by Turkey and Armenia, and on the west by Azerbaijan. It measures 61, 700 km², and has a population, according to the 2006 census, of 4,403,000 people. Georgia is a former republic of the Soviet Union, and was one of the fifteen Soviet Republics for almost 70 years (from 1921 till 1991). Following the collapse of the Soviet regime, in 1991 it regained its independence, and between 1990 and 1995 it was officially called the Republic of Georgia. However, it is no longer a republic but a sovereign state with a transition economy. Since the breakdown of the Soviet Regime, Georgia has undergone a turbulent period of transition. Georgia's state religion is Christian Orthodox.

Economic stagnation and an absence of national production has led to the impoverishment of Georgia itself and poverty for much of its population. The impact has been felt particularly harshly by the healthcare system. State-run hospitals, for instance, suffer from a chronic lack of resources and the quality of the treatment provided is, on occasions, questionable. There are few State programmes aimed at facilitating the treatment, rehabilitation, and integration into society of those with disabilities, which includes those with mental and psycho-social disabilities. Like other vulnerable groups in Georgian society they face inadequate support from the State.

The situation in Georgia has noticeably changed since the fraudulent parliamentary elections under the Presidency of Edward Shevardnadze in November 2003 were challenged by his opposition leaders. The latter managed to get election results annulled by the Supreme Court of Georgia and meanwhile, through large demonstrations lasting for weeks, managed to make the then-incumbent President step down. This event, known as the 'Rose Revolution' has been characterized as a breakthrough towards democracy in reversed authoritarian Post-Soviet Block by international community.

Although the social security system in Georgia has recently begun to be rebuilt and reorganised, the new State policy on vulnerable groups has excluded many groups of people that previously were considered to be vulnerable and who used to receive monthly benefits. These benefits were small but still vital for their survival.

The relevant legislation and the situation of people with mental and psycho-social disabilities in Georgia have not undergone significant changes since 2003. Disability issues remain inadequately addressed in both policy proposals and legislation.

2.2 Demographic and Social Landscape of Georgia

The break-down of the Soviet regime, followed by the Civil War (1992-1993), and a war in Abkhazia (1993-1994), contributed to a severe economic crisis in Georgia, compounded by a large wave of emigration. Combined with an increasing mortality rate, these events have led to a dramatic population decline. Of the current population of 4,401,3 people (not including uncontrollable territories of South Ossetia¹⁰ and Abkhazia), 2,284,000 live in urban areas.¹¹

There has been a steady increase in the number of people considered disabled¹² in Georgia since 2003, according to the data provided by its Department of Statistics. In 2003 the total number of people with disabilities was estimated at 17,689. In 2004 this figure rose to 20,198. 2005 saw further increases when the figures reached 24,471. There has been a corresponding increase in the estimates of people with disabilities considered to be incapable: 15,789 in 2003, 18,566 in 2004 and 23,015 in 2005.¹³

People with mental disabilities are, in most cases, placed in one of the seven psychiatric hospitals in Georgia. Additionally, there are two institutions set up for adults with intellectual disabilities: the Zurabishvili Psychiatric Hospital in Tbilisi, and the other, called the 'House for People with Intellectual and Physical Disabilities' in western Georgia, in the village of Dzevri.

2.3 Georgia's Legal System

Georgia is a unitary, presidential republic. Politically it is a democratic republic with the Government made up of the President (currently Micheil Saakashvili), a Cabinet of Ministers that includes the Prime-Minister; the Parliament of Georgia, and independent courts (Supreme Court, Constitutional Court, General Courts).

Georgia belongs to the countries of Romano-Germanic law in the areas of civil, criminal and public law. There is an increasing tendency however towards the introduction of Anglo-Saxon laws, examples of which include the laws on procedural transactions and on the freedom of speech and expression.

As a party to the EU initiative, the European Neighbourhood Policy, there are expectations that all of Georgia's legislation should be brought in line with the EU laws. Georgia has ratified the European Convention on Human Rights and Fundamental Freedoms, and its Constitution contains a charter of rights, the 2nd charter in the Constitution.

¹⁰ South Ossetia's name in Georgian is Samachablo.

¹¹ Data obtained from the Department of Statistics of Georgia, 2006.

¹² The term used on *incapable individuals* in the source provided by the Department of Statistics is '*invalids*'.

¹³ Data obtained from the Department of Statistics of Georgia, 2006.

Parliament adopted the Constitution of Georgia, the supreme law of the country, by a qualified majority of votes on 24 August 1995. Laws in Georgia are adopted by the Parliament, while regulations and decrees – by representatives of the executive branch. There are individual legal acts that are adopted following the rule stipulated in the law on normative acts. The president of Georgia has the right to issue decrees which have the power of law, but only in cases where an emergency is declared.

All legal acts are adopted in accordance with the Constitution. Specific international public and private law has been adopted in Georgia, such law taking precedence over domestic legislation although not over the Constitution which retains its supremacy. Monitoring of adherence to such law is purportedly regular. Of particular note is its ratification of the European Convention on Human Rights, which has given rise to a number of individual petitions before the European Court of Human Rights.

Three procedural codes have been adopted relatively recently: the Civil Code (1997), the Administrative Procedure Code (1999) and the Criminal Procedure Code which came into force in 2000. Of particular relevance to this report is the Civil Code which regulates property, family and personal relations.

2.4 Guardianship Law in Georgia

This section offers a very brief overview of guardianship law in Georgia, and is followed by a summary of the guardianship/incapacity process.

Specific guardianship law in Georgia is found principally in the 1997 Civil Code. Its provisions stipulate the concept of guardianship, the process and procedure of its appointment, the responsible body who may appoint a guardian; individuals who may not be appointed as a guardian; the rights and obligations of the guardians; grounds for their dismissal and where and by whom the guardian's action/decision can be challenged.

Georgia does not have one comprehensive law on people with mental and psycho-social disabilities. Because the provisions within the 1997 Civil Code do not cover all aspects of guardianship of people with psycho-social and intellectual disabilities, additional laws from other sources have to be applied when needed. These include, principally, the following: Georgia's Law on Social Security of Disabled Persons (1995); Georgia's Law on Medical examination (2002); and the new Law on Psychiatric Care (1996).

The term 'mentally disabled persons' was introduced in the Law on Social Security which stated that the new term had to replace the word 'invalid'. Nevertheless, Georgian legislation is still littered with terms such as 'mentally retarded'.

The Law on Social Security of Disabled Persons purportedly provides people with disabilities the right to professional, social, and medical rehabilitation, the opportunity

to fully integrate into society, and to use their creative and work capacity. This law also envisages individual rehabilitation programmes for people with disabilities including people with mental disabilities.

Georgia's Law on Medical and Social Care defines the concept and the purposes of incapacity assessment that can become the basis for an adult's deprivation of legal capacity, which should be carried out before the appointment of a guardian.

The Law on Psychiatric Care asserts that each patient is guaranteed humane and respectful treatment. Nonetheless, it also provides for two forms of involuntary institutionalization: 'emergency hospitalization' and 'compulsory treatment' which are ambiguously phrased allowing for such institutionalisation to be misused. Equally noteworthy is its failure to make provision for a right to legal representation prior to or upon involuntarily hospitalization.

Although brief, this overview contains sufficient information to make it clear that the provisions for guardianship in Georgian legislation are such that they require urgent revision.

2.5 Georgia's Guardianship Process

Georgia's guardianship law provides only for plenary (all encompassing) guardianship. Once deprived of legal capacity there is no other less restrictive protective arrangement provided by the law.

Before an adult can be deprived of legal capacity, a functional capacity examination must be carried out by an authorized incapacity assessment board. Each Board is made up of at least three certified professional doctor-experts and a psychologist. However, the exact composition of the board may vary depending on the circumstances of an individual case. Prior to the Board's capacity evaluation, specific necessary medical checks and rehabilitation procedures should be carried out.¹⁴

Each evaluation may be sought in writing by the Administration of the hospital where the adult in question is hospitalized, or by a court. The Board is authorized to arrange the requisite incapacity assessment to take place in a medical or rehabilitation institution and to send the adult to that institution. It is also authorized to request and receive all necessary information and documentation from any institution regardless of its organizational status. The purported purpose is to ensure an incapacity assessment based upon recent and precise information.¹⁵

¹⁴ Georgian Law on Medical Examination (2001), art. 6, 8.

¹⁵ *Ibid.*, art. 52.

Capacity is measured by an evaluation of an adult's social, psychological and physiological condition,¹⁶ whether it is temporary or permanent, and should include, for instance, an assessment of ability, or lack of, to move, to have a sense of direction, to communicate, have self-control, and to be able to look after him/herself.¹⁷ Whilst it is open to the Board to find one of four levels of incapacity: slight, moderate, significant or high,¹⁸ it is only if moderate, significant or high levels of incapacity are found that deprivation of legal capacity can follow.

The Ministry of Social Security and Healthcare of Georgia provides instructions on how an incapacity assessment of an adult's functional capacity should be carried out.¹⁹

The incapacity assessment must be followed by a written report, the format of which is, prescribed by the Ministry of Labour, Healthcare and Social Security of Georgia. A copy should be given to the adult in question or his/her legal representative. A brief conclusion of the capacity evaluation report is sent to the 'appropriate institution'.²⁰

The conclusion of the incapacity assessment may be challenged either by the adult in question, his/her representative, or the institution that provides social security to the individual by addressing the Board or any governmental body that has a supervisory status within one month of the issuing of the conclusion.²¹

Of particular concern in this process is the possibility of an incapacity assessment taking place without an adult actually being examined. Whereas provision is made for adults to undergo a medical examination at their place of residence or institution, if unable to attend the Board itself²² in the case of 'long distance' and/or obstacles for the adult in getting to the place where the incapacity assessment is arranged, the medical 'examination' can still take place without the actual presence of the adult in question,²³ although the adult or his legal representative have to give their consent to this. At the same time, legislation offers no explanation or guidance as to what can be considered 'long distance' or an 'obstacle in reaching the place'.²⁴

Following the determination of an adult's degree of incapacity, the court is in a position to deprive that adult of legal capacity. At the same time, when a person in question is involuntarily hospitalised (this can have two bases: 'emergency hospitalization' or 'compulsory treatment'), the court hearing on the issue of the person's deprivation of his or her legal capacity takes place without the presence of the person in question.

¹⁶ *Ibid*, art. 4 and 5.

¹⁷ Georgian Law on Medical Examination (2001).

¹⁸ *Ibid*, Chapter II, art. 10.

¹⁹ *Ibid*, art. 63.

²⁰ Law on Medical Expertise, art. 55.

²¹ Georgian Law on Medical Examination, 2001, art. 60-61, clause 1, 2.

²² *Ibid*, clause 51.

²³ *Ibid*, clause 51.2.

²⁴ *Ibid*, art. 51.

Adults undergoing a capacity deprivation procedure do have the right to legal representation, but when involuntarily detained for compulsory treatment, their rights are limited in deciding whether they would continue or quit the treatment. Additionally, such adults do not have the right to have legal representation during court hearings. It is mainly those lawyers who represent the guardians' interests who take part in court hearings.

After the capacity deprivation procedure is over it is the Guardianship Agency, which has to be based in the same administrative territory where the adult in question resides, that appoints a guardian to the legally incapacitated person. The appointment of the guardian can be made by the Guardianship Agency in the following situations: a) when a written request on appointment of the guardian is submitted to the Guardianship Agency or b) when the official court ruling based on an incapacity assessment is sent to the Guardianship Agency, which has an obligation to appoint a guardian within a period of one month.

Provision is made for the consent of an adult to be obtained prior to the appointment of a guardian, although only when it is possible to do so. Consequently, consent is not mandatory in the process of guardian appointment. However, legislation states that the relationship of the person to be appointed as guardian with the incapacitated adult as well as the person's qualities are to be taken into account when deciding on his/her appointment.²⁵

Guardians are granted full right to manage the finances and property of the legally incapacitated adult, to take care of their health, and to ensure that they are provided with all necessary means and conditions for proper living.²⁶ They have, in addition, the right to express the will and interests of the adult in question and can therefore represent legally incapacitated individuals before a third party such as a court. Guardians are not obliged to discuss their decisions with the adults in question.

Guardians' activities are supervised by the Guardianship Agency and the latter may dismiss the guardian based on a request by the incapacitated person. The appointment of another guardian shall be in consultation with the incapacitated adult. The decisions of the guardians are not viewed or examined by an objective body that would check whether the rights of the incapacitated person have been violated, or whether any international human standards have been violated. Often abuse by guardians of their power, which in most cases has to do with selling the property of the incapacitated person and using financial resources for their own needs and benefits, is 'discovered' quite late either by a third party or the incapacitated person after she/he regains legal capacity, when there is very little chance to remedy the situation.²⁷

²⁵ Georgian Guardianship Law, 1995.

²⁶ *Ibid.*

²⁷ *Ibid.*

As to remedies, provision is made for all actions of the guardian to be challenged in court.

2.6 Human-Rights Based Assessment of Georgia’s Legislation

As noted, MDAC has developed a series of 29 indicators to assess guardianship legislation. These indicators are derived from international human rights law and standards, such as the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the Council of Europe Committee of Ministers Recommendation No. R(99)4 on adults and legal capacity. Where an issue or assertion has not been clearly established in international law or standards, best practice examples are provided from national laws in various countries. The first indicator highlights principles that run throughout the legal framework, and which also indicate general societal attitudes towards people with mental disabilities. The remaining indicators, like guardianship systems themselves, are divided into three major sets. The first set addresses the rights of the adult prior to placement under guardianship. The second set addresses the rights of the adult after deprivation of legal capacity as well as the corresponding responsibilities and accountability of the guardian. The third set explores less restrictive alternatives as well as mechanisms for review and termination of guardianship once imposed.

The remaining structure of the report is as follows. Each indicator is detailed in full. This is followed by a very brief ‘conclusion’ as to Georgia’s compliance with it and then an ‘analysis’ of that compliance. Finally, examples of specific ‘human rights standards’ relevant to the indicator are given.

2.6.1 Principles Running Throughout Legal Framework (Indicator 1)

Indicator 1	<i>Legislative purpose or preamble to the law encompasses respect for the human rights, dignity and fundamental freedom of people with mental disabilities.</i>
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Conclusion: The Constitution and other laws provide for the equal rights of people in general, but principles are rarely mentioned with respect to people with psycho-social or intellectual disabilities.

Analysis: The Constitution of Georgia states²⁸ that the human rights, dignity and fundamental freedoms of each individual living on the territory of Georgia are acknowledged and protected by the State of Georgia. However, the Constitution does not say anything specifically about people with mental disabilities. The Law on Social

²⁸ Constitution of Georgia, ch. 1, art. 7.

Care for the Disabled and the 2006 Law on Psychiatric Care make a reference to the dignity of people with mental disabilities.

The Law on Social Care for the Disabled directly addresses the issues related to people with disabilities,²⁹ introduces the term ‘disabled persons’, and aims to ensure the realization of rights of people with disabilities equally to other individuals. Further, it sets out the State policy on people with disabilities that stipulates the need to comply with international agreements which, along with the Constitution of Georgia and other legal acts, determines the legal framework for issues of specific relevance to them. Additionally, it includes a specific non-discrimination clause:

‘Discrimination of disabled persons is forbidden and subject to punishment in accordance with the law’.³⁰

Human Rights Standards: Principle 1 of Recommendation No. R(99)4 provides that respect for the human rights and dignity of people with mental disabilities should permeate throughout the law:

In relation to the protection of incapable adults the fundamental principle, underlying all the other principles, is respect for the dignity of each person as a human being. The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms, taking into account any qualifications of those rights contained in the relevant international legal instruments.³¹

This principle may be implemented in legislation by the inclusion of a preamble or purpose statement in the relevant statutes. Such a proclamation on the recognition and importance of human rights principles and human dignity will guide the judiciary to consider these principles when drafting a decision. The World Health Organization (WHO) also recommends this approach in order to ‘help [...] courts and others to interpret legislative provisions whenever there is any ambiguity in the substantive provisions of the statute’.³² The WHO cites the preamble to the Polish Mental Health Protection Act as embodying this principle. This preamble states, ‘[a]cknowledging that mental health is a fundamental human value and acknowledging that the protection of the rights of people with mental disorders is an obligation of the State,

²⁹ The term only covers individuals with limited abilities due to disease, trauma, mental or physical defect. Issues related to people with physio-social disabilities are covered by the Law on Psychological Care.

³⁰ Law on Social Care for the Disabled, art. 1(2).

³¹ Recommendation R(99)4, Principle 1.

³² World Health Organization, WHO Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, Dare to Care (World Health Organization, Geneva, Switzerland, 2005), p. 19.

this Act proclaims [...]’.³³ A preamble such as this establishes the overriding values that should be applied to implementation of the law.

2.6.2 Procedural Rights During Guardianship Proceedings (Indicators 2-7)

This group of indicators addresses the procedural rights of adults in guardianship proceedings. While national legislation may well provide for additional rights and protections, these indicators represent the minimal necessary standards for due process and fair proceedings. Under European human rights law, ‘special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.’³⁴ Indicators 8 to 12 will address the quality of evidence that is provided to the court in incapacity cases, a critical stage in the guardianship process.

Indicator 2	<i>The legislation clearly identifies who may make an application for appointment of a guardian and the foundation needed to support it.</i>
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Conclusion: The legislation clearly identifies who may make an application for appointment of a guardian.

Analysis: Legislation³⁵ asserts that guardians are appointed to people with mental disabilities who were recognized as such by the court. A guardian’s appointment is partially regulated by provisions of Georgian Guardianship Law. The court that made the decision on an individual’s legal capacity shall notify the local guardianship agency within three days of appointing a guardian to the adult.³⁶ The provisions for the foundation of guardianship appointment are defined in the Georgian Law on Medical Examination.

The foundation for guardianship appointment is the lack of legal capacity. A guardian must be appointed to a person who is legally an adult for the purpose of protecting that person’s personal and property rights and interests, in cases of inability to independently exercise and protect those rights.

Human Rights Standards: This indicator has two principle focuses. The first is on whether the legislation specifically defines which individuals may file an application

³³ Mental Health Protection Act, M284 1994, Poland, as cited in WHO, WHO Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, dare to care (World Health Organization, Geneva, Switzerland, 2005), p. 19.

³⁴ European Court of Human Rights in the case of *Winterwerp v. the Netherlands*, Application no. 6301/73, judgment 24 October 1979, (A/33) (1979-80) 2 EHRR 387, para. 60.

³⁵ Guardianship Law, art. 1276.

³⁶ Civil Code, art. 1280.

for the appointment of a guardian and the second on whether the statute includes a list, or examples, of the prima facie evidence necessary to demonstrate the need for such an application. With respect to the first focus, Recommendation No. R(99)4 sets out in Principle 11(1) that:

‘The list of those entitled to institute proceedings for the taking of measures for the protection of incapable adults should be sufficiently wide to ensure that measures of protection can be considered in all cases where they are necessary. It may, in particular, be necessary to provide for proceedings to be initiated by a public official or body, or by the court or other competent authority on its own motion.’

The Recommendation calls for ‘fair and efficient procedures for the taking of measures for the protection of incapable adults’.³⁷ Fairness in this context includes the provision of a law that clearly specifies who can file applications.

The second, that a guardianship application must have some merit on the face of it, is necessary in order to protect an adult against malicious accusations of the deprivation of functional capacity. In the case of *H.F. v. Slovakia*, the European Court of Human Rights (ECtHR) examined the procedure that led H.F. to the deprivation of her legal capacity based on an application submitted by her ex-husband and substantiated by a psychiatric report that was, at the time of the hearing, over a year old. The court found a violation of Article 6(1) ECHR because, among other procedural defects, the Slovak Court failed to produce sufficient evidence in light of Principle 12 of Recommendation (99)4, which requires an ‘up-to-date report from at least one suitably qualified expert’.³⁸ When legislation prescribes the form of evidence necessary to be submitted with an application, incapacitations such as that suffered by the applicant in *H.F. v. Slovakia* may be avoided at the outset.

Indicator 3	<i>An adult has a right to actual notice of, and to be present and heard at all proceedings related to the application for deprivation of his or her legal capacity and appointment of a guardian.</i>
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Conclusion: Georgian legislation is silent on the issues of the right of an adult to be present and heard in the process of legal capacity deprivation.

³⁷ Recommendation No. R(99)4, Principle 5(1).

³⁸ *H.F. v. Slovakia*, Application No. 54797/00, judgment 8 November 2005. Note that the judgment is only available in French. For an English Summary, see Press Release, European Court of Human Rights Registrar, Chamber judgments concerning France, Malta, Moldova, Poland, Slovakia, Turkey and Ukraine (8 November 2005). Available through www.cmiskp.echr.coe.int/echr, visited 30 July 2006.

Analysis: The presence of the adult is not specifically restricted by the law in the process of appointment of a guardian. However, the court proceedings on deprivation of the legal capacity of an individual may take place without the actual presence of the individual in question when that person is detained in a hospital.

Human Rights Standards: The right to be present and heard during court proceedings is directly linked to the right to receive notice of the proceedings, as the right to be present and heard cannot occur without meaningful and actual notice. Principle 11 of Recommendation No. R(99)4 provides that the adult must be informed of the proceedings, specifying, among others, that this must be done ‘in a language, or by other means, which he or she understands.’³⁹

The Explanatory Memorandum to Recommendation No. R(99)4 reiterates that this procedural safeguard is necessary, citing the requirements of Article 6 of the ECHR.⁴⁰ The language used in the Principle recognizes that for the individuals concerned, notice as prescribed by general civil procedure law may not convey the meaning or ramifications of the proceedings. Therefore, the standard to be applied is whether the law provides for actual notice. One solution to this is incorporated in the Uniform Guardianship and Protective Proceedings Act that simply adds a provision requiring ‘notice under this Act must be in plain language.’⁴¹

With respect to the second element, Recommendation No. R(99)4 simply provides that ‘the person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.’⁴² Article 6 of the ECHR provides for fair trial rights in cases, including those where a person’s civil rights and obligations are in question, including guardianship issues.⁴³

³⁹ Note that Principle 11(2) also provides an exception to notice when such ‘would be manifestly without meaning to the person concerned or would present a severe danger to the health of the person concerned.’

⁴⁰ Council of Europe, Committee of Ministers. Explanatory Memorandum to Recommendation R(1999)4 on principles concerning the legal protection of incapable adults. Adopted 23 February 1999, para. 52.

⁴¹ See para. 113(c). The Uniform Guardianship and Protective Proceedings Act (1997) is model legislation drafted by the National Conference of Commissions on Uniform State Laws. The model legislation was also endorsed by the American Bar Association. The purpose of this uniform act was to ensure due process protection for people who have been deprived of legal capacity and to subject guardians to court jurisdiction throughout the US; consequently, its due process provisions may also serve as a model in other jurisdictions. Available at www.nccusl.org, visited 14 July 2006.

⁴² Principle 13.

⁴³ See *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979, (A/33) (1979) 2 EHRR 387, in which the Court said that ‘[t]he capacity to deal personally with one’s property involves the exercise of private rights and hence affects ‘civil rights and obligations’ within the meaning of Article 6 para. 1 [...]. Divesting Mr. Winterwerp of that capacity amounted to a ‘determination’ of such rights and obligations.’ This principle was more recently reaffirmed in *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, para. 51.

Indicator 4

An adult has a right to free and effective legal representation throughout guardianship proceedings.

Conclusion: There is no right to free legal representation in guardianship proceedings.

Analysis: Law does not specify provide for – or prevent – legal representation. According to the Civil Procedure Code, representatives of the guardianship authority should attend court sessions on legal capacity.⁴⁴ However, these people are not there to represent the adult.

Human Rights Standards: Council of Europe Recommendation No. R(2004)10 highlights that ‘persons with mental disorder should be entitled to exercise all their civil and political rights’.⁴⁵ It is a well-established principle of international law, explicitly stated in Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) that where liberty is in question, a person must have the right to free legal assistance and representation. The UN Human Rights Committee, the monitoring body for the ICCPR, has interpreted this obligation to additionally apply to ‘procedures to determine [their] rights and obligations in a suit at law’.⁴⁶ As the requirements of Article 14(3) of the ICCPR are considered basic guarantees of a fair hearing,⁴⁷ free and effective representation should be interpreted as a requirement during all incapacitation proceedings. Extension of this right to guardianship proceedings is also supported by Recommendation No. R(99)4, which provides that ‘there should be adequate procedural safeguards to protect the human rights of the adult concerned and to prevent possible abuses’.⁴⁸ Similarly, the ECHR has been interpreted to include fair trial rights during court procedures concerning legal capacity.⁴⁹

Enforcing this requirement by providing effective legal representation is especially crucial when the person is alleged to lack functional capacity to represent him or herself.⁵⁰ Deprivation of legal capacity may, as already noted, result in lifelong placement under guardianship and a loss of the right to exercise fundamental rights (such as the right to choose residence, to manage finances, to marry, to vote). The UN General Assembly recognized the importance of this obligation in the 1991 Principles

⁴⁴ Civil Procedure Code, art. 325(2).

⁴⁵ Recommendation No. R(2004)10 Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder, Adopted 22 September 2004, art. 4.

⁴⁶ See UN Human Rights Committee, General Comment 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law, dated 13 April 1984, para. 2.

⁴⁷ Human Rights Committee, General Comment 13, op. cit, para. 5.

⁴⁸ Principle 7.

⁴⁹ *Matter v. Slovakia*, op. cit, para. 51.

⁵⁰ See for example, the European Court of Human Rights case *Megyeri v. Germany*, Application No. 13770/88, judgment 12 May 1992, (1992) 15 EHRR 584, para. 23.

for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (Mental Illness Principles), which state that,

[t]he person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it.⁵¹

Indicator 5

An adult may not be detained in order to be subjected to an evaluation of his or her legal capacity.

Conclusion: Georgian law allows for the detention of a person solely to carry out an incapacity assessment.

Analysis: Law states that incapacity assessments may take place on a voluntary or involuntary basis,⁵² thereby allowing for the possibility of an adult being detained in order to carry out an incapacity assessment.

Human Rights Standards: The Mental Illness Principles state that ‘[n]o person shall be compelled to undergo incapacity assessment with a view to determining whether or not he or she has a mental illness except in accordance with a procedure authorized by domestic law’.⁵³ Similarly, the ECtHR has examined the issue of detention in relation to forced psychiatric examinations under Article 5 of the ECHR and the right to liberty. In *Nowicka v. Poland*, it held that detaining an individual in order to fulfil an obligation under law, such as a court ordered psychiatric examination, is, on its face, a permissible action. However, it also found that detaining an individual prior to such an examination and continued detention after the obligation ceases to exist, fails to balance the State’s interest in the examination and the individual’s right to liberty and constitutes a violation of Article 5.⁵⁴ In other circumstances, the ECtHR has held that forced psychiatric examinations violate Article 6 (right to fair trial)⁵⁵ and Article 8 (right to respect for private and family life)⁵⁶ of the ECHR.

⁵¹ UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on 17 December 1991, Principle 1(6).

⁵² Civil Procedure Code, art. 352(2).

⁵³ UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on 17 December 1991, Principle 5.

⁵⁴ *Nowicka v. Poland*, Application No. 30218/96, judgment 3 December 2002, paras. 58-61.

⁵⁵ See *Bock v. Germany* regarding the length of domestic procedures due to repeated court ordered psychiatric examinations. Application No. 11118/84, judgment 21 February 1989.

⁵⁶ See *Worwa v. Poland* holding that multiple examinations in a short period of time in connection with similar criminal cases constituted an unjustified interference with the applicant’s private life. Application No. 26624/95, judgment 27 November 2003.

Consequently, the mere possibility that a person may lack capacity, either partially or entirely is not a sufficient basis, by itself, to involuntarily detain a person.

Indicator 6	<i>An adult has the right and opportunity to present his/her own evidence (including witnesses), and to challenge the opposing evidence (witnesses).</i>
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Conclusion: Georgian legislation does not deprive adults of the right and opportunity to present their own evidence (including witnesses), and to challenge the opposing evidence (witnesses) in court.

Analysis: However, the case is different when the adult is mentally incapable, when their rights are exercised through their guardian. There is no possibility for an adult to present his or her own evidence (by themselves, but they may do it through their representatives) in a court hearing when they are involuntarily detained.⁵⁷ When not detained, which is the norm, the adult or his/her legal representative may challenge the opposing evidence.

Human Rights Standards: Recommendation No. R(99)4 states that '[t]here should be fair and efficient procedures for the taking of measures for the protection of incapable adults'.⁵⁸ This principle echoes Article 6(1) of the ECHR which guarantees a fair hearing in all cases involving civil rights and obligations.⁵⁹ The ability for the parties in the case to challenge evidence with counter evidence and the right to present evidence, including calling witnesses, is an aspect of a fair hearing. This safeguard is listed in Article 14(3) of the ICCPR, interpreted by the UN Human Rights Committee to include the minimum guarantees of a fair hearing.⁶⁰

In proceedings concerning the deprivation of legal capacity and guardianship, giving the adult the opportunity to challenge evidence and witnesses is especially important. It is principally through such challenges that the court may become aware of possible ulterior motives behind the application, such as, for instance, access to the adult's financial resources. Further, the adult, at this stage, may also be able to point out procedural irregularities, such as medical reports that are out of date or incomplete, as well as evidence demonstrating the adult's functional abilities.

⁵⁷ Law on Psychiatric Care.

⁵⁸ Principle 7(1).

⁵⁹ For application of Article 6(1) to guardianship proceedings, see *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979.

⁶⁰ International Covenant on Civil and Political Rights, Article 14(3)(e). See UN Human Rights Committee, General Comment 13, para. 5 regarding Article 14(3) as defining minimum guarantees.

Indicator 7

No adult is deprived of legal capacity without being the subject of an incapacity assessment, conducted by a qualified professional and based upon recent, objective information, including an in-person evaluation.

Conclusion: Adults in Georgia cannot be deprived of legal capacity without an incapacity assessment conducted by a qualified professional and based upon recent, objective information.

Analysis: The purpose of a capacity evaluation of an adult is, as its name suggests, to determine the degree of that person's capacity and limitations. It is a complex process that should be supported by social, professional, psychological and clinical-functional data.⁶¹

The capacity evaluation of an adult is carried out by the incapacity assessment board, comprised of at least three certified professional medical experts and a psychologist. However, the composition can vary depending on the nature of individual cases and on the type of the incapacity assessment required. Prior to the capacity evaluation by the board, all necessary medical assessments and rehabilitation procedures for the adult - after all rehabilitation programs have been exhausted - should be carried out.⁶²

The procedures provided by the Ministry of Social Security and Healthcare of Georgia give instructions as to the appropriate conduct of the evaluation.⁶³ The board's findings and conclusion formally determine which of the four permitted degrees of capacity limitation is relevant to the adult, whether this is considered to be temporary or permanent, and which may qualify the adult for social security. The four specific categories are: slight, moderate, significant and high levels of incapacity. In order to be declared by the Board as having limited functional capacity, an individual must be held to have either moderately, significantly or high levels of incapacity.⁶⁴

The board is authorized to send an adult for an incapacity assessment in medical and rehabilitation institutions to re-examine the medical diagnosis and the degree of his or her dysfunction.

The findings of the evaluation must be presented by way of an official report, the format of which is determined by the Ministry of Labour, Healthcare and Social Security of Georgia. Once finalized, the report is given to the adult or his/her legal representative, and a brief conclusion of the capacity evaluation must be sent, within 3 days, to the

⁶¹ Law on Medical Examination, 2001, arts. 4 and 5.

⁶² *Ibid*, arts. 6 and 8.

⁶³ Georgian Law on Medical Examination, 2001, art. 10.4.

⁶⁴ *Ibid*, ch. II, art. 10.

appropriate State institution.⁶⁵ The results of the evaluation may be formally challenged within a period of one month, either by the adult in question, his/her representative, and/or institution which provides social security to the individual.⁶⁶

The challenge must be directed to the board or a governmental body such as Ministry of Health Care and Social Security.⁶⁷

Although provision is made for in-person evaluations,⁶⁸ there are specific exceptions which considerably lessen the protection afforded to adults. Legislation states that adults shall be examined at their home or health institution if unable to attend an examination at the board itself. However if the distance between the adult and the suggested appointment is 'long' or the home of the adult is difficult to reach, the examination can take place in the absence of the adult⁶⁹ though the person in question or his legal representative have to give their consent on this. The failure to provide specific guidance as to what can be considered 'long distance' or a 'place that is difficult to reach',⁷⁰ makes this provision even more alarming.

Human Rights Standards: A finding of the deprivation of legal capacity removes an individual's right to make decisions about all areas of his or her personal and public life. It, therefore, interferes with those rights to privacy that are protected by international law.⁷¹ In a democratic society, such interference must be necessary and in accordance with the law. Legislation should contain provisions to ensure that a decision to deprive an adult of legal capacity is based on current and reliable information. Recommendation No. R(99)4 calls for a thorough in-person meeting between the adult and a 'suitably qualified expert'. It asserts the requirement for an up-to-date report to attest to the person's condition and notes that the resulting report should be recorded in writing.⁷² In *H.F. v. Slovakia*, the ECtHR specifically cited Recommendation No. R(99)4 in connection with the obligation to consult recent medical reports in determining legal capacity. In this case, it found that relying on an outdated psychiatric report did not amount to sufficient procedural safeguards to protect the applicant, whose legal capacity was at issue. It added that a request for a second psychiatric report would have been in the interests of the adult concerned.⁷³

⁶⁵ *Ibid*, art. 55.2.

⁶⁶ *Ibid*, art. 61.

⁶⁷ *Ibid*, art. 60, clause 1, 2.

⁶⁸ *Ibid*, art. 51.

⁶⁹ *Ibid*, art. 51.2.

⁷⁰ *Ibid*.

⁷¹ See Article 8 of the European Convention on Human Rights and art. 17 of the International Covenant on Civil and Political Rights.

⁷² Principle 12.

⁷³ *H.F. v. Slovakia*, Application No. 54797/00, judgment 8 November 2005. Note that the judgment is only available in French. For an English Summary, see Press Release by the Registrar of the European Court of Human Rights, 8 November 2005.

2.6.3 Quality of Evidence Provided to the Court in Incapacity Cases (Indicators 8-12)

Indicator 8	<i>A finding of incapacity requires a demonstrable link between the underlying diagnosis and the alleged inability to make independent decisions.</i>
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Conclusion: Legislation does require a demonstrable link between the adult’s diagnosis and the alleged inability to make decisions, which has to be based on a medical expert’s conclusions, and finding of incapacity has to be carried out by the court.

Analysis: As mentioned earlier, Georgian legislation differentiates between four levels of incapacity: slight, moderate, significant and high. Deprivation of legal capacity can occur after a finding of all but a slight incapacity.⁷⁴

The Board, which is a certified institution for incapacity assessment, has an obligation to examine the dynamics, structure and factors of the adult’s capacity limitation. The Board bears the responsibility for establishing the link between the capacity limitation status and the diagnosis; it also has to set the period after which the status will be re-examined.⁷⁵ The Board is the body that develops individual rehabilitation programmes (considering different types of rehabilitation, including social, in-house care-taking and material).⁷⁶

Based on the Board’s decision on a temporary or permanent capacity limitation of the adult, a guardian shall be assigned to the adult in question. The decision on the adult’s level of incapacity can be challenged by the adult or his/her legal representative in court. The capacity status has to be re-examined in a course of every one or two years, depending on the degree of the capacity limitation; for high levels only once every two years. In some cases, where it is expected that rehabilitation will occur, it is possible for incapacity status to be established for a period as short as six months.⁷⁷

Human Rights Standards: This indicator finds express support in the Mental Illness Principles, specifically principle 4(5) which states: ‘[n]o person or authority shall classify a person as having, or otherwise indicate that a person has, a mental illness except for purposes directly relating to mental illness or the consequences of mental illness.’ Accordingly, it would be contrary to this principle to restrict legal competence by classifying an individual as having been deprived of legal capacity without demonstrating that a mental disability impaired the individual’s ability to make independent choices and to what degree the mental disability warranted limiting such decisions.

⁷⁴ Georgian Law on Medical Examination, 2001, art. 10.

⁷⁵ *Ibid*, art. 46, a, b, i.

⁷⁶ *Ibid*, art. 9.

⁷⁷ *Ibid*, ch. III, art. 12.

This indicator also invokes several of the Recommendation No. R(99)4 principles. Principle 6 on proportionality states that if a measure of protection such as guardianship is necessary, it should be proportional to the degree of functional capacity of the adult and tailored to his or her circumstances and needs. This reflects an understanding that psycho-social disabilities can fluctuate, and that individuals will need different levels of protection and retention of rights based on the nature and severity of the underlying disability. Principles 7 and 12 provide that an adequate investigation and assessment of the adult's particular needs is an issue of fundamental fairness. Further, Article 8 of the ECHR mandates that any interference with a person's private life be proportionate to the aims pursued. In essence, complying with international human rights standards will mean that legal capacity is restricted only to the extent necessary to assist the individual in making decisions.

Indicator 9	<i>A finding of incapacity is based upon sufficient evidence and serves the interests of the adult.</i>
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Conclusion: Although provision is made for specific procedures and evidence to be obtained before and during the capacity evaluation. In the process the interests of the adult must be considered by the expert commissioned to evaluate the adult's capacity.

Analysis: Legislation combined with instructions specified by the Ministry of Health, Labour and Social Security concerning the procedures for conducting an incapacity assessment purport to seek transparency. For example an adult or his/her representative is permitted to nominate external specialists to attend the medical evaluation of the Board and examine that adult's level of capacity. Such experts are however not granted the same authority as the members of the Board.⁷⁸

In addition, an incapacity assessment must be carried out after proper diagnostic treatment and rehabilitation activities have been conducted in relation to the adult,⁷⁹ and only on the basis of recent documentation and information. To allow this, the Board is specifically authorised to request and to obtain any relevant information from any body and/or institution, regardless of their legal status, on the person in question.⁸⁰

Human Rights Standards: This indicator looks at two elements of incapacity determination and subsequent guardianship – the evidentiary basis submitted to the domestic court and the impact of the ruling upon the adult's interests.

⁷⁸ Georgian Law on Medical-Social Capacity, arts. 54 and 58.

⁷⁹ Law on Medical Examination, art. 6.

⁸⁰ *Ibid*, art. 47.

To be sufficient, the evidence must meet specific qualitative standards. Recommendation No. R(99)4 provides that the decision maker in incapacitation proceedings should see the individual personally, and that an up-to-date report from a qualified expert must be submitted.⁸¹ ‘Qualified expert’ is not defined, but should be understood as referring to a psychiatrist or psychologist, possibly with specialized training in capacity assessment rather than a general medical practitioner. The United Nations has suggested in addition that experts must conduct an evaluation of the adult’s social capacity.⁸²

As detailed above, the ECtHR has highlighted the necessity of a qualified expert report to determine capacity.⁸³ In *H.F. v. Slovakia*, it held that statements by the concerned individual’s former spouse and lay witnesses, in combination with a psychiatric evaluation that was one and a half years old, was not sufficient evidence for a deprivation of legal capacity. The case, therefore, not only clarifies that an expert report is necessary for States to meet their obligation under the ECHR, and that lay witnesses are not a satisfactory substitute, but also that the report must be recent in order to reflect the functional capacity of the individual at the time of the hearing. These points indicate that even an expert opinion on mental capacity may not meet the required burden of evidence.

Secondly, as suggested by Recommendation No. R(99)4, ‘[i]n establishing or implementing a measure of protection of an incapable adult the interests and welfare of that person should be the paramount consideration.’⁸⁴ To achieve this, the individual’s circumstances must be taken into account and the protection offered by guardianship weighed against negative consequences for the individual. As provided in Principle 5 of Recommendation No. R(99)4, restriction should not be established ‘unless the measure is necessary, taking into account the individual circumstances and needs of the person concerned.’ For example, as employment is an important source of social interaction and self-esteem for an employed individual, guardianship may not be in the individual’s best interest if, as a result, the right to work is restricted. Such considerations should be examined during proceedings in order to meet the necessity, subsidiarity, and proportionality requirements prescribed in Principles 5 and 6.

⁸¹ Principle 12.

⁸² See UN General Assembly, Declaration on the Rights of Mentally Retarded Persons’ Resolution 2856 (XXVI), 20 December 1971, para. 7.

⁸³ *H.F. v. Slovakia*, Application No. 54797/00, judgment 8 November 2005.

⁸⁴ Principle 8(1).

Indicator 10

Selection of a guardian is based on objective criteria and the wishes and feelings of the adult are considered.

Conclusion: Georgian legislation provides criteria for selecting a guardian. The adult's wishes and feelings can be taken into account, but not when the adult is involuntarily institutionalised.

Analysis: Legislation suggests that the consent of the adult is to be considered when choosing a guardian.⁸⁵ However, as there is no clear regulation as to who may be a guardian by law, and since the system of public guardianship does not exist in Georgia, guardians tend to be immediate family members or relatives of the adult in question. Legislation does however⁸⁶ provide a list of those individuals who may not be appointed as a guardian.⁸⁷

For the position of guardians or care-takers the following individuals may not be appointed:

- ⇒ A person who has not reached the age of eighteen.
- ⇒ A person who has been acknowledged as incapable by the court.
- ⇒ A person who has been deprived from the right of parenthood.
- ⇒ An adopter in case adoption was annulled due to her/his failure to carry out parental responsibilities.
- ⇒ A person who is facing removal from the position of guardian or care-taker because they did not fulfil their obligations.

Nevertheless, the wishes and feelings of the person in question may be considered in selecting a guardian.

However, in case individuals are hospitalized involuntarily, their wishes and feelings in relation to the selection of a guardian are not considered as they are not present at the guardianship appointment proceedings.

Human Rights Standards: The Disability Convention requires States Parties to ensure that the 'measures relating to the exercise of legal capacity respect the rights, will and preferences of the person'.⁸⁸ This, presumably, includes the appointment of a guardian.

⁸⁵ Guardianship Law, art. 1282(2).

⁸⁶ *Ibid*, art. 1283.

⁸⁷ For the list of those individuals who may not be appointed as guardians, see the Law on Guardian, Article 1283.: Persons who may not be appointed as guards or care-takers.

⁸⁸ Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 12(4).

Recommendation No. R(99)4 provides that the primary concern in assessing the suitability of a guardian should be ability of that person to ‘safeguard and promote the adult’s interests and welfare’.⁸⁹ It also suggests that States take steps to ensure that qualified guardians are available. This might include creating training associations.⁹⁰ This indicator also measures whether legislation prescribes qualities or attributes necessary to be appointed as a guardian. For example, Finnish legislation provides that the suitability of a prospective guardian should be determined based on skill, experience and the nature and extent of the duties required.⁹¹

Recommendation No. R(99)4 further states that ‘the wishes of the adult as to the choice of any person to represent or assist him or her should be taken into account and, as far as possible, given due respect’.⁹² The Explanatory Memorandum to the Recommendation warns that whilst the invaluable and irreplaceable role of relatives must be recognised and valued, the law must be aware that acute conflicts of interest may exist in some families and recognise the dangers these conflicts may present.⁹³ Finally, Principle 9 of Recommendation No. R(99)4 provides that respect for the past and present wishes and feelings of the adult should be ascertained and given due respect. This principle applies to all stages of establishing and implementing guardianship, but it is particularly important in choosing the person to be appointed as a representative.

Indicator 11	<i>The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict.</i>
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Conclusion: Issues related to conflict of interest between the guardian and the adult are not regulated by Georgian legislation.

Analysis: The legislation that provides guidance for appointing a guardian also regulates the relationship between the guardian and the adult.⁹⁴ The law provides for the consent of the adult to be obtained in the appointment of the guardian ‘where this is possible’.

Plenary guardianship offers greater opportunity for conflicts of interest between the adult and the guardian than less restrictive alternatives. A common example of potential and actual conflict is in the area of property, where the guardian has full responsibility to manage the adult’s property. There is however some provision for the

⁸⁹ Principle 8(2).

⁹⁰ Principle 17.

⁹¹ The Finnish Guardianship Services Act, 442/99, Chapter 2, Section 5. Unofficial translation provided by FINLEX, a service of the Finnish Government. Available at www.finlex.fi/en/, visited 18 July 2006.

⁹² Recommendation No. R(99)4, Principle 9(2).

⁹³ Explanatory Memorandum to Recommendation No. R(99)4, para. 44.

⁹⁴ Guardianship Law, art. 1282.

monitoring of the quality of guardians’ activities, through a body known as the local Guardianship Agency.⁹⁵

Human Rights Standards: Partly in order to prevent conflict of interests, Recommendation No. R(99)4 states that ‘the wishes of the adult as to the choice of any person to represent or assist him or her should be taken into account and, as far as possible, given due respect’.⁹⁶ However, the issue of conflicts between an appointed representative and the adult is not directly addressed by R(99)4. Therefore, further guidance can be found in good practices from other countries. The Standards of Practice adopted by the National Guardianship Association (NGA), a U.S.-based membership body of guardians and legal professions, addressed the issue of conflicts of interest between a guardian and a ‘ward’⁹⁷ in Standard 16:

‘The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward. Impropriety or conflict of interest arises where the guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the ward.’⁹⁸

The NGA Standard 16 continues, ‘a guardian who is not a family guardian shall not directly provide housing, medical, legal or other direct services to a ward.’⁹⁹ The guardian should remain free to carry out his/her duty to challenge inappropriate, inadequate or poor quality services from service providers on behalf of the adult. Clearly, where the guardian is also the service provider, the guardian has a conflict of interest.

Indicator 12	<i>An adult has the right to appeal a finding of incapacity and/or the appointment of a guardian.</i>
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Conclusion: The adult has the right to appeal a court order depriving the adult of legal capacity. The adult may not appeal the appointment of the guardian, but can submit a complaint.

Analysis: The adult may theoretically appeal a court order, but there are practical difficulties if the adult is not notified about the court decision. There is no mechanism

⁹⁵ *Ibid*, art. 1284.

⁹⁶ Principle 9(2).

⁹⁷ The term ‘ward’ is commonly used in English-speaking countries. However, MDAC has decided not to adopt use of this term because it dehumanises the individual.

⁹⁸ National Guardianship Association, ‘Standards of Practice,’ Adopted by the NGA Board of Directors, Ratified by the NGA Membership June 2000, Edited Edition 2002, page 9. State College, Pennsylvania.

⁹⁹ National Guardianship Association, ‘Standards of Practice,’ Adopted by the NGA Board of Directors, Ratified by the NGA Membership June 2000, Edited Edition 2002, page 9. State College, Pennsylvania.

for the adult to appeal the appointment of the guardian, but the adult can complain about the guardian to the guardianship authority.¹⁰⁰

Although the process of guardianship appointment may happen without the legal representation of an individual, the Georgian Guardianship Law¹⁰¹ gives the adult a right to request the Guardianship and Care State Body to appoint a new guardian.

Human Rights Standards: Recommendation No. R(99)4 mandates that every adult placed under guardianship should have adequate rights to appeal.¹⁰² For this proposition, R(99)4 relies on the United Nations Declaration on the Rights of Mentally Retarded Persons which provides that when a person’s rights are restricted, the procedure used for such restrictions must provide ‘proper legal safeguards against every form of abuse’ and must be subject to ‘the right of appeal to higher authorities.’¹⁰³

2.6.4 Rights of the Adult After Guardianship Is Established (Indicators 13-17)

Under legislation compliant with established international norms of human rights, an individual placed under plenary or partial guardianship should retain rights to make decisions in as many areas as possible as well as the opportunity to exercise those rights. Indicators 13-17 address the residual rights that exist for adults after being placed under guardianship, including the right to vote, right to work, right to property, right to marry, to found a family, to respect of his or her family life, and the right to associate.

Indicator 13	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise political rights.</i>
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Conclusion: Adults with legal incapacity under guardianship in Georgia are deprived of exercising significant political rights such as the right to vote.

Analysis: The Law on Elections in Georgia¹⁰⁴ as well as the Constitution of Georgia¹⁰⁵ deprives all persons found to lack legal capacity of the right to vote.

¹⁰⁰ Civil Code art. 1298.

¹⁰¹ Art. 1301.

¹⁰² Principle 14(3).

¹⁰³ UN Declaration of the Rights of Mentally Retarded Persons, Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971.

¹⁰⁴ Law on Elections in Georgia. art. 7(3).

¹⁰⁵ Constitution of Georgia, art. 28.

The Georgian Guardianship Law¹⁰⁶ states that in order for a person who has been deprived of his or her legal capacity to take any political action, the consent of his or her legal representative (guardian) is necessary.

Human Rights Standards: The right to political participation and universal suffrage has been recognised internationally in Article 25 of the Covenant on Civil and Political Rights. In addition to this, Article 3 of Protocol 1 to the European Convention on Human Rights provides that States ‘undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.’

Regarding public participation and participation in the democratic process of people with mental disabilities, the Council of Europe has stated that ‘[s]ociety needs to reflect the diversity of its citizens and benefit from their varied experience and knowledge. It is therefore important that people with disabilities can exercise their rights to vote and to participate in such activities.’¹⁰⁷ Specifically addressing individuals with mental disabilities, the right to autonomy and self-determination is elaborated in Principle 3 of Recommendation No. R(99)4, which denotes that legislative frameworks need to incorporate guardianship laws that recognise the existence of various degrees of capacity as well as the dynamic nature of capacity over time. Recommendation No. R(99)4 emphasises that a measure of protection such as guardianship ‘should not automatically deprive an adult of the right to vote, or to [...] make other decisions of a personal character at any time when his or her capacity permits him or her to do so’.¹⁰⁸

Indicator 14	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to work.</i>
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Conclusion: There are no limitations on the right to work for people under guardianship.

Analysis: There is no specific legislation which allows (or disallows) people under guardianship to work. The Law on Medical Examination¹⁰⁹ gives the right to individuals with significant and high levels of functional incapacity to engage in various types of work which are in compliance with their state of health and their functional

¹⁰⁶ Georgian Guardianship Law, art. 15.

¹⁰⁷ Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Recommendation No. (2006)5 of the Committee of Ministers of the Council of Europe, para. 3.1.1.

¹⁰⁸ Recommendation No. R(99)4, Principle 3(2).

¹⁰⁹ Ch. II, art. 11(1,2).

capacity. The same law¹¹⁰ states that the Ministry of Labour, Health and Social Security should provide a list of diseases, physical and mental disabilities with which individuals with limited capacity who may work under guardianship¹¹¹ by taking part in individual and special programmes. Those programmes are created for individuals with capacity limitations upon their examination and determination of capacity level.¹¹² Individuals with limited capacity are allowed to work at any enterprise with common working conditions however their tasks have to be in compliance with their individual rehabilitation programme.¹¹³

The Law on Social Security of People with Disabilities¹¹⁴ says that people with disabilities have the right to work in any type of legal entity. Additionally, the same law prohibits the denial of employment to individuals under guardianship by any employer on the grounds of limited capacity. There is a list of physical and mental disorders put together by the Ministry of Health, according to which individuals with those types of disorders shall be provided special rehabilitation programmes that do not necessarily prevent them from working, but they need to be provided with conditions in accordance with their individual programmes.

Human Rights Standards: Article 8 (right to privacy) of the European Convention on Human Rights includes the right to work. The European Court of Human Rights has said that ‘it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.’ The European Social Charter (revised) also contains provisions protecting the right to work. Recommendation No. R(99)4 provides that where a measure of protection is necessary, it should be proportional to the degree of capacity of the adult and tailored to the individual circumstances and needs of the person. Therefore, while some restriction may be necessary in certain situations, a blanket prohibition from employment of all people under guardianship may exclude individuals from participating in certain realms of life and activities despite their capacity to do so.

Indicator 15	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to property.</i>
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Conclusion: Due to plenary guardianship being the only type available in Georgia the right to manage property is fully transferred to the guardian. Although this does

¹¹⁰ Art. 11(2).

¹¹¹ ‘Defect’ is the word used in this particular paragraph.

¹¹² Law on Medical Expertise, art. 11.2.

¹¹³ Law on Social Security, Chapter V, Clause 21.

¹¹⁴ Chapter V, art. 21.

not mean that they are deprived of the right to property by law, in fact their rights are exercised by guardians.

Analysis: An adult deprived of legal capacity and under guardianship retains ownership of property however its management is fully transferred to the guardian. Legislation authorizes a guardian to enter into a contract on behalf of the adult although certain restrictions are listed in relation to managing the property of the adult.¹¹⁵ For example, there is a requirement to obtain consent from the Guardianship and Care Body prior to selling property or renting it out for a period of over 10 years or for any other transaction that has financial consequences in relation to the property.¹¹⁶ There are, in addition, provisions according to which guardians who abuse their power will be held accountable before court or will be dismissed from their position as guardians.¹¹⁷

Finally, there is an opportunity to appoint a so-called ‘property guardian’ provided for by the Georgian Guardianship Law on Appointment of Property Guardian¹¹⁸ when the person in question has property in a distant location which he/she does not occupy while being under guardianship. The consent of the adult’s guardian is required when the property guardian is appointed by the Guardianship Agency.¹¹⁹

Human Rights Standards: The right to property includes the ability of individuals to manage finances, complete transactions and enter legally binding contracts. A guardianship system that automatically exclude individuals from managing any aspect of their finances undermines the adult’s autonomy and dignity. Such a system does not reflect the reality, which is that functional capacity often fluctuates, and therefore decisions should be tailor-made. The right to use and manage one’s own property is protected in Article 1 of Protocol No. 1 to the European Convention on Human Rights, which reads, in relevant part:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’

Recommendation No. R(99)4 follows this sentiment by recommending that ‘[w]henever possible the adult should be enabled to enter into legally effective transactions of an everyday nature’.¹²⁰ The Council of Europe returned to this theme in its 2006 ‘Action Plan to promote the rights and full participation of people with

¹¹⁵ Georgian Guardianship Law, art. 1293.

¹¹⁶ *Ibid*, art. 1294 on Restriction of Guardian’s and Curator’s Authorization.

¹¹⁷ Art. 13000 on Improper Fulfilment of the Responsibilities of Guardian.

¹¹⁸ Art. 1286.

¹¹⁹ *Ibid*.

¹²⁰ Recommendation No. R(99)4, Principle 3(4).

disabilities in society’, which listed concrete measures to be taken by Member States. These measures included action ‘to ensure the equal right of persons with disabilities to own and inherit property, providing legal protection to manage their assets on an equal basis to others’.¹²¹

Indicator 16

By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to marry, to found a family, and to respect of family life.

Conclusion: The law deprives adults under guardianship of the right to marry if one of the persons in the relationship is deprived of his or her legal capacity by the court. Adults deprived of legal capacity are stripped of parental rights.

Analysis: Both the Family Law and the Civil Code¹²² state that individuals who have been deprived of legal incapacity are not allowed to marry. Further, the Civil Code strips adults deprived of legal capacity of parental rights.

Human Rights Standards: Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life, home and correspondence. This imposes on States a negative obligation not to interfere with, as well as a positive obligation to respect a person’s private and family life. There are similar Convention obligations to respect a person’s right to marry and found a family under Article 12, which reads, ‘[m]en and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right.’ The UN has also addressed this issue. Rule 9 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities contains strong language on the rights of people with disabilities to family life and personal integrity, affirming that ‘States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood’,¹²³ and that ‘[p]ersons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood’.¹²⁴

¹²¹ Council of Europe, Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Recommendation (2006)5, para. 3.12.3(viii).

¹²² Art. 1120.

¹²³ UN General Assembly, UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, dated March 4, 1996, Rule 9.

¹²⁴ *Ibid*, Rule 9(2).

Indicator 17	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to associate.</i>
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Conclusion: People under guardianship in Georgia are not deprived of the right to associate.

Analysis: The Georgian Law on Social Security of People with Disabilities¹²⁵ directly regulates the issue of the right of adults under guardianship (and of their guardians as well) to establish and/or join associations with the purpose of protection of their rights and interests and for provision of service or support to the members of the association.

Human Rights Standards: The right to associate can be especially important for people with disabilities, as membership in advocacy and peer support groups can foster skills development, empowerment and autonomy. Advocacy associations in particular may give individuals a collective political voice to lobby for legislative protection. A prohibition from associating with others to pursue a common aim engages Article 11 of the European Convention on Human Rights, which states: ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.’ Any restrictions on these rights must be clearly stated in law and necessary in a democratic society for one of the listed grounds in Article 11(2), such as for the protection of health or morals or for the protection of the rights and freedoms of others. The European Court of Human Rights has confirmed that ‘an inherent part of the right set forth in Article 11’ is the right to form associations.¹²⁶ It is difficult even to imagine a scenario in which restricting the rights of people under guardianship to associate would be ‘necessary in a democratic society.’ A blanket ban on doing so almost certainly violates binding international human rights law.

2.6.5 Obligations of the Guardian After Guardianship Is Established (Indicators 18-25)

In order to ensure that an adult under guardianship is treated with dignity and respect, and has the opportunity to maximize independence and self-determination, the State needs to establish workable systems to review the responsibilities, supervision and accountability of guardians. Indicators 18-25 address these responsibilities of guardians.

¹²⁵ Ch. VIII, art. 31.

¹²⁶ *Sidiropoulos v. Greece*, Application No. 26695/95, judgment 10 July 1998, (1998) EHRR 633.

Indicator 18

A person under guardianship is not precluded from making decisions in those areas where he/she has functional capacity.

Conclusion: People under guardianship in Georgia are precluded from making decisions in those areas where they have functional capacity.

Analysis: Because there is only the most restrictive, plenary system of guardianship available in Georgia, guardians are granted full power and authority, while people under guardianship – due to their mental disability – are deprived of such rights as to vote, to marry, to manage their property.

Human Rights Standards: As noted earlier, the disability rights movement advocates a least-restrictive measure approach to guardianship, which maximises self-determination, a basic principle of human rights. This approach permeates Recommendation No. R(99)4, which states that ‘[t]he range of measures of protection should include those which are limited to one specific act without requiring the appointment of a representative or a representative with continuing powers.’¹²⁷ Principle 3 of Recommendation No. R(99)4 sets out that legislation should allow for a maximum preservation of legal capacity and is worth citing in full:

- The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.
- In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.
- Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative’s consent, to undertake specific acts or acts in a specific area.
- Whenever possible the adult should be enabled to enter into legally effective transactions of an everyday nature.

An illustrative approach of the best practice can be found in France. In establishing guardianship, a judge in France may list transactions that the adult can undertake

¹²⁷ Recommendation No. R(99)4, Principle 2(5).

independent of the guardian. In assessing which tasks the individual should retain the freedom to conclude, the judge must consult a medical expert.¹²⁸

Indicator 19	<i>An adult subject to guardianship must be consulted about major decisions, and his/her wishes are adhered to whenever possible.</i>
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Conclusion: No provision in the legislation obliges guardians to consult with the adult in question on any decisions made by them.

Analysis: Once guardianship is established, the adult is completely excluded from the decision-making process. Although guardians are obliged to fulfill duties properly and respect the instructions of the court, they are not obliged to find out what the adult's wishes are. There are no legal provisions that provide for obtaining the adult's consent before the guardian makes any decision, nor for informing the adult that a particular issue is being contemplated.

Human Rights Standards: It is important for legislation to expressly give the adult a role in decision-making as it provides both a benchmark to evaluate the guardian's performance and a judicially enforceable standard. A good practice example would be Finland, whose legislation incorporates this principle by requiring that guardians ask an adult's opinion in connection with decisions within the scope of the guardian's duties.¹²⁹ Recommendation No. R(99)4 specifies that when taking a decision, 'the past and present wishes and feelings of the adult should be ascertained so far as

¹²⁸ French Civil Code Book 1, Title X, Chapter II, Article 420, applicable to adults under guardianship per Title XI, Chapter III, Article 501. Unofficial translation provided by Legifrance, a service of the French Government. Available at www.legifrance.gouv.fr, visited 2 August 2006. Another approach to encourage the adult's participation is found in the Uniform Guardianship Act which provides guidance on how to incorporate this principle into legislation. In the section entitled 'Guardian's Duties', the model legislation provides:

- A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian.
- See Uniform Guardianship and Protective Proceedings Act (1997), *supra* note 98, art. 3, para. 313(a).

¹²⁹ See The Finnish Guardianship Services Act, 442/99, Section 43(1) entitled 'Hearing the Ward', which reads, 'Before the guardian makes a decision in a matter falling within his/her task, he/she shall inquire the opinion of the ward, if the matter is to be deemed important from the ward's point of view and if the hearing can be arranged without considerable inconvenience.' Unofficial translation provided by FINLEX, a service of the Finnish Government. Available at: <http://www.finlex.fi/en/laki/kaannokset/1999/en19990442.pdf>, visited on May 1, 2007. This provision is not cited as a 'best practice' example because the Finnish legislation unfortunately contains a broad list of derogations.

possible, and should be taken into account and given due respect'.¹³⁰ This principle suggests that 'a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view'.¹³¹ Principle 2 of the Recommendation goes further, recommending that when trying to find the best solution to an individual's circumstances, '[c]onsideration should be given to the inclusion of measures under which the appointed person acts jointly with the adult concerned, and of measures involving the appointment of more than one representative'.¹³²

Indicator 20	<i>The scope of authority and obligations of the guardian are clearly defined and limited to those areas in which the adult subject to guardianship needs assistance.</i>
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Conclusion: Georgian law poorly defines the scope of authority and obligations of the guardian.

Analysis: Certain obligations and authority of guardians are found in legislative provisions. These include, for example, the right to manage property, enter any deal that shall be for the benefit of the adult,¹³³ and to represent the adult under guardianship before any third party, including in a court.¹³⁴ The law¹³⁵ also states that guardians are not authorized to make a contract bestowing a benefit upon another on behalf of the adult. The purpose of this provision is to attempt to narrow down the possibility of property mismanagement.

The very fact of plenary guardianship however, and the consequential removal of decision making powers in their entirety, clearly suggests a risk that the scope of authority and obligations of a guardian are not limited to those areas in which the adult needs assistance.

Human Rights Standards: Domestic legislation should provide clear direction to the authority determining legal capacity to define the scope of the individual guardian's obligations in light of the particular adult's functional capacity. Recommendation No. R(99)4 encourages countries to adopt a legal framework that can flexibly respond to different situations: '[t]he measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should

¹³⁰ Principle 9(1).

¹³¹ Principle 9(3).

¹³² Principle 2(6).

¹³³ Guardianship Law, arts. 1293 and 1294.

¹³⁴ *Ibid*, art. 1290.

¹³⁵ *Ibid*, art. 1296.

be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations'.¹³⁶ The Recommendation further advises that:

‘The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the adult.’¹³⁷

The Disability Convention provides that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to ensure that measures relating to the exercise of legal capacity ‘are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.’¹³⁸

An exemplary use of this approach can be found in the Finnish Guardianship Act which specifies that ‘the task of the guardian may be restricted to cover only a given transaction, matter, or property’.¹³⁹ Even within a particular matter, this law additionally safeguards the interests of the adult by prohibiting guardians from enumerated activities including conveying or purchasing property,¹⁴⁰ consent to marriage or adoption, or make or revoke a will, absent specific permission of the court.¹⁴¹

Indicator 21	<i>A guardian is obliged to promote the interest, welfare and independence of the adult under guardianship by seeking the least restrictive alternatives in living arrangements and endeavoring to allow the adult to live in the community.</i>
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Conclusion: Guardians need not specifically promote the welfare and independence or seek less restrictive living arrangements for the adult.

¹³⁶ Principle 2(1).

¹³⁷ Principle 3(1).

¹³⁸ Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 12(4).

¹³⁹ The Finnish Guardianship Services Act, 442/99, para. 8(3).

¹⁴⁰ *Ibid*, para. 34.

¹⁴¹ *Ibid*, para. 29.

Analysis: Guardians are obliged to ensure that adults under their guardianship are provided with proper living conditions, looked after, (which includes the provision of regular medical treatment) and their rights and interests are protected.¹⁴² On a more general level, although state social policy on social inclusion and rehabilitation of people under guardianship is entrenched in legislation,¹⁴³ this policy is not translated into obligations for guardians themselves.

Human Rights Standards: This indicator tests the often-intimate connection between guardianship and institutionalisation. The right to live in the community, and therefore to have a life free from social exclusion and discrimination, is of utmost importance in every country and is recognised in international law. The United Nations Convention on the Rights of Persons with Disabilities, which is set to be adopted by the UN General Assembly as this report went to print, sets out this right in draft Article 19:

Article 19 – Living Independently and Being Included in the Community

States Parties to this Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- ⇒ Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.
- ⇒ Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.
- ⇒ Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.¹⁴⁴

The 1991 UN Mental Illness Principles provide that ‘[e]very person with a mental illness shall have the right to live and work, to the extent possible, in the community’.¹⁴⁵ Each person has ‘the right to be treated and cared for, as far as possible, in the community in which he or she lives’.¹⁴⁶ In addition to this, the 2006 Council

¹⁴² Georgian Guardianship Law, art. 1289.

¹⁴³ Law on Social Security of Disabled Individuals.

¹⁴⁴ Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Eighth session, New York, 14-25 August 2006.

¹⁴⁵ UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on December 17, 1991, Principle 4, Life in the community.

¹⁴⁶ *Ibid*, Principle 7, Role of community and culture.

of Europe Disability Action Plan sets out a European-wide policy framework on disability for the next decade, calling on countries ‘to ensure community-based quality service provision and alternative housing models, which enable a move from institution-based care to community living’.¹⁴⁷ Although living arrangements are not expressly addressed in Recommendation No. R(99)4, the principle of proportionality dictates that, in all decisions, a course should be adopted that least restricts the adult’s rights and freedom while providing adequate protection.¹⁴⁸

Indicator 22

The guardian must manage the assets of the adult in a manner that benefits the adult under guardianship.

Conclusion: There is no specific regulation on the management of the assets of the adult under guardianship.

Analysis: Guardianship legislation does not specify a guardian’s responsibility as a manager of an adult’s property and/or real estate. The guardian is responsible for the management of the property under restricted norms given in the law and is obliged to ensure the wellbeing of the adult under guardianship. Therefore, there is no provision stating directly that all measures taken by a guardian in relation the property/real estate management shall be for the benefit of the adult, though at the same time, the way adult’s assets are managed shall not lead to the devaluation of the property. Nonetheless, as previously noted guardians are not authorized to sign contracts bestowing a benefit on another person on behalf of the adult¹⁴⁹ and there are additional restrictions on the guardian on issues related to property management which require the consent of the Guardianship Agency.¹⁵⁰

Human Rights Standards: Recommendation No. R(99)4 states that ‘the property of the incapable adult should be managed and used for the benefit of an adult and to secure his or her welfare’.¹⁵¹ Principle 20 further provides that a guardian should be held liable for ‘any loss or damage caused by them to incapable adults while exercising their functions’.¹⁵² This principle suggests that a guardian should be held liable for mismanagement or misappropriation of the funds or property of an adult under guardianship, arguably including acts or expenditures that do not directly benefit

¹⁴⁷ Recommendation R(2006)5 of the Council of Europe to member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015 (adopted by the Committee of Ministers on April 5, 2006 at the 961st meeting of the Ministers’ Deputies), para. 3.8.3(vi).

¹⁴⁸ Principle 6(2).

¹⁴⁹ Guardianship Law, art. 1294.

¹⁵⁰ *Ibid.*

¹⁵¹ Principle 8(3).

¹⁵² Principle 20(1).

the adult. The World Health Organization is of the view that ‘[s]pecifying penalties if guardians fail to perform their duties would strengthen legislation’.¹⁵³

Indicator 23

The guardian is obliged to visit and confer with the adult periodically.

Conclusion: Georgian law does not specify that guardians need to visit and periodically confer with the adult.

Analysis: The law is silent on periodic visits and contact between the guardian and the adult. After the adult is placed under guardianship, the guardian is not obliged to reside in the same place where the legally incapacitated individual lives, and is not obliged by law to visit or confer with the adult periodically.¹⁵⁴

Human Rights Standards: A cornerstone of Recommendation No. R(99)4, and person-centred protective systems generally, is the need to ensure that the adult remains central within the decision-making process. In order to take the adult’s wishes into account, it follows that the guardian must consult with the adult. Recommendation No. R(99)4 importantly places an obligation on the guardian to provide the adult with sufficient information concerning major decisions to put the adult in a position to express an informed view on the issue.¹⁵⁵ Another important benefit of requiring guardians to visit adults they represent is that they may gain a full understanding of the adults’ living conditions, as well as the care and services provided. This links with the indicator above on the guardian’s duty on maximising independent living.

A best practice example is the model legislation Uniform Guardianship and Protective Proceedings Act, which provides that the guardian must ‘become or remain personally acquainted with the [adult] and maintain sufficient contact with the [adult] to know of the [adult’s] capacities, limitations, needs, opportunities, and physical and mental health’.¹⁵⁶

¹⁵³ World Health Organisation, WHO Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, Dare to Care (World Health Organization, Geneva, Switzerland, 2005), p. 43.

¹⁵⁴ Law on Guardianship, Art. 1291, clause 2.

¹⁵⁵ See Principle 9.

¹⁵⁶ The Uniform Guardianship and Protective Proceedings Act (1997), para. 313(b)(i).

Indicator 24

A guardian's decisions are periodically reviewed by an objective body and the guardian is held accountable for all decisions.

Conclusion: Georgian legislation makes the guardian accountable for all decisions. Monitoring of the guardian's activities is carried out by the Guardianship Agency, but to what extent and whether it includes periodic revision of their decisions is not provided by the legislation.

Analysis: Guardians are theoretically held accountable for all decisions they make,¹⁵⁷ as their actions taken and decisions may be appealed in a court by any concerned person, including the adult.¹⁵⁸ Formal supervision of the actions of guardians is undertaken by the Guardianship Agency and Care State Body,¹⁵⁹ The rules and procedures of which are specified in the statute of the Guardianship Agency. More specifically provision is made for adults under guardianship to have their guardian held liable for any maltreatment, negligence or any other type of wrongful act that has caused damage to the adult in question.¹⁶⁰

Despite the right of the Guardianship Agency to supervise the activities of the guardian, it is important to remember that the Agency itself appoints the guardians. Thus it can hardly be called an independent and impartial body. The absence of an objective body to periodically review the decisions made by the guardian clearly leaves the accountability enforcement system of the guardian less effective, and fails to ensure early detection and prevention of abuse prior to the occurrence of irreversible damage.

Human Rights Standards: Recommendation No. R(99)4 specifies that '[t]here should be adequate control of the operation of measures of protection and of the acts and decisions of representatives'.¹⁶¹ The Recommendation goes on to specify that guardians must be responsible for their actions and any loss or damage caused by them to the adults under their care and, in particular, that 'the laws on liability for wrongful acts, negligence or maltreatment should apply to representatives and others involved in the affairs of incapable adults'.¹⁶² To comply in a meaningful way with this measure, review mechanisms must identify the guardian's duties (as discussed in Indicator 20), as well as providing accessible and workable procedural guarantees.

¹⁵⁷ Georgian Guardianship Law, art. 1300.

¹⁵⁸ *Ibid*, art. 1298.

¹⁵⁹ *Ibid*, art. 1284.

¹⁶⁰ Art. 1300 and 1298.

¹⁶¹ Principle 16.

¹⁶² Principle 20.

Conclusion: Georgian guardianship legislation does not specify a complaint procedure to review a guardian's acts or omissions.

Analysis: Although Georgian guardianship legislation does not specifically provide for a complaint procedure that can trigger review of a guardian's acts or omissions, it makes provision for an adult under guardianship to appeal a decision of the guardian in court.¹⁶³

Adults who have been deprived of their legal capacity have the right to request the Guardianship Agency to appoint, replace or dismiss a guardian.¹⁶⁴ Monitoring the activities and compliance of the guardians with their responsibilities is in the Guardianship Agency's competence. Monitoring regulations are based on the internal regulations of the agency. However, when the monitoring agency fails to meet its obligations and when the adult is not in a position to reach out and request the revision of the guardian's acts, this provision might remain unused.

Human Rights Standards: Limitation or deprivation of legal capacity should not exclude an adult from access to courts, authorities or complaints mechanisms to review a guardian's decision. It is imperative that there are bodies which have a legal mandate to amend or reverse a guardian's decision. Regrettably Recommendation No. R(99)4 does not directly address this point, but the World Health Organization has listed the availability of procedures for review of a guardian's decisions as one of the recommended ten basic principles of mental health law. The components of the review, according to the WHO, are availability, timeliness, accessibility to the individual concerned and an opportunity for the adult to be heard in person.¹⁶⁵

A best practice example can be found in a United States statute, which provides that an adult may request the court to review and amend a decision made by a guardian, to review the guardian's responsibilities, to remove a guardian and appoint a successor, or to terminate the guardianship.¹⁶⁶

¹⁶³ Georgian Guardianship Law, arts. 1298 and 1300.

¹⁶⁴ Art. 1305.

¹⁶⁵ Mental Health Care Law: Ten Basic Principles, WHO/MNG/MND/96.9. World Health Organization, Geneva. Available at: http://www.who.int/entity/mental_health/media/en/75.pdf, last accessed on 1 May 2007.

¹⁶⁶ See, e.g., Alaska Stat. §13.26.125 (Bender 2005).

2.6.6 Necessity of Guardianship and Alternatives (Indicators 26-29)

The last group of indicators (Indicators 26 to 29) examines legal alternatives to guardianship. Because of its intrusive and personal nature, guardianship should be used only as a last resort. Legislation that is compliant with international human rights norms usually provides for alternatives that give protection to individuals with mental health problems and intellectual disabilities, but these alternatives are less intrusive in nature and preserve the adult’s rights to exercise decision-making to the greatest extent possible. The last group of indicators reflect the need for guardianship frameworks to recognise the dynamic nature of capacity over time. Guardianship should be used only as long as and to the extent necessary to accomplish the task of protection of vulnerable persons. Therefore, it is paramount that guardianship arrangements are reviewed periodically, and modified or terminated as required by circumstances.

Indicator 26	<i>Less restrictive alternatives to guardianship are available and are demonstrably exhausted before a guardianship is imposed.</i>
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Conclusion: There are no less restrictive alternatives to guardianship in Georgia. There is no requirement to exhaust any other means of protection before imposing guardianship.

Analysis: Georgian legislation does not provide any protective measures other than plenary guardianship for people who have been deprived of their legal capacity. Supported decision-making as an alternative is not recognised and neither are other mechanisms such as powers-of-attorney or advanced directives.

Human Rights Standards: Recommendation No. R(99)4 states in Principle 5 that a protective measure such as legal incapacity and guardianship should be based on the principle of minimum necessary intervention, or the least restrictive alternative. It suggests that an adult should not be placed under guardianship unless other less formal arrangements have been exhausted. A best practice example of legislation that meets the standard set out in this indicator can be found in Canada. The Manitoba Vulnerable Persons Living with a Mental Disability Act specifies that a substitute decision maker may not be appointed before it is determined whether the individual has a support network and ‘reasonable efforts have been made to involve the support network’.¹⁶⁷ Furthermore, if the first criterion is not met, the court may mandate efforts to involve a support network as an alternative to appointing a substitute decision-maker.¹⁶⁸

¹⁶⁷ Vulnerable Persons Living with a Mental Disability Act, R.M., ch. 29, paras. 49(a)-(b) (1993).

¹⁶⁸ *Ibid*, ch. 29, para. 50(2). This approach is also followed in other Canadian jurisdictions. For example, in Ontario a court cannot appoint a guardian to take care of an adult’s property

Indicator 27

Guardianships are tailored to the individual needs of the person involved and address the varying degrees of capacity.

Conclusion: Guardianships are not tailored to the individual needs of people and do not address the varying degrees of capacity.

Analysis: Plenary guardianship, which is the only arrangement for people who have been deprived of their legal capacity in Georgia, takes a blunt, uniform approach with no scope for individually-tailored decisions. Once the adult's impaired capacity falls within three out of four degrees of incapacity, they are considered to be individuals with limited capacity subject to court's further decision whether to rule their legal incapacitation or not.

Human Rights Standards: Principle 6 of Recommendation No. R(99)4, which addresses the principle of proportionality, suggests that after all less restrictive alternatives have been exhausted and where guardianship is deemed to be necessary, it should be imposed in a manner proportional to the adult's degree of capacity and should be tailored to meet the specific needs of the adult. Guardianship should restrict the legal capacity to act and the rights and freedoms of an adult only to the extent necessary to provide adequate protection.¹⁶⁹

Internationally, this standard has been endorsed by the World Health Organization's handbook on mental health, human rights and legislation, which advises that 'any [guardianship] order must be tailored to ensure that it best suits the interests of the person who is subject to it'.¹⁷⁰ A best practice example comes from Germany, where guardianship has been largely replaced by 'care and assistance' (Betreuung in German) programmes, which include an individualised support order to be carried out by a caretaker (Betreuer in German) whose responsibility is limited to those tasks which the adult cannot manage without assistance. Additionally, the adult maintains all legal rights; the court determines whether under the circumstances it is necessary for the caretaker to legally represent the individual or to provide additional consent for legal actions. This has been described as a double-competence system in which both the caretaker and the adult have competence in legal issues.¹⁷¹

unless an alternative course 'less restrictive to the person's decision making rights' is unavailable. (Mental Health Act, S.O., ch. M.7, para. 33.1 and para. 33.7 (1990); Substitute Decisions Act, S.O., ch. 30, para. 22(3) (1992)). Similarly, in Yukon, the court cannot appoint a guardian unless 'forms of available support and assistance less intrusive than guardianship have been tried or carefully considered.' Adult Protection and Decision Making Act S.Y. ch. 21, Schedule A, para. 32(1) (Yukon).

¹⁶⁹ Explanatory Memorandum to Recommendation R(99)4, para. 40.

¹⁷⁰ Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, Dare to Care (World Health Organization, Geneva, Switzerland, 2005), p. 43.

¹⁷¹ Doron, I. (2002) 'Elder Guardianship Kaleidoscope – A Comparative Perspective', 16 Intl J Law Policy and the Family 368, at 378-9. The relevant sections of the German Civil

Indicator 28	<i>Guardianship is periodically reviewed and continues only as long as appropriate.</i>
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Conclusion: Georgian law provides for a periodic review of guardianship.

Analysis: In case a person is believed to have regained his or her functional capacity, the Georgian Guardianship law¹⁷² obliges the guardian to submit a motion to the court on an immediate acknowledgement of the person as legally capable and consequently on the termination of guardianship.

Human Rights Standards: The Disability Convention sets out an appeal requirement in Article 12(4), which says that ‘States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity [...] are subject to regular review by a competent, independent and impartial authority or judicial body.’¹⁷³

Recommendation No. R(99)4 also takes this approach by providing that measures such as guardianship should be of limited duration if possible and, at the very least, should be reviewed periodically to determine whether the need still exists.¹⁷⁴ This standard is also found in the Mental Illness Principles. Principle 1(6) requires that, ‘[d]ecisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law’.¹⁷⁵

Indicator 29	<i>An adult subject to guardianship has the right to request review, modification and/or termination of the guardianship.</i>
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Conclusion: The adult has the right to request restoration of legal capacity and termination of guardianship. However, termination of guardianship of mentally disabled individuals can take place only after the adult’s capacity has been restored.

Code are 1902 BGB and 1897 BGB. Also, importantly, a caretaker must seek judicial authorization for decisions with high risk or of importance. See 1902 BGB, discussed in Blankman, K. (1997) ‘Guardianship Models in the Netherlands and Western Europe’, 20(1) Intl J Law and Psychiatry 47, at 54.

¹⁷² Art. 1292.

¹⁷³ Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 12(4).

¹⁷⁴ Recommendation R(99)4, Principle 14.

¹⁷⁵ UN Resolution 46/119, op cit, Principle 1, Fundamental freedoms and basic rights.

Analysis: Although Georgian legislation provides a list of circumstances under which termination of guardianship may occur,¹⁷⁶ it does not make provisions for the termination of guardianship on the basis of a request from an adult under guardianship. Georgian legislation on guardianship gives the right to people under guardianship to express their opinion in connection with the appointment of a certain person as their guardian.¹⁷⁷ A guardian can be replaced based on a request submitted by the adult to the Guardianship Agency, which is obliged to dismiss the guardian and appoint another person based on the request of the adult.¹⁷⁸

Human Rights Standards: The right to fair trial in the determination of civil rights is set out in Article 6 of the ECHR, and includes legal capacity issues.¹⁷⁹ The ECtHR has ruled that guardianship engages Article 8 of the ECHR on privacy rights, asserting that a re-examination of legal capacity or guardianship is particularly justified if the adult so requests.¹⁸⁰ As with several other indicators, it is especially important that the right of review be prescribed by legislation. In the absence of such provision the adult may be precluded from accessing the court as the result of not having legal standing to bring cases to court.

¹⁷⁶ *Ibid*, art. 1302.

¹⁷⁷ Civil Procedure Code, art. 1281(3).

¹⁷⁸ Georgian Guardianship law, art. 1301.

¹⁷⁹ *Winterwerp v. the Netherlands*, op. cit.

¹⁸⁰ *Matter v. Slovakia*, op. cit.

Glossary of Terminology

Adult: An adult is a person who has reached the legal age of majority, which is 18 in Georgia.

Capacity: A legal term embodying the notion that for a person to make decisions and take actions that have a binding, legal effect, he or she must have the requisite mental state – the ability to understand the decision presented, consider alternatives, appreciate the consequences of the decision and communicate the decision. The terms ‘capable’ and ‘competent’ are frequently used interchangeably.

Defendant: In many countries, the person who faces capacity determination proceedings and/or guardianship proceedings is called the defendant. In other countries, the term ‘defendant’ is used primarily in criminal proceedings. Since capacity and guardianship proceedings are not criminal in nature, MDAC has chosen to avoid confusion by avoiding use of the term ‘defendant’ and refers instead simply to the ‘adult’.

Intellectual disability: This phrase refers to people who have intellectual limitations of varying types and degrees. Some countries use the term ‘learning disability’ instead. However, as with the phrase ‘mental health problem’ (see below), the literal translations into English from the national languages of our target countries may be outdated and pejorative (for example, terms such as ‘mental retardation’, ‘imbecile’, ‘abnormal comprehension’, ‘idiocy’, ‘weak mind’ and so on). Therefore, MDAC has elected to use ‘intellectual disability’ in lieu of all such terms.

Guardian: A guardian is an individual appointed by the appropriate entity to act in the place of a person who lacks legal capacity to handle his or her own affairs and welfare. The appropriate entity may be either a court or a guardianship authority, depending on the jurisdiction and/or the type of case. The guardian may be a relative, a professional guardian or any other person authorized under national legislation to act in this capacity on behalf of a person who has been deemed to lack capacity.

Guardianship: A legal relationship established through a court or administrative process between a person deemed to lack (either partially or completely) the requisite legal capacity to make personal decisions and the person appointed to make decisions on his or her behalf. Guardianship is also sometimes referred to as ‘substitute decision-making’. Guardianship is one form of ‘protective measure’ referenced by the Council of Europe Committee of Ministers in Recommendation No. R(99)4.

Mental disability: This umbrella term is applied to people who have been diagnosed with, or labelled as having, mental health problems and/or intellectual disabilities.

Mental health problem: (see ‘psycho-social disability’)

Partial guardianship (or limited guardianship): Type of guardianship established when a person who has some capacity to make decisions or take action on his or her own behalf and is deemed to have partial capacity. What a person may or may not be allowed to do for himself or herself when under partial guardianship is a matter for national legislation and/or courts to decide and will vary from country to country or within the same country.

Plenary guardianship: Type of all-encompassing guardianship established when a person is deemed to lack capacity completely or lack sufficient capacity to take any actions on his or her own behalf. Plenary guardianship is the most encompassing form of guardianship.

Psycho-social disability: An admittedly broad term meant to include people who have been diagnosed, labelled or perceived as suffering from a mental illness, and can include people with personality disorders. People with psycho-social disabilities are sometimes referred to as having a ‘mental disorder’, ‘mental disease’ or ‘mental defect’. For purposes of this report, all such terms are translated by MDAC as ‘psycho-social (mental health) disability’, a term which reflects ‘psycho-social disability’ which is used by the global organization World Network of Users, Ex-Users and Survivors of Psychiatry, and one which adds ‘mental health’ in parentheses for those readers not familiar with the newer term of ‘psycho-social disabilities’.

Supported decision-making: This alternative to guardianship is premised on the fact that with proper support, a person who might otherwise be deemed to lack capacity is, in fact, able to make personal decisions.

Trustee: Although its specific meaning will be defined in law, in general terms, a trustee is a person who maintains a fiduciary relationship to another person. In some jurisdictions, the term ‘trustee’ is used interchangeably with guardian, but in other jurisdictions (including, for example, Bulgaria), it is used only for certain relationships, such as in cases of partial incapacity.

Ward: The term commonly used in English-speaking countries to refer to a person who is under guardianship. MDAC prefers not to use this term as it dehumanises the individual. Instead, we simply use ‘adult’ or ‘person concerned.’

ANNEX B

Summary Table of the Indicators

Indicator 1	<i>Legislative purpose or preamble to the law encompasses respect for the human rights, dignity and fundamental freedom of people with mental disabilities.</i>
Indicator 2	<i>The legislation clearly identifies who may make an application for appointment of a guardian and the foundation needed to support it.</i>
Indicator 3	<i>An adult has a right to actual notice, and to be present and heard at all proceedings related to the application for deprivation of his or her legal capacity and appointment of a guardian.</i>
Indicator 4	<i>An adult has a right to free and effective legal representation throughout guardianship proceedings.</i>
Indicator 5	<i>An adult may not be detained in order to be subjected to an evaluation of his or her legal capacity.</i>
Indicator 6	<i>An adult has the right and opportunity to present his/her own evidence (including witnesses), and to challenge the opposing evidence (witnesses).</i>
Indicator 7	<i>No adult is deprived of legal capacity without being the subject of a capacity evaluation, conducted by a qualified professional and based upon recent, objective information, including an in-person evaluation.</i>
Indicator 8	<i>A finding of incapacity requires a demonstrable link between the underlying diagnosis and the alleged inability to make independent decisions.</i>
Indicator 9	<i>A finding of incapacity is based upon sufficient evidence and serves the interests of the adult.</i>
Indicator 10	<i>Selection of a guardian is based on objective criteria and the wishes and feelings of the adult are considered.</i>

Indicator 11	<i>The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict.</i>
Indicator 12	<i>An adult has the right to appeal a finding of incapacity and/or the appointment of a guardian.</i>
Indicator 13	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise political rights.</i>
Indicator 14	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to work.</i>
Indicator 15	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to property.</i>
Indicator 16	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to marry, to found a family, and to respect of family life.</i>
Indicator 17	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to associate.</i>
Indicator 18	<i>A person under guardianship is not precluded from making decisions in those areas where he/she has functional capacity.</i>
Indicator 19	<i>An adult subject to guardianship must be consulted about major decisions, and have his/her wishes adhered to whenever possible.</i>
Indicator 20	<i>The scope of authority and obligations of the guardian are clearly defined and limited to those areas in which the adult subject to guardianship needs assistance.</i>
Indicator 21	<i>A guardian is obliged to promote the interest, welfare and independence of the adult under guardianship by seeking the least restrictive alternatives in living arrangements, endeavouring to allow the adult to live in the community.</i>

Indicator 22	<i>The guardian must manage the assets of the adult in a manner that benefits the adult under guardianship.</i>
Indicator 23	<i>The guardian is obliged to visit and confer with the adult periodically.</i>
Indicator 24	<i>A guardian's decisions are periodically reviewed by an objective body and the guardian is held accountable for all decisions.</i>
Indicator 25	<i>A complaint procedure exists that triggers review of guardian's acts or omissions.</i>
Indicator 26	<i>Less restrictive alternatives to guardianship are available and are demonstrably exhausted before a guardianship is imposed.</i>
Indicator 27	<i>Guardianships are tailored to the individual needs of the person involved and address the varying degrees of capacity.</i>
Indicator 28	<i>Guardianship is periodically reviewed and continues only as long as appropriate.</i>
Indicator 29	<i>An adult subject to guardianship has the right to request modification and/or termination of the guardianship.</i>