



Guardianship and Human Rights in the Czech Republic

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 the Czech Republic

Analysis of Guardianship Law and Policy
2007



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CONTENTS

Executive Summary.....	5
Recommendations	7
1. Introduction.....	10
1.1 Guardianship.....	10
1.2 Researching Guardianship.....	12
1.3 Acknowledgements.....	12
1.4 Method	13
1.4.1 Stage one: Legislative Review.....	13
1.4.2 Stage two: Collection of Data from the Field.....	14
1.5 Indicators for a Human Rights-Based Assessment of Guardianship	14
2. Guardianship Law and Policy in the Czech Republic	16
2.1 Introduction.....	16
2.2 Demographic and Social Landscape of the Czech Republic.....	16
2.3 Czech Republic’s Legal System.....	20
2.4 Guardianship Law in the Czech Republic	23
2.4.1 History.....	23
2.4.2 Current Law on Incapacitation and Guardianship in the Czech Republic... 24	
2.4.3 Types of Legal Capacity in the Czech Republic.....	26
2.4.4 Types of Guardianship in the Czech Republic	27
2.5 Two-Step Guardianship/Incapacity Process.....	29
2.5.1 Step one: Deprivation or Limitation of Legal Capacity	26
2.5.2 Step two: Appointment of a Guardian	31
2.6 Human-Rights Based Assessment of the Czech Republic’s Legislation.....	32
2.6.1 Principles Running Throughout Legal Frameworks (Indicator 1).....	32
2.6.2 Procedural Rights During Guardianship Proceedings (Indicators 2-7).....	34
2.6.3 Quality of Evidence Provided to the Court in Incapacity Cases (Indicators 8-12).....	43
2.6.4 Rights of the Adult After Guardianship is Established (Indicators 13-17).....	50
2.6.5 Obligations of the Guardian After Guardianship Is Established (Indicators 18-25).....	58
2.6.6 Necessity of Guardianship and Alternatives (Indicators 26-29).....	67
Annex A: Glossary of Terminology.....	75
Annex B: Summary Table of the Indicators.....	77

EXECUTIVE SUMMARY

This report is the first to look in any depth into laws relating to guardianship in the Czech Republic. As with a number of other post-communist states, the Czech Republic has failed to amend its guardianship laws to bring them in line with current human rights standards. It is these standards, and the compliance of the Czech Republic with them, that form the focus of this report. The legal and moral imperatives on the Czech Republic to amend its guardianship laws are demonstrated in this report, a report that is particularly timely in view of the recent adoption by the UN General Assembly of the Convention on the Rights of Persons with Disabilities.¹ It is of note that the Czech Republic took an active part in drafting this Convention, Article 12 of which calls on all countries to ensure that people with disabilities have the right to recognition as people before the law and that they enjoy legal capacity on an equal basis with others in all aspects of life.²

Issues related to disability and guardianship, which affect many thousands of people in the Czech Republic, are currently not a priority area for Czech policy makers. The combined result is a legislative framework governing mental disability, and guardianship in particular, which adds to the vulnerability and social exclusion of people with mental health problems and intellectual disabilities.³ It does so by depriving adults under guardianship of their fundamental human rights and inadequately regulating the responsibilities of their guardians.

This report offers an analysis of domestic legislation on guardianship, such legislation being viewed through the lens of current binding 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 therefore examines whether adequate safeguards are provided in these various statutes and regulations, safeguards required to ensure a legal system that fully respects these human rights standards.

The outcome of this examination indicates that although the Constitution of the Czech Republic provides for respect for the human rights of people with mental disabilities in accordance with international standards, a series of legislative weaknesses result in serious deficiencies throughout its legislative framework. Indeed, the main findings of the report reveal that the Czech Republic 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 Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 12.

² *Ibid*, art. 12.

³ These terms are defined in the Glossary, see p. 75.

Adults under guardianship are subject to significant, arbitrary and automatic deprivations of their human rights. These include a deprivation of their right to property, to a family life, to marry, to vote, to associate freely, to access courts, and to make a will.

Czech guardianship law lacks rigour and quality. Whilst it provides certain procedural protections, such protections can be undermined by a failure to make them effective. Thus, for example, an adult generally has the 'right' to an attorney during the capacity deprivation procedure and the guardianship proceedings, but there is no accompanying legislation making formal provision for an attorney to be provided universally or paid for by the State once the capacity deprivation procedure is finished.

Guardianship contributes to social exclusion. Contrary to international law⁴ an adult in the Czech Republic may be detained for an incapacity evaluation. More significantly, once an adult is placed under guardianship, he or she can be placed, without the adult's consent, into a social care institution for the rest of his or her life. No appeals are available. Further, there is no statutory obligation on guardians to promote independence or seek community-based or less restrictive living arrangements. Indeed, in the Czech Republic there are no real alternatives to guardianship (for example, advance directives, supported decision-making) for people with disabilities who need support in making certain decisions.

Additional deficiencies in the legislative framework include the failure to regulate adequately the powers of guardians. There is, for instance, no duty on guardians to take the opinions of adults under guardianship into account when making decisions about the lives of those adults. Guardianship agencies of local authorities have statutory responsibility for overseeing guardianship arrangements, but their duties are not adequately defined in legislation, potentially permitting negligent and abusive guardians to go undetected. Once placed under guardianship through this flawed procedure, adults, possibly traumatized and confused, have just 15 days to request termination of that guardianship. After that 10 day period the right to request termination of guardianship expires.

The Mental Disability Advocacy Center urges the Czech government to reform its guardianship laws. This must be done in a way that actively both involves and respects people with mental health problems and with intellectual disabilities, as well as their local and national organisations.

This report sets out a series of recommendations designed to improve law and better respect the human rights of people with disabilities in the Czech Republic.

⁴ 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, Medical Examinations.

RECOMMENDATIONS

Overall, this report suggests that Czech guardianship laws fail to meet basic international standards. The clear implication is that the lives of many thousands of people in the Czech Republic could be significantly improved. This will only happen if the government commits to change the legislative landscape. With this in mind, MDAC makes below a number of recommendations to the Czech government, which if followed would bring the law in line with basic international standards. The indicators referred to are 29 basic guarantees of a human rights compliant guardianship system and are shown in parentheses after specific recommendations. They are given here so that the reader can refer to their more detailed analysis given in the main sections of the report. The four principle recommendations are:

1. **Maximise autonomy.** Ensure that adults retain the right to make decisions in all areas of life in which they have functional capacity. Specifically:
 - ⇒ Abolish plenary (all encompassing) guardianship because there is no need to have a legal mechanism to take away all of someone's rights. Legal orders should always be tailor-made to the individual's needs (Indicator 27).
 - ⇒ Abolish the automatic deprivation of the fundamental rights of adults under guardianship to:
 - property
 - work
 - family life
 - marry
 - vote
 - associate
 - access courts
 - make a will (Indicators 13, 15-17).
 - ⇒ In partial guardianship, ensure that the judge is entitled to list only those decision-making areas where the adult lacks capacity (Indicator 18).
 - ⇒ Ensure that legislation defines the scope of the guardian's obligations in light of the adult's capacity (Indicator 20).
 - ⇒ Ensure that legislation specifies that a finding of incapacity is based on a demonstrable link between diagnosis and functional capacity (Indicator 8).
2. **Provide alternatives.** Require use of the least restrictive alternatives that both promote the independence and protect the adult. Specifically:
 - ⇒ Create less restrictive alternatives to guardianship, such as powers of attorney, advance directives and supported and assisted decision-making (Indicator 26).
 - ⇒ Require that guardianship be used only as a last resort (Indicator 26).

⇒ Require guardians to seek the least restrictive living arrangements for adults (Indicator 21).

3. **Prevent abuse.** Reduce the potential for abuse of adults under guardianship. Specifically:

⇒ Establish objective criteria for conducting incapacity evaluations and clear grounds for a judicial determination of legal incapacity. This must include a provision that ensures that decisions are made on the basis of current medical and psychological reports (Indicators 7 and 8).

⇒ Ensure that legislation specifies the type and quality of evidence needed for a judicial finding of deprivation of legal capacity (Indicator 9).

⇒ Establish criteria for selecting the guardian that clearly preclude people with conflicts of interest from serving as guardians (Indicators 10 and 11).

⇒ Ensure that legislation mandates compulsory and meaningful reviews of guardianship, at which the adult is fully involved and adequately legally represented. (Indicator 27).

⇒ Identify those areas where guardians have authority to act, as well as those where they have no such authority.

4. **Improve procedures.** Provide sufficient guarantees of the right of adults to meaningful participation in the guardianship process from the beginning of the process and for as long as the adult is under guardianship. Specifically:

⇒ Define in law sufficiently clear and specific bases for filing an application for declaring a person incapable (Indicator 2).

⇒ Ensure proper notification and access to information about all proceedings related to the procedure for depriving the person of his or her legal capacity, and ensuring that the adult is present and heard at these proceedings. Clearly identifying when the adult's presence is not necessary (as an exception) at guardianship court hearings (Indicator 3).

⇒ Ensure provision of free legal representation at court hearings, including appeals. (Indicator 4).

⇒ Abolish involuntary detention of people for the purpose of incapacity assessments (Indicator 5).

⇒ Ensure that the adult's wishes are considered and given due weight when appointing a guardian (Indicator 10).

⇒ Ensure that an adult has the right and opportunity to challenge the appointed guardian (Indicator 12).

⇒ Ensure adults are actually consulted about decisions affecting their life (Indicator 19).

⇒ Require guardians periodically to visit and speak with the adults for whom they are responsible (Indicator 23).

⇒ Establish an effective complaints mechanism for adults under guardianship, including access to judicial remedies (Indicator 25).

- ⇒ Establish a procedure for periodic review of guardians' actions by an objective body that would be required to take into account information received from the adult, and which would hold the guardian accountable for all decisions (Indicator 24).

MDAC believes that implementation of these recommendations would produce significant improvement in the quality of Czech law regarding guardianship by strengthening the protection of the human rights and interests of the adults who live their lives under guardianship. MDAC looks forward to engaging and cooperating with the Czech authorities and civil society as they plan and implement reform.

1. INTRODUCTION

1.1 Guardianship

This report concerns 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.⁵ The legal mechanism of guardianship exists in some form in almost every jurisdiction in the world and 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 an adult is found to either partially or completely lack capacity to make decisions on his or her own behalf. The outcome of such findings could be that the person is ‘legally incapacitated’.⁶ The court (or an administrative authority) then appoints another person to act as the guardian. The guardian’s specific authority is defined either by law or by court order. Generally, the guardian has 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 the guardian, such as his or her 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 the 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 the adult. Therefore, effective guardianship systems must oversee the actions of guardians and have an efficient accountability system.

⁵ 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.

⁶ Throughout this report, MDAC uses the term ‘legal capacity’, as defined in the Glossary at p. 75. 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 is coming under increased criticism for its failures in providing adequate due process protections in establishing and administering guardianship and ensuring the right of self-determination.⁷ In a small number of jurisdictions, such as in Canada and the UK, guardianship laws have been reformed, and other means of providing protection and assistance to people with mental disabilities have emerged, notably supported decision-making.⁸ 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 has at long last been recognised as a pressing issue internationally. In the newly adopted United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) legal capacity 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 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.

⁷ 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.

⁸ See the Glossary at p. 75 for a definition of supported decision-making.

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. Additionally, because legislation and reality frequently diverge, the project examines the actual practices in the field of guardianship. This report presents a legislative analysis, which will be followed in 2007 by a comprehensive report that will include observations on how the guardianship system functions in practice.

MDAC started its guardianship research in late 2004 by examining the legislative structure of guardianship systems in a number of countries. The first part of the project focused on four countries: Bulgaria, Hungary, Serbia and Russia. In 2006, MDAC started research in an additional four countries: Croatia, the Czech Republic, Georgia and Kyrgyzstan. The aim of the 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, this report may raise more questions than it answers. This is particularly true as it is not a statistical survey, but rather a comparative legal analysis. The results in this report refer only to the legislation. As explained above, research on practice is still ongoing, and it will provide information about how guardianship systems work.

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), Petar Sardelić (Croatia), Zuzana Benešová (Czech Republic), Nina Dadalauri (Georgia), Dániel Kaderják (Hungary),⁹ Meder Dastanbekov (Kyrgyzstan), Anna Smogunova (Russia), and Vidan Hadži-Vidanović (Serbia).

⁹ Dániel Kaderják also served as project assistant. He is a senior law student.

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.

This report was drafted by Zuzana Benešová and David Kosar. Robert Kaňka provided extensive comments. István Fenyvesi and Oliver Lewis produced the final version.

1.4 Method

1.4.1 Stage one: Legislative Review

Stage one of the research, which is represented by this report, is a *de jure*¹⁰ 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;

10 'Of right; legitimate, lawful; by right and just title.' Black's Law Dictionary (West 4th ed. 1951).

- 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; and
- Resolving disputes between guardians and people under guardianship.

1.4.2 Stage two: Collection of Data from the Field

Stage two focuses on a *de facto*¹¹ examination of guardianship practices within each target country by observing court hearings, reviewing court files and, to the extent applicable and possible, observing guardianship agency proceedings and reviewing guardianship agency files.

Because certain information is available only from those who participate in guardianship processes, researchers follow cases, observe court and guardianship authority hearings, review case files, and conduct interviews. This manner of data collection gives an opportunity to capture a snap-shot of guardianship practices.

Conducting research that includes interviews of participants, some of whom have mental health problems or intellectual disabilities, raises ethical concerns about the privacy and the capacity of interviewees to understand the purpose of the research and to give informed consent to participate in it. MDAC carefully considers the ethical issues that are raised by this aspect of research and has adopted guidance to protect the participants and the data they provide. Each researcher has a numerical system of maintaining information and stores the key and raw data in different locations. The guidance sets out standards for informing research ‘subjects’ about the voluntary nature of participation in the research, the right to refuse participation at any time, and the conditions of confidentiality surrounding the information which they provide.

1.5 Indicators for a Human Rights-Based Assessment of Guardianship

Throughout the project, MDAC has used 29 indicators against which legislation is analysed.¹² These indicators come from the key 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

¹¹ ‘Actual; existing in fact; having effect even though not formally or legally recognized.’ Black’s Law Dictionary (West 8th ed. 2004).

¹² See Annex B for a table-summary of all twenty-nine indicators.

explanatory memorandum,¹³ 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’,¹⁴ 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 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.

¹³ See the full text of the memorandum at <https://wcd.coe.int/ViewDoc.jsp?id=407333>.

¹⁴ ‘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.

2. GUARDIANSHIP LAW AND POLICY IN THE CZECH REPUBLIC

2.1 Introduction

The Czech Republic is a land-locked country located in the heart of central Europe. The country neighbours Germany to the west, Austria to the south, Slovakia to the east and Poland to the north. The territory of the Czech Republic was part of Austro-Hungarian Empire until 1918. After the communist coup d'état in 1948 and Czechoslovakia¹⁵ became part of the communist bloc for the next 41 years. The Czech Republic itself came to existence in 1993 after peaceful dissolution of the former Czechoslovakia (the other successor state being the Slovak Republic). The Czech Republic joined the Council of Europe in 1992, OECD in 1995, NATO in 1999 and the European Union in 2004.

2.2 Demographic and Social Landscape of the Czech Republic

The Czech Republic is a relatively small and homogenous country in terms of ethnic and religious affiliation.¹⁶ The vast majority of the inhabitants of the Czech Republic are Czechs¹⁷ (94.2%). The largest minorities are the Slovaks (1.9%), the Poles (0.5%), the Germans (0.4%), and the Roma (0.1%).¹⁸ As of 31 December 2005, the Czech Republic had 10,251,079 inhabitants,¹⁹ of which 5,002,648 were men and 5,248,431 women.²⁰ The number of inhabitants in the Czech Republic has been falling since 1994 due to one of the lowest fertility rates in Europe (1.22 children per woman of reproductive age in 2004).²¹ The year 2006 was the first since 1994 when the birth rate was higher than the mortality rate.²² Life expectancy is 72.9 years for men and 79.1 years for women.²³

¹⁵ The official name of Czechoslovakia varied according to the regime.

¹⁶ According to the 2001 census, 59% of the country is agnostic, atheist or non-believer, 26.8% Roman Catholic and 2.5% Protestant.

¹⁷ According to the 2001 census, 3.7% of the population claimed Moravian nationality, and 0.1% Silesian nationality.

¹⁸ All numbers refer to the 2001 census. For further information see http://www.czso.cz/eng/redakce.nsf/i/population_and_housing_census (last visited February 12, 2007).

¹⁹ Czech Statistics Office, Statistical Yearbook of the Czech Republic 2006, <http://www.czso.cz/eng/edicniplan.nsf/publ/1001-06-2006> (last visited February 12, 2007).

²⁰ *Ibid.*

²¹ Czech Statistics Office, Total fertility rate in European countries: 1960-2004, available at <http://www.czso.cz/csu/2006edicniplan.nsf/publ/4032-06-2006>, §11.7; see also Czech Statistical Office, Vital Statistics of the Czech Republic between 2001 and 2006, available at [http://www.czso.cz/csu/redakce.nsf/i/pohyb_obyvatelstva_v_ceske_republice_v_letech_2001_2006_abs/\\$File/POHYB01_09_ABS.pdf](http://www.czso.cz/csu/redakce.nsf/i/pohyb_obyvatelstva_v_ceske_republice_v_letech_2001_2006_abs/$File/POHYB01_09_ABS.pdf) (last visited 12 February 2007).

²² *Ibid.* (at the time of writing this report, only the data for January-September 2006 were available).

²³ Czech Statistics Office, Basic facts on Czech Republic, http://www.czso.cz/eng/redakce.nsf/i/basic_facts_on_czech_republic (last visited February 12, 2007).

There is a lack of official data on the number of people with psycho-social disabilities (mental health problems) and intellectual disabilities in the Czech Republic. Neither the 2001 census nor the relevant ministries have relevant data. The Government Council for Human Rights acknowledged this problem in the late 1990s, but in 2002 still observed that '[t]he protection of the rights of persons whose freedom has been restricted de facto – as a result of being placed in various types of institutional care – remains a matter of peripheral interest for the public, legislators, lawyers and, with exceptions, also for the protectors of human rights'.²⁴ The council went to on state that a 'particularly urgent problem is represented by the protection of persons deprived of legal capacity and the procedural status of persons in proceedings on legal capacity'.²⁵ The Government Council for Human Rights thus urged that 'given the specific nature of these proceedings and their consequences for mentally ill persons, it is highly desirable for these proceedings to be monitored statistically and for their course to be tracked'.²⁶

Guardianship remained unchanged, forcing the Government Council for Human Rights in 2005 to report again that 'It is not known how many Czech citizens currently have no or limited legal capacity, whether there has been an increase in the number of proceedings commenced, or whether or not there is a tendency to reinstate legal capacity because this information is not maintained by the Ministry of Justice. Nor does the Ministry of Justice keep statistics on the number of people who are placed in a healthcare institution against their will every year and who are de facto and de jure deprived of their personal freedom'.²⁷ According to the Ministry of Health, 4,929 patients were hospitalized involuntarily in 2005.²⁸

The numbers of people who live in, or receive services from, social care institutions has been growing since 1994.²⁹ In that year there were 245 social care institutions for people with disabilities with total capacity of 18,481 people.³⁰ Ten years later in 2004 there were 279 social care homes (109 for adults and 170 for children) with the total capacity of 20,897.³¹ It must be noted that since there are three different types of placement in the institutions (daily, weekly or yearly stay) this number also includes people who are staying in the facilities for one day or for several weeks. It was estimated that approximately 16,500 people were long-term residents in the social care homes in 2004.³² It is also worthy of mention that most of the institutions (141)

²⁴ Government Council for Human Rights, Report on the State of Human Rights in the Czech Republic in 2002, §4.7.2, p. 43.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Government Council for Human Rights, Report on the State of Human Rights in the Czech Republic in 2005, §4.7.3, p. 52.

²⁸ *Ibid.*

²⁹ Předběžná národní zpráva o zdravotní a dlouhodobé péči 2005 v České republice, p. 17.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

are intended for young people with mental disabilities.³³ They have a total capacity of 10,036 beds, of which 8,153 beds are intended for long-term residents.³⁴ These figures are clarified in the table below.

*Number of institutions and their capacity*³⁵

Type of institutions	Number of institutions	Total capacity	Long stay
Adults – combined disabilities	8	656	623
Adults – mental disabilities	64	5,260	5,010
Youths – combined disabilities	17	727	327
Youths – mental disabilities	141	10,036	8,153
Psychotics and psychopaths	7	703	683
Adults – phys & other disabilities	5	188	147
Youths – phys & other disabilities	13	669	264
Adults – physical disabilities	6	492	491
Youths – physical disabilities	3	1,037	-
Adults – Sensory disabilities		3	395
Adults with alcoholism and substance abuse	8	170	170

Source: *Czech statistical office, figures for 2003*
Ministry of Labor and Social Affairs, figures for 2004

The Ministry of Labour and Social Affairs runs only five institutions.³⁶ The majority of institutions are run by municipal and regional authorities and non-governmental

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Main source for these figures were the data of the Czech Statistics Office from 2003.

³⁶ Website of the Ministry of Labour and Social Affairs, <http://www.mpsv.cz/cs/9> (last visited 12 February 2007).

entities (including both organisations and individuals). It is generally assumed that a high proportion of social care institution residents are under guardianship, but no figures are available.

Only recently, the Ministry of Justice has provided more detailed figures on incapacitation and guardianship proceedings (see the table below). Except for the sudden (and unexplained) increase in 2004, the number of decisions on legal capacity has not fluctuated. Most people are deprived of legal capacity and placed under plenary guardianship. Unfortunately, these figures have only been available since 2002, and thus it is impossible to estimate the total number of people under guardianship. Furthermore, the table lacks further categorisation, for instance according to the gender, age and diagnosis of people under guardianship, how many such people have an institutional guardian, what is an average number of people under guardianship for whom each professional guardian is responsible, and exactly what are the living arrangements of these people.

Judicial decisions in the incapacitation and guardianship proceedings						
District courts (okresní soudy)						
	<i>Type of Decision</i>	2002	2003	2004	2005	2006
Legal capacity	Judgments where plenary incapacity was found	1,314	1,312	1,508	1,594	1,459
	Other decision in plenary incapacity proceedings	426	461	521	473	580
	Judgements where partial incapacity was found	254	281	314	312	357
	Other decision in partial incapacity proceedings	67	68	90	91	62
	Judgements where the legal capacity were restored	48	45	33	49	52
	Other decision in the restoring of legal capacity	108	95	115	113	139
Appointment of the guardian	Approving the agreement or other legal act on behalf of person under plenary or partial incapacity	1,039	1,086	1,193	1,332	1,283
	Not approving the agreement or other legal act on behalf of person under plenary or partial incapacity	37	38	34	35	35
	Other decision about agreement or other legal at on behalf of person under plenary or partial incapacity	113	118	157	180	168
	Judgment of appointing the proceedings guardian according to the §29 of Civil Code	462	378	543	529	434
	Other decision in proceeding where guardian for proceedings was appointed	-	-	-	-	93

As for mental health services, in 2005 there were 32 psychiatric departments in hospitals and 20 specialist psychiatric hospitals (including three children's hospitals), with a total of 9,858 beds.³⁷ These numbers have remained more or less constant in recent years.³⁸ The number of all hospitalisations has increased by 3% since 2000 (to 60,633 hospitalizations in 2005)³⁹, 69% of hospitalisations took place in psychiatric hospitals,⁴⁰ and the average length of stay was 79 days in psychiatric hospitals and 21 days in psychiatric departments of hospitals.⁴¹ Furthermore, 2.5% of patients in psychiatric hospitals stayed there longer than one year.⁴²

2.3 Czech Republic's Legal System

The Czech Republic is a parliamentary republic with a president elected in a joint session of both chambers of the Chamber of Deputies and the Senate.⁴³ The Constitution defines the Czech Republic as a 'sovereign, unitary, and democratic, law-abiding state governed by the rule of law, based on respect for the rights and freedoms of man and citizens'.⁴⁴ Being a unitary state, the Czech Republic delegates two types of powers to the territorial units:

1. the power of self-administration in certain areas, where the territorial unit remains free to adopt legislation if it wishes to do so (area of independent powers of self-administration),⁴⁵
2. the exercise of public authority, where the territorial unit acts in the exercise of public authority and of concrete public competence and is thus obliged to obey detailed instruction issued by the central government. Exercising this function, territorial unit acts as a kind of decentralised body of the government (area of the exercise of assigned public administration).⁴⁶

Territorial self-government (územní samospráva) is realised on two levels: (1) Municipalities (obce) which are the basic territorial self-governing units; and (2) Regions (vyšší územně-samosprávné celky) which represent the so-called higher territorial self-governing units.⁴⁷

³⁷ Institute of Health Information and Statistics of the Czech Republic. Psychiatric Care 2005, p. 13, available at http://www.uzis.cz/download.php?ctg=10®ion=100&mnu_id=3120&mnu_action=select (last visited 12 February 2007).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Act No. 1/1993 Coll., Constitution of the Czech Republic, adopted by the Czech National Council on 16 December 1992 (hereinafter 'Constitution'), art. 54(2).

⁴⁴ Constitution, art. 1(1).

⁴⁵ *Ibid.*, art. 104(3).

⁴⁶ *Ibid.*, art. 105.

⁴⁷ *Ibid.*, art. 99.

The Czech legal system is based upon the civil law system and is heavily influenced by the Austrian and German legal culture.⁴⁸ The three basic features of the legal system are: (1) principle areas of law and procedure are codified – for example, Civil and Criminal Codes, Codes of Criminal, Civil and Administrative Procedure; (2) the system of legal sources is hierarchical, forming a pyramidal structure of legal force within the legal system; (3) only statutes are recognised as a formal source of law. The most important sources of law are Acts of Parliament (the more complex ones are called codes or procedural codes in case of procedural norms). The hierarchy of legal regulations adopted and/or approved by the national authorities in the Czech Republic reads as follows:

- ⇒ Constitution and other constitutional laws (including the Charter of Fundamental Rights and Basic Freedoms).⁴⁹
- ⇒ International treaties ratified by the parliament.⁵⁰
- ⇒ Statutes adopted by the parliament.⁵¹
- ⇒ Derived legislation (adopted by the government⁵² and ministries⁵³).
- ⇒ Legislative acts of self-regulated entities.⁵⁴

Since 2004, European Union law has become part of the Czech legal order, trumping national law. The Czech catalogue of human rights, the Charter of Fundamental Rights and Basic Freedoms (hereinafter also ‘Charter’),⁵⁵ is not contained in the Constitution itself, but a separate law that forms a part of the constitutional order.⁵⁶ Similar to other post-communist rights regimes, the Charter contains a broad range of rights and freedoms, including social, economic and cultural rights. However, the Charter also includes both a general limitation clause and several specific limitation clauses.⁵⁷ Only the Constitutional Court is empowered to review the constitutionality of the legislation (abstract constitutional review) and decide upon conformity of decisions of public authorities (including courts) with fundamental rights enshrined in the Charter via an individual complaints procedure.

⁴⁸ See also Bobek, M.: Introduction to the Czech legal system and legal resources online, http://www.nyulawglobal.org/globalex/czech_republic.htm (last visited 12 February, 2007).

⁴⁹ Constitution, art. 112(1): ‘The constitutional order of the Czech Republic is made up of this Constitution, the Charter of Fundamental Rights and Basic Freedoms, constitutional acts adopted pursuant to this Constitution, and those constitutional acts of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, and the Czech National Council defining the state borders of the Czech Republic, as well as constitutional acts of the Czech National Council adopted after the sixth of June 1992.’

⁵⁰ Constitution, art. 10.

⁵¹ *Ibid.*, arts. 39-52.

⁵² *Ibid.*, art. 78.

⁵³ *Ibid.*, art. 79(3).

⁵⁴ *Ibid.*, art. 104(3).

⁵⁵ Act No. 2 /1993 Coll., as amended.

⁵⁶ Constitution, arts. 3 and 112(1).

⁵⁷ See e.g. Art. 17 §4 of the Charter (limitations on freedom of expression), or Arts. 41 and 44 of the Charter (limitation clauses of certain social, economic and cultural rights).

The Czech Republic ratified many international human rights treaties and conventions including the following United Nations instruments: International Covenant on Civil and Political Rights (ICCPR);⁵⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR);⁵⁹ International Convention on the Elimination of All Forms of Racial Discrimination (CERD);⁶⁰ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);⁶¹ Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT);⁶² Convention on the Rights of the Child (CRC),⁶³ and the Discrimination (Employment and Occupation) Convention – International Labor Organization.⁶⁴ Within the European legal system it has ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁶⁵ and the European Social Charter.⁶⁶ However, the Czech Republic has neither ratified nor signed Protocol 12 to the European Convention on Human Rights which guarantees a free-standing right to non-discrimination, nor has it ratified the Revised European Social Charter,⁶⁷ nor the protocol which allows collective complaints under the Revised European Social Charter.⁶⁸

As to the legal status of international treaties, the Constitution after its amendment in 2002 expressly provides that '[p]romulgated international agreements, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order',⁶⁹ and stipulates primacy of the these treaties before the law: 'should an international agreement make provision contrary to a law, the international agreement shall be applied'.⁷⁰ Consequently, it is true that the party to any judicial proceedings can invoke a so-called 'self-executing' provision of the international treaty and that the Czech Constitutional Court interprets this notion broadly.⁷¹ However, the jurisprudence of the European Convention on Human Rights is hardly ever used in proceedings before lower courts, and the European Court's interpretation of national guardianship laws remains little more than an academic debate.

⁵⁸ Promulgated under No. 120/1976 Coll.; entered into force for the then Czechoslovakia on 23 March, 1976.

⁵⁹ *Ibid*; entered into force on 23 March, 1976.

⁶⁰ Promulgated under No. 95/1974 Coll.; entered into force on 4 January, 1969.

⁶¹ Promulgated under No. 62/1987 Coll.; entered into force on 18 March, 1982.

⁶² Promulgated under No. 143/1988 Coll.; entered into force on 6 August, 1988.

⁶³ Promulgated under No. 104/1991 Coll.; entered into force on 6 February, 1991.

⁶⁴ Promulgated under No. 465/1990 Coll.; entered into force on 21 January, 1965.

⁶⁵ Promulgated under No. 209/1992 Coll.; entered into force on March 18, 1992.

⁶⁶ Promulgated under No. 14/2000 Coll. Of Intl. Treaties; entered into force on 3 December, 1999.

⁶⁷ European Social Charter (revised) CETS No. 163.

⁶⁸ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No. 158.

⁶⁹ Constitution, art. 10.

⁷⁰ *Ibid*.

⁷¹ See Decisions of the Constitutional Court No. Pl. ÚS 31/96 and No. Pl. ÚS 34/02.

2.4 Guardianship Law in the Czech Republic

2.4.1 History

The 1811 Common Civil Code (Všeobecný občanský zákoník), often referred to as ABGB (Allgemeines bürgerliches Gesetzbuch),⁷² provided special protection to specific groups of people who were not able to manage their affairs due to age, intellectual disabilities or mental health issues, or other specific circumstances.⁷³ This protection extended also to those who were ‘furious, lunatic and simple, who are incapacitated or are not able to recognize consequences; also those, who were proclaimed as squanderers’.⁷⁴ The form of the special protection was either (1) deprivation of legal capacity,⁷⁵ (2) appointment of a guardian, or (3) both of these together.⁷⁶ This package existed ipso facto without a court decision and there was no two-step incapacitation/guardianship process until 1916. The two-step incapacitation/guardianship process was introduced only by the ‘Incapacitation Code’ (Řád o zbavení svéprávnosti)⁷⁷ that introduced also a plenary/limited incapacitation dichotomy, and the institute of the guardian for the former (opatrovník) and ‘temporary sustainer; (prozatimní podpůrce) for the latter.⁷⁸ This law lasted with minor amendments until 1950.

The communist era downplayed the role of the civil legal relationships and according to one commentator, ‘annihilated domestic legal tradition’.⁷⁹ The Civil Code was amended in 1950,⁸⁰ significantly simplifying several legal concepts, but still did not depart from the continental legal tradition.⁸¹ As to the level of legal capacity, it recognized three age groups (6, 15, 18 years), each with different legal consequences.⁸² As to the incapacitation, people older than six – including adults – and who were unable to manage their affairs due to a permanent mental disability, were deprived

⁷² The imperial patent No. 946/1811 (hereinafter only ‘ABGB’).

⁷³ ABGB, art. 21.

⁷⁴ *Ibid.*

⁷⁵ Term ‘legal capacity’ refers to what is known as ‘capacity to undertake acts in law’ (způsobilost k právním úkonům) and not to ‘capacity to being recognized as a person’ (právní způsobilost); see Glossary, p. 75.

⁷⁶ Rouček, F., Sedláček, J.: Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi, Linhart, Prague, 1935 (as reprinted by CODEX Bohemia in 1998, p. 207).

⁷⁷ Imperial Patent No. 207/1916.

⁷⁸ For further details, see Rouček, F., Sedláček, J.: Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi, Linhart, Prague, 1935, reprinted by CODEX Bohemia in 1998, p. 213.

⁷⁹ Kühn, Z., Aplikace práva soudcem v éře středoevropského komunismu a transformace, Prague, C.H. Beck, 2005, p. 66.

⁸⁰ Act No. 141/1950 Coll. (hereinafter the ‘1950 Civil Code’).

⁸¹ Kühn, Z., Aplikace práva soudcem v éře středoevropského komunismu a transformace, Prague, C.H. Beck, 2005, p. 66.

⁸² 1950 Civil Code, arts. 9-14.

of legal capacity.⁸³ As a result, such people had in fact the same legal position as a six-year-old child.⁸⁴ Furthermore, the Code stated that adults unable to manage their affairs due to permanent mental disability or excessive use of alcohol, drugs or poison, were partially restricted of legal capacity.⁸⁵ Such people were considered to have the same capacity as teenagers between 15 and 18 years old.⁸⁶ For such people, the guardian acted on their behalf,⁸⁷ whereas people partially deprived of their legal capacity acted in areas where they no longer possessed the legal capacity⁸⁸ with the consent of their guardian.⁸⁹

It was the 1963 Code of Civil Procedure⁹⁰ and 1964 Civil Code⁹¹ which significantly simplified the legal framework regulating incapacitation and guardianship. The new Civil Code was referred to as ‘the only truly revolutionary civil code’ in the communist bloc.⁹² Leaving aside for now ‘temporary guardians’ and ‘collision guardians’, the 1964 Civil Code did not devote to guardianship only one single clause.⁹³ The Code of Civil Procedure devoted a whole two articles to guardianship.⁹⁴ The rules governing the incapacitation were only slightly more extensive.⁹⁵ Guardianship law in the Czech Republic still suffers from a lack of clarity and regulation, which, as this report demonstrates, has a direct impact on human rights.

2.4.2 Current Law on Incapacitation and Guardianship in the Czech Republic

The 1964 Civil Code and the 1963 Code of Civil Procedure are still valid today. Therefore, the terms ‘Civil Code’ and ‘Code of Civil Procedure’ will from now on refer in this report solely to these Codes explicitly stipulated otherwise.

It is also notable that ‘[i]n the Czech Republic, there is no specific law on psychiatric care to regulate the rights of persons with mental disorders or to create a legislative framework for the reform of care for persons with mental disorders.’⁹⁶

⁸³ 1950 Civil Code, art. 15.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, art. 13(1).

⁸⁶ *Ibid.*, art. 13(2).

⁸⁷ *Ibid.*, art. 13(1).

⁸⁸ In other areas (i.e. in which they were not incapacitated) they acted without any constraints.

⁸⁹ 1950 Civil Code, art. 14.

⁹⁰ Act. No. 99/1963 of the Coll., Civil Procedure Code.

⁹¹ Act No. 40/1964 of the Coll., Civil Code.

⁹² Kühn, Z., *Aplikace práva soudcem v éře středoevropského komunismu a transformace*, Prague, C.H. Beck, 2005, p. 67 (quoting Rudzinski, A. W., *New Communist Civil Codes of Czechoslovakia and Poland: A General Appraisal*, Indiana L.J., 1965, Vol. 41, p. 48).

⁹³ 1964 Civil Code, art. 27(2).

⁹⁴ 1963 Civil Procedure Code, arts. 192-193.

⁹⁵ See 1964 Civil Code, art. 10, and 1963 Civil Procedure Code, arts. 186-191.

⁹⁶ Government Council for Human Rights, *Report on the State of Human Rights in the Czech Republic in 2005*, §4.7.1, p. 50.

Both Codes have been amended on numerous occasions, but the provisions on guardianship have remained largely untouched.⁹⁷ As to the provisions on the incapacitation, the situation is slightly better due to the amendment to the Code of Civil Procedure in 2005.⁹⁸ This amendment remedied the biggest deficiencies of the incapacitation proceedings. The main changes in proceedings on legal capacity can be summarized as follows:⁹⁹

1. the maximum time bar for submitting a repetitive petition for restoring an adult's legal capacity (if the court has rejected a previous petition and stated that no improvement of the mental health of the person concerned can be expected) was reduced from three years to one year;¹⁰⁰
2. the adult's opinion with regard to appointment of guardian was strengthened,¹⁰¹ also the adult is entitled to select his or her own representative for the proceedings, and only if he or she fails to select a representative, the court itself appoints a guardian for the proceedings (so-called 'procedural guardian');¹⁰²
3. the procedural guardian appointed by the court must be an attorney;¹⁰³
4. the court is now expressly required to advise the adult whose legal capacity is in question about that person's right to select a representative for the proceedings and about other procedural rights and obligations;¹⁰⁴
5. the court no longer has discretion whether to hear the adult,¹⁰⁵ but is obliged to do so whenever the adult requests so;¹⁰⁶
6. the maximum period in which the adult may be detained in a hospital for an incapacity assessment was reduced from three months to six weeks;¹⁰⁷
7. the court no longer has the discretion to make an order without having a hearing¹⁰⁸ was quashed;¹⁰⁹ and finally
8. the court no longer has a discretion whether the person concerned will be delivered the judgment on the removal of his legal capacity in cases where 'such delivery could have an unfavourable effect on the addressee because of his mental disorder.

⁹⁷ Except for an amendment to the Civil Procedure Code in 2000 as a result of the amendment to the Family Act.

⁹⁸ Act No. 205/2005 Coll., amending Act No. 99/1963, Coll. the Civil Procedure Code, as amended, and Act No. 85/1996, Attorneys' Act, as amended; which entered into effect as of 1 August 2005 (hereinafter the '2005 Amendment to the Civil Procedure Code').

⁹⁹ See also Government Council for Human Rights, Report on the State of Human Rights in the Czech Republic in 2005, §4.7.3, pp. 51-52.

¹⁰⁰ Civil Procedure Code, art. 186(3).

¹⁰¹ *Ibid.*, art. 187(1) (applicable before the 2005 Amendment to the Civil Procedure Code).

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Civil Procedure Code, art. 189(1) (applicable before the 2005 Amendment to the Civil Procedure Code).

¹⁰⁶ *Ibid.*, art. 187(2).

¹⁰⁷ *Ibid.*, art. 187(3).

¹⁰⁸ *Ibid.*, art. 189(1) (applicable before the 2005 Amendment to the Civil Procedure Code).

¹⁰⁹ *Ibid.*, art. 189.

or if the addressee was not able to grasp the significance of the decision',¹¹⁰ but the decision not to deliver a judgment is now limited to cases where the adult is not capable of understanding the decision and only if this lack of capability is expressly stated in the conclusions of an expert opinion.¹¹¹

In sum, the Civil Code contains substantive provisions on incapacitation¹¹² and guardianship,¹¹³ which are very concise. To the contrary, the Code of Civil Procedure devotes the specific chapters (albeit still far from being perfect) both to incapacitation under heading 'Proceedings related to capacity to undertake acts in law'¹¹⁴ and guardianship procedure under heading 'Proceedings on guardianship'.¹¹⁵ The typology of the incapacitation and guardianship in the substantive law will be discussed in more detail in the following subchapter and the two-step incapacitation/guardianship procedure will be dealt with in Part 2.5.

2.4.3 Types of Legal Capacity in the Czech Republic

The Civil Code recognizes two categories of incapacitation: (1) full deprivation of legal capacity (when the adult is placed under plenary or all-encompassing guardianship); and (2) partial deprivation of legal capacity (when the adult is placed under partial guardianship).¹¹⁶

Full deprivation of legal capacity/plenary (all-encompassing) guardianship

An adult may be deprived of legal capacity only if the following legal requirements are met:

- ⇒ the adult had a mental disorder;
- ⇒ this mental disorder is not only temporary; and
- ⇒ due to this mental disorder the individual is incapable of undertaking acts in law.¹¹⁷

Nowadays the Civil Code distinguishes only between adults and minors,¹¹⁸ and stipulates that '[m]inors possess the capacity to undertake only such acts in law if the nature of these acts corresponds to the mental and moral maturity of their age'.¹¹⁹

¹¹⁰ Civil Procedure Code, art. 189(2) (applicable before the 2005 Amendment to the Civil Procedure Code) (emphasis added by author).

¹¹¹ *Ibid*, art. 189.

¹¹² Civil Code, art. 10.

¹¹³ *Ibid*, arts. 27(2), 29 and 30.

¹¹⁴ Civil Procedure Code, arts. 186-191.

¹¹⁵ *Ibid*, arts. 192-193.

¹¹⁶ Civil Code, art. 10.

¹¹⁷ *Ibid*, art. 10(1).

¹¹⁸ *Ibid*, arts. 8-9.

¹¹⁹ *Ibid*, art. 9.

Partial deprivation of legal capacity/partial guardianship

The court shall limit the individual's legal capacity in two cases:

1. in cases of mental health problems or intellectual disabilities, when:
 - ⇒ an adult has a mental disorder;
 - ⇒ this mental disorder is not only temporary; and
 - ⇒ due to this mental disorder the individual possesses only limited capacity to undertake acts in law.¹²⁰
2. in cases of excessive consumption of alcohol, narcotics or intoxicants, when:
 - ⇒ an adult excessively consumes alcoholic beverages, narcotics or intoxicants; and
 - ⇒ due to this, the adult possesses only limited capacity to undertake acts in law.¹²¹

The determination of the scope could be both negative (enlisting the areas where the person is not entitled to act independently) and positive (enlisting those areas where the adult is capable of making independent decisions), since the application does not provide any further guidance. However, a positive list raises serious human rights concerns. Giving a complete list of all the areas where the person retains the legal capacity to make decisions is impossible.

2.4.4 Types of Guardianship in the Czech Republic

There are three types of guardianship:

1. Regular guardianship

The Civil Code elaborates this main form of guardianship in one clause, namely it provides that the 'legal representative of the person who was deprived of legal capacity or whose legal capacity was limited is a guardian appointed by the court'.¹²² There is no comprehensive definition of guardianship. It is possible that an adult's legal capacity is taken away but no guardian is appointed. Law prioritises appointing the guardian from the adult's family, or another individual or legal entity, or failing that a guardianship office of a local authority.¹²³

2. Special (temporary) guardianship

A special guardian may be appointed when 'compelling reasons' exist,¹²⁴ and when one of the following conditions is met: either (1) it is necessary for the protection of the

¹²⁰ *Ibid*, art. 10(2) (emphasis added by author).

¹²¹ *Ibid*, art. 10(2).

¹²² *Ibid*, art. 27(2).

¹²³ *Ibid*, art. 27(3).

¹²⁴ *Ibid*, art. 29.

interests of the person concerned; or (2) it is required by public interest.¹²⁵ In reality special guardians are used rarely,¹²⁶ which is curious, because the incapacity covered by special guardianship is not necessarily identical to that of regular guardianship, because (1) it is not preceded by often lengthy court procedure to deprive or restrict an adult's legal capacity; and (2) the courts have wide discretion in formulating its decision and individualising its decision.¹²⁷ In sum this form of guardianship may be seen to represent a less restrictive legal instrument than regular guardianship.

3. Collision guardianship

A so-called 'collision guardian' is appointed when there is a conflict of interests:

1. between the (regular) guardian and the person under guardianship; or
2. between the different people under (regular) guardianship (e.g. between two incapacitated people) who are represented by the same guardian.¹²⁸

Such a guardian is appointed often for a single act in law, in relation of which the conflict of interests arise.¹²⁹ It was reported that the term 'collision of interests' has been interpreted rather restrictively so far,¹³⁰ although due to the prevailing pattern in the appointment of guardians both types conflict of interests often arise. Firstly, prioritising relatives to be guardians must inevitably lead to conflicts between the interests of the guardian and the adult (related primarily to inheritance or property). Secondly, the second category of conflict happens frequently because institutional guardians or its employees often have guardianship responsibilities over a vast number of people.¹³¹

4. Procedural guardianship

As noted previously, the previous three substantive guardianships must be distinguished from the procedural guardianship. The major difference is that the procedural guardian represents the adult only during legal proceedings and is not entitled to undertake any substantive acts on the adult's behalf.¹³² Considering the alleged incapacity of the adult, it is curious that guardianship proceedings do not require compulsory appointment of the procedural guardian. Thus it is fully within the court's discretion whether to appoint one or not.¹³³ The function of the procedural guardian is limited to the proceedings concerned and automatically ceases to exist

¹²⁵ *Ibid.*

¹²⁶ Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 5.

¹²⁷ *Ibid.*

¹²⁸ Civil Code, art. 30.

¹²⁹ Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 17.

¹³⁰ *Ibid.*, p. 6.

¹³¹ *Ibid.*, p. 17.

¹³² *Ibid.*, p. 5.

¹³³ Civil Procedure Code, art. 29(3).

after the appointment of the regular guardian. Exceptionally, the court might also appoint the so-called ‘procedural collision guardian’ when there is a conflict of interest between adult and guardian,¹³⁴ such as when the adult complains about the services of the guardian.¹³⁵

2.5 Two-Step Legal Capacity/Guardianship Process

There are two separate steps for depriving an adult of legal capacity and appointing a guardian.

2.5.1 Step one: Deprivation or Limitation of Legal Capacity

This procedure is governed by the Code of Civil Procedure under the heading ‘Proceedings related to capacity to undertake acts in law’,¹³⁶ which was subject to a substantial amendment in 2005 (see Part 2.4.2). This section applies also to restoring legal capacity. The public prosecutor is entitled to intervene at any stage during the course of the deprivation of legal capacity procedure.¹³⁷

Law is vague as to the application of such a procedure, stating that the application ‘may be filed also by medical facility which is in that case also a party to the proceedings’,¹³⁸ It is thus generally accepted that the proceedings may be initiated by any party whose legal interests might be at stake.¹³⁹ The procedure can be initiated also ex officio.¹⁴⁰

In order to prevent abuse of the procedure (e.g. by family members), courts are entitled to request the applicant to submit a report on the mental health of the adult within the stipulated time limit.¹⁴¹ If this does not happen, the proceedings are discontinued.¹⁴² The court need not require such a medical report – it is purely discretionary.

The adult under guardianship is the only person entitled to request restoration of legal capacity,¹⁴³ and in such case need not be represented by the guardian.¹⁴⁴ However, as noted above in section 2.4.2, the procedure on restoring the legal

¹³⁴ *Ibid*, art. 32(2).

¹³⁵ See also Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 19.

¹³⁶ Civil Procedure Code, arts. 186-191.

¹³⁷ *Ibid*, art. 35(1)(e).

¹³⁸ *Ibid*, art. 186(1).

¹³⁹ Winterová, A. et al.: *Občanský soudní řád s vysvětlivkami a judikaturou*, 2. aktualizované vydání, Praha, Linde, 2005, p. 507.

¹⁴⁰ Civil Procedure Code, art. 81(1).

¹⁴¹ *Ibid*, art. 186(2).

¹⁴² *Ibid*.

¹⁴³ *Ibid*, art. 186(3).

¹⁴⁴ *Ibid*, art. 22.

capacity is qualified by the time-bar condition on the repetitive claims.¹⁴⁵ The adult may thus be prevented from filing a subsequent claim for up to one year from the previous application,¹⁴⁶ only if no improvement of the adult's mental health can be expected.¹⁴⁷ Even if presented with positive evidence, the court has discretion to ban the adult filing the repetitive application.¹⁴⁸

An adult must be represented during the incapacitation proceedings, and may select his own representative. Only when the adult does not select such a representative, the court appoints a procedural guardian,¹⁴⁹ who must be an attorney.¹⁵⁰ However, there is no possibility for the State to pay for an attorney selected by the adult – this is a serious weakness in the system. The court must tell the adult of the right to select a representative and other procedural rights.¹⁵¹ The court may decide not to hear the adult in cases when it is not possible to hold a hearing at all or without being detrimental to the health of the adult.¹⁵² If the adult requests to be heard, the court is obliged to hold a hearing.¹⁵³ In order to evaluate the mental capacity of the person concerned, the courts must always hear an expert.¹⁵⁴ If it is necessary, the adult may be detained in hospital for a maximum period of six weeks for an incapacity assessment to be carried out.¹⁵⁵

If the criteria are met and the court deprives or restricts an adult of legal capacity, the court may decide not to deliver its judgment to the adult if: (1) the adult is not capable of understanding the decision and (2) this incapacity is expressly stated in the conclusions of an expert opinion.¹⁵⁶

There is a procedure to remedy wrong decision, for example those based on invalid or defective expert opinion.¹⁵⁷ Finally, the legal capacity procedure is exempted from the court fees.¹⁵⁸ In what on the face of it appears wholly unfair, the state pays only for an attorney selected by the court, and not one selected by the adult.¹⁵⁹

¹⁴⁵ Civil Procedure Code, art. 186(3).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, art. 187(1).

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, art. 187(2).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, art. 187(3).

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, art. 189.

¹⁵⁷ *Ibid.*, art. 190. See also Winterová, A. et al.: *Občanský soudní řád s vysvětlivkami a judikaturou*, 2. aktualizované vydání, Praha, Linde, 2005, p. 517.

¹⁵⁸ Art. 11(1)(h) of the Act. No. 549/1991 Coll., on Court Fees.

¹⁵⁹ Civil Procedure Code, arts. 187(1) and 191.

2.5.2 Step two: Appointment of a Guardian

Following a judgement depriving or restricting the adult of legal capacity, it is the court's responsibility to initiate appointment of a guardian.¹⁶⁰ As mentioned above, the Code of Civil Procedure unfortunately devotes only two articles to this.¹⁶¹ The court is responsible for ensuring that a guardian is appointed to each adult without legal capacity, but there is no time limit.¹⁶² The court is obliged to inform all the parties of the appointment of guardian proceedings,¹⁶³ including the adult.¹⁶⁴

In contrast to the procedure depriving or restricting the adult of legal capacity, the public prosecutor is not entitled to intervene in the guardianship procedure.¹⁶⁵ There is no right to legal representation or a procedural guardian. A 'special guardian' may be appointed, but this is not obligatory.¹⁶⁶ The Supreme Court of the former Czechoslovakia held in 1984 that it is not necessary to appoint a procedural guardian to an adult deprived of legal capacity for a guardianship procedure since the adult's rights are not at stake.¹⁶⁷ Although this decision is rather old, it is still reproduced in most of the commentaries on the Code of Civil Procedure.¹⁶⁸

After selecting a guardian, the court must define the scope of rights and duties of the guardian in the decision itself.¹⁶⁹ The guardian must then take an oath and promise to perform his function of guardian properly and follow the orders of the court.¹⁷⁰ The procedure deals with other issues related to guardianship such as supervision of the guardians, authorising certain acts, and issuing orders to the guardian, etc.¹⁷¹ The abovementioned issues are also governed by certain provisions on custody of minors¹⁷² that apply analogously to the guardianship procedure.¹⁷³ As a general rule the court directly supervises administration of the adult's property and takes measures in order to secure the property.¹⁷⁴

¹⁶⁰ *Ibid*, arts. 192-193.

¹⁶¹ *Ibid*.

¹⁶² *Ibid*, art. 192(1).

¹⁶³ *Ibid*, art. 81(3).

¹⁶⁴ This obligation was often breached since the courts erroneously applied by analogy art. 189(2) of the Civil Procedure Code. See Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 18.

¹⁶⁵ Civil Procedure Code, art. 35(1)(e).

¹⁶⁶ *Ibid*, art. 29(3).

¹⁶⁷ Decision Rc 2/1984/IV.

¹⁶⁸ See e.g., Winterová, A. et al.: *Občanský soudní řád s vysvětlivkami a judikaturou*, 2. aktualizované vydání, Praha, Linde, 2005, p. 525, or Bureš, J., Drápal, L., Krčmář, Z., Mazanec, M.: *Občanský soudní řád s judikaturou a souvisejícími předpisy*, Praha, C. H. Beck, 2004, p. 529.

¹⁶⁹ Civil Procedure Code, art. 193(2).

¹⁷⁰ *Ibid*, art. 180(1).

¹⁷¹ See Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 18.

¹⁷² Civil Procedure Code, arts. 176-179 and 180(1).

¹⁷³ *Ibid*, art. 193(3).

¹⁷⁴ *Ibid*, art. 193(1).

As for the guardian’s obligations, he or she must perform the function properly (by analogy with custody on minors)¹⁷⁵ and must submit to the court a final balance sheet after the end of guardianship.¹⁷⁶ In addition, the court may request the guardian to provide periodic reports.¹⁷⁷ Courts maintain an unclear supervisory role with regard to exceptional property issues.¹⁷⁸

2.6 Human-Rights Based Assessment of the Czech Republic’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 the Czech Republic’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 Preamble to the Constitution, the Charter of Fundamental Rights and Basic Freedoms and other laws provide for the equal treatment for all people, but they do not explicitly specify people with mental disabilities.

¹⁷⁵ *Ibid*, art. 193(3) in conjunction with art. 178(1).

¹⁷⁶ *Ibid*, art. 193(2).

¹⁷⁷ *Ibid*.

¹⁷⁸ Civil Code, art. 28 (emphasis added by author).

Analysis: Pursuant to the Charter of Fundamental Rights, ‘[a]ll people are free, have equal dignity, and enjoy equality of rights’,¹⁷⁹ and ‘[t]heir fundamental rights and basic freedoms are inherent, inalienable, non-prescriptible, and not subject to repeal’.¹⁸⁰ The Charter has a specific anti-discrimination clause.¹⁸¹ Although disability is not explicitly stated in the list of prohibited grounds for discrimination, the list is non-exhaustive and it is widely accepted that mental health and intellectual disability fall within the ambit of term ‘other status’.

The Charter further provides that ‘everyone has the capacity to possess rights’,¹⁸² protects human dignity¹⁸³ and privacy.¹⁸⁴ The Constitutional Court has repeatedly stressed the importance of human dignity of people deprived of legal capacity and the severity of such interference of rights.¹⁸⁵ Any limitation of fundamental rights must be based in law,¹⁸⁶ cannot be discriminatory in nature,¹⁸⁷ and must preserve the ‘essence and significance’ of the right concerned.¹⁸⁸

Several other acts including the Civil Code also provide for protection of personal rights.¹⁸⁹ As to the discrimination clauses, perhaps the most comprehensive clause is stipulated in the Labour Code.¹⁹⁰ The anti-discrimination law (compatible with European Union law) is still in the legislative process and its final wording has not been settled.

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

¹⁷⁹ Charter, art. 1.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*, art. 3(1).

¹⁸² *Ibid.*, art. 5.

¹⁸³ *Ibid.*, art. 10(1): ‘Everyone has the right to demand that his human dignity, personal honor, and good reputation be respected, and that his name be protected’.

¹⁸⁴ *Ibid.*, art. 10(2): ‘Everyone has the right to be protected from any unauthorized intrusion into her private and family life’.

¹⁸⁵ Decision No. IV. ÚS 412/04; see also Decisions No. I. ÚS 173/06 and III. ÚS 747/2000.

¹⁸⁶ Charter, art. 4(2): ‘Limitations may be placed upon the fundamental rights and basic freedoms only by law and under the conditions prescribed in this Charter ...’.

¹⁸⁷ *Ibid.*, art. 4(3): ‘Any statutory limitation upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions.’

¹⁸⁸ *Ibid.*, art. 4(4): ‘In employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations are not to be misused for purposes other than those for which they were laid down’.

¹⁸⁹ Civil Code, art. 11.

¹⁹⁰ Labour Code, Act No. 262/2006.

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.¹⁹¹

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’.¹⁹² 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, this Act proclaims [.]’.¹⁹³ 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 minimum 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 individuals who, on account of their mental disabilities, are not fully capable of acting for themselves’.¹⁹⁴ The next critical issue is the quality of evidence that is provided to the court in cases examining legal capacity. Indicators 8 to 12 address these issues.

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: Legislation does not clearly define who may apply to a court to deprive or restrict an adult of legal capacity. There is no precise standard of evidence needed to support such an application.

¹⁹¹ Recommendation R(99)4, Principle 1.

¹⁹² 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.

¹⁹³ 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.

¹⁹⁴ European Court of Human Rights, Winterwerp v. the Netherlands, Application no. 6301/73, judgment 24 October 1979, (A/33) (1979-80) 2 EHRR 387, para. 60.

Analysis: An application to deprive an adult of legal capacity and to appoint a guardian may be filed to the local district court.¹⁹⁵ Law does not explicitly provide who is entitled to initiate the procedure to deprive or restrict an adult of legal capacity, stipulating only that such a case may be filed also by a medical facility.¹⁹⁶ It is thus generally accepted that the proceedings may be initiated by any party whose legal interests might be at stake.¹⁹⁷ In addition, incapacitation procedure can be initiated *ex officio*.¹⁹⁸ The courts interpret the notion of applicant broadly and hold that a petitioner may be anyone who has the capacity to sue and to be sued, which is a remarkably wide definition.¹⁹⁹

As to the foundation needed to support such an application, unless a local authority or hospital, the court may order a medical report on the mental condition of the adult.²⁰⁰ If no medical report is submitted during the specified period, the proceedings are terminated.²⁰¹ This provision was supposed to prevent the abuse of the incapacitation procedure (e.g. by the family members of the person concerned), but since the request of medical report is not obligatory, the protection of the adult is rather loose. There is no requirement that the medical report should be up-to-date. The public prosecutor is entitled to intervene at any stage during the course of the incapacitation procedure,²⁰² giving the adult an additional theoretical safeguard.

Human Rights Standards: This indicator has two principle focuses. The first is on whether the legislation specifically defines which individuals may file an application 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’.²⁰³ 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

¹⁹⁵ Civil Procedure Code, art. 85(1) in conjunction with art. 88(d).

¹⁹⁶ *Ibid.*, art. 186(1).

¹⁹⁷ Winterová, A. et al.: *Občanský soudní řád s vysvětlivkami a judikaturou*, 2. aktualizované vydání, Praha, Linde, 2005, p. 507.

¹⁹⁸ Civil Procedure Code, art. 81(1).

¹⁹⁹ Decision Rc 2/1984 I.

²⁰⁰ Civil Procedure Code, art. 186(2).

²⁰¹ *Ibid.*

²⁰² Civil Procedure Code, art. 35(1)(e).

²⁰³ Recommendation No. R(99)4, Principle 5(1).

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. This procedure was 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) 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’.²⁰⁴ 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: Legislation provides a right to actual notice, and to be present and heard at all proceedings related to the application for deprivation of the adult’s legal capacity and appointment of a guardian.

Analysis: The court must deliver the application by registered letter ‘to the hands’ (do vlastních rukou) of all the parties to the proceedings.²⁰⁵ The adult has the right to be notified of the proceedings not later than ten days before the court hearing.²⁰⁶ The court is obliged to summon all participants of the proceedings and all people whose presence is otherwise required, including the adult.²⁰⁷ However, the court may decide not to hear the adult if it is not possible to hold a hearing at all, or in a case where attending the hearing would be detrimental to the adult’s health.²⁰⁸ If the adult requests to be heard, the court must hear the person.²⁰⁹

²⁰⁴ *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.

²⁰⁵ Civil Procedure Code, arts. 79(3) and 81(3).

²⁰⁶ *Ibid*, §115.

²⁰⁷ Judicial decision Rc 3/1979 (18.11.1977). Before the 2005 amendment of the Civil Procedure Code (Act No. 205/2005 Coll.), there was an exception to this rule. Pursuant to Art. 189 (1) of the Civil Procedure Code, the chairperson of the court was not obliged to order a hearing if the hearing was ‘not suitable’. Such provision was in deep conflict with the procedural rights of the adult.

²⁰⁸ Civil Procedure Code, art. 187(2).

²⁰⁹ *Ibid*.

The court may decide not to deliver the judgment to the adult when: (1) the adult is not capable of understanding the decision and (2) this lack of capability is expressly stated in the conclusions of an expert opinion.²¹⁰ There is no requirement that the notice to deliver the judgment in plain language.

However, the court must deliver a judgment on appointment of guardian to all the parties to the proceedings,²¹¹ including the adult under all circumstances.²¹² In other words, the adult need not be told that he or she has been deprived of legal capacity but needs to be told that a guardian has been appointed. Unfortunately, the obligation to deliver to the adult the decision on appointment of a guardian is often breached, since the courts erroneously apply by analogy the provision on (not) informing the adult about deprivation of legal capacity.²¹³

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.’²¹⁴

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.²¹⁵ 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 into the Uniform Guardianship and Protective Proceedings Act that simply adds a provision requiring ‘notice under this Act must be in plain language.’²¹⁶

²¹⁰ *Ibid.*, art. 189.

²¹¹ *Ibid.*, art. 81(3).

²¹² Since there is no provision on this specific aspect in Arts. 191-193 dealing with appointment of a guardian, a contrario general provision, i.e. Art. 81(3) of the Civil Procedure Code applies.

²¹³ See Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 18.

²¹⁴ 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.’

²¹⁵ 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.

²¹⁶ 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.

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’.²¹⁷ 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.²¹⁸

Indicator 4

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

Conclusion: An adult has a right to a free court-appointed attorney which is paid for by the state. However, the state does not pay for an attorney chosen by the adult. There is no right to legal representation in the procedure to appoint a guardian.

Analysis: The general rule is that an adult be represented during the legal capacity proceedings. The adult is entitled to select his or her own representative (not paid for by the state).²¹⁹ Only if the adult does not exercise this right, the court will appoint a so-called ‘procedural guardian’.²²⁰ These people, thanks to a 2005 legal amendment, must be attorneys.²²¹ The court must tell the adult about the right to select a representative for the proceedings and about other procedural rights and obligations.²²² And finally, the incapacitation procedure is exempted from the court fees.²²³

In the procedure to appoint a guardian, the adult has few rights. There is no legal or other representation, and as the person now lacks legal capacity, he or she cannot choose a representative. The court can appoint a ‘special guardian’,²²⁴ but this is not obligatory and is seen as unnecessary, a position taken by the Supreme Court of the former Czechoslovakia in 1984 when it held that it is not necessary to appoint a procedural guardian to an adult deprived of legal capacity for a guardianship procedure since rights of this adult were not at stake.²²⁵ The public prosecutor is not entitled to intervene in the guardianship procedure.²²⁶

²¹⁷ Principle 13.

²¹⁸ 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.

²¹⁹ Civil Procedure Code, art. 191.

²²⁰ *Ibid*, art. 187(1).

²²¹ *Ibid*.

²²² *Ibid*.

²²³ Art. 11(1)(h) of the Act. No. 549/1991 Coll., on Court Fees.

²²⁴ Civil Procedure Code, art. 29(3).

²²⁵ Decision Rc 2/1984/IV.

²²⁶ Civil Procedure Code, art. 35(1)(e).

According to the Constitutional Court, a person deprived of legal capacity must benefit from the effective representation also during any appeal procedures.²²⁷

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’.²²⁸ 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’.²²⁹ As the requirements of Article 14(3) of the ICCPR are considered basic guarantees of a fair hearing,²³⁰ free and effective representation should be interpreted as a requirement during all incapacitation proceedings. Extension of this right to guardianship procedures 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’.²³¹ Similarly, the ECHR has been interpreted to include fair trial rights during court procedures concerning legal capacity.²³²

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.²³³ 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 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.²³⁴

²²⁷ Decision No. I. ÚS 173/06.

²²⁸ 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.

²²⁹ 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.

²³⁰ Human Rights Committee, General Comment 13, op cit, para. 5.

²³¹ Principle 7.

²³² *Matter v. Slovakia*, op cit, para. 51.

²³³ 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.

²³⁴ 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).

Indicator 5

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

Conclusion: An adult may be detained for up to six weeks to conduct an incapacity assessment.

Analysis: If it is necessary for the incapacity assessment, an adult may be detained in a hospital for six weeks.²³⁵ A doctor must request this, and court can order detention on the basis of a single medical opinion.²³⁶ This provision has been widely criticised.

Human Rights Standards: The Mental Illness Principles state that ‘[n]o person shall be compelled to undergo medical examination 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’.²³⁷ 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 5.²³⁸ In other circumstances, the ECtHR has held that forced psychiatric examinations violate Article 6 (right to fair trial)²³⁹ and Article 8 (right to respect for private and family life)²⁴⁰ of the ECHR. 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.

²³⁵ Civil Procedure Code, art. 187(3).

²³⁶ *Ibid.*

²³⁷ 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.

²³⁸ *Nowicka v. Poland*, Application No. 30218/96, judgment 3 December 2002, paras. 58-61.

²³⁹ 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.

²⁴⁰ 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.

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: If the adult participates in the hearing (which is not necessarily the case) he or she may present evidence and call witnesses and to examine and challenge the evidence presented by the opposing party.

Analysis: Law provides the general right to submit both written evidence and witness testimony.²⁴¹ Parties may submit their own evidence and call witnesses and may challenge opposing evidence or witnesses.²⁴² Every means by which the adult's situation can be ascertained may serve as evidence, in particular the testimonies of witnesses, an expert opinion, reports and statements of authorities, individuals or legal entities.²⁴³ All parties to the proceedings may express their opinion about any evidence,²⁴⁴ including the incapacity assessment. However, in order to exercise these rights, the adult must be aware of them and the court is explicitly required to advise the adult both about these issues.²⁴⁵

The main focus of such court hearings is the adult's mental health diagnosis and prognosis. However, neither the Civil Code nor the Code of Civil Procedure specifies that this be so. The content of the incapacity assessment has been elaborated in some detail by courts. According to the established case law, the court has to clarify the personal situation of the adult, his/her demeanour in everyday life, his/her capacity to take care of himself/herself or relatives, to communicate with others, to participate in society, and to manage finances.²⁴⁶ As mentioned above in Indicator 5, there must always be an expert opinion,²⁴⁷ but the court is not bound by the expert's opinion and should weigh all of the evidence itself.²⁴⁸

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'.²⁴⁹ This principle echoes Article 6(1) of the ECHR which guarantees a fair hearing in all cases involving civil rights and obligations.²⁵⁰ The ability for the parties in the case to challenge evidence with counter evidence and the right to present evidence,

²⁴¹ Civil Procedure Code, art. 125.

²⁴² *Ibid*, art. 120(1).

²⁴³ *Ibid*, art. 125.

²⁴⁴ *Ibid*, art. 123.

²⁴⁵ *Ibid*, art. 187(1).

²⁴⁶ Rc 44/1967 from 29 December 1966.

²⁴⁷ Civil Procedure Code, art. 187(3).

²⁴⁸ *Ibid*, art. 132.

²⁴⁹ Principle 7(1).

²⁵⁰ For application of Article 6(1) to guardianship proceedings, see *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979.

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.²⁵¹

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.

Indicator 7	<i>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.</i>
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Conclusion: Law requires at least one incapacity assessment which evaluates the mental condition of the adult. However, there is no requirement for the report to be up-to-date and it is possible for the expert never to have met the adult.

Analysis: The courts must interview the expert (usually a psychiatrist) about the adult's health.²⁵² In practice, an incapacity assessment consists of three parts: a finding (description of the situation, all relevant facts, a summary of the evidence, etc.), an opinion (the answers to the questions of the court and their substantiation), and information about the expert.

The incapacity assessment is in practice highly influential to the outcome of the case, some may say excessively so. In theory at least, an incapacity assessment must not serve as the only evidence and the court may not accept an expert's findings uncritically.²⁵³ The court is bound by the rule of free evaluation of evidence.²⁵⁴ Therefore, theoretically at least, the court must compare and link the results of the incapacity assessment with other findings of the adult's actual situation. As a result of a balanced process, the judge is able to assess what legal steps, if any, should be taken.²⁵⁵

²⁵¹ 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.

²⁵² Paragraph 187 clause 3.

²⁵³ Decision Rc 1/1981 (23.12.1980).

²⁵⁴ Civil Procedure Code, art. 132.

²⁵⁵ Decision Rc 44/1967 (29.12.1966).

The law does not stipulate any time limits for the incapacity assessment in order to ensure that it is up-to-date, does not require an in-person assessment, and does not even require that the opinion be in-writing. All of these elements represent significant weaknesses in the law.

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.²⁵⁶ 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.²⁵⁷ 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.²⁵⁸

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 not explicitly require a demonstrable link between the adult's diagnosis and the alleged inability to make decisions.

Analysis: The Civil Code²⁵⁹ is extremely brief in this regard.²⁶⁰ As previously noted, an adult may be restricted of legal capacity if, due to a mental health problem, the adult is not able to undertake acts in law.²⁶¹

²⁵⁶ See Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights.

²⁵⁷ Principle 12.

²⁵⁸ *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.

²⁵⁹ Civil Code, art. 10.

²⁶⁰ For reasons of this situation, see also Part 2.4.1.

²⁶¹ Civil Code, art. 10(1).

On the face of it, the law requires a causal link between the mental disorder and incapacity to undertake acts in law, but it does not require this link to be demonstrable. In practice, courts do not assess the causal link, assuming a mental health diagnosis necessitates at least partial deprivation of legal capacity. In this regard the courts tend to defer excessively to the sole opinion of a physician, allowing the medical opinion to dictate the judicial one.

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.

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: There is no requirement that a finding of incapacity must be based upon sufficient evidence. The law does not contain an explicit condition that deprivation of legal capacity must serve the interests of the adult.

Analysis: In general, the law requires a decision on legal capacity to be based on a finding of the facts of a case. In its quest for the truth, the court is not bound by the parties.²⁶² To the contrary, the court is obliged to produce all the evidence necessary for

²⁶² Civil Procedure Code, art. 120(2).

the assessment of the factual situation.²⁶³ Law explicitly requires the judge to interview the adult if the latter has requested it,²⁶⁴ and the judge must hear an expert during the proceedings (see also indicator 7).²⁶⁵

Otherwise, only general legal provisions apply. Thus, ‘every means by which the [adult’s] situation can be ascertained, may serve as evidence: in particular examination of witnesses, an expert’s report, reports and statements of authorities, individuals or legal entities, notarial or executorial records and other documents, on-site search and examination of the participants.’²⁶⁶ The court may evaluate evidence at its own discretion.²⁶⁷

There is no specific requirement that a finding of legal incapacity must be based upon sufficient evidence. Similarly, the law does not require that deprivation of legal capacity be in the adult’s interests: it is possible therefore to deprive an adult of legal capacity for someone else’s interests. Commentators have noted that paternalistic attitudes of mental ill-health and disability in general still prevail, and the ‘protection’ offered by guardianship is rarely explicitly weighed against possible (or probable) negative consequences.²⁶⁸

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.

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.²⁶⁹ ‘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.²⁷⁰

As detailed above, the ECtHR has highlighted the necessity of a qualified expert report to determine capacity.²⁷¹ 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

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*, art. 187(2).

²⁶⁵ *Ibid.*, art. 187(3).

²⁶⁶ *Ibid.*, art. 125(1).

²⁶⁷ *Ibid.*, art. 132.

²⁶⁸ See Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 23.

²⁶⁹ Principle 12.

²⁷⁰ See UN General Assembly, Declaration on the Rights of Mentally Retarded Persons’ Resolution 2856 (XXVI), 20 December 1971, para. 7.

²⁷¹ *H.F. v. Slovakia*, Application No. 54797/00, judgment 8 November 2005.

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.’²⁷² 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.

Indicator 10	<i>Selection of a guardian is based on objective criteria and the wishes and feelings of the adult are considered.</i>
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Conclusion: There are no criteria for selecting a guardian. The adult’s wishes and feelings do not need to be taken into account.²⁷³

Analysis: There is insufficient criteria for selecting a guardian because the selection is primarily based upon the convenience and approval of the adult’s relatives rather than on the adult’s actual needs. If the adult’s relatives are available and willing to become guardians, the law gives preference to their appointment.²⁷⁴ If no relatives are available, the court appoints a legal entity (public authority, health care institution, or social care institution) as a guardian.²⁷⁵ Appointing such an institutional guardian is an obvious conflict of interests (see Indicator 11, below).

²⁷² Principle 8(1).

²⁷³ The Family Act makes only exception and specifies who shall be guardian to minors. According to this act, the guardian of the minor are primarily parents, further the adoptive parents, guardian (usually an authority for the social-legal protection of children), the foster parents in some cases. (See the Act No.94/1963 Coll. Family Act, Arts. 31–37a, 45c., 63, and Art. 78 and the following in connection with Art. 17 (a) of Act No. 359/1999 Coll. on Social and Legal Protection of Children).

²⁷⁴ Civil Code, art. 27(3).

²⁷⁵ *Ibid*, art. 27(3).

A potential guardian must agree to the appointment in advance, but no such agreement is needed for a public guardian. Guardians are not screened for suitability nor is there any mandatory training, or indeed any state-run training which guardians could voluntarily attend.

Law is also silent about the consideration of the personal wishes and preferences of the adult concerning the appointment of a guardian. As to the appointment of guardian, similarly to the incapacitation procedure, the law does not expressly identify who may be the applicant. The public prosecutor is not entitled to intervene in the guardianship procedure.²⁷⁶

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’.²⁷⁷ This, presumably, includes the appointment of a guardian.

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’.²⁷⁸ It also suggests that States take steps to ensure that qualified guardians are available. This might include creating training associations.²⁷⁹ 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.²⁸⁰

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’.²⁸¹ 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.²⁸² 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

²⁷⁶ Civil Procedure Code, art. 35(1)(e).

²⁷⁷ 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).

²⁷⁸ Principle 8(2).

²⁷⁹ Principle 17.

²⁸⁰ 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.

²⁸¹ Recommendation No. R(99)4, Principle 9(2).

²⁸² Explanatory Memorandum to Recommendation No. R(99)4, para. 44.

guardianship, but it is particularly important in choosing the person to be appointed as a representative.

Indicator 11

The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict.

Conclusion: Apart from the very general provisions, legislation does not explicitly require that the guardian should not have a conflict of interest with the adult or the appearance of such a conflict.

Analysis: Situations of clear conflict of interest frequently arise. First, due to the prioritising of family members as guardians and the lack of obligation on the court to question the suitability of such arrangements. Secondly, in case of appointment of the director or other staff of social care institutions where the adult lives as guardian.²⁸³ If the adult wants to complain about, for example, the quality of nursing care, the adult would turn to the guardian, in this case someone who is employing the very nurses in question. Similarly, the guardian, whose income depends on the maintenance of a large residential institution, is unlikely to advocate for a more appropriate living arrangement for the adult.

There is an in-built safeguard for such conflict situations, namely the so-called ‘collision guardian’,²⁸⁴ and ‘procedural collision guardian’.²⁸⁵ As noted, these are inexplicably underused.²⁸⁶ Furthermore, the guardian must take an oath to the court to properly fulfil duties and respect the instructions of the court.²⁸⁷ In theory, the court may also explicitly insert a clause to the oath stating that the guardian shall perform duties in the interests of the adult.²⁸⁸

Human Rights Standards: As previously noted (see Indicator 10 above), the Disability Convention seeks to ensure by way of Article 12(4), State provision of procedural guarantees to protect people who need assistance in exercising their legal capacity. Such guarantees, again as noted above, include a provision that ‘measures relating to the exercise of legal capacity respect the rights, will and preferences of the person’. Specifically, however, these measures must be ‘free of conflict of interest and undue influence’.²⁸⁹

²⁸³ See Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 24.

²⁸⁴ Civil Code, art. 30.

²⁸⁵ Civil Procedure Code, art. 32(2).

²⁸⁶ Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 5.

²⁸⁷ Civil Procedure Code, art. 180(1).

²⁸⁸ *Ibid.*

²⁸⁹ 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).

French legislation directly provides for such occurrences. In France, each adult under guardianship is additionally appointed a ‘supervisory guardian’ who, among other duties, is designated to represent the adult when his or her interests are in conflict with the interests of the guardian.²⁹⁰ The Standards of Practice adopted by the National Guardianship Association (NGA), a United States-based membership organisation of guardians and legal professionals, addresses the issue of conflict of interest between a guardian and a ‘ward’,²⁹¹ in Standard 16, which states that:

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.²⁹²

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.’²⁹³ 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: Legislation provides that the adult has the right to appeal a finding of legal incapacity and/or the appointment of a guardian. However, this right may be violated if the court decides on the proposal of a medical expert not to deliver the judgment to the adult.

Analysis: The finding of incapacity or the appointment of a guardian is such a serious intervention to the life of person concerned that ‘the rule of full appeal’ applies to both of these proceedings. According to that rule, the adult is not only entitled to present his/her evidence at the court of first instance, but this right exists also during the appeal procedure.²⁹⁴ The right of the person concerned to lodge an appeal was explicitly upheld by the courts of general jurisdiction.²⁹⁵ Recently, the Constitutional

²⁹⁰ French Civil Code Book 1, Title X, ch. II, art. 420, applicable to adults under guardianship per Title XI, ch. III, art. 495. Unofficial translation provided by Legifrance, a service of the French Government. Available at www.legifrance.gouv.fr, visited 2 August 2006.

²⁹¹ For a definition of ‘ward’, see Glossary, p. 77.

²⁹² National Guardianship Association, ‘Standards of Practice’, Adopted by the NGA Board of Directors, Ratified by the NGA Membership June 2000, Edited Edition 2002, State College, Pennsylvania, page 9.

²⁹³ *Ibid.*

²⁹⁴ Civil Procedure Code, art. 205a(2).

²⁹⁵ R 77/1965.

Court has held that there is not only a right to appeal but also a requirement that the adult must enjoy effective legal representation during the appellate proceedings.²⁹⁶

In general, the Code of Civil Procedure allows filing an appeal against a judgement within 15 days from the delivery of a judgement.²⁹⁷ But the court may decide not to deliver the decision on legal capacity, as noted in Indicator 4, above.

Human Rights Standards: Recommendation No. R(99)4 mandates that every adult placed under guardianship should have adequate rights to appeal.²⁹⁸ 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.’²⁹⁹

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 under both plenary and partial guardianship are deprived from exercising significant political rights such as the right to vote.

Analysis: Legislation deprives people with no capacity of their political rights in the following areas: the right to vote in parliamentary elections,³⁰⁰ the right to be elected to both parliamentary chambers, and similarly both the right to vote and the right to be

²⁹⁶ Decision No. I. ÚS 173/06.

²⁹⁷ Civil Procedure Code, §201.

²⁹⁸ Principle 14(3).

²⁹⁹ UN Declaration of the Rights of Mentally Retarded Persons, Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971.

³⁰⁰ Art. 2 of Act No. 247/1995 Coll., Act on Elections to the Parliament of the Czech Republic.

elected to municipality councils,³⁰¹ regional councils,³⁰² and vote in local referenda.³⁰³ These rights are denied to all people under plenary guardianship, regardless of their actual, individual level of functional ability.

Adults restricted or deprived of legal capacity are prohibited from holding some public offices or positions. For example they may not be elected president,³⁰⁴ senators,³⁰⁵ members of the lower house of parliament,³⁰⁶ or the Public Defender of Rights (Ombudsman).³⁰⁷

Human Rights Standards: The right to political participation and universal suffrage has been recognized internationally in Article 25 of the ICCPR. The more recent Disability Convention sets out in greater detail the specific components of political rights. Its Article 29(a) requires States Parties to ‘guarantee to people with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- a. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
 - i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use.
 - ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate.
 - iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;³⁰⁸

Within Europe, a restriction of a person’s right to vote engages Article 3 of Protocol 1 to the ECHR which provides that countries ‘undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free

³⁰¹ Arts. 4(2)(b) and 5(1) of Act No. 491/2001 Coll., on Elections to the Municipality Councils.

³⁰² Arts. 4(2)(b) and 5(1) of Act No. 130/2000 Coll., on Elections to the Municipality Regional Councils.

³⁰³ Art. 2 of Act No. 22/2004 Coll, on the Local Referendum.

³⁰⁴ Constitution, art. 57(1).

³⁰⁵ *Ibid*, art. 19(2).

³⁰⁶ *Ibid*, art. 19(1).

³⁰⁷ Art. 2(2) of Act No. 349/1999 Coll. on the Public Defender of Rights.

³⁰⁸ Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 29(a).

expression of the opinion of the people in the choice of the legislature'. Regarding people with disabilities with respect to public participation and the democratic process, the Council of Europe has recently 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'.³⁰⁹

Specifically addressing individuals with mental disabilities, the right to autonomy and self-determination is elaborated in Principle 3 of Recommendation No. R(99)4. This specifies that legislative frameworks need to incorporate guardianship laws that recognise that different degrees of functional capacity exist as well as the dynamic nature of functional capacity over time. Recommendation No. R(99)4 emphasises that a measure of protection such as guardianship 'should not automatically deprive the person concerned 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'.³¹⁰

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: The limitation of the right to work exists for people under both partial and plenary guardianship. Legislation excludes people under guardianship from holding some positions.

Analysis: People can perform 'business' only if they have full legal capacity.³¹¹ Self-employed people thus need to have legal capacity to start a business. As for employees, a person can enter into an employment relationships if they are over 15 years old.³¹² Legislation also restricts adults under partial or plenary guardianship from holding some specific positions and professions. For example, people under guardianship cannot work as attorneys,³¹³ public notaries,³¹⁴ or judges.³¹⁵

Human Rights Standards: Legislation which automatically bans an adult under guardianship from working undermines the autonomy of the individual. This may have a negative psychological impact as people are deprived of an important source

³⁰⁹ 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 No. (2006)5, para. 3.1.1.

³¹⁰ Recommendation No. R(99)4, Principle 3(2).

³¹¹ Small Businesses Act (No. 455/1991 Coll.), art. 6(1)(b).

³¹² Labour Code (No. 262/2006), art. 6(1).

³¹³ Attorneys' Act (No. 85/1996 Coll.), art. 5(1)(a).

³¹⁴ Notary Act (No. 358/1992 Coll.), art. 7(1)(a).

³¹⁵ Act No. 6/2002 Coll., on Courts and Judges, art. 60(1).

of self-esteem and social interaction. Article 8 of the ECHR seeks the protection and respect to private life, and the ECtHR has included the right to work within its scope. It has formally noted 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’.³¹⁶

Both the International Covenant on Economic, Social and Cultural Rights and the (Revised) European Social Charter protect the right to work.³¹⁷ Recommendation No. R(99)4 provides that where a measure of protection is necessary, it should be proportional to the degree of the functional capacity of the adult and tailored to the individual’s circumstances and needs.³¹⁸ Therefore, while some restriction may be justified in certain situations, a blanket prohibition from employment of all people under guardianship arbitrarily excludes people with disabilities from participating in society without any examination of their functional capacity or desire to do so. Such restrictions are also contrary to the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which states that ‘[l]aws and regulations in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment’.³¹⁹ This approach is followed by the Disability Convention which sets out ‘the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities’.³²⁰

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: People under plenary guardianship are automatically deprived of their right to dispose over property independently. The deprivations of the right to property exist also for people under the partial guardianship.

Analysis: People under plenary guardianship are not entitled to exercise any property rights. This includes theoretically such minor transactions as buying a newspaper, travelling by public transport, or making a phone call from a public phone box.

³¹⁶ *Niemietz v. Germany*, Application No. 13710/88, judgment 16 December 1992, (A/251-B) (1993) 16 EHRR 97, para 29.

³¹⁷ Article 6 of the International Covenant on Economic, Social and Cultural Rights, UN Document A/6316, entered into force 23 March 1976; Article 15(2) of the European Social Charter (revised), Strasbourg, 3 May 1996.

³¹⁸ Recommendation No. R(99)4, Principle 6.

³¹⁹ Rule 7(2).

³²⁰ Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 27(1).

Whether adults under partial guardianship can exercise property rights depends on the court decision which must clearly indicate either those decision-making areas the adult retains or loses.³²¹

Human Rights Standards: The right to property includes the ability of individuals to manage finances, complete transactions and enter legally binding contracts. Guardianship systems that automatically exclude individuals from managing any aspect of their finances undermine autonomy and dignity, as well as refuse to acknowledge the varied functional capacity of individuals with mental disabilities. The Disability Convention sets out the right of property of people under guardianship in Article 12(5). Under this provision States Parties ‘shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or 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.’

The right to use and manage one’s own property is set out in Article 1 of Protocol No. 1 to the ECHR, 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.³²²

Recommendation No. R(99)4 expands on this, by recommending that ‘[w]henever possible the adult should be enabled to enter into legally effective transactions of an everyday nature’.³²³ The Council of Europe returned to this theme in the 2006 ‘Action Plan to promote the rights and full participation of people with disabilities in society’ which listed concrete measures to be taken by member states to this end. This included the responsibility ‘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’.³²⁴

³²¹ Civil Code, art. 10(2).

³²² This Protocol opened for signature on 20 March 1952, and has equal legal force as the main text of the Convention.

³²³ Recommendation No. R(99)4, Principle 3(4).

³²⁴ Council of Europe, Disability Action Plan 2006, op cit, para. 3.12.3(viii).

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: Adults under plenary guardianship are prohibited from marrying. Those under partial guardianship may marry with the approval of a court. Severe limitations concerning the respect of family life and the foundation of a family exist for adults both under partial and plenary guardianships.

Analysis: Deprivation or limitation of legal capacity has substantial legal consequences on the adult's right to respect for family life. These include parental rights and the legal capacity to marry. An adult totally deprived of legal capacity may not get married.³²⁵ An adult with restricted legal capacity, may enter into marriage only with an approval of a court.³²⁶ Marriage is further prohibited when 'a person suffers from a mental disorder which is of such an effect that this person would be deprived of his/her legal capacity or his/her legal capacity would be limited'.³²⁷ In other words, this is an absurd situation that adults with full legal capacity may be deprived of their right to marriage if in a particular scenario under purely speculative circumstances, they would be deprived of legal capacity. Law also stipulates that the court may allow the marriage of an adult 'whose legal capacity would be limited' if the health condition of the adult is compatible with purpose of marriage.³²⁸ These provisions are absurd, unnecessary and unworkable and thus in urgent need of reform.

A marriage will be ex officio proclaimed null and void when one of the adults was fully deprived of legal capacity or 'suffers from a mental disorder which is of such an effect that this person would be deprived of his/her legal capacity'.³²⁹

When the marriage was entered by an adult with limited legal capacity or an adult 'who suffers from a mental disorder which is of such an effect that his/her legal capacity would be limited' (and this person did not have approval of the court), the court will proclaim this marriage null and void,³³⁰ but not ex officio.³³¹ The court will act only on the application of one of the adults who entered into marriage³³² and it will not proclaim the marriage null and void if the health condition of the adult is compatible with purpose of marriage.³³³ (How healthy a person needs to be to get married is not specified anywhere).

³²⁵ Family Act (No. 94/1963 Coll.), art. 14(1).

³²⁶ *Ibid* (No. 94/1963 Coll.), art. 14(2).

³²⁷ *Ibid* (No. 94/1963 Coll.), art. 14(3).

³²⁸ *Ibid*.

³²⁹ *Ibid* (No. 94/1963 Coll.), art. 14(4).

³³⁰ *Ibid*.

³³¹ *Ibid*.

³³² *Ibid*.

³³³ *Ibid*.

Adults under guardianship – whether plenary or partial – may not exercise parental responsibility.³³⁴ Parental responsibility is switched to the other (legally capable) parent.³³⁵ If the other parent is not available, the child may be taken into state care.³³⁶ Such adults may not adopt children.³³⁷

Human Rights Standards: The Disability Convention details international agreement on the right to various aspects of family life in its Article 23. In view of its specificity, and the lack of this elsewhere, the article is given in full:

Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:
 - a. The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized.
 - b. The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided.
 - c. Persons with disabilities, including children, retain their fertility on an equal basis with others.
2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.
3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.
4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

³³⁴ Family Act (No. 94/1963 Coll.), art. 34(2).

³³⁵ *Ibid.*

³³⁶ *Ibid.*, art. 34(2).

³³⁷ *Ibid.*, (No. 94/1963 Coll.), art. 64(2).

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 8 of the ECHR guarantees the right to respect for private and family life, home and correspondence. This imposes on States a negative obligation not to interfere with, and also positive obligations to respect, a person's private and family life. There are similar obligations and duties 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'.

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: The right to associate is restricted for people under the guardianship in some specific areas.

Analysis: Legislation is quite laconic when it comes to the right to associate. There are no legal limitations for people under guardianship to join non-profit organisations,³³⁸ or political parties.³³⁹ There are specific areas where such restriction exists: a proposal to a registration of a church or a religious society shall be submitted by adults with full legal capacity.³⁴⁰ However, the right to be merely a member of a religion or a religious society is ensured.³⁴¹

Human Rights Standards: The right of association can be especially important for individuals with mental 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 policy and legislative change.

The Disability Convention sets out the right to associate as an integral element in participating in political and public life. Its Article 29(b) mandates States Parties to:

Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and

³³⁸ Act No. 83/1990 Coll., on Association of Citizens, art. 6(2).

³³⁹ Act No. 424/1991 Coll., on Association in Political Parties and Political Movements, art. 2(3).

³⁴⁰ Act No. 3/2002 Coll., on Religions and Religious Societies, art. 10(1).

³⁴¹ *Ibid.*, art. 2(3).

on an equal basis with others, and encourage their participation in public affairs, including:

- i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties.
- ii. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

A prohibition on associating with others to pursue a common aim engages Article 11 of the ECHR. This 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 laid down in law and necessary in a democratic society for one of the listed grounds, such as for the protection of health or morals or for the protection of the rights and freedoms of others. Although the wording of Article 11 does not expressly refer to it, 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.³⁴² It is difficult to conceive of any legitimate reason that restricting the rights of people under guardianship to associate, form or join non-profit organisations could be ‘necessary in a democratic society’.

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

In order to ensure that the adult is adequately provided for, is treated with dignity and respect, and has the opportunity to maximize independence and self-determination, law must specify that the responsibilities of guardians and the mechanisms for their accountability. These issues are considered by Indicators 18-25.

Indicator 18	<i>A person under guardianship is not precluded from making decisions in those areas where he/she has functional capacity.</i>
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Conclusion: If an adult is able to take decisions only in some areas, the court shall limit his or her legal capacity and shall specify the extent of such limitations in the decision. However, the court may list those areas where the adult retains legal capacity to act.

Analysis: As mentioned above, legislation differs between two types of restrictions of an adult’s legal capacity – plenary and partial.³⁴³ An adult, who has functional

³⁴² *Sidiropoulos v. Greece*, no. 26695/95, judgment 10 July 1998, (1998) EHRR 633.

³⁴³ Civil Code, art. 10(1) and (2).

capacity in some areas may have their legal capacity restricted.³⁴⁴ In such case, the court shall specify extent of such restriction in the decision,³⁴⁵ but as noted above the court may specify those areas where an adult retains legal capacity, which has human rights implications because the court cannot possibly list all those decisions which the adult can make. It is much more proportionate and consistent with a human rights approach that the court is clear about which rights it is taking away.

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'.³⁴⁶ 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:

1. 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.
2. 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.
3. 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.
4. Whenever possible the adult should be enabled to enter into legally effective transactions of an everyday nature.

An illustrative approach to best practice can be found in France. In establishing guardianship, a judge in France may list transactions that the adult can undertake independent of the guardian. In assessing which tasks the individual should retain the freedom to conclude, the judge must consult a medical expert.³⁴⁷

³⁴⁴ *Ibid*, art. 10(2).

³⁴⁵ *Ibid*.

³⁴⁶ Recommendation No. R(99)4, Principle 2(5).

³⁴⁷ 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:

Indicator 19

An adult subject to guardianship must be consulted about major decisions, and his/her wishes are adhered to whenever possible.

Conclusion: Guardians do not need to consult with the adult regarding any decisions.

Analysis: In case of plenary guardianship the adult is excluded from the decision-making process altogether once guardianship is established. A person under partial guardianship is excluded from decision-making in those areas specified by the court. Although guardians are obliged to fulfill duties properly and respect the instructions of the court,³⁴⁸ 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 takes any decision, nor for informing the adult that a particular issue is being contemplated.

Human Rights Standards: Law must ensure that adults under guardianship must be consulted on decisions affecting their lives. A legal obligation to consult provides both a benchmark to evaluate the guardian's performance and a judicially enforceable standard.³⁴⁹

As previously noted the Disability Convention states clearly that any measures relating to the exercise of legal capacity should 'respect the rights, will and preferences of the person'.³⁵⁰ Similarly, 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 possible, and should be taken into account and given due respect'.³⁵¹ This principle 'also implies that a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in

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).

³⁴⁸ Civil Procedure Code, art. 180(1).

³⁴⁹ For example, Finnish legislation incorporates this principle by requiring that guardians ask the individual for their opinion on decisions within the scope of the guardian's duties. See The Finnish Guardianship Services Act, 442/99, Section 43(1) entitled Hearing the Ward. Unofficial translation provided by FINLEX, a service of the Finnish Government. Available at www.finlex.fi/en/, visited 18 July 2006.

³⁵⁰ 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).

³⁵¹ Principle 9(1).

particular concerning any major decision affecting him or her, so that he or she may express a view'.³⁵²

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'.³⁵³

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: The scope of authority and obligations of the guardian are not clearly defined in law.

Analysis: The guardian shall take an oath to perform duties properly and follow the instructions of the court,³⁵⁴ and the court shall specify the scope of authority and obligations of the guardian in a decision.³⁵⁵ However, legislation is silent on the exact duties and obligations of the guardian or their scope and there is nothing to guide guardians apart from the court's decision.

Human Rights Standards: 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 be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations'.³⁵⁶ 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.³⁵⁷

³⁵² Principle 9(3).

³⁵³ Principle 2(6).

³⁵⁴ Civil Procedure Code, §180/1.

³⁵⁵ *Ibid*, §192/2.

³⁵⁶ Principle 2(1).

³⁵⁷ Principle 3(1).

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.'³⁵⁸

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'.³⁵⁹ 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,³⁶⁰ consent to marriage or adoption, or make or revoke a will, absent specific permission of the court.³⁶¹

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 endeavouring to allow the adult to live in the community.</i>
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Conclusion: Guardians need not promote the welfare and independence of the adult, or seek less restrictive living arrangements for the adult.

Analysis: There is no provision in the legislation that requires the guardian to seek the least restrictive alternatives in living arrangements in the community. The guardian is not required to seek approval from the court to determine where the adult would live. The guardian is only obliged to perform his function 'properly' (by analogy with custody on minors)³⁶² This has obvious implications for adults living in institutions, whose guardians are institutionally not bound to advocate for better living arrangements. This is a major contributor to the continued reliance in the Czech Republic on institutional 'care', which perpetuates social exclusion of people with disabilities.

Human Rights Standards: This indicator tests the relationship between guardianship and living in an institution. The right to live in the community is enshrined in international law principally in Article 19 of the Disability Convention and as follows:

³⁵⁸ 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).

³⁵⁹ The Finnish Guardianship Services Act, 442/99, para. 8(3).

³⁶⁰ *Ibid*, para. 34.

³⁶¹ *Ibid*, para. 29.

³⁶² Civil Procedure Code, art. 193(3) in conjunction with art. 178(1).

Living independently and being included in the community

States Parties to this Convention recognize 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:

- a. 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.
- b. 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.
- c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

The 2006 Council 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’.³⁶³ 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.³⁶⁴

Indicator 22	<i>The guardian must manage the assets of the adult in a manner that benefits the adult under guardianship.</i>
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Conclusion: There is only a vague obligation on guardians to manage the assets of the adult under guardianship for that person.

Analysis: As a general rule, ‘the court supervises the administration of the [adult’s] property exercised by the guardian, and takes necessary and suitable measures in order to determine and preserve the property’.³⁶⁵ There are no more detailed provisions, apart from reporting requirements (see Indicator 28), and the guardian must submit to the court a final balance sheet after the end of guardianship.³⁶⁶ In addition, the court may also request the guardian to provide periodic reports on the exercise of his

³⁶³ Council of Europe Disability Action Plan 2006, op cit, para. 3.8.3(vi).

³⁶⁴ Principle 6(2).

³⁶⁵ Civil Procedure Code, art. 193(1).

³⁶⁶ *Ibid*, art. 193(2).

functions.³⁶⁷ The content and the intensity of the supervision of the guardian depend to a significant extent on the attitude of a particular court.

Guardians are obliged to administer the adult's property. If there is a situation which is 'other than ordinary matter', the guardian must seek permission of the court.³⁶⁸ In order to obtain such permission, the action related to the property must be of benefit to the adult (by analogy with custody on minors).³⁶⁹ However there is no definition of what 'ordinary matter' means.³⁷⁰ According to case-law, the phrase related to asset management includes selling, buying, or transfer of property, real estate, cars, and acquisition of inheritance.³⁷¹

The guardian is entitled to be reimbursed for expenses related to managing the property and also payment from the revenue of the adult's assets. The court determines the amount of such remuneration.³⁷² The guardian is also responsible for the damage caused by breaching duties related to managing the adult's property (see also Indicator 24).³⁷³

Human Rights Standards: The importance of this standard is twofold: in the ability of the adult or another interested individual to bring claims against a guardian should that guardian misuse the assets of the person under guardianship; and in provision of clear legal regulations by which to monitor a guardian's actions. While Recommendation No. R(99)4 says little regarding the guardian's role as manager of the finances of the adult under guardianship, it does state that 'the property of the incapable adult should be managed and used for the benefit of the person concerned and to secure his or her welfare'.³⁷⁴ 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'.³⁷⁵ 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 the adult. The WHO has also adopted this approach and recommends that '[s]pecific penalties if guardians fail to perform their duties would strengthen legislation'.³⁷⁶

³⁶⁷ *Ibid.*

³⁶⁸ Civil Code, art. 28 (emphasis added by author).

³⁶⁹ Civil Procedure Code, art. 193(3) in conjunction with art. 179.

³⁷⁰ See Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 16.

³⁷¹ Jehlička O., Švestka J., Škárová M., Spáčil J.: *Občanský zákoník – komentář*, C.H.Beck, 2004, p. 209.

³⁷² *Ibid.*

³⁷³ Civil Code, art. 420.

³⁷⁴ Principle 8(3).

³⁷⁵ Principle 20(1).

³⁷⁶ WHO Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, dare to care, op cit, p. 43.

Indicator 23	<i>The guardian is obliged to visit and confer with the adult periodically.</i>
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Conclusion: Guardians do not need to visit and periodically confer with the adult.

Analysis: Law is silent on periodic visits and contact between the guardian and the adult. Even though the courts may request the guardian to provide periodic reports on the exercise of his functions,³⁷⁷ there is no obligation for the guardian to ever meet the adult.

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 under guardianship remains central to the decision-making process. This includes effective consultation to give the adult's wishes due consideration whenever possible. Recommendation No. R(99)4 also provides that a representative or guardian should give the adult sufficient information concerning major decisions so that he or she may express a view.³⁷⁸ A second important benefit of requiring guardians to visit an individual they represent is to allow them to gain a full understanding of the individual's living situation and the care and services provided. As a best practice example, the American Uniform Guardianship and Protective Proceedings Act provides that the guardian must 'become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health'.³⁷⁹

Indicator 24	<i>A guardian's decisions are periodically reviewed by an objective body and the guardian is held accountable for all decisions.</i>
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Conclusion: Legislation does not sufficiently ensure that a guardian's decisions are periodically reviewed by an objective body. Law provides that the guardians are held accountable for their decisions.

Analysis: As stated above, Code of Civil Procedure provides that at the end of the guardianship relationship, the guardian is required to submit a final account on the asset management;³⁸⁰ the court may also order the guardian to submit periodic reports about his/her activities during the course of the guardianship.³⁸¹ Unfortunately, the contents of such report are not defined in the law.

³⁷⁷ Civil Procedure Code, art. 193(2).

³⁷⁸ Principle 9.

³⁷⁹ Section 313(b)(i).

³⁸⁰ Civil Procedure Code, art. 193(2).

³⁸¹ *Ibid.*

The guardian is held liable for the damage caused by any failure in his/her duties related to the asset management.³⁸² Therefore, general provisions on the civil liability apply.³⁸³ If the guardian benefited from an unjustified enrichment to the detriment of the adult's assets, he/she is obliged to return the enrichment to the adult.³⁸⁴ The 'unjustified enrichment' is defined as a 'property benefit gained from a performance without a legal reason, a performance from a null and void legal act, a performance from a legal title that ceased to exist as well as a property benefit gained from unfair sources'.³⁸⁵

In sum, even though the guardian is in theory held accountable for all the decisions on behalf of the person concerned, the guardian's decisions are either not periodically reviewed or the supervision is rather loose, and thus there is little evidence (and incentive) to initiate any proceedings against the guardian. This situation is further exacerbated by the fact that the courts are reluctant to appoint 'collision guardians' or the so-called 'provisional collision guardians'.

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'.³⁸⁶ 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'.³⁸⁷ To meaningfully comply 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.

Indicator 25	<i>A complaint procedure exists that triggers review of guardian's acts or omissions.</i>
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Conclusion: There is a complaint mechanism to trigger review of a guardian's acts or omissions, but the procedure is weak.

Analysis: The law does not provide for a specific mechanism for the adult under guardianship to file a complaint against the guardian. If the adult or other people (or entities such as non-governmental organisations) think that the rights of the adult

³⁸² Civil Code, art. 420.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*, art. 451(1).

³⁸⁵ *Ibid.*, art. 451(2).

³⁸⁶ Principle 16.

³⁸⁷ Principle 20.

have been violated, the provisions on the custody of minors³⁸⁸ apply by analogy.³⁸⁹ The person or entity wishing to make a complaint may file an application to the court which is obliged to deal with it.³⁹⁰ As to the consequences, there are neither specific provisions on dismissal of a guardian nor grounds for such a decision in law. However, there is nothing preventing a court to take this action. Indeed, as early as in 1968, courts held that the judge is entitled to discharge the guardian from his function when serious reasons exist, and especially in cases where the guardian failed in to properly carry out duties.³⁹¹

Human Rights Standards: A finding of incapacity and placing an adult under guardianship should not preclude the adult from accessing the court or other authorised body to request independent review of a decision of the guardian. However, for such access to have any force, the court or authorised body must have the legal right to amend or reverse the guardian's decision. Whilst Recommendation No. R(99)4 does state that an adult who has been deprived of his or her legal capacity 'should be entitled to demand a review' this provision appears to relate to review of the need for guardianship itself. MDAC maintains that a person under guardianship should also have the opportunity to obtain an independent review of decisions or actions taken by the guardian as well. Therefore, a legislative example that would meet this indicator may be found in typical state legislation from the United States, which provides that the adult can ask the court to review and amend a decision of a guardian or amend the guardianship plan or the responsibilities of the guardian, remove a guardian and appoint a successor, or terminate the guardianship.³⁹²

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

The last group of 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 provide protections to individuals with mental limitations, 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 utilized only as long as and to the extent necessary to accomplish the task of protection of vulnerable people. Therefore, it is paramount that guardianship arrangements are reviewed periodically, and modified or terminated as conditions require.

³⁸⁸ Civil Procedure Code, arts. 176-179 and 180(1).

³⁸⁹ *Ibid*, art. 193(3).

³⁹⁰ *Ibid*, art. 178(1).

³⁹¹ Judicial decision R 77/68.

³⁹² See, for example, Alaska , Stat. §13.26.125 (Bender 2005).

Indicator 26

Less restrictive alternatives to guardianship are available and are demonstrably exhausted before a guardianship is imposed.

Conclusion: Less restrictive alternatives to guardianship do not exist. There is no requirement to exhaust any other means of protection before imposing guardianship.

Analysis: Legislation does not provide any protective measures for people who lack functional capacity in some areas other than placement under plenary or partial guardianship. Assisted or supported decision-making is not recognised and neither are other mechanisms such as powers-of-attorney or advance directives.

It has been suggested that the institute of ‘special guardian’ may offer a less restrictive alternative,³⁹³ but this proposal has not been implemented in practice. The Constitutional Court has stated that any encroachment of a fundamental right must meet the criterion of necessity which requires a comparison of the means restricting human rights with other provisions seeking to achieve the same objective without impinging on rights and freedoms,³⁹⁴ and adopting the ‘least onerous solution’.³⁹⁵

Human Rights Standards: The Disability Convention provides that ‘States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’.³⁹⁶ This encourages a paradigm shift away from guardianship models and towards systems which encourage supported decision-making. Implicit in this is that alternatives to guardianship do exist and are utilised.

Recommendation No. R(99)4 states in Principle 5 that a protective measure such as deprivation of legal capacity and guardianship should be based on the principle of minimum necessary intervention, or least restrictive alternative. It suggests that guardianship should not be established for a person unless other less formal arrangements have been exhausted. A model from Canada provides an instructive example of legislation that meets this indicator. The Manitoba Vulnerable Persons Living with a Mental Disability Act specifies that a substitute decision maker may not be appointed unless it is determined whether the individual has a support network and ‘reasonable efforts have been made to involve the support network’.³⁹⁷ Further, if the first criterion is not met, the court may mandate attempts to involve a support

³⁹³ Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 5; see also Part 2.4.4.

³⁹⁴ Decision No. Pl. US 4/94.

³⁹⁵ Decision No. Pl. US 3/02.

³⁹⁶ Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 12(3).

³⁹⁷ Vulnerable Persons Living with a Mental Disability Act, R.M., ch. 29, para. 49(a)-(b) (1993).

network as an alternative to appointing a substitute decision maker.³⁹⁸ Similarly, in Finland a guardian may be appointed without restricting the adult's legal competency; incapacity decisions are a separate legal procedure. The court may only declare an individual as lacking legal capacity after it has established that the listed alternatives are not sufficient to safeguard the adult's interests.³⁹⁹

Indicator 27	<i>Guardianships are tailored to the individual needs of the person involved and address the varying degrees of capacity.</i>
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Conclusion: Partial guardianship are supposed to be tailored to meet the needs of the person concerned.

Analysis: Although the Civil Code recognises three categories of guardianship, this indicator will discuss only the two types of 'regular guardianship' since both the 'special guardianship' and 'collision guardianship' are ipso facto tailored to the individual needs of the person involved and used only scarcely in practice.⁴⁰⁰ Regular guardianship consists of two types: partial and plenary (see also Part 2.4.4 and Indicators 18 and 20 above), which are mostly determined by the severity of the diagnosis of the person concerned and (in)ability to made decisions.⁴⁰¹

In the case of partial guardianship, legislation makes it possible to individually tailor the conditions of the guardianship to the needs of the adult since the court is obliged to define the scope of rights and duties of the guardian in the decision.⁴⁰² Partial guardianship supposes that the court assesses the functional abilities and needs of the adult. Conversely, plenary guardianship takes a blunt, uniform approach with no scope for individually-tailored decisions. In practice, the degree of individual tailoring varies from one court to the other even in case of partial guardianships.

³⁹⁸ Vulnerable Persons Living with a Mental Disability Act, R.M., ch. 29, para. 50(2). This approach is also followed in other Canadian jurisdictions. For example, in Ontario a physician may order a community treatment plan as an alternative to psychiatric hospitalization; also the court may not appoint a guardian for the individual's property 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 may not 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).

³⁹⁹ The Finnish Guardianship Services Act 442/99, para. 18.

⁴⁰⁰ See also Part 2.4.4.

⁴⁰¹ Civil Code, art. 10(1) and (2).

⁴⁰² Civil Procedure Code, art. 193(2).

Human Rights Standards: Principle 6 of Recommendation No. R(99)4 on proportionality suggests that where guardianship is deemed to be necessary, after all lesser alternatives have been exhausted, it should be imposed in a manner proportional to the degree of functional capacity of the adult and should be tailored to meet the specific needs of the adult. In essence, guardianship should restrict the legal capacity to act, and the rights and freedoms of the person only to the extent necessary to provide adequate protection.⁴⁰³ Internationally this standard is endorsed by the WHO’s mental health and legislation handbook, which states that ‘any [guardianship] order must be tailored to ensure that it best suits the interests of the person who is subject to it’.⁴⁰⁴

In Germany, for instance, reforms have replaced guardianship with ‘care and assistance’ (Betreuung) programmes, which include an individualised support order to be carried out by a caretaker (Betreuer), whose responsibility is limited to those tasks the court has decided the concerned person cannot manage without assistance. Additionally, the individual maintains all legal rights; the court determines whether in 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 regime, where the caretaker and individual simultaneously have competence regarding legal affairs.⁴⁰⁵

Indicator 28	<i>Guardianship is periodically reviewed and continues only as long as appropriate.</i>
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Conclusion: There is no periodic review of guardianship. The court is obliged to consider if the need for limitation or deprivation of the legal capacity is still necessary but the content and periodicity of this control varies significantly and as such is a weak safeguard.

Analysis: No periodic reviews of guardianship are required by law. Similarly, there is no limitation on the duration of guardianship once it is established. The guardian is obliged merely to perform his function ‘properly’.⁴⁰⁶ The guardian must send the court a final balance sheet at the end of guardianship,⁴⁰⁷ which may well be on the

⁴⁰³ Explanatory Memorandum to Recommendation R(99)4, para. 40.

⁴⁰⁴ WHO, WHO Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, dare to care, op cit, p. 43.

⁴⁰⁵ Doron, I. ‘Elder Guardianship Kaleidoscope – A Comparative Perspective’, 16, Int’l J. of Law Policy and the Family, 368, 378-9. The relevant sections of the German Civil Code are 1902 BGB and 1897 BGB. Also of note is that the caretaker must seek judicial authorization for decisions with high risk or importance. See 1902 BGB, discussed in Blankman, K. (1997) ‘Guardianship Models in the Netherlands and Western Europe’, 20(1) Int’l J. of Law and Psychiatry 47, at 54.

⁴⁰⁶ Civil Procedure Code, art. 193(3) in conjunction with art. 178(1).

⁴⁰⁷ *Ibid*, art. 193(2).

adult's death. In addition, the courts may also request the periodic reporting of the guardian,⁴⁰⁸ but regular reporting is not mandatory. However, the content and length of these reports is unspecified. Thus the such reports do not provide sufficient guidance for the decision whether the continuation of the guardianship is justified. The content and the intensity of the supervision of the guardian depends to a significant extent on the attitude of a particular court.

The law states briefly that 'the court shall change or cancel the limitation or deprivation of the legal capacity if reasons leading thereto have changed or no longer exist'.⁴⁰⁹

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'.⁴¹⁰

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.⁴¹¹ 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'.⁴¹²

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 (termination of guardianship), but the adult may be prevented from filing a repetitive petition for up to one year.

Analysis: The procedure for restoring legal capacity may be initiated by the adult.⁴¹³ This provision represents an exception to the rule that an adult lacking full legal capacity must be represented by the guardian.⁴¹⁴ However, as noted in Part 2.4.2 above, the

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Civil Code, art. 10(3). See also Indicator 20.

⁴¹⁰ 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).

⁴¹¹ Recommendation R(99)4, Principle 14.

⁴¹² UN Resolution 46/119, op cit, Principle 1, Fundamental freedoms and basic rights.

⁴¹³ Civil Procedure Code, art. 186(3).

⁴¹⁴ *Ibid.*, art. 22.

right to initiate restoration of legal capacity is qualified by a time-bar condition on repetitive claims.⁴¹⁵ The adult may thus be prevented from filing a subsequent claim for up to one year from the previous application.⁴¹⁶ To prevent repetitive claims, two conditions must be met cumulatively: (1) the court must have rejected a previous petition (which is obvious); and (2) no improvement of the adult's mental health can be expected.⁴¹⁷ Furthermore, even when these two conditions are met, it is still fully within the discretion of the court whether it decides to deprive the adult from filing repetitive applications.⁴¹⁸ However, when the court opts for deprivation, its discretion is limited by the criterion of reasonableness of the time-bar,⁴¹⁹ and ultimately by maximum limit of one year.⁴²⁰ In other words, the court need not automatically prevent the repetitive application for the maximum period of one year but it can shorten this period according to the circumstances of the individual case.

Guardians can also request restoration of the adult's legal capacity. Similarly, courts must still have the duty to quash *ex officio* the decision on incapacitation adopted on the basis of an incorrect assessment of the adult.⁴²¹ This situation may arise for instance when the decision of the court is based on invalid or defective expert opinion.⁴²² Thus, if it is established that the conditions for limiting or depriving the legal capacity were not met at the time of the decision, the court will quash the decision.⁴²³ This has a retroactive effect.

Finally, a strict reading of the law would mean that only adults fully deprived of their legal capacity may apply for restoration, and that the provision does not allow those whose legal capacity has been partially deprived to apply for restoration.⁴²⁴ Such a strict reading may be legally correct but is surely a mistake in legislative drafting.

There is no legal opportunity for an adult to request a court to remove the guardian and appoint someone else. In order to resolve such a situation, the court may appoint a 'special guardian',⁴²⁵ 'collision guardian',⁴²⁶ or a so-called 'procedural collision guardian',⁴²⁷ but it has been reported that the courts are generally reluctant to do so.⁴²⁸

⁴¹⁵ Art. 186(3) of the Civil Procedure Code.

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ Civil Procedure Code, art. 190.

⁴²² Winterová, A. et al.: *Občanský soudní řád s vysvětlivkami a judikaturou*, 2. aktualizované vydání, Praha, Linde, 2005, p. 517.

⁴²³ Civil Procedure Code, art. 190.

⁴²⁴ *Ibid.*, art. 186(3).

⁴²⁵ Civil Code, art. 29.

⁴²⁶ *Ibid.*, art. 30.

⁴²⁷ Civil Procedure Code, art. 32(2).

⁴²⁸ Kaňka, R., *Současná úprava institutu opatrovnictví v ČR*, p. 5.

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.⁴²⁹ 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.⁴³⁰ 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.

⁴²⁹ *Winterwerp v. the Netherlands*, op cit.

⁴³⁰ *Matter v. Slovakia*, op cit.

Glossary of Terminology

Adult: An adult is a person who has reached the legal age of majority. In the Czech Republic the age of majority is 18.

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.

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 languages across Europe and central Asia may be outdated and pejorative (for example, terms such as ‘mental retardation,’ ‘imbecile,’ ‘abnormal comprehension,’ ‘idiocy,’ ‘weak mind’ and so on).

Guardian: A guardian is a person appointed by the appropriate entity to act in the place of an adult who lacks legal capacity to handle his or her own affairs. The appropriate entity may be either a court or a guardianship agency, depending on the jurisdiction and/or the type of case. The guardian may be a relative, a professional guardian or any other person authorised 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 the requisite legal capacity (either partially or completely) 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 term is applied to people who have been diagnosed with, or labelled as having psycho-social disabilities (mental health problems) and/or intellectual disabilities.

Mental health problem: See psycho-social disability.

Partial guardianship (or limited guardianship): Partial/limited guardianship is 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 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 currently used by the global community (for example, the World Network of Users, Ex-Users and Survivors of Psychiatry used this term throughout negotiations on the UN Convention on the Rights of Persons with Disabilities). The term is meant to include people who have been diagnosed, labelled or perceived as having a mental illness, and can include people with personality disorders. People with psycho-social disabilities are sometimes referred to as users of mental health services, having a ‘mental illness’ or ‘mental disorder.’ For purposes of consistency, all such terms are translated as ‘psycho-social disability,’ a term MDAC maintains is less stigmatizing.

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. It is also used in English to mean a department of a hospital. Instead, MDAC simply uses ‘adult’ or ‘person concerned.’

ANNEX B

Summary Table of the Indicators

Indicator 1	<i>The 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>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 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>
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 functional 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.</i>
Indicator 7	<i>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.</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>

Mental Disability Advocacy Center (MDAC)

The Mental Disability Advocacy Center (MDAC) advances the human rights of adults and children with actual or perceived intellectual or psycho-social disabilities. Focusing on Europe and central Asia, we use a combination of law and advocacy to promote equality and social integration. We have participatory status at the Council of Europe and are a cooperating organisation of the International Helsinki Federation for Human Rights.

Our vision is for a world that values emotional, mental and learning differences, and where people respect each other's autonomy and dignity.

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