

# Guardianship and Human Rights in Serbia

Analysis of Guardianship Law and Policy

2006



Mental Disability Advocacy Center

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*Cover design: György Péchy, Jr.*

*Layout: István Fenyvesi*

*ISBN: 978-963-87395-7-5*

*This report is available in English and Serbian*

The research and publication of this report was made possible through the generous financial contributions of

*The Sigrid Rausing Trust*  
*The Open Society Institute (Budapest)*

and

In-kind contributions  
from the *Council of Europe*

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## EXECUTIVE SUMMARY

This report is the first work of its kind to look in any depth into laws relating to guardianship in Serbia. Serbia conducted reform of part of its guardianship laws in 2005. However it failed to bring them in line completely with current human rights standards. It is these standards and the compliance of Serbia with them that form the focus of this report. The legal and moral imperatives on Serbia 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.<sup>1</sup> It is of note that Serbia 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 persons before the law and that they enjoy legal capacity on an equal basis with others in all aspects of life.<sup>2</sup>

Guardianship in Serbia is partially regulated by laws that have not changed significantly since the communist times, during which people with disabilities were excluded from society. Change has been particularly slow with respect to procedural aspects of incapacitation. However, overall reform of the Serbian legal system is in progress now, with people with disabilities being a principle priority. This is demonstrated by the adoption of various pieces of legislation including the Act on Prohibition of Discrimination of People with Disabilities in April 2006 and the Family Act in 2005. Far advanced steps have also been taken to introduce an Act on Rights of the Patients with Mental Disabilities and an Act on Professional Rehabilitation and Employment of People with Disabilities. Although these laws suggest increasing recognition by Serbia of the rights of people with disabilities, it should be noted that these laws have significant weaknesses, particularly those relating to guardianship. Further work is needed to ensure their conformity with international standards.

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 Serbian Constitution specifically 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

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.

the report reveal that Serbia 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:

- The guardianship law in Serbia is too vague and lacks clarity. In many cases it is inconsistent, mainly as the result of it being regulated by numerous laws.
- Adults under plenary 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. Even if not specifically deprived of certain rights, a lack of procedural capacity ensures their inability to enforce them.
- Guardianship contributes to social exclusion. Contrary to international law<sup>3</sup> an adult in Serbia 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.
- There are no alternatives to guardianship (for example, advance directives and supported decision-making) for people with disabilities who need support in making certain decisions.

The Mental Disability Advocacy Center welcomes a number of positive changes in Serbian guardianship laws. However, it urges the Serbian government to reform these still further and specifically to rectify weaknesses it has introduced during the period of reform. MDAC believes that the drafting of the new Serbian Civil Code will be an obvious opportunity for this to put into effect, and urges the Serbian government to do so in a way that actively both involves and respects people with mental health problems, and intellectual disabilities, as well as their local and national organisations.

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

3 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 Serbian guardianship laws, although in some regards in conformity with international standards, fail to meet a number of the basic requirements of international law of human rights. The clear implication is that the lives of around 10 thousand people currently under guardianship in Serbia could be significantly improved. This will only happen if the government commits to further reform the legislative landscape. With this in mind, MDAC makes below a number of recommendations to the Serbian 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 brackets 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.

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 and substitute it with some form of tailor-made partial guardianship in which a judge would have to specify those areas where the adult lacks capacity (Indicator 27).
  - ⇒ Abolish the automatic deprivation of the fundamental rights of adults under guardianship to
    - property
    - family life
    - marry
    - vote
    - associate
    - access courts
    - make a will (Indicators 13, 15-17).
  - ⇒ 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 not only in the cases of plenary guardianship but in cases of partial guardianship too (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, advanced directives and supported 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 not only on the ground of 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).

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 how it is going to be assessed that the adult is not capable to understand proceedings or that his presence at the court hearings would be harmful for his health. (Indicator 3).

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

⇒ Abolish involuntary detention of people with the purpose of incapacity examinations (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).

⇒ 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 Serbian 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 Serbian authorities and civil society as they plan and implement reform.

## 1. INTRODUCTION

### 1.1 Guardianship

This report is about guardianship of adults and does not deal with legal arrangements for children. MDAC defines ‘guardianship’ as a legal relationship established by a court process between an adult who is deemed to lack the requisite legal capacity to make personal decisions and the person appointed to make decisions on that adult’s behalf.<sup>4</sup> 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 adults are found to either partially or completely lack capacity to make decisions on their own behalf. The outcome of such findings could be that an adult is “legally incapacitated”.<sup>5</sup> 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.

As the global disability rights movement gains momentum, the guardianship model is coming under increased criticism for its failures in providing adequate due process

- 4 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.
- 5 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.

protections in establishing and administering guardianship and ensuring the right of self-determination.<sup>6</sup> 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.<sup>7</sup> 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.

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

6 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](http://www.worldenable.net/rights/adhoc3meet_guardianship.htm).

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

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 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 later 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 Serbia. 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),<sup>8</sup> Meder Dastanbekov (Kyrgyzstan), Anna Smorgunova (Russia), and Vidan Hadži-Vidanović (Serbia).

<sup>8</sup> 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 Research and Development Director Marit Rasmussen developed and managed this project for over two years. Interns Priscilla Adams, Jill Diamond, Jill Roche and Nicholas Tsang helped with background research and István Fenyvesi designed and laid out the reports.

The Serbia report was drafted by Vidan Hadži-Vidanović, and Marit Rasmussen provided extensive comments. István Fenyvesi, Sarah Green 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 study of the legislative texts, rather than how they are applied. The study examines the types of protective arrangements available under national laws as well as any other relevant national legislation by:

- Studying the legal procedures for obtaining or terminating guardianship and the rights of the parties to such procedures.
- Examining the evidentiary standards in guardianship proceedings.
- Documenting the rights of the person alleged to lack capacity throughout the guardianship process.
- Assessing which rights are taken away after a finding of incapacity has been made.

- Analysing the power and authority of guardians, their accountability and how they are monitored, as well as the processes, if any, for bringing complaints against guardians; 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<sup>9</sup> 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.<sup>10</sup> 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 explanatory memorandum,<sup>11</sup> 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

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

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

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



States of the Council of Europe, there is an expectation that they will comply with its ‘soft law’,<sup>12</sup> 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.

12 ‘Soft law’ refers to rules, recommendations, guidelines or broad principles that while not strictly legally binding are nonetheless legally significant. Black’s Law Dictionary (8<sup>th</sup> 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 SERBIA

### 2.1 Introduction

The Republic of Serbia is a country in the South-Eastern part of Europe which is located in the central part of the Balkan Peninsula. The Republic of Serbia was a member state of Serbia and Montenegro (former Yugoslavia) until May 2006 when Montenegro proclaimed its independence.

Serbia is an ex-communist country in transition. During the Balkan wars in the early nineties, Serbia had a major role in the conflict. Because of its engagement, the UN Security Council imposed sanctions against Serbia and Montenegro (then Yugoslavia). Combined, these led to the economic collapse of the country and strengthened the regime of Slobodan Milošević. His dictatorship ended in 2000 following extensive demonstrations and the coming into power of the coalition of democratic forces, named the Democratic Opposition of Serbia. Since that time and as noted above, Serbia has been in a gradual transition to a democratic society.

### 2.2 Demographic and Social Landscape of Serbia

According to the 2002 census, Serbia had 7,498,001 inhabitants, 51.4% of whom were female.<sup>13</sup> Approximately the same percentage of men and women live in cities (56.6% of female citizens and 56.2% of male citizens, respectively). The average age of the female population (38.4 years) slightly exceeds the average age of the male population (36.4 years), reflecting the average life expectancy which is higher for women than for men (75.1 years for women and 70.1 years for men).

In 2002, Serbia found itself among the ten countries with the oldest populations in the world; there were only 1 million citizens aged between 15 and 24, representing 13.4% of the population. On the other hand, 22.6% of the citizens were aged 60 and above.<sup>14</sup>

There is no current official data on the number of people with disabilities in Serbia. It has been estimated that approximately 200,000 people, or 3% of the entire population, have mental health problems and intellectual disabilities.<sup>15</sup> According to the latest

<sup>13</sup> *Human Development Report 2005 – Serbia: Strength of Diversity*, UNDP, Belgrade, 2005, p. 25.

<sup>14</sup> *Human Development Report 2005 – Serbia: Strength of Diversity*, UNDP, Belgrade, 2005, pp. 24-25.

<sup>15</sup> See in V. Hadži-Vidanović, “Human Rights of People with Disabilities in Serbia and Montenegro in Practice” in: Miroslav Živanović, Saša Madacki (eds.), *Human Rights of People with Disabilities – Situation in Bosnia and Herzegovina, Croatia and Serbia and Montenegro*, Centre for Human Rights – Sarajevo University, Sarajevo, 2006, pp. 146-162.

WHO data from 1999, 88,943 people with intellectual disabilities were registered in Serbia. Of these, 76,492 were believed to have mild intellectual disabilities, while 4,447 were believed to have medium, and 8,004 severe intellectual disabilities.<sup>16</sup> Although this is less than half the estimated number, it does not include individuals diagnosed with a mental health problem.<sup>17</sup> In 2006 there were 509 people who were detained in the psychiatric institutions following a court order for compulsory treatment made in turn following commitment of a crime.<sup>18</sup>

As of 2004, approximately 3,000 adults were placed in social care institutions<sup>19</sup> for people with predominantly intellectual disabilities.<sup>20</sup> These are large institutions where people are segregated from society for life. Many of these residents are placed under guardianship, as the following table illustrates.<sup>21</sup>

	Institution	No. of adults	No. of adults under guardianship
1	Stara Moravica	344	108
2	Jabuka	152	68
3	Izvor	92	10
4	Kragujevac <sup>22</sup>	960	576
5	Kulina	210	26

*Table 1. Number of adults under guardianship in social care institutions.*

Worryingly there are no official data on the number of people under guardianship nationwide. However, the guardianship authorities of local governments are obliged to keep records on people under guardianship, and it seems that in the last few years these records have been up-to-date in the majority of Serbian municipalities.<sup>23</sup> The major problem for collecting the data on people under guardianship is the highly decentralized social care system and the lack of a central registry within the Ministry of Social Affairs.

16 *Ibid.*

17 Society of People With Intellectual Disabilities, Stari Grad, annual report for 2004.

18 Ministry of Justice of Republic of Serbia, official website, [http://mpravde.mvcore.net/active/sr-cyrillic/home/zatvori/statistika\\_zatvori.html](http://mpravde.mvcore.net/active/sr-cyrillic/home/zatvori/statistika_zatvori.html).

19 This estimate was made based on interviews with the directors of nine social care institutions for people with mental disabilities in Serbia.

20 In some social care homes, such as, for instance, the “Little Bees” social care home in Kragujevac, there is one unit for people with mental health problems (approximately 100 people were living there in the first half of 2005).

21 This estimate was made based on interviews with the directors of nine social care institutions for people with mental disabilities in Serbia. The data was available only for 65% of the estimated adults.

22 There are 565 residents in this care home. 210 of them are adults with mental disability. For all of them the process for appointment of a guardian at the time of MDAC visit had been initiated.

23 Family Act, art. 340.

Nevertheless, certain data are available, the most recent of which are from the year 2001. According to these figures, between 1998 and 2001, an average of 140 people were placed under guardianship each year.

Year	1997	1998	1999	2000	2001
Number of guardianships established	300+	145	146	130	137

*Table 2. Number of guardianship over adults in Serbia established in the period 1997-2001*

The most up-to-date available data suggests that around 8,000 to 10,000 people are currently under guardianship in Serbia. The largest number of these currently live in Belgrade (2,989).<sup>24</sup> In other major towns in Serbia the number of guardianships is significantly lower, ranging between 40 (in Pirot) and 44 (in Kragujevac),<sup>25</sup> to 76 (in Jagodina),<sup>26</sup> 149 (in Sabac)<sup>27</sup> and 170 (in Valjevo).<sup>28</sup>

### 2.3 Serbia's Legal System

Serbia is one of the successor states of the Socialist Federal Republic of Yugoslavia.<sup>29</sup> Until recently, it was a member state of the State Union of Serbia and Montenegro (before 2003, the name of the union was Federal Republic of Yugoslavia). Following the proclamation of independence by the Montenegrin parliament on 3 June 2006, Serbia became an independent state.

Following a referendum held in October 2006, Serbia adopted a new Constitution in November 2006 which established Serbia as an independent and sovereign state.<sup>30</sup> The Constitution replaced an older version adopted by the Milošević regime in 1990.

24 Official Report of the City Social Care Centre Belgrade, 2005.

25 Official Report of the City Social Care Centre Kragujevac, 2004.

26 Information received in a telephone interview with the Centre for Social Work officials on 5 January 2007.

27 *Ibid.*

28 *Ibid.*

29 Before 2003, SaM was called the Federal Republic of Yugoslavia. During the course of the 20<sup>th</sup> century, it was known under many names: between 1918 and 1929 – Kingdom of Serbs, Croats and Slovenes; between 1929 and 1944 – Kingdom of Yugoslavia. After the Second World War it changed the name to the Federal Democratic Yugoslavia, then Federal People's Republic of Yugoslavia and Socialist Federal Republic of Yugoslavia. After the secession of Croatia, Slovenia, Macedonia and Bosnia and Herzegovina, it was renamed to the Federal Republic of Yugoslavia. Other successor states are: Croatia, Slovenia, Bosnia and Herzegovina, Macedonia and Montenegro.

30 Official Gazette RS, no. 98/06.

The new Constitution introduced several comprehensive provisions related to human rights. However, compared to the Human Rights Charter<sup>31</sup> of the former State Union of Serbia and Montenegro, the Bill of Rights contained in the new Constitution seems to have taken a step backward. For instance, three principle shortcomings can be identified. First, certain guaranties contained in the Human Rights Charter are not included in the new Constitution.<sup>32</sup> Second, important guaranties omitted from the Human Rights Charter were likewise omitted from the new Constitution.<sup>33</sup> Finally, a number of the human rights guarantees found in both the Human Rights Charter and the new Constitution, are worded more weakly and vaguely in the latter and thus open to differing interpretations.<sup>34</sup>

Serbia has ratified all major international human rights instruments, including: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the European Convention on Human Rights (ECHR). The Constitution provides that generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system of Serbia and should be applied directly.<sup>35</sup> Nonetheless, this is subject to the proviso that ratified international treaties must be in accordance with the Constitution.<sup>36</sup> Legislation must comply with treaties ratified by Serbia and

31 The Charter on Human and Minority Rights and Fundamental Freedoms was a part of the constitutional system of the former State Union Serbia and Montenegro. It was at the time a modern document that contained an exhaustive catalogue of human rights. It was positively assessed both by international and national experts, including the European Commission for Democracy through Law (Venice Commission), *Opinion No. 234/2003 Charter of Human Rights of Serbia and Montenegro* (available at: [http://www.venice.coe.int/site/dynamics/N\\_Opinion\\_ef.asp?L=E&OID=234](http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&OID=234)).

32 One illustrative example would be the prohibition on the interpretation of the human rights provisions in such a manner that they include the right of the state, individuals or groups to take such actions which could lead to complete derogation or limitations of the constitutional human rights provisions, contrary to the Constitution. A similar prohibition was included in the Human Rights Charter in its Art. 4.

33 This is the case with the number of socio-economic rights guaranteed by the International Covenant on Economic, Social and Cultural Rights and European Social Charter.

34 For more detailed explanation on these issues see: R. Žarevac, “Ustavna zaštita ljudskih prava – pitanje poverenja i prakse“, *Evropski forum*, no. 10, 2006. (“Constitutional Protection of Human Rights – the question of trust and practice”, *European Forum*, no. 10, 2006); M. Milanović, V. Hadži-Vidanović, “Međunarodno pravo i ljudska prava u Predlogu Ustava Srbije”, *Srpska pravna revija*, no. 5, 2006, (“International Law and Human Rights in the Draft Constitution of Serbia”, *Serbian Law Review*, no. 5, 2006, pp. 62-73).

35 Constitution, art. 16(2) .

36 Constitution, art. 16 (3). The Constitutional Court has the authority to review the constitutionality of ratified treaties. In addition, ratification of international treaties is possible only through the adoption of the law on ratification of that instrument, and the Constitutional Court can decide on the constitutionality of the laws after their adoption and before they are signed by the President of the Republic, ie, before they come into force.

with generally accepted rules of the international law.<sup>37</sup> It is clear therefore that the Constitution is considered the highest legal authority, followed by ratified international treaties, then national laws, by-laws and other sources of law.

Accession to the European Union was declared as a national priority in October 2000.<sup>38</sup> The country is undergoing substantial legal reforms in order to comply with EU entry criteria.

## 2.4 Guardianship Law in Serbia

### 2.4.1 Mental Health Law

Aspects of mental health law can be found in the Health Protection Act,<sup>39</sup> in the Social Security Act,<sup>40</sup> as well as in related laws and by-laws. These laws set out basic principles in relation to people with mental disabilities and people under guardianship, the former being specifically recognized as being vulnerable and in special need of health protection.<sup>41</sup> Notably, there is nothing in these statutes that identify those under guardianship as being specifically vulnerable. The protection of those with mental disabilities relates principally however, to provision of medical treatment even in situations when they are not covered by health insurance. Detention and involuntary treatment in psychiatric hospitals can be provided to persons without their consent in cases when they are unable to express consent as a result of being unconscious or for some other reason.<sup>42</sup> For those under guardianship and deprived of legal capacity, medical treatment can be provided after their guardian has been informed about the treatment.<sup>43</sup> If a doctor suspects that the guardian is not acting in the adult's best interests, he or she must report this suspicion to the guardianship authority.<sup>44</sup> Nonetheless, an adult must be involved in medical decisions, taking into account the adult's abilities.<sup>45</sup>

Adults can be compulsorily detained in a psychiatric hospital if a doctor believes that the nature their mental illness is such that it may endanger their own life, that of others, or that it may endanger property. Such a decision must be reviewed by a panel of doctors within 24 hours.<sup>46</sup> If the panel confirms the detention, the hospital must

37 Constitution, art. 194.

38 Resolution on Accession to EU, October 14, 2004, RS No. 48.

39 Health Protection Act, Official Gazette, No. 107/05, especially art. 34, 35 and 44.

40 Social Security Act, *Official Gazette RS*, No. 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96, 29/01, 84/04.

41 Health Protection Act, art. 11 (2) .

42 Health Protection Act, op cit, art. 34.

43 Health Protection Act, op cit, art. 35(1).

44 Health Protection Act, op cit, art. 35(2).

45 Health Protection Act, op cit, art. 35(4).

46 Health Protection Act, op cit, art. 44.

notify the court. Adults can be detained without judicial review for 33 days, such detention notable for its probable violation of international law.<sup>47</sup>

#### 2.4.2 History of Guardianship in Serbia

Guardianship laws were introduced in Serbia as a result of the influence of other Western European civil codes, particularly that of Austria.<sup>48</sup> The Serbian Civil Code of 1844, was, with amendments, in force until after the Second World War and included a guardianship regime similar to that found in the Austrian model. The code also included features, such as the Family Council, similar to those found in the French Civil Code. However, while in the French law the Family Council was a regular body of the civil law, in the Serbian legal system it was simply a secondary body set up to supervise guardians. In general, judges monitored the activities of guardians; however, in special circumstances, a Family Council composed of family members of the adult, and with the guardianship judge as its president, undertook this responsibility.<sup>49</sup>

The 1844 Civil Code prescribed that a court could deprive adults of legal capacity and impose guardianship. However, the legal test for such deprivation was limited to determining whether or not adults were 'mentally ill or mad'<sup>50</sup> and its purpose was primarily the protection of the property of the individuals under guardianship.<sup>51</sup> Before the Guardianship Act was introduced in 1872, the guardian who had an obligation to protect both the property and personality of the adult had been considered to be a tutor, and not a guardian.<sup>52</sup> The introduction of the Guardianship Act led to the guardians having an obligation to provide adults with care and medical treatment, if the guardianship was established as a result of mental illness.<sup>53</sup> Guardians could be appointed by a court in the absence of an adult's consent, essentially imposing civil duties on the person, irrespective of their willingness to undertake those duties. A

47 This procedure is regulated by the Non-Contestant Procedure Act, see Official Gazette RS, No. 25/82, 48/88, 46/95, art. 45-55.

48 *Allgemeines Bürgerliches Gesetzbuch – 1811*.

49 Lazar Marković, *Gradansko pravo – Porodično pravo, druga knjiga*, (Civil Law – Family Law, Vol. II), Geca Kon, Belgrade, 1920, p. 240, Nadežda Ljubojev, *Starateljstvo nad punoletnim licima u Jugoslovenskom pravu* (Guardianship over Adults in the Yugoslav Law), Belgrade, 1999, p. 29.

50 The list of reasons and circumstances for establishing guardianship under the 1844 Civil Code was exhaustive. Among these were: mental illness or madness; inability of a person to communicate with the help the sign language, persons who were deaf, blind or mute; persons who had been announced by court as prodigal; missing persons; and, confined persons and prisoners.

51 Lazar Marković, *Gradansko pravo – Porodično pravo, druga knjiga*, (Civil Law – Family Law, Vol. II), Geca Kon, Belgrade, 1920, p. 272

52 *Ibid*, p. 218. See in Nadežda Ljubojev, *Starateljstvo nad punoletnim licima u Jugoslovenskom pravu* (Guardianship over Adults in Yugoslav Law), Belgrade, 1999, p. 28.

53 Nadežda Ljubojev, *op. cit.* p. 28.

guardian could also be appointed by way of will of an adult's father, so giving him in effect total control of choice of a future guardian.

### *2.4.3 Sources of Guardianship Law*

As noted, there is no single codification of Serbian civil law and guardianship law itself is dispersed among various laws and regulations. The supreme source of guardianship law is the Constitution which provides that '(a)ll are equal before the Constitution and law. Everyone shall have the right to equal legal protection, without discrimination. All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability (emphasis added) shall be prohibited'.<sup>54</sup> In addition provision is made for the right to legal personality in the following terms: "Upon becoming of age all persons shall become capable of deciding independently about their rights and obligations. A person becomes of age after turning 18".<sup>55</sup>

The Constitution further provides that, '(h)uman and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right' (emphasis added).<sup>56</sup> The Constitution does not provide for any limitation of the right to exercise legal capacity. This is, perhaps, an oversight and it is yet to be seen what view the Constitutional Court will take as to the constitutionality of depriving an adult of legal capacity in light of the new Constitution.

There are two principle acts containing the majority of guardianship provisions. First, the Family Act,<sup>57</sup> which contains substantive guardianship provisions, such as the rights and duties of the guardian and the adult under guardianship. The procedural aspects for appointing a guardian are also regulated by this law.<sup>58</sup> The second is the Non-Contestant Procedure Act. <sup>59</sup> This regulates the incapacity assessments, which, as will be detailed below, are the first phase in the guardianship procedure.

Additional laws play a role in the guardianship process. For example, the Act on Obligations regulates the capacity of people under guardianship to make contracts,

54 Constitution, art. 21. Official translation of the new Constitution. For additional information, see website of the National Assembly , <http://www.parlament.sr.gov.yu/files/eng/doc/2006/UstavRS.zip>.

55 Constitution, art. 37

56 Constitution, art. 20.

57 This came into force on 1 July 2005. Official Gazette RS, No. 18/05, Art. 126-150. Subsequently referred to as the Family Act.

58 Family Act, art. 329-341.

59 Non-Contestant Procedure Act, Official Gazette RS, No. 25/82, 48/88. 46/95, art. 31-44.



as well as liability for damages.<sup>60</sup> The Criminal Code regulates criminal liability of people with mental disabilities.<sup>61</sup> Electoral laws regulate the right of adults deprived of legal capacity to vote.<sup>62</sup>

#### 2.4.4 Types and Role of Guardianship

##### *Types of guardianship*

There are two forms of adult guardianship:

- **Temporary guardianship** (or guardianship for a special situation)<sup>63</sup>  
Provision is made for a guardianship agency of a local government to appoint a temporary guardian<sup>64</sup> for an adult if the authority believes that there are special circumstances warranting protection of the adult, their rights and their interests.<sup>65</sup> The length of this atypical form of guardianship depends on the specific circumstances of each case.
- **Regular guardianship**  
In contrast to the early legislation, there is now no definition of ‘guardianship’.<sup>66</sup> In general terms, guardianship over adults is understood as a special form of legal protection for adults who are not able to exercise their rights.<sup>67</sup> It is understood that guardianship will protect the interests of an adult with psycho-social disabilities (mental health problems) or intellectual disabilities.<sup>68</sup>

60 Act on Obligations, Official Gazette SFRJ, No. 29/78, 39/85, 45/89, 57/89, Official Gazette SRJ, No. 31/93.

61 Criminal Code, Official Gazette 85/05, art. 23.

62 Law on the Election of Members of the Parliament, Official Gazette RS, No. 35/00, Act on Elections of the President of Republic of Serbia, Official Gazette RS, No. 1/90, 79/92, 73/02, 18/04, Local Self-Government Act, Official Gazette RS, No. 9/02.

63 See Family Act, art. 126 and 132.

64 Also known as a “collision guardian”, see *supra*, footnote ##.

65 See Family Act, art. 132. In the old law this institution was known as the “collision guardian”.

66 According to Article 219, para. 2, of the Family Act 1980 (Official Gazette RS, no. 22/80, 11/88, 22/93, 35/94), the purpose of guardianship was the protection of an individual’s interests through the provision of care, empowering the individual for an independent life, and by providing medical treatment.” It also prescribed that guardianship should protect property rights and other rights and interests of persons under guardianship.

67 M. Draškić, *Porodično pravo (Family Law)*, COLPI – Dosije, Belgrade, 1998. As noted earlier, the terms mental health problem and intellectual disability have been chosen to describe mental disabilities throughout the report. These terms may not reflect the exact terminology used within the legislation, which sometimes has pejorative connotations. For the definition of these and other terms, see the glossary in Annex A.

68 *Ibid.*

### *Role of Guardian*

Serbian law requires a guardian to take care of the welfare of the adult placed under plenary (all-encompassing) guardianship, as well as the adult's real estate. This will be explained further below. There are two exceptions to this: temporary guardianship and partial guardianship. First, temporary guardianship is used when there are so-called special circumstances, such as a conflict of interest between the adult and his regular guardian. A court can appoint a temporary guardian with given limited authority for specific tasks, usually associated with the adult's property. Secondly, a court can appoint someone as partial guardian where the court only partially deprives the adult of legal capacity.<sup>69</sup> In such cases the court must specify those areas of decision-making where the adult retains legal capacity, and can therefore make independent decisions without consultation with or authorisation of a guardian. For the purposes of this report this latter form of guardianship will be referred to as partial guardianship.

#### *2.4.5 Substantive Elements of Adult Guardianship*

As noted under Serbian law a court can deprive adults of all legal capacity by way of plenary guardianship, or restrict their legal capacity, in which case the adult is placed under partial guardianship.<sup>70</sup>

#### **Plenary (all-encompassing) Guardianship**

An adult may be deprived of legal capacity only if the following legal requirements are met:<sup>71</sup>

- the adult has a mental health problem or intellectual disability
- which causes an 'incompetence to comprehend normally' and
- the adult is unable to take care of his or her rights and interests.<sup>72</sup>

One legal consequence of adults being deprived of legal capacity is they are treated in a similar manner to children under guardianship under the age of 14.<sup>73</sup> Accordingly, in many circumstances guardians of adults have similar duties to those guardians of children.<sup>74</sup>

#### **Partial Guardianship**

Partial guardianship can be imposed on an adult if:

- the adult has a mental health problem or intellectual disability

<sup>69</sup> Family Act, art. 147(3).

<sup>70</sup> Family Act, art. 146-147; Non-Contestant Procedure Act, art. 31.

<sup>71</sup> See Non-Contestant Procedural Act, art. 31. These are listed in the Family Act, arts. 146-147.

<sup>72</sup> *Ibid.*

<sup>73</sup> Family Act, article 146(2).

<sup>74</sup> Family Act (1980), art. 277(1).

- causing conduct which directly jeopardises their own rights and interests or the rights and interests of others<sup>75</sup>

The adult's inability to understand the meaning of their actions is not required for a judge to order partial deprivation of the adult's legal capacity.

### Guardianship Agencies

Guardianship agencies are offices within the local municipalities in Serbia (altogether 138 guardianship agencies excluding Kosovo) under the name of Centres for Social Affairs.<sup>76</sup> Each guardianship agency consists of people with various professional backgrounds – social workers, psychologists, lawyers, who work based on social work methods.<sup>77</sup>

Guardianship agencies have wide discretionary powers and deal with a range of issues related to social protection, hence their frequent referral as an 'organ for family protection',<sup>78</sup> or 'omnibus-organ'.<sup>79</sup> The primary function of guardianship agencies is the protection of children and family, representation of the interests of society, and decision making on behalf of individuals as a state body. As they have both protective and decision making functions, they can, under certain circumstances, be seen as both an administrative and a decision-making body.<sup>80</sup>

The multiple responsibilities of the guardianship agencies can lead to a conflict in their roles. In judicial proceedings, the guardianship agencies have a consultative status and are the expert body. They also however can act as the legal representative of adults, as a guardian ad litem<sup>81</sup> and in administrative procedures, they can represent all parties (applicant, the adult, and guardian) often at the same time.

Guardianship agencies may initiate proceedings to deprive adults of legal capacity<sup>82</sup> and further have the duty to appoint a guardian once legal capacity has been removed.<sup>83</sup> They are mandated to monitor the acts of that guardian,<sup>84</sup> and, when appropriate to initiate proceedings to restore a person's legal capacity.<sup>85</sup>

75 Family Act, art. 147.

76 Family Act, art. 12.

77 M. Janjic-Komar et al, op. cit, p. 262.

78 M. Janjic-Komar, R. Korac, Z. Ponjavic, *Porodično pravo* (Family Law), 4<sup>th</sup> ed., Belgrade, 1999, p. 261.

79 *Ibid.*

80 For example, see the discussion under Indicators 12 and 20.

81 See M. Janjić-Komar, *Family Law (Porodično pravo)*, 4<sup>th</sup> ed, Nomos, Belgrade, 1999, p. 261. The author describes a guardianship agency as an "omnibus organ" which goes deep into the family affairs. The author states that the competences of the guardianship agency are fundamentally in contradiction with one another and that in many cases they can be irreconcilable.

82 Non-Contestant Procedure Act, art. 32.

83 Family Act, art. 329.

84 Family Act, arts. 133, 142, 329-333.

85 Non-Contestant Procedure Act, art. 42, Family Act, art. 337.

Appeals against decisions of the guardianship agencies are made to the Ministry of Labour, Employment and Social Affairs.<sup>86</sup> A significant weakness however is the total absence of recourse to judicial remedies.

## 2.5 Two-Step Guardianship/Incapacity Process

The report has thus far outlined the plenary and partial guardianship in addition to the role of the guardianship agency. In this section the procedure from incapacity assessment to the appointment of a guardian will be described. Essentially the procedure can be broken down into two distinct phases: deprivation of legal capacity (judicial procedure) and appointment of the guardian (administrative procedure).

### 2.5.1 Deprivation of Legal Capacity

The judicial phase is, curiously, regulated by the Non-Contestant Procedural Act.<sup>87</sup> During this procedure the court determines whether the legal criteria for deprivation of legal capacity are met. In so doing it, should examine medical reports and hear witnesses. Specific provision is made for this procedure to be carried out promptly:<sup>88</sup> for example an applicant is under an obligation to submit all the relevant information and the evidence with the application; for procedural appeals, there is a three-day time limit for their submission<sup>89</sup> and an obligation of the appeal court to deliver its decision within three days from receiving that appeal. Appeals against a decision leading to the deprivation of legal capacity must be made within 15 days.<sup>90</sup>

A guardianship agency, the adult's spouse, child or parents may apply to the court to deprive an adult of legal capacity.<sup>91</sup> The court, in addition, may initiate proceedings *ex officio* if it receives information that the adult may need to be placed under guardianship.<sup>92</sup> The adult must be examined by at least two doctors with an expertise in the area of mental disability. These experts provide a report on the adult's mental condition and ability to understand the meaning of their actions.<sup>93</sup> Legislation provides that the court may hear the adult, the adult's current or temporary guardian, and the applicant.<sup>94</sup>

86 Family Act, arts. 333, 336, 337, 338.

87 Non-Contestant Procedural Act, arts. 31-44.

88 Non-Contestant Procedure Act, art. 31(2).

89 The three-day time limit is set only for procedural appeals. When an appeal on deprivation of legal capacity decision is in question, the deadline is 15 days. Non-Contestant procedure Act, art. 19 and 40.

90 Non-Contestant Procedure Act, art. 40.

91 The application procedure is discussed in greater detail under Indicator 2 in the following section.

92 Non-Contestant Procedure Act, art. 32(1).

93 Non-Contestant Procedure Act, art. 38. The role of the medical evaluation is further discussed under Indicator 7 below.

94 Provisions describing the concerned adult's right to be heard and the role of witnesses are discussed in-depth under Indicators 4 and 6 below.

If the court finds that the legal criteria for depriving a person of legal capacity are met, that adult will be subjected to plenary or partial deprivation of their legal capacity.<sup>95</sup> The judicial decision must be in writing and must give full reasons.<sup>96</sup>

### 2.5.2 Appointment of a Guardian

A guardian can be appointed only to a person who has been deprived (fully or partially) of legal capacity through the judicial procedure described above. Any such deprivation must immediately be notified by the court to a guardianship agency.<sup>97</sup>

As the court has an obligation to forward its decision on deprivation of legal capacity directly to a guardianship agency, in the majority of the cases it is the guardianship agency itself that initiates the subsequent procedure leading to the appointment of a guardian. Nonetheless, provision is made for a wide range of additional organisations to initiate the procedure if deemed appropriate.<sup>98</sup>

Placing an adult under guardianship and appointing a guardian is largely an administrative procedure,<sup>99</sup> which must be completed promptly. A guardian must be appointed within 30 days from the day the guardianship agency received the court's confirmation of its deprivation of an adult's legal capacity.<sup>100</sup> Ministerial guidance suggests that this procedure should take just eight days.<sup>101</sup> Even prior to appointment

95 Non-Contestant Procedure Act, art. 40.

96 Note that the court can delay the delivery of the decision on depriving the person of her/his capacity because of misuse of the alcohol or other opiates, if there are reasons to believe that the person concerned will refrain from such substance abuse in the future. Such future restraint might be evidenced by a willingness to obtain medical treatment either on a person's own initiative or by a proposal of the court. The delivery of the decision can be delayed within the time frame of 6 to 12 months, and it can be withdrawn if the person in concern stops the treatment or is expelled from the institution because of the violation of public order. See art. 41 of the Non-Contestant Procedure Act.

97 Family Act, art. 149(2).

98 The initiative for starting the guardianship procedure can be submitted by health and educational institutions, institutions for social protection, judicial and other governmental bodies, non-governmental organizations, and citizens. .

99 See Family Act, art. 291. Under this provision a guardianship agency has to act in accordance with the Law on General Administrative Procedure (Official Gazette of the SRY, No. 33/97 and 31/2001) when deciding on placing people under guardianship and other matters related to family affairs if there are no *special* procedural provisions in the Family Act. Accordingly, provisions of Articles 329-341 of the Family Act are *lex specialis* in relation to the Law on General Administrative Procedure. According to paragraph 2 of Article 291, a guardianship agency in its work should apply social care and social protection methods. The special aspects of the procedure are regulated by arts. 329-341 of the Family Act.

100 Family Act, art. 332(4).

101 *Guidelines for the Social Care Centres on the Conducting of the Procedures for the Implementation of the Measures for Guardianship Protection*, Ministry for Labour

of a guardian however the guardianship agency is authorized to take immediate measures to protect the adult, his/her rights and property.<sup>102</sup>

The guardianship agency has the following obligations:

- The preparation of a guardianship plan. This is a newly established requirement in Serbian guardianship law.<sup>103</sup>
- To take a decisions on an adult's accommodation within 24 hours of receiving information about the need to appoint a guardian.<sup>104</sup> Although this provision is aimed mainly at children without parental care, its wording is such that it would appear that a guardianship agency has to make a similar decision for adults regardless of whether they have a family and a home. In the first instance, the guardianship agency is obliged to attempt to place the adult with their family.<sup>105</sup>
- The guardianship agency must make an inventory of the adult's property within eight days from the day it receives notification of the need to put the person under guardianship.<sup>106</sup> Inventories are made by the Standing Committee for Census and Estimation of Ward's Property Value, a newly established body within the guardianship agency.<sup>107</sup>

Guardians can ask for payment for reasonable expenses incurred while performing their duties.<sup>108</sup> These expenses are taken from the income of the adult in question provided that this does not jeopardize their financial situation.<sup>109</sup> They cannot however be paid for their services.

and Social Affairs, 14 December 1994. However, this recommendation was adopted in accordance with the previous Family Act which differentiated between the procedure of putting an adult under guardianship and the procedure of appointing a guardian. According to the previous law, a guardian could be appointed after a person was placed under guardianship. The time limit of 8 days was only for the procedure of establishing guardianship and did not include the process of selecting the guardian. (See Nadežda Ljubojev, *op. cit*) In contrast, under the new law, the decision establishing guardianship and the appointment of a guardian is formally the same document. See Family Act of 2005, art. 125, para. 3, and Art. 333, para. 3 and compare with the provisions in the previous law, Family Act of 1980, art. 224.

102 Family Act, art. 332(3) and (4).

103 Family Act, art. 125(2) The guardianship plan will be discussed under Indicator 20, below.

104 Family Act, art. 332(2).

105 Family Act, art. 125(3) and (4).

106 Family Act, art. 332, para. 3.

107 Family Act, art. 125, p. 5.

108 Family Act, art. 143.

109 Family Act, art. 144, para 2 and art. 140, 4. It should be noted that previous law contained a better solution according to which the guardian was compensated from the budget of municipality. Art. 247 of the old Family Act. See M. Draškić, *op.cit*, p. 308.

## 2.6 Human-Rights Based Assessment of Serbia'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 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 Serbia'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 Frameworks (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:** Serbian law fails to specify that the purpose of guardianship is to ensure respect for the human rights and dignity of people with mental disabilities.

**Analysis:** In direct contrast to earlier versions of the law, current legislation does not specify the purpose of guardianship nor does it explicitly reference respect for human rights.<sup>110</sup> The Constitution provides that 'Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to

<sup>110</sup> Family Act 1980, art. 219, para. 2, stated that the purpose of guardianship was the protection of an individual's person, to be carried out principally by the provision of care and medical treatment leading to independent living. In addition guardianship also had the purpose of securing pecuniary and other rights and interests of those under guardianship.

European principles and values.<sup>111</sup> There is no clear statement that the law is intended to ensure full respect of rights and dignity for people with mental disabilities. In fact, by legally equating adults with mental disabilities with children, as is the case in Serbia,<sup>112</sup> the law reinforces stereo-types and archaic notions of adults with disabilities as helpless children in need of the benign care and paternalism of the State.

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

In relation to the protection of incapable adults the fundamental principle, underlying all the other principles, is respect for the dignity of each person as a human being. The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms, taking into account any qualifications of those rights contained in the relevant international legal instruments.<sup>113</sup>

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’.<sup>114</sup> 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 [...]’.<sup>115</sup> 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

111 Constitution, art. 1.

112 Family Act, art. 146(2) and 147(2).

113 Recommendation R(99)4, Principle 1.

114 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.

115 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.



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'.<sup>116</sup> 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:** The law clearly states who may submit applications to initiate guardianship proceedings. It is unclear however what evidence must be supplied to support the application.

**Analysis:** Legislation provides that the court, the guardianship agency and various family members may submit an application to begin guardianship proceedings.<sup>117</sup> Competence to file the application has to be proven and submitted with the application, unless the applicant is a guardianship agency. Distant relatives must prove that they are related to the adult, and also that they must live with the adult.<sup>118</sup>

The law does not provide for a specific level or quality of evidence required, merely that 'the application must include the facts on which it is based, as well as evidence confirming those facts, or make them possible'.<sup>119</sup> It is interesting to note that there is no specific mention of the need to provide evidence of a mental health diagnosis and/or the manner in which that condition affects an adult's ability to make decisions or take care of him/herself. Legislative provision is also made providing for the rather illogical scenario in which adults may file an application to have themselves deprived of legal capacity, so long as they can understand the meaning and the legal consequences of such an application.<sup>120</sup>

As noted above, the court must initiate the guardianship procedure itself if in receipt of information leading it to believe that a person in its jurisdiction meets the conditions for deprivation of legal capacity.<sup>121</sup>

Court decisions as to who can initiate proceedings leading to the deprivation of legal capacity conflict. In one case, an appellate court decision, it was held that a psychiatric

116 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.

117 Non-Contestant Procedure Act, art. 32.

118 Non-Contestant Procedure Act, art. 32, para. 2.

119 Non-Contestant Procedure Act, art. 33.

120 Non-Contestant Procedure Act, art. 32, para. 3.

121 Non-Contestant Procedure Act, art. 32, para. 2.

hospital cannot apply to have one of its patients deprived of legal capacity.<sup>122</sup> It held that the list of possible applicants cited above is exhaustive. However, in a second appellate court decision, it was held that, if the procedure has already begun, the application cannot be struck out solely because the applicant does not have the requisite standing to submit it.<sup>123</sup>

Serbian law does not give the authority to initiate the procedure to the public prosecutor and other public authorities even in circumstances where the adult may be vulnerable to abuse or neglect by family members. However, these agencies can notify the court of a situation, and as noted, the court would then have to take up the case *ex officio*.

**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”.<sup>124</sup> Fairness in this context includes the provision of a law that clearly specifies who can file applications.

The second, that a guardianship application must have some merit on the face of it, is necessary in order to protect an adult against malicious accusations of the deprivation of functional capacity. In the case of *H.F. v. Slovakia*, the European Court of Human Rights (ECtHR) examined the procedure that led H.F. to the deprivation of her legal capacity based. 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’.<sup>125</sup> When legislation prescribes the form of evidence

122 Belgrade County Court GZ 10262/84.

123 Pozarevac County Court, GZ. 643/90.

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

125 *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,

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:** Although the law does provide that notice shall be given to adults subject to incapacity proceedings, it also allows for their exclusion from the proceedings based solely upon speculative medical opinion.

**Analysis:** All adults must be notified of incapacity hearings.<sup>126</sup> The court must examine the adult in-person, except in cases where it determines that such a hearing could be harmful to the adult's health or if participation in the hearing is not possible at all, owing to the mental or physical condition of the adult.<sup>127</sup>

This provision introduces an inappropriate weakness into the requirement for a hearing at which the adult should be present. It creates the bizarre situation in which an adult can be excluded from his/her own guardianship hearing if there is evidence that he is unable to understand the meaning of the proceedings and cannot answer questions. Given the fundamental rights that are at stake in incapacitation hearings, there is little justification for excluding the adult merely because medical opinion suggests a lack of understanding, as the adult has no opportunity to oppose such a finding. Given that these procedures always relate to functional capacity, it is all too easy to allege that an adult cannot understand the procedure.

**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."<sup>128</sup>

Malta, Moldova, Poland, Slovakia, Turkey and Ukraine (8 November 2005). Available through [www.cmiskp.echr.coe.int/echr](http://www.cmiskp.echr.coe.int/echr), visited 30 July 2006.

126 Non-Contestant Procedure Act, art. 35(2).

127 Non-Contestant Procedure Act, art. 36, paras. 1 and 2.

128 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.'

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.<sup>129</sup> 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.”<sup>130</sup>

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’.<sup>131</sup> 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.<sup>132</sup>

Indicator 4

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

**Conclusion:** Legislation provides for a right to free and effective legal representation throughout guardianship proceedings.

**Analysis:** The law provides two forms of representation of an adult during the incapacitation procedure: the appointment of a temporary guardian,<sup>133</sup> and the second the appointment of a temporary counsellor. Before these are detailed, it

129 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.

130 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](http://www.nccusl.org), visited 14 July 2006.

131 Principle 13.

132 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.

133 Family Act, art. 132, Non-Contestant Procedure Act, art. 35, 36, Civil Procedure Act, art. 75-78.

should be noted that there is a legislative presumption of legal capacity from the onset of such proceedings.

The court has discretion to instruct the guardianship authority to appoint a temporary guardian.<sup>134</sup> The court will do this whenever it finds that the adult is not able to represent himself, but has an obligation to do this only if the adult is already incapacitated.<sup>135</sup> Temporary guardian can be appointed on the specific request of the adult.<sup>136</sup> Guardianship agency has an obligation to appoint temporary guardian on the request of the adult if he provides justified reasoning for such a request.<sup>137</sup> However, the guardianship authority does not need to do this: according to ministerial guidelines, guardianship authorities need to appoint a counselor only if the agency itself has initiated the procedure.<sup>138</sup> Further, the guidelines state that if there is reason to believe that the adult is capable of protecting his or her interests and rights themselves, then the guardianship agency is not obliged to follow the instructions of the court.<sup>139</sup>

The alternative to temporary guardianship is the appointment of a temporary counsellor, who in contrast, must always be a practicing lawyer. Such counsellors are appointed by the court when, again, it is of the view that the adult in question is unable to represent him/herself and specifically that the process leading to the appointment of a temporary guardian would take too long.<sup>140</sup> The role of the counselor is to offer legal representation throughout the guardianship proceedings<sup>141</sup> and, notably, 'to safeguard the interests (emphasis added) of the person concerned' during the proceedings, rather than to represent the wishes of the adult. This distinction is important: the adult may have a very different opinion from the counsellor as to what his 'interests' are.

The legislative presumption of legal capacity from the onset of the guardianship proceedings,<sup>142</sup> is clearly of very limited practical influence: it is too easily overturned.

134 Civil Procedure Act, art. 75-78. See also Family Act, art. 132.

135 Civil Procedure Act, art. 78(2).

136 Family Act, art. 132(2) point 5.

137 *Ibid.*

138 *Guidelines for the Social Care Centers on the Conducting of the Procedures for the Implementation of the Measures for Guardianship Protection*, Ministry for Labour and Social Affairs, 14 December 1994, pp. 15. It should be noted that these guidelines were adopted in accordance with the previous Family Act (1980). As new guidelines which would be in line with the new Family Act were not released until the conclusion of this report, it is MDAC's assessment that cited guidelines are still widely in use, regardless to the fact that their legal status is uncertain (according to the article 362 (2) of the Family Act, all bylaws adopted in accordance with the previous Family Act (1980) ceased to be in force. However, guidelines are not bylaws, but merely instructions of the administrative body, thus there is no legal ground to consider them as out of force).

139 *Ibid.* See also in Nadezda Ljubojev, op. cit. p. 105-106.

140 Civil Procedure Act, art. 79.

141 Non-Contestant Procedure Act, art. 6 in accordance with Civil Procedure Act, art. 79.

142 The incapacitation can be delivered only by the decision of the court. During this procedure, the person still has capacity under the law.

Indeed, given the very allegation of a lack of legal capacity and the fundamental importance of the rights that are at stake during these proceedings, it is equally clear that legislative provisions provide only weak safeguards of these rights. Consequently, it can be safely asserted that there appears to be neither free, nor necessarily effective, legal representation throughout the guardianship proceedings.

**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’.<sup>143</sup> 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’.<sup>144</sup> As the requirements of Article 14(3) of the ICCPR are considered basic guarantees of a fair hearing,<sup>145</sup> 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’.<sup>146</sup> Similarly, the ECHR has been interpreted to include fair trial rights during court procedures concerning legal capacity.<sup>147</sup>

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.<sup>148</sup> 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

143 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.

144 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.

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

146 Principle 7.

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

148 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.

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.<sup>149</sup>

Indicator 5	<i>An adult may not be detained in order to be subjected to an evaluation of his or her legal capacity.</i>
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**Conclusion:** Legislation allows adults to be detained in a psychiatric hospital for up to three months in order to conduct an incapacity assessment.

**Analysis:** A court can order an adult to be detained in a psychiatric institution if the court considers this necessary to determine the adult's mental condition.<sup>150</sup> Such detention can be for any period up to three months.<sup>151</sup> One or several medical experts must provide evidence as to the necessity of the detention.<sup>152</sup> The fundamental problem with this provision is that involuntary detention is itself harmful regardless of one's mental state.

The adult, guardian or temporary counselor may appeal against this court order.<sup>153</sup> The time limit for submission of the appeal is three days from the date on which the court order is delivered to the adult. Unless and until a court decides otherwise, an appeal does not delay the enforcement of the order.<sup>154</sup> The consequence of this provision is that the adult can be immediately transferred to a hospital without waiting for the appeal court's decision.

**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'.<sup>155</sup> 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

149 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).

150 Non-Contestant Procedure Act, art. 38, para. 3.

151 Non-Contestant Procedure Act, art. 38, para 3.

152 The law is vague and unclear as to the number of doctors required to provide expert opinion in such cases.

153 Non-Contestant Procedure Act, art. 39, para. 2.

154 Non-Contestant Procedure Act, art. 39(3).

155 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.



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.<sup>156</sup> In other circumstances, the ECtHR has held that forced psychiatric examinations violate Article 6 (right to fair trial)<sup>157</sup> and Article 8 (right to respect for private and family life)<sup>158</sup> 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.

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:** There is no specific provision on an adult's right to present his/her own evidence. However, as the court decision is delivered on the basis of the 'evidence' presented at the hearing,<sup>159</sup> there is presumably nothing that actually precludes an adult from presenting such evidence. In addition, the court is obliged to hear an adult during legal capacity hearings. It can refuse to conduct such hearings only if it could harm an adult's health or the hearing is simply not possible at all owing to the mental or physical health of the adult.<sup>160</sup> However, the only evidence that has to be taken into consideration by the court under all circumstances is the assessment of medical experts.<sup>161</sup>

**Analysis:** In order to gain an overall picture of any case, a judge should hear from all parties involved and needs to evaluate not only factors relating to an adult's life, mental state, and functional abilities, but also to consider the motivation for filing the application.

The court does however have the discretion and power to question any individual or organisations able to offer relevant information about the life and the behaviour of the adult concerned person. This might include the police, hospitals, relatives, social care homes, employees etc. There remains however specific legislative provision<sup>162</sup> for the

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

157 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.

158 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.

159 Non-Contestant Procedure Act, art. 35.

160 Non-Contestant Procedure Act, art. 36.

161 This is the only evidence that has to be acquired under all circumstances. See Non-Contestant Procedure Act, art. 38.

162 Non-Contestant Procedure Act, art. 37.



court to obtain further relevant information from sources referred to, and listed, as ‘secondary sources’. However the majority of these ‘secondary sources’ ceased to exist following the ending of the communist era.<sup>163</sup>

It is worth re-iterating at this point that as the court’s obligation to hear the applicant may be waived due to the adult’s mental or physical health problems, that adult may be deprived of the right to either examine or respond to the evidence collected by the court from various sources.

**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’.<sup>164</sup> This principle echoes Article 6(1) of the ECHR which guarantees a fair hearing in all cases involving civil rights and obligations.<sup>165</sup> The ability for the parties in the case to challenge evidence with counter evidence and the right to present evidence, including calling witnesses, is an aspect of a fair hearing. This safeguard is listed in Article 14(3) of the ICCPR, interpreted by the UN Human Rights Committee to include the minimum guarantees of a fair hearing.<sup>166</sup>

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:** Prior to a court depriving an adult of legal capacity the adult must be examined by two medical doctors with mental health specialisation. A written report must be presented both to the Court and to the parties concerned.

<sup>163</sup> The majority of the institutions simply do not exist anymore, or if they do, their relevance is minimal: they remain relics of the socialist self-management regime. However, as the Non-Contestant Procedure Act has not been amended since Serbia entered in the transitional period, these terms are still present in Serbian legislation.

<sup>164</sup> Principle 7(1).

<sup>165</sup> For application of Article 6(1) to guardianship proceedings, see *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979.

<sup>166</sup> 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.

**Analysis:** Two doctors should carry out an incapacity assessment of adults in guardianship proceedings. These experts have to be professionals in the mental health field (psychiatrists, neuro-psychiatrists, clinical psychologists etc), and they have to be on the court's list of the experts. The report should detail the adult's mental condition and ability to comprehend.<sup>167</sup> No further specific provisions are made as to the parameters of these assessments or the content of reports.

If an examination it is not carried out in an institution, it should be conducted in the presence of the judge.<sup>168</sup>

Once it receives the report, the court must immediately forward it to the parties. The parties may contest the expert opinions but it is ultimately for the court to decide whether they are adequate and/or whether new opinions should be sought. Curiously, the applicant to the proceedings selects the expert from a court-provided list,<sup>169</sup> although the adult whose capacity is being judged may give its opinion on this proposal.<sup>170</sup> In contrast to these provisions of the Non-Contestant Procedure Act, are those of the Civil Procedure Act. This latter act provides that it is the court itself that selects the experts. Although both parties can ask for a second opinion, the court can exercise its discretion whether to admit such second opinions as evidence.

Obtaining and taking into consideration these two expert opinions is the only legislative obligation of the court. Indeed the court has full discretion whether to seek or hear any or all additional relevant parties, including the adult in question, and witnesses.

**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.<sup>171</sup> 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.<sup>172</sup> 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

167 Non-Contestant Procedure Act, art. 38.

168 Non-Contestant Procedure Act, art. 38(2). Stationary institution is a generic term for hospitals, clinics, institutes and the like.

169 Civil Procedure Act, art. 250. Official Gazette RS, no. 125/04.

170 Courts with internet facilities hold this list on their web-sites. See for example web-site of the Fifth Municipal Court in Belgrade at [http://www.petisud.com/ser/profesionalna\\_pomoc/sudski\\_vestaci.php](http://www.petisud.com/ser/profesionalna_pomoc/sudski_vestaci.php)

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

172 Principle 12.

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.<sup>173</sup>

### 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:** In the case of plenary deprivation of legal capacity, Serbian legislation requires a strong link between a mental disability and the inability of adults to manage their affairs. For partial deprivation of legal capacity the evidence required is less stringent.

**Analysis:** The law requires a causal link between the alleged mental condition and the resulting inability to act. First, there must be a diagnosis of a psycho-social disability (mental health problem) or intellectual disability. Additionally, the resultant mental disability must be shown to prevent the adult from taking care of his or her personal affairs.<sup>174</sup>

For partial deprivation of legal capacity, the law requires only a demonstration that an adult has a psycho-social disability (mental health problem) or intellectual disability and that this jeopardizes the rights and interests of the adult or others. The wording of this text is too vague and so fail to provide a sufficiently high standard required for a legal provision which results in a significant deprivation of human rights.

**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.

<sup>173</sup> *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.

<sup>174</sup> See Family Act, arts. 146-147 and Section 2.4.5 of this report, above.

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

*A finding of incapacity is based upon sufficient evidence and serves the interests of the adult.*

**Conclusion:** Serbian law does not require sufficient evidence before a court can deprive a person of legal capacity.

**Analysis:** Although the law requires a variety of evidence to be produced before adults can be deprived of their legal capacity,<sup>175</sup> the only evidence that the court is obliged to always obtain is two medical reports.<sup>176</sup> Nonetheless, courts do have a discretion to obtain relevant information from additional sources, such as, for example, a temporary guardian, the applicant, and any others who can accurately comment on the adult's living habits, behaviour, and on other relevant circumstances.<sup>177</sup> The applicant of the procedure must submit 'minimal' evidence in advance of the court hearing to convince the judge that the application is reasonably grounded.<sup>178</sup>

A judge may choose not to be present during the adult's medical examination if it is conducted in a health care institution. The reason for this is the prolonged period of time in which this kind of examination is taken.<sup>179</sup> This means that in theory, people who are inside a locked institution and therefore more vulnerable, are provided with fewer safeguards.

<sup>175</sup> Non-Contestant Procedure Act, arts. 35-38.

<sup>176</sup> See Indicator 6.

<sup>177</sup> Non-Contestant Procedure Act, art. 37.

<sup>178</sup> Non-Contestant Procedure Act, art. 33.

<sup>179</sup> Non-Contestant Procedure Act, art. 38. See in Svetislav Vuković, "Komentar Zakona o vanparničnom postupku" (Commentary of the Non-Contestant Procedure Act), Poslovni biro, Belgrade, 2003, p. 45.

A judge must however have some direct contact with, and must hear,<sup>180</sup> an adult except where:

- the adult’s health would be at risk; or
- it is impossible to conduct the hearing owing to the adult’s mental or physical condition.<sup>181</sup>

Although there is no specific legislative guidance as to the standard of proof that should be met for the deprivation of legal capacity, a number of influential commentators have suggested that the decision should be delivered on the grounds of clear and convincing evidence.<sup>182</sup>

Finally, and of particular note, is the failure for provision to be made that any deprivation of legal capacity is to be in the best interests of the adult. It is sufficient to show merely that there is a link between the adult’s mental condition (medical element) and their inability to independently take care of their rights and interests (social element).<sup>183</sup>

**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.<sup>184</sup> ‘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.<sup>185</sup>

As detailed above, the ECtHR has highlighted the necessity of a qualified expert report to determine capacity.<sup>186</sup> 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

180 Non-Contestant Procedure Act, art. 36 and art. 38.

181 Non-Contestant Procedure Act, art. 36, para 2.

182 See in Borivoje Poznić, Vesna Rakić Vodinić, *Gradansko procesno pravo (Civil Procedural Law)*, 15th ed, Savremena administracija, Belgrade, 1999, 232-234.

183 See Indicator 8.

184 Principle 12.

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

186 *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'.<sup>187</sup> 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:** The selection of a guardian is not based on objective criteria. Although the wishes of adults who have been partially deprived of legal capacity by law must be taken into account, there is no similar provision that protects this right of adults who have been fully deprived of legal capacity.

**Analysis:** Recent legislative amendments have provided the right for adults partially deprived of legal capacity and who are able to understand the meaning of their actions, to have the right to propose a specific guardian.<sup>188</sup> Whilst this is a textual breakthrough for those under partial guardianship, it remains to be seen how it will work in practice.

As for those fully deprived of legal capacity (under plenary guardianship), it is not clear whether their wishes have to be taken into account. It would appear that in these situations the legislative approach mirrors that towards children: there must be an assessment of the adult's ability to express an opinion as to who they would like to see as their guardian, as well as their ability to understand what the consequences of such appointment would be.<sup>189</sup>

<sup>187</sup> Principle 8(1).

<sup>188</sup> Family Act, art. 127.

<sup>189</sup> Family Act, art. 127.

A guardian can be any person who has the personal qualities and abilities for conducting the duties of a guardian, and who consents to becoming a guardian.<sup>190</sup> Three restrictions apply however. These are: if the guardian has in the past been deprived of their parental rights; deprived of their legal capacity; or if they have a conflict of interests with the adult.<sup>191</sup> In addition, the guardian must be a person who could be expected to fulfil their obligations, based on their personal qualities, relationship with the adult and the adult's relatives.<sup>192</sup>

The adult's spouse, relative or a foster carer should be appointed as guardian if it is in the best interest of the adult,<sup>193</sup> although there is no obligation on these people to accept the position.<sup>194</sup>

Finally, a guardianship agency can decide not to appoint a guardian, but to carry out the duties of the guardian itself. The 'guardian' then becomes an employee of the guardianship agency.<sup>195</sup> However, any such person must not have any guardianship related administrative power.<sup>196</sup>

The guardianship agency must inform the authorities within its jurisdiction that the guardian has been appointed, such as land registrars and other public offices, so that newly-established guardianship can be recorded.

**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'.<sup>197</sup> 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'.<sup>198</sup> It also suggests that States take steps to ensure that

190 2005 Family Act, art. 126.

191 Family Act, art. 128, p. 3.

192 Family Act, art. 128, p. 4.

193 2005 Family Act, art. 126, para. 2.

194 This is in contrast to the Family Act of 1980 that made it obligatory for certain relatives to accept the appointment to be the guardian, see art. 224(4). These were parents, children and brothers and sisters. They could be relieved of this duty: if they were 60 years old and over; if because of illness, physical disabilities or because of the nature of their job they could not fulfil their obligations as a guardian properly; if they already were serving as a guardian or they were taking care of two or more children other than their own; mothers with a child who is less than 7 years old; if they had 3 or more minor children.

195 Family Act, art. 131(2).

196 Family Act, art. 131(3)

197 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).

198 Principle 8(2).

qualified guardians are available. This might include creating training associations.<sup>199</sup> 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.<sup>200</sup>

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.’<sup>201</sup> 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.<sup>202</sup> Finally, Principle 9 of Recommendation No. R(99)4 provides that respect for the past and present wishes and feelings of the adult should be ascertained and given due respect. This principle applies to all stages of establishing and implementing guardianship, but it is particularly important in choosing the person to be appointed as a representative.

Indicator 11	<i>The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict.</i>
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**Conclusion:** There is a requirement to consider potential conflicts of interest when appointing a guardian. However, the law does not specifically preclude appointments of guardians who have real conflicts of interest or the appearance of such.

**Analysis:** Individuals who have a conflict of interest with the adult are disqualified from being appointed as guardians.<sup>203</sup> However, the law does not elaborate on what is meant by conflict of interest or how a guardianship agency should take potential conflicts of interest into account. Given that it is possible for directors of social care institutions to be appointed as guardians, Serbian law clearly adopts a narrow view of what constitutes a conflict of interest.<sup>204</sup> This gives rise to a classic conflict of interest situation in that the director of an institution has to both run the institution efficiently, and make decisions related to the individual’s care and rights. These two different areas of responsibility may conflict where the director’s job itself depends on

199 Principle 17.

200 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/](http://www.finlex.fi/en/), visited 18 July 2006.

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

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

203 Family Act, art. 128.

204 Family Act, art. 130.



maintaining a large segregated institution, whereas the adult may not wish to live in an institution nor may it be in his/her best interests to do so.

**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’.<sup>205</sup>

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.<sup>206</sup> The Standards of Practice adopted by the National Guardianship Association (NGA), a United States-based membership organisation of guardians and legal professionals, address the issue of conflicts of interest between a guardian and a ‘ward’,<sup>207</sup> 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.<sup>208</sup>

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’.<sup>209</sup> 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.

205 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).

206 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](http://www.legifrance.gouv.fr), visited 2 August 2006.

207 For a definition of ‘ward’, see Glossary, p. 75.

208 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.

209 *Ibid.*

**Conclusion:** Adults have the right to appeal a finding of legal incapacity, but no right to appeal the appointment of a guardian.

**Analysis:** The adult may appeal the deprivation of legal capacity within 15 days from receiving the decision.<sup>210</sup> An appeal can also be submitted by the guardian or temporary counsellor.

Adults deprived of legal capacity do not have procedural capacity.<sup>211</sup> As noted above, courts have a discretion to appoint a temporary counsellor during incapacity procedures, and request a guardianship agency to appoint a temporary guardian. If, and once so appointed that counsellor or guardian may proceed to represent the adult during the subsequent administrative procedure. An adult deprived of legal capacity can still be a party to that administrative procedure,<sup>212</sup> but cannot represent him/herself or instruct their own lawyer.

As a result of the possibility of the guardianship authority being able to appoint a guardian and a temporary counsellor<sup>213</sup> during the administrative procedures, in effect that authority can be the applicant of the procedure and the adult's legal representative at the same time.

An adult is, somewhat absurdly, only able to appeal the appointment of a guardian with that guardian's permission, regardless of whether the adult has the ability to understand and undertake the appeal.<sup>214</sup> The guardian, however, can appeal the appointment of the guardian within 15 days from receiving the decision.<sup>215</sup> The appeal is sent to the Ministry of Labour, Employment and Social Affairs. An appeal can also be submitted by any other person who has a legal interest in the matter, such other persons including relatives, the adult's creditors, debtors, partners, etc. As such appeals have to be submitted within 15 days of receiving the decision, and not all have an automatic right to receive notice of that decision, in practice their involvement in such issues is negligible.

210 Non-Contestant Procedure Act, art. 40(3).

211 Non-Contestant Procedure art. 43, para. 2.

212 General Administrative Procedure Act, art. 43, 44 and 45.

213 If a temporary counsellor is selected, this person may subsequently be appointed as the permanent guardian. Opposite opinion expressed in M. Petković (1998) "Problemi starateljske zaštite" *Socijalna politika i socijalni rad* ("Problems of the Tutelage Protection", *Social Policy and Social Work*), no. 4, p. 64.

214 Family Act, art. 333(5).

215 Family Act, art. 333(5) See also Family Act, art. 336(2).

**Human Rights Standards:** The right to appeal a decision on deprivation of legal capacity is an important aspect of procedural fairness and human rights safeguards, both of which are required by Principle 7 of Recommendation R(99)4. As an individual may no longer have legal capacity (or legal standing) to lodge an appeal after the deprivation of legal capacity, it is crucial for that right to be articulated in guardianship law. Recommendation No. R(99)4 says that every adult placed under guardianship should have adequate rights to appeal.<sup>216</sup> For this proposition, R(99)4 relies on the United Nations Declaration on the Rights of Mentally Retarded Persons. This 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".<sup>217</sup> The Mental Illness Principles, reaffirm this position. Principle 1(6) requires States to provide the right to appeal the decision to a higher court by the person whose legal capacity is at issue, as well as his or her personal representative and other interested individuals.<sup>218</sup> As noted elsewhere, legislation providing for others to appeal the decision can be crucial as the adult under guardianship may not have the functional capacity to realise that there have been procedural or other violations or how to challenge. In more general terms the Disability Convention requires State Parties to 'ensure effective access to justice for persons with disabilities on an equal basis with others'.<sup>219</sup>

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

Legislation compliant with international human rights standards will ensure that an adult placed under guardianship retains rights to make decisions in as many areas as possible, as well as the opportunity to exercise those rights. Indicators 13-17 address the adult's residual rights after being placed under guardianship, including the right to vote, the right to work, the right to property, the right to marry, to found a family, to respect for 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 plenary guardianship lose many political rights including the right to vote. The rights to self-representation and participation in civil proceedings and to initiate criminal proceedings are also restricted.

<sup>216</sup> Principle 14(3).

<sup>217</sup> UN Declaration of the Rights of Mentally Retarded Persons, adopted by General Assembly Resolution 2856 (XXVI) on 20 December 1971.

<sup>218</sup> UN on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by General Assembly Resolution 46/119 on 17 December 1991, Principle 1(6).

<sup>219</sup> Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 13(1).

## Analysis:

### *The Right to Vote*

According to the Constitution of the Republic of Serbia<sup>220</sup> every adult citizen who has ‘working ability’ has the constitutional right to vote and to be elected.<sup>221</sup> However, all election laws restrict the voting right of adults deprived (fully or partially) of legal capacity.<sup>222</sup>

### *Capacity in the Civil Procedure*

A serious limitation on the rights of adults deprived of legal capacity and under plenary guardianship is their consequent lack of legal standing and inability to bring cases, independently of their guardian,<sup>223</sup> to court. If a guardian brings proceedings on an adult’s behalf, and the court finds that he/she performs inadequately, it has a duty to inform the guardianship authority of its findings.<sup>224</sup>

Adults subject to partial guardianship may represent themselves in civil proceedings related to an issue for which they have been formally designated as retaining legal capacity.<sup>225</sup> For other issues such a person may only initiate proceedings through the guardian. Again, if the court finds that the guardian performs inadequately during the proceedings, it must inform the guardianship authority.

In relation to administrative proceedings, adults under either plenary or partial guardianship have no legal standing in administrative proceedings whatsoever.<sup>226</sup>

### *Capacity in Criminal Procedure*

Once deprived of legal capacity adults cannot independently initiate criminal proceedings as a private prosecutor.<sup>227</sup> They must do so through their guardian.

**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

220 Article 33 of the Constitution of Serbia.

221 Please note that this is an official translation of the Constitution which can be found on <http://www.parlament.sr.gov.yu/content/eng/index.asp>. “Working ability” actually means “legal capacity”.

222 The Law on Election of Members of the Parliament (art. 10) prescribes that ‘the right to vote for an MP, or to be elected as an MP can only be exercised by a citizen whose place of residence is in the Republic of Serbia [...] who has reached the age of 18, and who has full legal capacity’. The Act on Elections of the President of the Republic of Serbia (art. 2) as does The Local Self-Government Act (art. 122).

223 Civil Procedure Act, art. 75.

224 Civil Procedure Act, art. 77.

225 Civil Procedure Act, art. 74(2).

226 Civil Procedure Act, art. 43.

227 Criminal Procedure Act, article 55.

rights. Its Article 29(a) requires States Parties to ‘guarantee to persons 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;<sup>228</sup>

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 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’.<sup>229</sup>

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’.<sup>230</sup>

228 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).

229 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.

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

Indicator 14

*By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to work.*

**Conclusion:** Adults under plenary guardianship are prohibited from working. Those subject to partial guardianship may enter into work contracts with approval from both the guardian and the guardianship authority.

**Analysis:** Adults under plenary guardianship are prohibited from entering into employment relationships. Indeed legally incapacitated adults are considered to be in the similar position to children under 14 who are not able to enter into labour contract under any condition.<sup>231</sup>

For those subject to partial guardianship they are treated in the eyes of the law in a similar way to children who are 14 years or older.<sup>232</sup> Such children can only sign contracts of employment with written consent of their parents or a guardian. Consequently, such adults can work only with the consent of their guardian. Guardians in turn require approval of the guardianship agency prior to giving such consent.<sup>233</sup>

**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 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’.<sup>234</sup>

Both the International Covenant on Economic, Social and Cultural Rights and the (Revised) European Social Charter protect the right to work.<sup>235</sup> 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.<sup>236</sup> 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

231 Labour Law, art. 24 Official Gazette RS, No. 24/05, 61/05.

232 Family Act, art. 147(2).

233 See Family Act, art. 137(4.3).

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

235 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.

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

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'.<sup>237</sup> 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'.<sup>238</sup>

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:** Adults fully deprived of legal capacity automatically lose almost all property rights, except for low value transactions. Adults partially deprived of legal capacity retain some property rights, such as the right to dispose of earned income and to participate in certain business transactions.

**Analysis:** Although the role of guardians is to act in the best interest of adults under plenary or partial guardianship, much of the detail of the legislative focus is on limiting the ability of such adults to contract or enter into business relationships, with others. This is evidenced by the terminology used to describe legal capacity, which is in fact referred to as business capacity.

#### *General Transactions*

Adults fully deprived of legal capacity are prohibited from carrying out any transactions, with exceptions listed below.<sup>239</sup>

As noted, the legal capacity of an adult with partial legal capacity is identical to that of children aged 14 and above. As such children have the right to independently dispose of earned property,<sup>240</sup> so to do such adults. In addition however, they can enter into the contracts that have been identified, and formally noted, by the courts as falling within their legal capacity. Approval from a guardian and guardian authority is required prior to disposal<sup>241</sup> of assets and property of significant value, and when carrying out any other affairs of legal nature, for instance and as noted above, to accept a job offer.

<sup>237</sup> Rule 7(2).

<sup>238</sup> 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).

<sup>239</sup> Law of Obligations, art. 56(1).

<sup>240</sup> Family Act, art. 64(3).

<sup>241</sup> Law of obligations, art. 56(3).

In contrast are, what are termed, ‘legal transactions’. These transactions do not place any obligations on adults under guardianship (both plenary and partial). Giving or receiving a gift is an example of such a transaction. Such adults can enter into these so long as they themselves do not acquire any rights or obligations or they acquire exclusive rights.<sup>242</sup>

*Capacity to enter into contracts*

Adults under plenary guardianship cannot enter into contracts.<sup>243</sup> If they attempt to do so, such a contract is deemed invalid and it cannot be validated. However, some commentators have suggested that in practice this does not to apply to low value contracts, such as the purchase of daily items, including for instance food, sweets etc..<sup>244</sup>

Adults under partial guardianship can enter into contracts for which they have been specifically authorised by the courts,<sup>245</sup> without prior approval of their guardian. The court may additionally authorise the adult to enter into other contracts. If an adult with partial legal capacity purports to enter into a contract beyond his legal capacity it is considered voidable. However, it may be validated by the granting of prior, or even post consent, of the guardian.

*Constraints of the acts of guardians in relation to an Adult’s Property*

A guardian may only engage in ‘ordinary business’ transactions regarding the adult’s property.<sup>246</sup> Ordinary business is generally that concerned with the everyday maintenance of ‘property’. Actions falling beyond this standard must have prior approval of the guardianship agency. In any event, a guardian may not dispose of adults’ property if it represents the main element of their assets.<sup>247</sup> ‘Property’ includes real-estate, objects of great value, in addition to an adult’s rights related to sources of income, such as pensions, disability and other social security payments.

*Capacity to Make a Will*

A will can be made by any person who has reached 15 years of age and is capable of comprehension.<sup>248</sup> Consequently an adult without legal capacity cannot make a will. Adults partially deprived of legal capacity have capacity to make a will only if they are authorised to do so by the court.

**Human Rights Standards:** The right to property includes the ability of individuals to manage finances, complete transactions and enter legally binding contracts.

242 Family Act, art. 64.

243 Law of Obligations, *Sl. list SFRJ, br. 29/78, 39/85, 45/89 i 57/89 i “Sl. list SRJ”, br. 31/93*, art. 56.

244 Slobodan Perovic, *Obligaciono pravo* (Law on Obligations), Belgrade, 1990.

245 Law on Obligations, art. 56 (2). The law does not mention what these contracts are, so it should be interpreted as the contracts for which the adult is authorized by the court.

246 Family Act, art. 139(2).

247 Family Act, art. 140(3).

248 Inheritance Act, art. 79.



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.<sup>249</sup>

Recommendation No. R(99)4 expands on this, by recommending that ‘[w]henver possible the adult should be enabled to enter into legally effective transactions of an everyday nature’.<sup>250</sup> 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’.<sup>251</sup>

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 denied the right to marry, to found a family and respect for family life. Adults partially deprived of legal capacity may marry and engage in other family life issues only if a court determines that the adult possesses the necessary capacity to do so.

**Analysis:** An adult not capable of ‘normal comprehension’ may not get married, as this is viewed as a contract.<sup>252</sup> Consequently, those under plenary guardianship, and

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

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

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

252 Family Act, Art. 18.

consequently deprived of legal capacity, may not get married. Similarly, they have no legal standing before divorce courts with the result that consent and representation by the guardian is required for both the initiation of, and representation during, divorce proceedings.

Adults with partial capacity may get married, although the law does not explicitly provide for this right. Courts can grant permission for 16 and 17 year olds to marry, and the same logic is applied to adults partially deprived of legal capacity.<sup>253</sup> Such adults can apply to a court directly<sup>254</sup> for such permission, and in direct contrast to other matters (for instance those related to property) there is no requirement to obtain the guardian's prior consent to seek such permission; the guardian cannot intervene in this issue. In all other cases the adult has no legal standing before divorce courts and consent and representation by the guardian is required should an adult feel the wish to take this course of action. There is an express prohibition against adults marrying their guardian.<sup>255</sup>

Adults under plenary guardianship may not give a legally binding statement acknowledging paternity. However, children aged 16 and 17 and who are able to comprehend can acknowledge paternity, and it follows therefore that adults with partial legal capacity may do so if they meet the comprehension requirement.

**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.

<sup>253</sup> Article 23.

<sup>254</sup> Non-Contestant Procedure Act, art. 80.

<sup>255</sup> Article 22.

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.
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:** Adults under guardianship are deprived of joining organisations and political parties.

**Analysis:** Only people who have the right to vote can establish, or be a member of, a non-governmental organisation or a political party.<sup>256</sup> Adults under plenary guardianship have no right to vote (see Indicator 13) and cannot therefore be a

<sup>256</sup> Association, Political Parties and Non Governmental Organizations Act, Official Gazette SRS, No. 24/82, 39/83, 17/84, 50/84, 45/85, 12/89 and Official Gazette RS, No. 53/93, 67/93 and 48/94.

member of such organisations. The position of those with only partial legal capacity remains unclear in the absence of specific relevant legislative provision.

**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 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 ECtHR has confirmed that ‘an inherent part of the right set forth in Article 11’ is the right to form associations.<sup>257</sup> 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.

<sup>257</sup> *Sidiropoulos v. Greece*, no. 26695/95, judgment 10 July 1998, (1998) EHRR 633.

Indicator 18

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

**Conclusion:** Serbian law recognizes only two forms of ‘permanent’ guardianship:<sup>258</sup> plenary and partial. Under partial guardianship, the court must specify those areas where the adult retains the capacity to decide without the guardian.

**Analysis:** Much material relevant to this indicator has been noted elsewhere. At this juncture therefore, the principle points are simply re-iterated as follows: during the procedure of deprivation of legal capacity the court can fully or partially deprive adults of legal capacity.<sup>259</sup> If an adult is partially deprived of their legal capacity, the court must (or possibly may)<sup>260</sup> identify those areas that the adult is entitled to decide upon independently. These are typically the right to work, to marry under certain conditions, to spend earned money, and enter into specified business transactions.

Clearly once under plenary guardianship, functional capacity is deemed not to exist and consequently such adults are precluded from making relevant decisions.

**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’.<sup>261</sup> 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.

258 As opposed to the temporary guardianship and/or temporary counsellor discussed under Indicator 12.

259 Non-Contestant Procedure Act, art. 40.

260 The Non-Contestant Act Article 40(2). provides that the judge has the option of creating such a list, but it is not mandatory. Under the new Family Act, creating the list is no longer an optional possibility but the obligation of the courts.

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

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.<sup>262</sup>

Indicator 19

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

**Conclusion:** There is no provision in Serbian law that requires the guardian to consult with or adhere to the wishes of the adult under guardianship.

**Analysis:** Serbian law fails to require any consultation between the guardian and the adult on the taking of major or minor decisions and in relation to those decisions relating to adults' healthcare, it fails to refer to the participation of the adults at all. Surgical and other medical interventions may be performed only with prior consent of a patient with full capacity, or in the case of an adult who has been deprived of their legal capacity, the guardian.<sup>263</sup> Unfortunately, the law is silent here on the position of adults under partial guardianship.

**Human Rights Standards:** Law must ensure that adults under guardianship must be consulted on decisions affecting their lives. A legal obligation to consult

<sup>262</sup> 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](http://www.legifrance.gouv.fr), visited 2 August 2006. Another approach to encourage the adult's participation is found in the Uniform Guardianship Act which provides guidance on how to incorporate this principle into legislation. In the section entitled "Guardian's Duties", the model legislation provides:

A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian.

See Uniform Guardianship and Protective Proceedings Act (1997), *supra* note 98, art. 3, para. 313(a).

<sup>263</sup> Health Protection Act, art. 19.

provides both a benchmark to evaluate the guardian's performance and a judicially enforceable standard.<sup>264</sup>

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'.<sup>265</sup> 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'.<sup>266</sup> 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 particular concerning any major decision affecting him or her, so that he or she may express a view'.<sup>267</sup>

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'.<sup>268</sup>

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:** Plenary guardianship automatically removes a number of specifically listed rights but independent decision making power is removed entirely. Partial guardianship allows a court to define those areas where the adult retains decision-making power.

**Analysis:** The administrative decision of appointing a guardian by the guardianship agency must include a list of rights and duties of the guardian<sup>269</sup> and so too must an individualized guardianship plan (see further below), for which provision has recently

264 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/](http://www.finlex.fi/en/), visited 18 July 2006.

265 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).

266 Principle 9(1).

267 Principle 9(3).

268 Principle 2(6).

269 Family Act, art. 135-144, and art. 333(3).

been made, be prepared.<sup>270</sup> Although, as noted below, there is little specific guidance as to the content of such plans, their very preparation provides an opportunity to address the specific needs of each adult.

The court's decision on partial deprivation of legal capacity contains a list of decision-making areas that the adult retains. By specifically identifying these areas, the authority of the guardian is clearly strictly defined and the opportunity for 'tailoring' the guardianship preserved. Nonetheless in practice, this opportunity tends to be wasted.

As noted, a guardian is limited in deciding on the adult's education (including vocational training, and even work) and needs the previous approval of the guardianship agency prior to any final decision being made.<sup>271</sup>

#### *Guardianship Plan*

When the guardianship agency appoints a guardian it must also prepare a 'guardianship plan'. This is a new concept in Serbian law but unfortunately fails to offer guidance as to what such plans should contain. As the guardianship plan must be written simultaneously with the decision about whom to appoint as guardian, it is difficult to imagine that the named guardian has anything but a minor role in drafting the plan. This minor role is more likely when the guardian is neither a close relative nor a friend of the adult.

**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'.<sup>272</sup> 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.<sup>273</sup>

The Disability Convention provides that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to ensure that

<sup>270</sup> Family Act, art. 125(2).

<sup>271</sup> Family Act, art. 137, para. 4, p. 1.

<sup>272</sup> Principle 2(1).

<sup>273</sup> Principle 3(1).



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.’<sup>274</sup>

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’.<sup>275</sup> 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,<sup>276</sup> consent to marriage or adoption, or make or revoke a will, absent specific permission of the court.<sup>277</sup>

Indicator 21

*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.*

**Conclusion:** Serbian legislation refers to the importance of adults under guardianship living independently.

**Analysis:** A principle duty upon guardians is for them to take steps to eliminate the causes leading to a deprivation of capacity, and to maximise opportunities for independent living<sup>278</sup> This approach was seen in early legislation which specifically stated that the purpose of guardianship was to make an adult under guardianship capable of independent living<sup>279</sup> and is followed today.<sup>280</sup> Consequently this duty guides the manner in which all other duties should be fulfilled.

When identifying and appointing a guardian a guardianship agency must also specify where the adult is to live: guardians do not have the authority to independently make such a decision. However, the when deciding upon appropriate accommodation, a guardianship authority can choose a residential social care institution, and as noted above, it can appoint the director of such an institution as the appropriate guardian.

274 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).

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

276 *Ibid*, para. 34.

277 *Ibid*, para. 29.

278 Family Act, art 136(2).

279 See, for instance, Family Act, art. 219 (1980).

280 Family Act, art. 136(2).

**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:

*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’.<sup>281</sup> 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.<sup>282</sup>

Indicator 22

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

**Conclusion:** Serbian law provides that guardians must manage the assets of adults under guardianship, plenary and partial, in their best interests.

**Analysis:** Legislation states that the primary duty of a guardian is to ensure the welfare and benefit of adults and their property.<sup>283</sup> In so doing a guardian is obliged to ensure the resources required and due are received and to make legal representation if they

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

282 Principle 6(2).

283 Family Act, arts. 135-142.

are not forthcoming.<sup>284</sup> For instance, if an adult is eligible to receive social aid, an application for that aid must be made by a guardian.

A guardian can take decisions independently of the authority of the guardianship agency, only in connection with the everyday management of an adult's property. Such 'everyday management' includes decisions in relation to the maintenance and preservation of such property.<sup>285</sup> It excludes however the disposal of the property unless such disposal takes place in a manner that prevents loss, or is made specifically to fulfil an adult's needs and welfare. Maintenance can also include repairs, payment of the necessary costs related to the property (taxes, utilities, etc) as well as leasing parts of the property for short-term tenure (one year at the most).<sup>286</sup> Urgent measures, so long as these are solely taken in order to protect the property, are allowed.

As to the financial support of those under guardianship, plenary or partial, guardians have no obligation to offer support from their own resources. However, they must ensure that adults receive access to any financial and other sources necessary for the maintenance of their daily living needs, and ensure receipt of all resources to which they are entitled.<sup>287</sup> Such support includes private income; assets given by, for instance, close family members who are obliged to provide financial support to the adult;<sup>288</sup> and/or the property of the adult if there is no specific income or individuals who are obliged to provide support.<sup>289</sup>

**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'.<sup>290</sup> 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'.<sup>291</sup> 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

284 Family Act, art. 138.

285 See for instance Obren Stanković, Miodrag Orlić, *Stvarno pravo (Property Law)*, 9th Edition, Nomos, Belgrade, 1996, pp. 151-152.

286 *Ibid.*

287 Family Act, art.138.

288 The circle of these persons is described in Articles 151-159 of the Family Act. These are close relatives of the adult (parents, brothers and sisters, spouse and children (including adopted and step-children).

289 Social Protection Act, *Official Gazette RS*, No. 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96, 29/01, 84/04.

290 Principle 8(3).

291 Principle 20(1).

including acts or expenditures that do not directly benefit the adult. The WHO has also adopted this approach and recommends that '[s]pecifying penalties if guardians fail to perform their duties would strengthen legislation'.<sup>292</sup>

Indicator 23	<i>The guardian is obliged to visit and confer with the adult periodically.</i>
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**Conclusion:** The law states that guardians must visit adults under their care, but is silent on how often these visits must take place.

**Analysis:** Guardians living apart from adults under their guardianship must visit them.<sup>293</sup> This duty includes those living in social care homes or other institutional settings. However, there is no specific legislative provision prescribing exactly how often a guardian should visit, although it is suggested that a correct interpretation of this duty is that visits should be conducted regularly and frequently.

**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.<sup>294</sup> A second important benefit of requiring guardians to visit an individual they represent is so 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'.<sup>295</sup>

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:** Guardians must submit annual reports to the guardianship agency and a final report if and when guardianship is terminated. Guardians are responsible for

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

293 Family Act of 2005, art. 136, para. 3.

294 Principle 9.

295 Section 313(b)(i).

the damages arising as a result of their actions and/or omissions whilst performing their duties, and can be held accountable for damages made intentionally or because of negligence.<sup>296</sup>

**Analysis:** The guardian must report to the guardianship agency and submit an account of their work at the beginning of every calendar year for the previous year, during the year as requested by the guardianship authority, and on termination of guardianship.<sup>297</sup> The annual report should detail measures undertaken in respect of the adult's care, specifically on the conditions of accommodation, health and education and property dealings. As to property, specific information its management, disposals, revenues and expenditures in the previous year should be given, as indeed should full details of the final status of the adult's assets.<sup>298</sup>

The guardianship agency may request a guardian to complete an ad hoc report at any time. This must be submitted within 15 days the request. As to the report on termination of the guardianship, no guidance is given as to its required content.

Although the Serbian guardianship law does not specify criminal liability of the guardian, they are criminally liable in accordance with the criminal law. Guardians can be prosecuted for a number of criminal offences, for instance, for breaches of trust under the Criminal Code.<sup>299</sup>

**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'.<sup>300</sup> 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'.<sup>301</sup> 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.

296 Art. 141 of the Family Act.

297 Art. 142, para. 1 of the Family Act.

298 Family Act, art. 142.

299 Article 216. Official Gazette RS, no. 85/05. See in Marija Draškić, *Porodično pravo (Family Law)*, Colpi, Dosije, Belgrade, 1998, p. 307.

300 Principle 16.

301 Principle 20.

**Conclusion:** The law provides an opportunity for an adult, and others with a legal interest, to submit a complaint to the guardianship agency challenging a decision of a guardian.

**Analysis:** Provision is made for an adult under guardianship to lodge a complaint, but only when having the ability to understand the meaning of such an action.<sup>302</sup> When deciding on the admissibility of such a complaint, the guardianship agency should take into account the circumstances of the particular case, bearing in mind the adult's best interest. Such complaints can, in addition, be lodged by any person with a legal interest. Examples would include relatives, debtors or creditors.

Upon receipt of a complaint, the guardianship agency has 15 days to respond.<sup>303</sup> It has the power to reverse a decision of a guardian, or, if the decision could lead to violation of the rights of the adult, can initiate the procedure for dismissal of that guardian. A complaint may, in addition, be lodged against the actions of the guardianship agency. The adult, the guardian and other interested parties may lodge such a complaint, which must be submitted to the Ministry for Labour, Employment and Social Affairs. The Ministry must provide an answer to that complaint within 30 days from its receipt and can either reverse or uphold the decision about which the complaint has been made.<sup>304</sup>

It is unclear whether the current law allows a guardianship agency to order a guardian to pay compensation for damages arising to an adult as the result of negligence acts or omissions.<sup>305</sup> It can however 'invite' the guardian to make compensation, and if this invitation is refused can take the guardian to court. If this action is taken a 'collision guardian' should be appointed to represent the adult's interests.

The guardianship agency is under a duty to dismiss a guardian without undue delay if it establishes that the guardian has failed to fulfil their duties, regardless of the reason, if they are abusing their power, or if rendered unable to continue as guardian.<sup>306</sup> If negligent, a guardian must be dismissed within 30 days, or if the guardianship agency comes to the conclusion that another person would be a more appropriate appointment.

The guardian can appeal such a decision within 15 days from receiving notification of the this intended course of action. Others with a legal interest may also appeal. The

302 Family Act, art. 335.

303 Family Act, art. 335(2).

304 Family Act art. 338.

305 Family Act, arts. 141 and 335.

306 Family Act, art. 133.

appeal should be submitted to the Ministry of Labour, Employment and Social Affairs, which must arrive at a final decision on the issue within two months.<sup>307</sup> Inexplicably, the adult does not have the right to appeal a decision of the guardianship agency.

Guardians can ask the guardianship agencies to discharge them from their duties. Upon such a request they must be so discharged within 60 days. In such circumstances, the guardianship agency is under a duty to protect the adult's interests until a new guardian is appointed.

**Human Rights Standards:** Deprivation of legal capacity should not preclude an adult from accessing the court, or other body, from seeking an independent review of a decision or course of action of a guardian. The court, or other body, must have the legal right to amend or reverse either. While Recommendation No. R(99)4 states 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. A person under guardianship should have, in addition, the opportunity to obtain an independent review of actual decisions or actions taken by the guardian, a view shared by the WHO. Indeed the WHO has asserted availability of procedures for review of guardians' decisions as one of the recommended ten basic principles of mental health law.<sup>308</sup> The WHO Principles further list components imperative to an effective review procedure: availability, timeliness, accessibility to the individual concerned, and an opportunity for the adult to be heard in person.

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.<sup>309</sup>

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

The last group of indicators (Indicators 26 to 29) examines legal alternatives to guardianship. Owing to its intrusive and personal nature, guardianship should be used only as a last resort. Legal frameworks should recognise the dynamic nature of functional capacity over time, and guardianship should be maintained only as long as, and to the extent necessary, to accomplish the task of protection of vulnerable people. Guardianship arrangements should be reviewed periodically, and modified or terminated as conditions require.

307 General Administrative Procedure Act, art. 237.

308 WHO, Mental Health Care Law: Ten Basic Principles, WHO/MNG/MND/96.9. Available at [http://www.who.int/entity/mental\\_health/media/en/75.pdf](http://www.who.int/entity/mental_health/media/en/75.pdf), visited 2 August 2006.

309 See, eg, Alaska Stat. para. 13.26.125 (Bender 2005).

Indicator 26

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

**Conclusion:** There are no less restrictive alternatives to guardianship.

**Analysis:** Serbian legislation does not specifically recognize any other alternative to guardianship.<sup>310</sup> Guardianship is the only possible measure to protect an adult's rights and interests. Nonetheless, there has recently been provision made for 'advanced directives' to be made in certain areas of health care decision making. It is now possible for every person to decide in advance and appoint someone who will be responsible for making health care decisions on his/her behalf should that person become unable to make their own such decisions.<sup>311</sup>

Prolonged parental care should be mentioned here, although technically it is not a 'less restrictive alternative' for guardianship as it only concerns young people. Prolonged parental care is in essence a guardianship carried out by the parents of a child who lacks functional capacity. The principle aim of such care is to ensure protection of their rights and interests. A court has jurisdiction to decide on prolonging parental rights,<sup>312</sup> a procedure which should be initiated before the child reaches 18. The legal consequences of prolonged parental care are much the same as of the guardianship, but there are a few differences. Firstly, it is still a relationship between a child and parent(s). Secondly, the remit of parental authority is much broader than a guardian's. The parents do not need the permission of the guardianship agency to decide on the majority of issues related to their child.<sup>313</sup>

**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'.<sup>314</sup> 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

310 Examples of less restrictive measures include the supported decision making model, where the adult makes all necessary decisions with assistance identifying and weighing the alternatives, or voluntary arrangements such as power of attorney.

311 Health Protection Act, art. 32(4).

312 This procedure is regulated by Articles 72-74 of the Non-Contestant Procedure Act.

313 Only a few exceptions exist and are related to property of greater value or real-estate belonging to the child See Family Act, Art. 193(3) and (4).

314 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).



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’.<sup>315</sup> Further, if the first criterion is not met, the court may mandate attempts to involve a support network as an alternative to appointing a substitute decision maker.<sup>316</sup> 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.<sup>317</sup>

Indicator 27

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

**Conclusion:** Given the nature of plenary guardianship, there is no opportunity to tailor this to an adult’s needs. The needs of adults under partial guardianship can be tailored by the court.

**Analysis:** Serbian law does not recognize guardianship without deprivation of legal capacity. For those under plenary guardianship, there is no possibility for the court or the guardianship agency to tailor the guardianship to the individual’s particular needs and capacity. However, this option does exist for individuals under partial guardianship. In such circumstances the courts must formally decide which actions can be undertaken by adults.<sup>318</sup>

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

316 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 absent 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).

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

318 Family Act, art. 147(3).

With respect to those with partial capacity, a guardianship agency is, as noted previously, obliged to list in its decision on appointment of the guardian the guardian's duties and responsibilities,<sup>319</sup> in addition to which it must provide a guardianship plan. In cases of partial guardianship, these rights and responsibilities of the guardian have to be in conjunction with the court's decision and list of businesses that can be conducted independently by the adult. This gives a high level of flexibility in tailoring the measures to the adult's specific circumstances and needs. Furthermore, it meets the requirement according to which the legislative framework should, as far as possible, recognize that different degrees of incapacity that may exist and that incapacity may vary from time to time. However, it seems that lack of some sort of the less formal approach in modifying guardianship in time (for example by introducing the possibility for guardianship agency to make adjustments of the businesses that can be conducted independently by the adults) lowers flexibility of the guardianship.<sup>320</sup>

Indicator 28

*Guardianship is periodically reviewed and continues only as long as appropriate.*

**Conclusion:** Guardianships are not time limited. There are no automatic reviews of the necessity of guardianship.

**Analysis:** Recent legislative changes mean that the court now lists those acts that can be independently undertaken by the adult, lists that are now more difficult to alter. Such lists were previously the responsibility of the guardianship agency. Courts do however have the authority to change plenary into partial guardianship (or the other way round) if there are changes in the adult's mental health. Although there is no legislative guidance, it is generally assumed that if the guardian, or guardianship authority, believes that there are reasons to modify the guardianship, they should submit an application to the court. The adult may initiate this procedure too, in the same manner as an application for termination of guardianship.

As for termination of guardianship, the law provides that guardianship is terminated only when the criteria for deprivation of legal capacity are no longer met.<sup>321</sup>

In direct contrast to earlier legislation, there is now no obligation upon guardianship agencies to initiate the procedure for restoring the capacity of the adult even when in receipt of information suggesting this to be appropriate. Legislative provisions simply state that the guardianship agency shall deliver the decision on termination of guardianship when the legal requirements are met.<sup>322</sup>

319 Family Act, art. 333(3).

320 This possibility existed in the 1980 Family Act. See art. 277(2).

321 Family Act, art. 145, para 1, p. 5.

322 Family Act, art. 337.

**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.’<sup>323</sup>

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.<sup>324</sup> 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’.<sup>325</sup>

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:** There is legislative provision specifically authorising an adult under guardianship, plenary or partial, to request review of the guardianship if he or she can understand the consequences of their acts. It is not clear, however, whether an adult can represent him or herself during the procedure.

**Analysis:** The Non-Contestant Procedure Act<sup>326</sup> specifically states that the procedure for restoration of legal capacity can be initiated by the same persons that are authorized to commence the procedure for deprivation of legal capacity. As mentioned above, the adult himself belongs to the circle of these people if he or she can understand the consequences of their conduct. It is not clear, however, how the court establishes whether an adult who has been deprived of their legal capacity has or has not functional capacity to initiate the procedure for restoration of legal capacity. In addition, it is unclear whether an adult can represent himself during the procedure, or this should be done by his guardian, or by a collision guardian if the guardian opposes the restoration of the adult’s legal capacity.

The adult has the right to appeal a court decision failing to restore legal capacity<sup>327</sup> as can a guardian or temporary counsellor although only if they initiated the application

323 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).

324 Recommendation R(99)4, Principle 14.

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

326 Article 42.

327 Article 43.

themselves.<sup>328</sup> The appeal should be submitted within 15 days from the date of delivery of the decision.

**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.<sup>329</sup> 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.<sup>330</sup> 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.

328 See Decision of the Supreme Court of Serbia, Rev. 1734/93.

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

330 *Matter v. Slovakia*, op cit.

## Glossary of Terminology

**Adult:** An adult is a person who has reached the legal age of majority. In Russian 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.’

## 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 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 with 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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MDAC work is funded by Doughty Street Chambers, the European Commission, the Open Society Institute – Budapest, the Sigrid Rausing Trust, and individual donors

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