



Guardianship and Human Rights in Bulgaria

Analysis of Law, Policy
and Practice



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



MDAC advances human rights.

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

Mental Disability Advocacy Center

Guardianship and Human Rights in Bulgaria

Analysis of Law, Policy and Practice
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EXECUTIVE SUMMARY

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

Much remains to be done in the area of guardianship regulation to bring such law in line with current human rights standards. It is these standards, and the compliance of Bulgaria with them, in legislation and in practice that form the focus of this report. The legal and moral imperatives on Bulgaria to amend its guardianship laws are demonstrated in this report, a report that is particularly timely in view of the recent adoption of the UN Convention on the Rights of Persons with Disabilities.¹ This Convention calls for a paradigm shift to more humane models where support and assistance are provided, but in which legal rights remain intact.

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

The outcome of this examination indicates that although the Bulgarian Constitution specifically provides for respect for the human rights of people with disabilities, these principles are rarely mentioned with respect to people with psycho-social (mental health) or intellectual disabilities and little understood by professionals involved in the guardianship process. Further, a series of legislative weaknesses have resulted in a number of deficiencies throughout the law. These weaknesses are reflected in the practice of the process itself. Indeed, the main findings of the report reveal that Bulgaria 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:

- Approximately 85% of people who live under guardianship are under ‘plenary’ (all encompassing) guardianship and are deprived of legal capacity entirely. These people are subject to significant, arbitrary and automatic deprivations of their

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.

human rights. These include a deprivation of their right to property, to work, to family life, to marry, to vote, to associate freely, and to access courts. Even if not specifically deprived of certain rights, a lack of procedural capacity ensures their inability to enforce them.

- Guardianship is Bulgaria's only legal response to people who require assistance to make decisions. There are no alternatives available, such as supported and assisted decision making (where someone provides help in a structured way), advance directives (where an adult specifies his or her wishes in the event of future functional incapacity) or powers of attorney (where an adult specifies a person to take decisions in the event of future functional incapacity).
- The guardianship law is too vague and lacks clarity: regulation by numerous laws has led to frequent inconsistency and uncertainty.
- Adults subject to the guardianship process are provided with insufficient access to adequate advice and representation to assist them through it.
- Professionals involved in the guardianship process have little understanding of its human rights implications.
- There are no alternatives to guardianship (for example, advance directives, supported decision-making) for people with disabilities who need support in making certain decisions.

In addition to the constraints imposed upon MDAC's research, in many if not most cases no commitment of professionals involved in the guardianship process to the assistance of those subject to the guardianship process was observed. MDAC urges the Bulgarian government to commit itself fully to the reform of all of its laws that have an impact upon guardianship.

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

RECOMMENDATIONS

Overall, this report suggests that Bulgarian guardianship laws and practices fail to meet basic international standards. The clear implication is that the lives of many thousands of people in Bulgaria could be significantly improved. This will only happen if the government commits to change the legislative landscape. With this in mind, MDAC makes below a number of recommendations to the Bulgarian 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. The four principle recommendations are:

1. Provide alternatives to guardianship: The Bulgarian government should require the use of least restrictive alternatives which promote the independence of, and also protect the adult by:
 - ⇒ Creating supported decision-making services. Such services should be based on the following basic principles:
 - The adult retains full legal capacity whilst receiving services from a support person/network.
 - A support person/network should not be appointed without the adult's consent.
 - There must be a relation of trust between the adult and the supporting person/network. A court should therefore not create such relationship, only recognise its existence.
 - The support person/network should not act on behalf of the adult. This role is limited to merely providing the adult with support and assistance in making and communicating decisions.
 - There must be safeguards in place to protect the adult against abuse and exploitation.
 - ⇒ Providing the right to create legally-binding advance directives (in which an adult specifies his or her wishes in case of future functional incapacity) and powers of attorney (where an adult specifies a person to take decisions in case of future functional incapacity) (Indicator 26).
 - ⇒ Requiring that guardianship is used only as a last resort (Indicator 26).
2. Maximise autonomy. Ensure that adults retain the right to make decisions in all areas of life in which they have functional capacity. Specifically:
 - ⇒ Abolish the automatic deprivation of the fundamental rights of adults under guardianship to

- Property.
 - Work.
 - Family life.
 - Marry.
 - Vote.
 - Associate.
 - Access courts.
 - Make a will (Indicators 13, 15-17).
 - ⇒ Require guardians to seek the least restrictive living arrangements for adults (Indicator 21).
 - ⇒ Ensure that legislation defines the scope of the guardian's obligations in light of the adult's capacity (Indicator 20).
 - ⇒ Ensure that legislation specifies that a finding of incapacity is based on a demonstrable link between diagnosis and functional capacity (Indicator 8).
 - ⇒ Establish regular reviews of guardianship. (Indicator 28).
3. 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 that the adult is properly notified and has 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. Also, clearly identifying when the adult's presence is not necessary (as an exception) at guardianship court hearings (Indicator 3).
 - ⇒ Ensure provision for the adult of free legal representation paid for by the State at court hearings, including appeals. (Indicator 4).
 - ⇒ Ensure that the adult's wishes are considered and given due weight when appointing a guardian (Indicator 10).
 - ⇒ Ensure that an adult has the right and opportunity to challenge the appointed guardian (Indicator 12).
 - ⇒ Ensure adults are actually consulted about decisions affecting their life (Indicator 19).
 - ⇒ Require guardians periodically to visit and speak with the adults for whom they are responsible (Indicator 23).
 - ⇒ Establish an effective complaints mechanism for adults under guardianship, including access to judicial remedies (Indicator 25).
 - ⇒ Establish a procedure for periodic review of guardians' actions by an objective body that would be required to take into account information received from the adult, and which would hold the guardian accountable for all decisions (Indicator 24).

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

- ⇒ Establish objective criteria for conducting incapacity assessments and clear grounds for a judicial determination of legal incapacity. This must include a provision that ensures that decisions are made on the basis of current medical and psychological reports. (Indicators 7 and 8).
- ⇒ Ensure that legislation specifies the type and quality of evidence needed for a judicial finding of deprivation of legal capacity. (Indicator 9).
- ⇒ Establish criteria for selecting the guardian that clearly preclude people with conflicts of interest (such as directors of social care institutions) from serving as guardians. (Indicators 10 and 11).
- ⇒ Ensure that legislation mandates compulsory and meaningful reviews of guardianship, at which the adult is fully involved and adequately legally represented. (Indicator 27).
- ⇒ Identify those areas where guardians have authority to act, as well as those where they have no such authority.

MDAC believes that implementation of these recommendations, coupled with training of professionals working in the guardianship field, will produce significant improvement in the quality of the Bulgarian guardianship system. The recommendations would bring legislation into line with international law and standards by strengthening the protection of the human rights and interests of the adults under guardianship. MDAC looks forward to engaging and cooperating with the Bulgarian 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 capacity to make personal decisions and the person appointed to make decisions on that adult’s behalf.² The legal mechanism of guardianship exists in some form in almost every jurisdiction in the world. It is widely accepted as a means of protecting individuals who are deemed incapable of managing their personal affairs as a result of a mental health problem (psycho-social disability), intellectual disability, degenerative disease or profound physical or sensory disability.

Guardianship is usually established through court proceedings, or a combination of court and administrative processes, during which adults are found to either partially or completely lack capacity to make decisions on their own behalf. The outcome of such findings could be that an adult is ‘legally incapacitated’.³ The court (or an administrative authority) then appoints a guardian to act on that adult’s behalf. The guardian’s specific authority is defined either by law or by court order. Generally, guardians have both decision-making authority over the adult and an obligation to protect the adult’s welfare. The effectiveness of guardianship as an institution heavily depends on certain personal qualities of each guardian, such as their competence, diligence and conscientiousness.

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

² 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.

³ Throughout this report, MDAC uses the term ‘legal capacity’, as defined in the Glossary on p. 114. Different jurisdictions use different terminology to define the legal inability to act on one’s own behalf, such as, for instance, ‘incapable’ or ‘incompetent’. Some laws provide for a finding of partial or limited legal capacity.

As the global disability rights movement gains momentum, the guardianship model as a means of providing protection and assistance to people with mental disabilities is coming under increased criticism. The principle criticism is its failure to provide adequate due process protections in establishing and administering guardianship and ensuring the right of self-determination.⁴ In a small number of jurisdictions, such as jurisdictions in Canada and the UK, guardianship laws have been reformed, and alternative means of providing protection and assistance have emerged. Possibly the most notable of these is supported or assisted decision-making.⁵ As a result, legislators and courts in these jurisdictions see the guardianship model as a last resort that is to be used only after all other less restrictive measures of support and protection have been exhausted.

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

Equal recognition before the law

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

⁴ 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.

⁵ See the Glossary at p. 114 for a definition of supported decision-making.

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

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

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, including the UN Disability Convention. To highlight guardianship as an area in need of urgent reform, MDAC initiated its guardianship project to identify the strengths and weaknesses of existing legislative regimes. The project has two stages. The first is an examination of specific legislative regimes that impact on guardianship. As legislation and reality frequently diverge, the second stage examines this reality, by reviewing the implementation, or otherwise, of this legislation and how it effects individuals facing guardianship proceedings and life thereafter.

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

The specific aim of stage one research is to examine the degree of compliance of national guardianship legislation in these countries with international human rights law, standards and best practices, in order to highlight any areas in need of reform. As with many research projects that serve as the first exploration of uncharted territory, the resultant reports may raise more questions than they answer. This is particularly true as the guardianship project is not a statistical survey, but, rather, a legal analysis.

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 and Aleksandra Korec (Croatia), Zuzana Benešová and David

Kosar (Czech Republic), Nina Dadalauri (Georgia), Dániel Kaderják (Hungary, a senior law student who also served as project assistant), Meder Dastanbekov (Kyrgyzstan), Anna Smorgunova (Russia), and Vidan Hadži-Vidanović (Serbia).

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

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

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

Research in Bulgaria was carried out by Slavka Kukova, who wrote the first draft. Georg Høyer commented on later stages, and István Fenyvesi and Oliver Lewis produced the final report.

1.4 Method

1.4.1 Stage One: Legislative Review

Stage one of the research, the results for Bulgaria of which are found in section 2, page 15 of this report, is a *de jure* study of the legislative texts, rather than how they are applied. The study examines the types of guardianship arrangements available under national laws as well as any other relevant national legislation by:

- Studying the legal procedures for obtaining, modifying and terminating guardianship and the rights of the parties to such procedures.
- Documenting the rights of the person alleged to lack capacity throughout the guardianship process.

- Assessing which rights are taken away after an adult is deprived or restricted of legal capacity.
- Analysing the power and authority of guardians, their accountability and how they are monitored, as well as the processes, for bringing complaints against them.

1.4.2 Stage two: Collection of Data from the Field

Stage Two, the results for Bulgaria of which are found in section 3 of this report, focuses on a *de facto*⁶ examination of guardianship practices by observing court hearings, reviewing court files and, to the extent applicable and possible, observing guardianship agency proceedings and reviewing guardianship agency files. This manner of data collection gives an opportunity to capture a snap-shot of guardianship practices.

Ethical concerns are raised when conducting research that includes interviews of participants, some of whom have psycho-social (mental health) disabilities or intellectual disabilities. These concerns are 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 has carefully considered the ethical issues that are raised by this aspect of research and has adopted guidance to protect the participants and the data they provide (See Annex C on page 119 of this report). Each researcher created a numerical system of maintaining information and stored the key and raw data in different locations. The guidance sets out standards for informing research participants 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.⁷ These indicators are based in large part on 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,⁸ as well as from a review of guardianship legislation in jurisdictions in Europe, the United States and Canada. MDAC has formulated its indicators bearing in mind that, with the exception of Kyrgyzstan, all

⁶ 'Actual; existing in fact; having effect even though not formally or legally recognized.' Black's Law Dictionary (West 8th ed. 2004).

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

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

countries under review have ratified the European Convention on Human Rights and, as Member States of the Council of Europe, there is an expectation that they will comply with its ‘soft law’,⁹ such as Recommendation No. R(99)4.

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

The indicators are not exhaustive, but do highlight critical issues faced by adults in guardianship systems. Omission of a particular point or issue from an indicator does 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, and hopes that the indicator system will generate research in other countries.

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

2. GUARDIANSHIP LAW AND POLICY IN BULGARIA

2.1 Introduction

The Republic of Bulgaria, is a country in southeastern Europe. It borders the Black Sea to the east, Greece and Turkey to the south, Serbia and the Republic of Macedonia to the west, and Romania to the north along the river Danube. Bulgaria was under communist rule from 1944, when it was invaded by the Soviet Union. Although the Soviets withdrew in 1947, a communist government was left in the wake of their departure. Communists ruled in Bulgaria until 1989, when its long-term Prime Minister, Todor Zhivkov, was removed as head of the Communist Party. In 1990, as a wave of democratisation spread across Eastern Europe, Bulgaria was also affected, and the first post-communist coalition government came into power. Since then, Bulgarian democracy has persevered, though at times on shaky ground. Legal reforms occurred throughout the 1990s, and in 2004 Bulgaria joined the North Atlantic Treaty Organization (NATO). Since ratification of the accession treaty to the European Union in May 2005, Bulgaria is poised to join the EU in 2007.¹⁰

2.2 Demographic and Social Landscape of Bulgaria

As of December 2003, there were an estimated 7,801,273 people living in Bulgaria, comprised of 3,790,840 men and 4,010,433 women.¹¹ According to data provided by the National Centre for Health Information (NCHI) under the Ministry of Health Care, at the end of 2004 there were just over 46,000 individuals in Bulgaria deemed to have intellectual disabilities. Of that number, the intellectual disabilities of 28,365 were categorized as mild, 12,952 as moderate, and 4,695 as profound or severe. For some, the level of cognitive impairment was unspecified.¹² According to the NCHI's data for the same date, the number of people registered as 'mentally ill' was 178,447.

According to data collected by the non-governmental organisation Bulgarian Helsinki Committee (BHC) in June 2004, there were approximately 4,500 adults living in 52 state-run social care homes.¹³ Social care homes are government institutions for adults

¹⁰ http://ec.europa.eu/comm/enlargement/bulgaria/eu_relations.htm (accessed June 13, 2006).

¹¹ Data published by the National Centre for Health Information. See <http://www.nchi.government.bg/>.

¹² Interview with Krassimira Dikova, Officer of the Medical Statistical Data Collection Department at the National Centre for Health Information, Sofia, 13 December 2005.

¹³ The Bulgarian Helsinki Committee (BHC) conducted a three-year monitoring study of social care homes for adults with mental disabilities. The data cited is a result of that study, which was conducted between 2001 and 2004, and published in *Archipelago of the Forgotten – Social Care Homes for People with Mental Disabilities in Bulgaria*, Sofia, August 2004.

with mental and/or intellectual disabilities.¹⁴ Although no official statistics exist, the BHC estimates that, at the time of their visits, approximately 85% of residents in homes for people with intellectual disabilities, 73% of the residents in the homes for people with mental illness and approximately 44% of the residents in the homes for people with dementia were under legal guardianship.¹⁵ In total, according to the BHC's data, approximately 3,300 – over 70% of institutionalized adults – have been placed under guardianship. Of those under guardianship, approximately 85% were placed under 'plenary' guardianship and deprived of legal capacity entirely.¹⁶ These terms are described further in the glossary.¹⁷

2.3 Bulgaria's Legal System

Bulgaria is a parliamentary republic with an elected president and 15 ministers. The Parliament is a unicameral legislative body consisting of 240 members. Parliament is responsible for enacting laws and ratifying international treaties. Bulgaria's judicial system is independent, although the degree of independence has been brought into question by numerous reports.¹⁸ The Supreme Court of Administration and the Supreme Court of Cassation oversee application of laws by the lower courts and determine the legality of governmental acts. The Constitutional Court interprets the Constitution and rules upon the constitutionality of Bulgarian laws.

The supreme law in the country is the Constitution, which has direct effect. The Constitution provides that 'any international instruments which have been ratified by the constitutionally established procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise.'¹⁹

Bulgaria is party to all major international human rights conventions. Bulgaria has ratified the International Covenant on Civil and Political Rights (ICCPR),²⁰ the

¹⁴ Of the 52 social care homes in Bulgaria, 26 are designated as homes for adults with intellectual disability, 13 are designated for people with mental illnesses and 13 are for sufferers of dementia.

¹⁵ BHC, *'Archipelago of the Forgotten – Social Care Homes for People with Mental Disabilities in Bulgaria,'* Sofia, August 2004, p. 136.

¹⁶ BHC, *'Archipelago of the Forgotten – Social Care Homes for People with Mental Disabilities in Bulgaria,'* Sofia, August 2004, p. 21.

¹⁷ See Annex A.

¹⁸ See, Daniel Smilov, *'EU Enlargement and Judicial Independence in Bulgaria,'* November 2003. Available at: http://www.iue.it/LAW/Events/WSWorkshopNov2003/Smilov_paper.pdf and EUMAP, *'Judicial Independence in Bulgaria,'* Open Society Institute 2001. Available at: http://www.eumap.org/topics/judicial/reports/judicial01/sections/bulgaria/judicial_bulgaria.pdf.

¹⁹ Constitution of the Republic of Bulgaria, prom. SG 56, 13 July 1991, amend. SG 85, 26 September 2003, amend., SG. 18/25 Feb 2005, ch. I, art. 5(4) (BULG. CONST.).

²⁰ Ratified on 23 March 1976.

International Covenant on Economic, Social and Cultural Rights (ICESCR),²¹ the Convention on Elimination of All Forms of Discrimination against Women (CEDAW),²² the Convention on the Rights of the Child (CRC),²³ the European Convention on Human Rights (ECHR),²⁴ the Revised European Social Charter,²⁵ and the International Labour Organization Convention 111 Concerning Discrimination in Respect of Employment and Occupation (ILO 111).²⁶ Bulgaria has yet to sign Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which guarantees a free-standing right to non-discrimination.

2.4 Guardianship Law in Bulgaria

The substantive guardianship law is set out in the Law for Individuals and Family, and Chapter 10 (Full Legal Guardianship and Trusteeship) of the Family Code. Procedural issues are regulated by the Civil Procedure Code. The scarcity of legal provisions regarding guardianship is to some extent compensated by Supreme Court case law. The legal frameworks for incapacitation and guardianship remain unchanged since the early 1980s, reflecting the dominant attitudes at that time towards people with mental health problems or intellectual disabilities in Bulgarian society.

In summary, Bulgarian law employs a two-stage process. The first stage is the incapacity process through which an individual may be deprived of his/her legal capacity either partially or fully. This is done through a court procedure by which a person's legal capacity to exercise rights and accept legal responsibilities is limited or removed. The second is the point at which a guardian is appointed for a person who has been either partially or fully deprived of legal capacity. Courts do not appoint the guardian rather the guardianship authority, an office consisting of local governmental authorities, make the appointment. Once appointed, a guardian exercises the person's rights and accepts legal responsibilities on behalf of the person under guardianship.

The Law for Individuals and Family provides for two categories of legal incapacity: (a) plenary guardianship, which means that the adult's legal capacity is entirely removed and the person is left with no legal powers; and (b) partial guardianship, which means that the adult's legal capacity is limited rather than removed. Partial guardianship

²¹ Ratified on 3 January 1976.

²² Ratified on 10 March 1982.

²³ Ratified on 3 July 1991.

²⁴ Ratified on 7 September 1992.

²⁵ Revised on 7 June 2000 (entered into force on 1 August 2000).

²⁶ Ratified on 22 July 1960.

allows participation in legal actions only with the consent of the guardian.²⁷ It should be noted that under Bulgarian law, a person with limited capacity is placed under the care of a ‘trustee,’ as opposed to a ‘guardian.’²⁸

Diagnosis is equated with legal incapacity in the Law for Individuals and Family by its stipulation that adults who, due to their intellectual disability or mental disability²⁹ cannot take care of their affairs shall be found to be disabled by the court and shall be placed under plenary guardianship.³⁰ The law provides that people with less severe mental disabilities may be placed under partial guardianship.³¹ Adults under partial guardianship are deemed to have similar legal rights and responsibilities as children aged 14 to 18, while adults under plenary guardianship are equated with children under the age of 14.³² Equating adults under guardianship to children is further emphasised in the Family Code, which regulates adult guardianship in the same provisions as applied to children without parental supervision. Thus, the Family Code contains no special obligations or recognition that acting as a guardian to an adult might have different requirements than acting as a guardian for a child.³³

2.5 Bulgaria’s Two-Step Guardianship/Incapacity Process

As mentioned above, there are two separate steps in Bulgaria for depriving an adult of his/her legal capacity and appointing a guardian. The first step, which is conducted by a court and regulated by the Civil Procedure Code, is the incapacitation procedure initiated when a person is presumed to lack the capacity to take care of his or her own affairs. The second step involves appointment of a guardian and is an administrative procedure conducted by the local guardianship authority.

No special legal rules govern the incapacitation part of the process, but the Civil Procedure Code is applicable. The Code provides for oral court hearings in public unless the law provides otherwise.³⁴ If the circumstances of the case refer to the private life of the parties or may be harmful to the public, then the court may, on its own motion or upon the motion of a party, rule that all or part of the court hearing be conducted in

²⁷ Law for Individuals and Family, art. 3-5, adopted SG 182, 9 August 1949.

²⁸ Under Bulgarian law, a person with limited capacity is placed under the care of a ‘trustee’ as opposed to a ‘guardian’: see Family Code, art. 109, para (1) and (2). This report uses ‘guardianship’ and ‘trusteeship’ interchangeably.

²⁹ It should be noted that precise translation of the terminology used in the law would be due to ‘weak mind’ or ‘disease of the soul.’ Law for Individuals and Family, Art. 5 (amend. SG 89, 6 November 1953).

³⁰ Law for Individuals and Family, art. 5 (amend., SG 89, 6 November 1953).

³¹ Law for Individuals and Family, art. 5(2).

³² Law for Individuals and Family, art. 5.

³³ Family Code, Chapter 10, art. 117, adopted SG 41/28 May 1985.

³⁴ Civil Procedure Code, art. 105, para.1, which provides that hearing of cases will be conducted orally at an open session, unless the law provides for a closed session.

private.³⁵ The law is silent on procedures to be followed by the guardianship authority during the second stage of the guardianship process.

2.5.1 Incapacitation Procedure

The outcome of the incapacitation procedure is a determination of whether the adult has the legal capacity to exercise his or her rights. The legal grounds for the procedure are the mental disability or the intellectual disability that causes an inability to take care of the adult's interests and actions.³⁶ The Supreme Court of Cassation has ruled that the primary aim of depriving an adult of legal capacity is the legal protection of the adult, while protection of the public interest from the acts or omissions of an adult is the secondary aim.³⁷ Analysis of the policy inherent in the law seems to focus mainly on protection of the assets of the person concerned for the benefit of his/her heirs since there are more provisions, with more detail, relating to the property aspects of guardianship, as opposed to the personal protection and care of the person under guardianship.

There is no public body in Bulgaria mandated to investigate allegations of abuse or neglect of people with mental disabilities. However, public officials, public organisations and citizens who are of the opinion that a person may be in need of guardianship are legally obliged to inform the municipality in which the person resides.³⁸ The mayor of each municipality either personally acts as the guardianship authority him or herself, or appoints an official to be the guardianship authority for the municipality.³⁹ The capacity proceeding is initiated when someone, who is properly qualified by law, files an application to declare a person incapable. When court proceedings are initiated, the adult is presumed to possess capacity. Bulgarian law provides for no special protections. The adult is given the same procedural rights as other litigants in civil matters. These rights are examined in more detail below. Among the procedural rights are the rights to be notified of the request for deprivation of legal capacity,⁴⁰ to be present at court

³⁵ Civil Procedure Code, art. 105, para. 3: 'If, due to the circumstances of the case, a public hearing may prove to be harmful to the public interest or if these circumstances refer to the intimate life of the parties, the court shall, ex officio or at the request of any of the parties, rule that the hearing of the case or the performance of only some of the actions under it shall be done behind closed doors. In such case admitted in the court room shall be the parties, their attorneys, the experts and witnesses, as well those whom the chairman allows.'

³⁶ Supreme Court of Cassation, Decision N456/16.02.1976 (Case No. 2727/75).

³⁷ Supreme Court of Cassation, Decision N2188/30.07.1979.

³⁸ Family Code, art. 109, para 3.

³⁹ Family Code, art. 110.

⁴⁰ Civil Procedure Code, art.46, para. 1 'The summon shall be served against the personal signature of the summoned person or its attorney in the case. When the person is legally incapable, the summon shall be served on its legal representative or custodian or on its attorney in the case.'

hearings,⁴¹ to have a private hearing,⁴² to be represented by an attorney,⁴³ to present evidence and to call witnesses,⁴⁴ to examine and challenge evidence presented by the other party,⁴⁵ and to appeal the court decision.⁴⁶

The prosecutor must take part in court hearings, even in cases where the prosecutor is not the applicant.⁴⁷ The role of the prosecutor in these cases is to provide his or her

⁴¹ Civil Procedure Code, art. 275, para.3 ‘The person to be placed under guardianship should be interrogated in person and, if needed, shall be brought by compulsion. In case the person is in a hospital establishment and his health condition does not permit to be brought in person at the court hearing, the court shall be obliged to get an immediate impression of his condition.’, art.16, para.1: ‘Legally capable persons may participate in all court procedures personally’.

⁴² Civil Procedure Code, art.105, para.3 ‘If, due to the circumstances of the case, its public hearing may prove to be harmful to the public interest or if these circumstances refer to the intimate life of the parties, the court shall, ex officio or at the request of any of the parties, rule that the hearing of the case or the performance of only some of the actions under it shall be done behind closed doors. In such case admitted in the court room shall be the parties, their attorneys, the experts and witnesses, as well as the persons for whom the chairman allows that.’

⁴³ Civil Procedure Code, art.20, para.1 ‘The following may be representatives of the parties by proxy: a) the attorneys at law; b) the parents, children or the spouse; c) the legal advisers or other employees with legal education at the institutions, enterprises, co-operations and other public organisations and corporate bodies....’

⁴⁴ Civil Procedure Code, art. 109 The provision reads:

1) At this hearing each party shall be obliged to make and ground all of its demands and objections and give a statement on the circumstances adduced by the other party. Further on the court shall invite the parties to come to an agreement. If they fail to reach an agreement, at the invitation of the court the defendant shall produce his evidence and the claimant – his additional evidence, if any.

2) The court shall put questions to each of the parties concerning the factual contentions of the opposite party. The answers to these questions shall be dictated in short by the chairman, in order to be entered on the protocol.

4) (Amend., SG, No. 64/1999) In view of the explanations of the parties the court can decree by a definition for separation of the disputable from the indisputable that certain circumstances need no evidence. Art. 110 of the Code reads:

1) (New – Izv. No. 90 of 1961, amd. No 99 of 1961, amd. – SG No. 124 of 1997). At its first session the defendant shall be obliged to produce all of his written evidence on the disputable factual circumstances and to point out the other evidence and the circumstances, which he will ascertain with them.

2) (New – SG No. 124 of 1997) In connection with the objections of the defendant, the claimant may, within a term established by the court, produce and point out new evidence.

3) (New, SG 105/02) As an exception, at the next hearing, the parties can suggest new circumstances and point out and indicate new evidence only if for lack of them a correct ruling cannot be provided and if the additional stamp duty has been paid according to art. 65, para 1. In this case para 4 of art. 63 shall not apply.

⁴⁵ Civil Procedure Code, art. 109, art.110.

⁴⁶ Civil Procedure Code, art.196, para.1 ‘The decisions of the regional courts of law shall be subject to appellate appeal before the district courts of law, and the decisions of the district courts of law shall as a first instance – before the respective court of appeal.’

⁴⁷ Civil Procedure Code, art. 275, para. 2.

opinion to the court as to whether or not there is sufficient evidence for an individual to be deprived of legal capacity.⁴⁸

If the court is satisfied that the adult has been informed of the proceedings, the court will hear evidence, including witnesses and experts, and decide on the case. The proceedings may last for more than one hearing if, for example, the court orders additional evidence.

2.5.2 Procedure for Appointment of a Guardian

After a person is placed under plenary guardianship, the court communicates the decision to the guardianship authority so that a guardian may be appointed.⁴⁹ The mechanism for this communication from court to guardianship authority is not specified nor is the timeframe within which the communication should occur. The Family Code sets out limited circumstances in which the court itself appoints a guardian without sending the case to the guardianship authority. If the adult has a spouse with legal capacity he or she may be appointed guardian or, if no spouse exists, one of the adult's parents may be appointed.⁵⁰ However, in most cases, the trustee/guardian is appointed by the guardianship authority. The guardianship authority is responsible for overseeing and monitoring all guardianship arrangements within the municipality and assisting guardians in carrying out their duties.⁵¹

When the guardianship authority receives the decision from the court regarding the incapacity of a person, it opens a proceeding to appoint a guardian. The guardianship authority is obliged to select from among the adult's close relatives a person to be guardian who would best protect the adult's interests. To facilitate this process, the law stipulates several negative requirements regarding the potential trustees/guardians. In other words, the law provides some disqualifying criteria but does not necessarily provide guidance as to how eligible potential guardians should be evaluated. Under the law, the court need not communicate decisions involving partial guardianship to the guardianship authority, yet the guardianship authority is nonetheless obliged to appoint a guardian in these cases as well. The guardianship authority, therefore, has no mechanism prescribed by law to receive such information for adults partially deprived of their capacity.

At the opening of the proceedings to appoint a guardian, the guardianship authority may also appoint a guardianship board. For adults under plenary guardianship, the authority must convene such a board, which consists of the guardian, a deputy and,

⁴⁸ Civil Procedure Code, art.27, para. 2. (Amd. SG No. 124 of 1997)

⁴⁹ Civil Procedure Code, art. 276, para.3. (Amd. - SG No. 124 of 1997) 'After the decision by which the person is placed under full guardianship enters into force, the court shall communicate that to the guardianship body in order to establish guardianship.'

⁵⁰ Family Code, chapter 10, art. 128, para 3.

⁵¹ Family Code, art.124.

in the case of plenary guardianship, two advisors, generally chosen from among the relatives and friends of the adult, who the guardianship authority believes will ‘best care for’ the adult’s interests.⁵² For this reason, it seems that the guardianship board is conceived to be individualized to each adult’s circumstances. The function of the guardianship board is to provide assistance to the guardian in carrying out his/her duties. Where possible the guardianship board for persons under plenary guardianship must also include persons with ‘pedagogical education.’⁵³ Further, ‘guardians and members of the guardianship board cannot be disabled, deprived of parental rights, convicted of severe deliberate crimes, nor persons who due to sickness, alcoholism, immoral life, mercenary conduct, conflict of interests of adults under guardianship, or for other reasons, are unable to fulfil guardian functions.’⁵⁴ For adults partially deprived of legal capacity, the guardianship authority appoints only a guardian and a deputy guardian from the relatives and close acquaintances.⁵⁵

The role of an advisor in a guardianship board is to assist the guardian and the deputy-guardian in fulfilling their obligations. The advisors are obliged to inform the guardianship authority about failures of the guardian in protecting the rights and interests of the person under guardianship. They receive reports by the guardian and are supposed to participate in any determinations made by the guardianship authority about approval of the report.⁵⁶

The guardianship authority has the power to change the guardianship board when the interests of the adult require, when the obligations of a guardian or the needs of the adult are not fulfilled, or when the guardian becomes unable to fulfil the required tasks.⁵⁷ While the guardianship authority has the power to make these changes, it is required to consider the opinion of the adult’s relatives, although the adult need not be consulted.

Before a guardian is appointed, the guardianship authority itself, or through someone it appoints, must take an inventory of the adult’s property and take other protective measures necessary regarding the personal property and other interests of the adult. Where necessary, the guardian can assign another person to temporarily fulfil guardian functions. The guardianship authority may request the social support office for the municipality to accommodate the ‘child’ in a foster family or in a specialized institution.⁵⁸

⁵² Family Code, art. 111, para. 1 and art. 113, para. 1.

⁵³ Family Code, art. 111. ‘Pedagogical education’ is a literal translation of the law into English. The plain meaning of which suggests special training in education.

⁵⁴ Family Code, art. 116.

⁵⁵ Family Code, art. 112. As noted above, MDAC uses the word ‘guardian’ when the Bulgarian law states ‘trustee’ to be appointed for adults partially deprived of their legal capacity.

⁵⁶ Family Code, art. 121.

⁵⁷ Family Code, art. 113.

⁵⁸ Family Code, art. 114. The law refers to ‘the child’ but since this law applies both to adults under guardianship and children under guardianship, it is conceivable that the provision for ‘foster family’ care could apply to adults as well as to children.

The guardianship authority may stop the activities of the guardian and propose other activities after receiving advice from the guardianship board.⁵⁹ The proposed guardian is not obliged by law to inform the guardianship authority about his/her care plan at the time of appointment, which means that there is no inquiry into the manner in which the proposed guardian plans to provide care for the adult and therefore no evaluation of the appropriateness of the guardian's plan in light of the specific needs of the adult. The decisions (and refusal to take decisions) of the guardianship authority can be appealed by 'the interested persons' or by the prosecutor to the district court. The meaning of 'interested persons' is not defined within this section of the legislation but presumably it would be the same list of 'interested persons' who are eligible to file the application in the first instance as listed in the Civil Procedure Code.⁶⁰ The decision of the district court cannot be appealed.⁶¹

According to the Family Code, the guardian must always be one person who is assisted by a deputy and, only in plenary guardianship cases, by the members of the guardian board. The law does not permit agencies or public corporations to be guardians, though it allows public officials (such as directors of social care institutions) to be appointed as guardians.⁶² The law does not provide that a guardian undergo any training.

2.6 Human-Rights Based Assessment of Bulgaria's Legislation

MDAC has developed a series of 29 indicators to be used in assessing guardianship legislation. These indicators are derived from international human rights law and standards, such as the European Convention on Human Rights and the Council of Europe Council of Ministers Recommendation No. R(99)4 on adults and incapacity. It should be noted here that where an issue or assertion has not been clearly established in international law or standards, national laws and practices from different countries are considered. The first indicator highlights principles that run throughout the legal framework, perhaps indicating general societal attitudes towards persons with mental disabilities. The remaining indicators, like guardianship systems themselves, are divided into three major areas. The first area addresses the rights of the adult prior to placement under guardianship. The second area addresses the rights of the adult after deprivation of legal capacity as well as the corresponding responsibilities and accountability of the guardian. The third area explores less restrictive alternatives as well as mechanisms for review and termination of guardianship once imposed.

Within each box is a concise statement of the indicator. The conclusion regarding the apparent compliance of the law to the stated indicator is below, followed by an analysis of specific provisions of Bulgarian law that support the conclusions. Finally,

⁵⁹ Family Code, art 125.

⁶⁰ Civil Procedure Code, Ch 27, art 275(1).

⁶¹ Family Code, art.115.

⁶² Family Code, art. 128, para.1.

in the section termed ‘Human Rights Standards’ MDAC provides a basis derived primarily from Recommendation No. R(99)4 and the European Convention on Human Rights. In a few instances, where no clear standard was espoused within these two documents, examples of acceptable legal provisions are provided.

2.6.1 Principles Running Throughout Legal Framework (Indicator 1)

Indicator 1	<i>Legislative purpose or preamble to the law encompasses respect for the human rights, dignity and fundamental freedom of people with mental disabilities.</i>
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Conclusion: The Constitution and some laws provide for equal rights of people with mental disabilities, but the principles enumerated in Indicator 1 do not sufficiently permeate national guardianship legislation.

Analysis: According to the Bulgarian Constitution, ‘all persons are born free and equal in dignity and rights.’⁶³ The Constitution further states that ‘all citizens shall be equal before the law’ and that ‘there shall be no privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status, or property status.’⁶⁴ The language ‘all persons are born free and equal’ clearly includes people with mental disabilities. However, there is no explicit guarantee of equal treatment for people with disabilities of any kind. Further, the Constitution states that ‘fundamental civil rights shall be irrevocable,’ and a person’s ‘rights shall not be abused, nor shall they be exercised to the detriment of the rights or the legitimate interests of others.’⁶⁵ Referring specifically to people with mental disabilities, the Constitution provides that such people shall enjoy ‘special protection of the state and society.’⁶⁶ Arguably, guardianship is a measure of ‘special protection’.

These constitutional provisions apply generally, but other than the second paragraph of the Family Code, which concludes that an objective of the Family Code is to provide protection of the rights and interests of those under guardianship or trusteeship, specific legislation addressing legal capacity and guardianship contains no statement to suggest its purpose.⁶⁷

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:

⁶³ Bulg. Const., ch. I, art. 6(1).

⁶⁴ Bulg. Const., ch. I, art. 6(2).

⁶⁵ Bulg. Const., ch. II, art. 57(1).

⁶⁶ Bulg. Const., ch. II, art. 51(3).

⁶⁷ Family Code, art. 2.

‘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 on those rights contained in the relevant international legal instruments.’⁶⁸

This principle can be implemented in legislation by including a preamble or a 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.’⁶⁹ The WHO cites the Polish Mental Health Protection Act preamble as embodying this principle. This example 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 [...]’⁷⁰ A preamble such as this establishes the overriding values that should be applied to implementation of the law that follows.

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

This group of indicators addresses the procedural rights of adults in guardianship proceedings. While national legislation may well provide for additional rights and protections, these indicators represent the minimal necessary standards for due process and fair proceedings. Under European human rights law, ‘special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.’⁷¹

⁶⁸ Recommendation No. R(99)4, Principle 1.

⁶⁹ 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.

⁷⁰ 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.

⁷¹ European Court of Human Rights in the case of *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979, (A/33) (1979-80) 2 EHRR 387, para. 60.

Indicator 2

The legislation clearly identifies who may make an application for appointment of a guardian and the foundation needed to support it.

Conclusion: Legislation clearly defines *who* may initiate an application for guardianship, but it does not sufficiently provide for *the factual basis* upon which applicants may file.

Analysis: An application to deprive an adult of legal capacity and to appoint a guardian may be filed in the first instance in the district court.⁷² Article 275 of the Civil Procedure Code specifies the range of people who are eligible applicants: the adult's spouse, the adult's close relatives, the prosecutor and anyone who has a 'legal interest' in the declaration of incapacity.⁷³ The legislation does not define what is meant by a 'legal interest,' but case law suggests that an acceptable 'legal interest' would be a financial stake.⁷⁴ As examples of persons who have legal interest in filing an application, the case law points to the creditors of the adult and people who have signed contracts with the individual for whom guardianship is sought.⁷⁵ The list of who is determined to be a 'close relative' for purposes of this legislation is found in Article 46 of the Family Code.⁷⁶ Essentially, status as 'close family' is determined according to Bulgarian inheritance laws.⁷⁷ Thus it seems that those who are potential heirs of the person to be placed under guardianship also have the legal right to file an application to adjudicate the person incapacitated. Bulgaria's legislation seems to define the right to file an application for guardianship in terms of the interest of the applicant rather than the needs of the person concerned. The legislation makes no specific mention of filing an application for the purpose of protecting the vulnerable individual from abuse or exploitation.

Any other person who wishes to file an application but who is not among the statutory list may ask the regional prosecutor to do so, but the prosecutor has some discretion on whether to proceed. For example, directors of psychiatric hospitals and social care homes may ask the prosecutor to file applications to place their patients and residents under guardianship. Further, directors of social care homes are legally obliged to do so

⁷² Civil Procedure Code, art. 80, para. 1 (amend. - SG No 90 of 1961) (para. 1, amend. - SG No 28 of 1983).

⁷³ The legislation actually provides that the participation of the Prosecutor is obligatory in such proceedings regardless of whether the Prosecutor has filed the application.

⁷⁴ Supreme Court of Cassation, Decree 5/79, 13 February 1980.

⁷⁵ Supreme Court of Cassation, Decree 5/79, 13 February 1980.

⁷⁶ Family Code, Art. 46. (1) Lineal affinity is the relation between two persons of which one of them originates directly or indirectly from the other. (2) Collateral affinity is the relation between two persons having a common strips without origination of the one from the other; Art. 47. (1) There are, between lineal relatives, as many degrees as the number of generations. (2) There are, between two collateral relatives, as many degrees as the number of generations of one of them up to the common strips and from the latter to the other relative.

⁷⁷ Supreme Court of Cassation, Decision N667/14.03.1970 (case number 329/70).

by an order issued by the Deputy Minister of Labour and Social Welfare.⁷⁸ This order calls for blanket application of guardianship to all residents under state care and thus leaves no room for evaluation of an individual's ability to manage their own affairs.⁷⁹ This order, while no substitute for a judicial decision regarding the person's capacity, nonetheless provides a basis for filing an application that MDAC finds problematic. The application is not based on the needs or mental status of the adult, but solely on the basis of the adult's residence in a social care home. While the court retains judicial independence, it does not operate in a vacuum and may be influenced by the ministerial order to grant the application.

Human Rights Standards: Legislation should define the scope of individuals who may file an application for the appointment of a guardian. So should it specify the nature of evidence necessary to demonstrate the need for such an application. With respect to the first factor, Recommendation No. R(99)4 specifies 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.'⁸⁰

The Recommendation calls for 'fair and efficient procedures for the taking of measures for the protection of incapable adults'.⁸¹ Fairness in this context includes the provision of a law that clearly specifies who can submit applications.

The second factor, or specificity requirement – that a guardianship application must have some merit on the face of it – is necessary in order to protect the adult against malicious accusations of incapacity. In the case of *H.F. v. Slovakia*, the European Court of Human Rights examined the procedure leading to the deprivation of an individual's legal capacity. This procedure was based on an application by the individual's ex-husband and substantiated by a psychiatric report that at the time of the hearing was more than one year old. The court found a violation of Article 6(1) because, among other procedural defects, the Slovakian Court failed to secure sufficient evidence in light of Principle 12 of Recommendation (99)4 which requires

⁷⁸ Letter SG-91-00-77, 20 October 1999 issued by the Ministry of Labour and Social Policy, section 9. In relevant part the letter states that 'when a person placed in a social care home has no parents nor appointed guardian, the director of the institution is obliged a) to present to the local branch of the National Insurance Institute necessary documents for receiving the pension of the person in the home; b) to send an application to the court for placement under guardianship; c) after the court decision is issued to apply to the guardianship body at the respective municipality to appoint a guardian.'

⁷⁹ See Indicator 9.

⁸⁰ Principle 11(1).

⁸¹ Recommendation No. R(99)4, Principle 5(1).

an ‘up-to-date report from at least one suitably qualified expert.’⁸² When legislation prescribes the type of evidence to be submitted with an application, a procedure such as that suffered by the applicant in *H.F. v. Slovakia* can be avoided.

Indicator 3	<i>An adult has a right to actual notice, and to be present and heard at all proceedings related to the application for deprivation of his or her legal capacity and appointment of a guardian.</i>
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Conclusion: Legislation provides for a fairly elaborate scheme to provide notice to the person concerned. However, this notice is about the process and not about the need to actually inform the individual of his/her right to appear and participate in the guardianship process. Additionally, while the requirement that the judge hearing the case obtain an in-person impression of the person subject to the guardianship is laudable, legislation allows for exclusion of the person concerned from further participation in the process.

Analysis: Under Bulgarian legislation, the adult has the right to be notified no less than seven days before the court hearing.⁸³ The adult should be questioned in person and, if need be, may be brought to the court against his or her will. If the adult is in a hospital and the treating doctor determines that he or she has a health condition that prevents the adult from attending court, the judge is obliged to obtain a direct impression of the adult’s health condition.⁸⁴ This can be accomplished, for example, by going to the hospital to see and speak with the adult. While this requirement does support the opportunity for the person to be heard by the judge, a personal visit by the judge *in lieu* of attendance at the court hearing does not ensure that the adult has the opportunity to respond to evidence nor does it ensure that the adult will have adequate opportunity to present evidence including calling witnesses. The adult should be summoned no later than seven days prior to the court hearing.

There are several means by which an adult may be informed of court hearings, and these are set out in detail in legislation.⁸⁵ Such notice must be given by a designated

⁸² *H.F. v. Slovakia*, Application No. 54797/00, judgment 8 November 2005. Please note that the judgment is available only in French. For an English Summary, see Press Release, European Court of Human Rights Registrar, 8 November 2005. Available at: <http://www.echr.coe.int/ECHR/EN/Header/Press/Press+service/Introduction/>.

⁸³ Civil Procedure Code, art. 41, para 5.

⁸⁴ Civil Procedure Code, art. 275, para 3.

⁸⁵ The summons should contain the following: the court issuing it, the name and address of the summoned person, under which case and in what capacity he/she is summoned, the place and time of the hearing and notice of any legal consequences from the non-appearance.

court official⁸⁶ who must sign for the date and manner of service.⁸⁷ The adult or attorney must sign that notice has been given.⁸⁸ In cases where personal service of notice is unsuccessful, the notice may be sent by post via registered delivery.⁸⁹ Telephone or fax notification is also possible, in which case the relevant official must provide written verification.⁹⁰ The procedure is similar for notification by telegram and telex.⁹¹ If an adult refuses to accept the notice, the refusal must be verified by a witness's signature. If these requirements are met, then he/she will be deemed to have been notified.⁹² While the procedures are detailed, they fail to ensure that the adult receives *actual* notice, because there is no way to know who receives a fax, telegram or even a phone call.⁹³

Supreme Court case law is explicit that the first order of business for the court in a guardianship proceeding must be to conduct the obligatory interview of the person involved.⁹⁴ The apparent reasoning for the obligatory interview is that 'the peculiarities of this procedure are mainly related to the requirement for direct interrogation of the person to be placed under guardianship.'⁹⁵ By requiring the judge to obtain a personal impression of the adult at the outset of the case, it is likely that the Supreme Court may have intended to protect mentally 'healthy' individuals from unscrupulous relatives who have financial interests or other illegitimate motivations for filing a guardianship

⁸⁶ If there is no court in the locale where service must be accomplished then service may be carried out through the municipality or the city-council, Civil Procedure Code, art. 41, para 2.

⁸⁷ Civil Procedure Code, art. 41, para 1 The law provides that in case the deliverer fails to find the involved person, he shall serve the summons on an adult person from the person's family or if no family is available, then a neighbour. This person receives the summons, signs a receipt and is obliged to hand the summons to the person involved. It is interesting to note that while in cases involving matrimonial claims, the server is prohibited from presenting the summons to the neighbours as a means of protecting marital privacy, there is no such provision for the protection of privacy in cases involving the mental health and capacity. The person giving notice must verify with his/her signature the date, manner and to whom the notice was delivered, or if delivery was impossible, the reasons.

⁸⁸ Civil Procedure Code, art.46, para. 2.

⁸⁹ Civil Procedure Code, art 41, para 3. In urgent cases, the adult may be notified by telephone, telex, fax or by telegram; however, what constitutes an 'urgency' that permits this type of service is unclear in the legislation.

⁹⁰ Civil Procedure Code, art 41, para 5.

⁹¹ Civil Procedure Code, art 41, para 4.

⁹² Civil Procedure Code, art.47.

⁹³ Further, even if a family member refuses to accept the notice, the person concerned can still be deemed to have been notified. If the notice is not delivered directly into the hands of the adult, mere demonstration that notice was signed for or a fax was sent does not ensure that the person involved has been notified that their rights are at stake.

⁹⁴ The judge is to interview the person concerned even before interrogating experts, relatives or gathering any other evidence. Supreme Court of Cassation, Decree 5/79/13.02.1980.

⁹⁵ Supreme Court of Cassation, Decision N1664/21.06.1976 (case number 1051/76) (Unofficial translation).

application.⁹⁶ The Supreme Court has held that the questioning during this interview should address the ‘intellectual capacity, way of communicating, quickness of the mind of the person.’ It is unclear what is meant by ‘quickness of the mind,’ or indeed the training that judges may have had in assessing these qualities.⁹⁷ If the adult is ill and cannot attend court, the judge must gain a personal impression of the adult by visiting the adult at home or in the hospital.⁹⁸

Although the Civil Procedure Code provides that the adult subject to guardianship has the right to be heard in person during the first court hearing, there is no obligation on the court to involve the person concerned in any subsequent hearings, opening up a possibility that the adult may not participate in other court hearings at which important evidence may be presented and decisions made. Once the court has obtained the ‘personal impression’ of the adult, and after all relevant parties have been notified, the court may proceed despite the non-appearance of any party.⁹⁹ Before doing this, however, the court must at least delay proceeding until all cases with parties present have been heard first. Additionally, during the administrative proceedings for appointment of a guardian, neither the presence nor the opinion of the adult is required by law.

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 be exercised without meaningful and actual notice. Principle 11 of Recommendation No. R(99)4 makes it clear that the adult must be informed of the proceedings, and that this must be done ‘in a language, or by other means, which he or she understands.’¹⁰⁰ The Explanatory Memorandum to Recommendation No. R(99)4 reiterates the necessity of this procedural safeguard, citing the requirements of Article 6 of the European Convention on Human Rights.¹⁰¹ The language used in the Principle recognizes that for an adult, notice as prescribed by general civil procedure law may not convey the meaning or ramifications of the proceedings. Therefore, actual notice must be given. A possible solution to otherwise vague laws is to incorporate a provision such as that in the

⁹⁶ Supreme Court of Cassation, Decree 5/79/13.02.1980, para. 3.

⁹⁷ *Ibid*, Decision N1892/14.07.1978 (case number 1010/78).

⁹⁸ *Ibid*, Decision N2133/12.12.1978 (case number 1089/84).

⁹⁹ Civil Procedure Code, art. 71, (amended SG No 28 of 1983, SG No 55 of 1992, SG No. 124 of 1997; amended, SG 105/2002), provides that parties who fail to appear in court after receiving valid service may be fined by the court.

¹⁰⁰ Principle 11(2) also provides an exception to the 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.’ It is the position of MDAC that notice of such a hearing should always be provided as there is no disadvantage to providing notice in all situations and, in addition to this, it seems unlikely that awareness of such proceedings would put an adult’s health in ‘severe danger’.

¹⁰¹ Council of Europe, Committee of Ministers. Explanatory Memorandum to Recommendation No. R(1999)4 on principles concerning the legal protection of incapable adults. Adopted February 23, 1999, para. 52.

American Uniform Guardianship and Protective Proceedings Act. This simply adds a provision requiring that ‘notice under this Act must be in plain language’.¹⁰²

With respect to the second element, namely to be heard, 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.’¹⁰³ Article 6 of the European Convention of Human Rights provides for fair trial rights in cases, including those where a person’s civil rights and obligations are in question. The European Court of Human Rights has held that guardianship falls within the category of civil rights and therefore such proceedings must comply with the requirements of Article 6.¹⁰⁴

Indicator 4	<i>An adult has a right to free and effective legal representation throughout guardianship proceedings.</i>
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Conclusion: The availability of a lawyer to represent the adult subject to guardianship is provided for in the legislation. However, the law fails to specify that such legal representation is provided free of charge. The exercise of the right to a lawyer is therefore illusory for adults who cannot afford to pay for representation.

Analysis: The Bulgarian Constitution provides that ‘[e]veryone shall have the right to legal defence whenever his rights or legitimate interests are violated or endangered. He shall have the right to be accompanied by legal counsel when appearing before an agency of the state.’¹⁰⁵ However, it appears that guardianship legislation does not oblige the court to provide a lawyer for the person concerned even if asked. In addition to lacking funds to hire lawyers, many people facing guardianship proceedings live in social care institutions that are hundreds of kilometers from urban centres. Residents of such institutions are unlikely to have the opportunity to search out legal assistance even in the event that they can pay for the service. Therefore, the right to a lawyer

¹⁰² See The Uniform Guardianship and Protective Proceedings Act (1997) para. 113(c). This is model legislation drafted by the National Conference of Commissions on Uniform State Laws. It has been endorsed by the American Bar Association. The purpose of this uniform act was to ensure due process protection for incapacitated persons and to subject guardians to court jurisdiction throughout the United States; consequently, its due process provisions may also serve as a model in other jurisdictions. Available at: www.nccusl.org visited 1 May 2007.

¹⁰³ Principle 13.

¹⁰⁴ 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.

¹⁰⁵ Bulg. Const., ch. II, art. 56.

exists theoretically, but because of practical and financial obstacles, it is an illusory right for many individuals.

Human Rights Standards: Recommendation No. R(2004)10 highlights that ‘persons with mental disorder should be entitled to exercise all their civil and political rights.’¹⁰⁶ It is a well-established principle of the 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. It is clear, as pointed out by the European Court of Human Rights, that procedures determining legal capacity directly implicate an individual’s rights and obligations.¹⁰⁷ As the requirements of Article 14(3) of the ICCPR are considered basic guarantees of a fair hearing,¹⁰⁸ free and effective representation should be interpreted as a requirement during all capacity 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.’¹⁰⁹

Enforcing this requirement by providing effective legal representation is especially crucial when the person is alleged to lack capacity to represent him or herself.¹¹⁰ Deprivation of legal capacity may result in a 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, and so on). The UN General Assembly recognized the importance of this obligation in the 1991 Mental Illness Principles, which state:

‘The person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it.’¹¹¹

¹⁰⁶ Recommendation No. R(2004)10 Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder, Adopted 22 September 2004, Article 4.

¹⁰⁷ *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, para. 51.

¹⁰⁸ See UN Human Rights Committee, General Comment 13, para. 5.

¹⁰⁹ Principle 7.

¹¹⁰ 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.

¹¹¹ UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on December 17, 1991, Principle 1(6).

Indicator 5

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

Conclusion: Bulgarian legislation does not provide for detention of the person concerned merely for the purpose of conducting a capacity evaluation.

Analysis: Bulgarian legislation does not provide for a person to be detained solely for the purpose of obtaining a capacity evaluation. A person (including a person involved in guardianship proceedings) can be detained, however, for compulsory treatment under the Health Act and for the purpose of the protection of the health and life of others.¹¹²

According to the Bulgarian Health Act, Article 155, and in connection with Article 146 of the same Act, a person who either suffers from a serious ‘psychiatric disorder,’ ‘mental retardation’ or vascular or senile dementia may be subject to involuntary detention and treatment beyond an initial emergency basis if the chief of the medical establishment decides the person’s status so warrants. Under these circumstances, the person may be so detained and treated for duration not longer than 24 hours. The chief of the medical establishment is obliged to immediately notify the relatives of the patient and must submit a psychiatric opinion to the court which provides the basis of the detention and treatment. The detention may be extended once up to 48 hours with permission by the district judge.¹¹³ The compulsory accommodation and treatment must be carried out at medical establishments designated to provide psychiatric care or psychiatric hospitals. The purpose of this placement in inpatient psychiatric care establishment is the involuntary treatment of the patient deemed to have behaved in a manner that is dangerous or challenging to others. Detention under this provision, while possibly affecting people who are also involved in guardianship proceedings or under guardianship, does not provide for detention merely as a means of obtaining a legal capacity assessment.

Human Rights Standards: The UN Mental Illness Principles state that ‘No 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.’¹¹⁴ The European Court of Human Rights has examined the issue of detention in relation to forced psychiatric examinations under Article 5 of the Convention and the right to liberty. In *Nowicka v. Poland*, the Court held that detaining an individual in order to fulfil an obligation under the law, such as a court-ordered psychiatric examination, is on its face a permissible action. However, the Court held that detaining an individual prior to such an examination and

¹¹² The Law of Health, ch. 5 sec II, art. 155-165.

¹¹³ Health Act, art. 154.

¹¹⁴ 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.

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 thus constitutes a violation of Article 5.¹¹⁵ In other cases, the Court additionally held that forced psychiatric examinations violate Article 6 (right to fair trial)¹¹⁶ and Article 8 (right to respect for private and family life, home and correspondence)¹¹⁷ of the European Convention on Human Rights. Consequently, the mere possibility that a person may lack legal 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: The adult has the right to present evidence and call witnesses and to examine and challenge the evidence presented by the opposing party.

Analysis: The Civil Procedure Code provides generally for both written evidence and witness testimony in civil cases. Each party may present his/her own witnesses and has the right to be present for the presentation of witnesses of the opposing party. Exercising these rights requires that the adult be aware of them. However, there is no requirement for the adult to be informed of his or her rights. Thus, litigants who are not represented by lawyers may not be aware of these important rights.¹¹⁸

Legislation provides that expert witnesses must be appointed where the subject matter requires specialized knowledge that the court does not itself possess.¹¹⁹ The court may appoint up to three expert witnesses, with each party having a right to nominate one expert each and the court selecting the third.¹²⁰ Generally, the party that asks for an assessment must also pay for the assessment with the exception of the prosecutor which would be paid for by the court.¹²¹ The court is not bound by any of the experts' opinions, but may consider them in light of all other evidence presented. Knowing about these protections is difficult if the adult is not legally represented. If the adult is not present at the court hearings and not adequately

¹¹⁵ *Nowicka v. Poland*, Application No. 30218/96, judgment of December 3, 2002, paras. 58-61.

¹¹⁶ 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.

¹¹⁷ 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.

¹¹⁸ Analysis of the practice will be provided in the second stage of guardianship report, due in 2007.

¹¹⁹ Civil Procedure Code, art. 157, (1) (Para. 1, suppl. - SG No 28 of 1983).

¹²⁰ *Ibid*, art. 157, (2) (Amd. - SG No 124 of 1997, SG, No 64/1999).

¹²¹ *Ibid*, art. 59 and 61-62 (Amd. - SG No 124 of 1997).

represented by a lawyer, it is unlikely that a subject person will know that expert witnesses can be appointed. Therefore, the short-comings of Bulgarian legislation addressed previously in Indicator 3 and 4 are important to this Indicator as well.

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'.¹²² This principle echoes Article 6(1) of the European Convention on Human Rights, which guarantees a fair hearing in all determinations of civil rights and obligations.¹²³ The ability for the parties in the case to challenge evidence with counter evidence and the right to present evidence, including calling witnesses, are all included within the right to a fair trial. This safeguard is also stated in Article 14(3) of the International Covenant on Civil and Political Rights, which lists the minimum guarantees of a fair hearing.¹²⁴ In the case of proceedings on legal incapacity and guardianship, the ability of the adult to challenge evidence is especially important, because only when evidence is tested do weaknesses or hidden motivations come to light. For instance, through cross examination the court may be able to hear about family conflicts and the application being motivated by the possibility of having control of the adult's finances. Furthermore, at this stage, the adult 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 a capacity evaluation, conducted by a qualified professional and based upon recent, objective information, including an in-person evaluation.</i>
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Conclusion: Legislation does not require a capacity evaluation before an adult is deprived of legal capacity. If the court requests an expert opinion, there is no assurance that the opinion will be a capacity evaluation since there are no minimum standards for the contents or quality of the opinion.

Analysis: No capacity evaluation is required by law: the court can deprive an adult of legal capacity after questioning the adult and his/her relatives.¹²⁵ If the judge cannot make a decision solely on the basis of questioning the adult and relatives, the judge

¹²² Principle 7(1).

¹²³ For application of Article 6(1) to guardianship proceedings, see *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979.

¹²⁴ International Covenant on Civil and Political Rights, article 14(3)(e). See also Human Rights Committee, General Comment 13, para. 5 regarding Article 14, subsection 3 as defining minimum guarantees.

¹²⁵ Civil Procedure Code, art. 276. (Amd. - SG No 28 of 1983) (1).

may collect other evidence and hear experts.¹²⁶ Bulgarian law does not specify which relatives should be questioned or the subject matter of the questioning. Therefore, it is possible for a relative to convince a judge that the adult needs a guardian, and for the court to place the adult under guardianship, without seeking a capacity assessment or a medical opinion of any kind.

The law states that if the adult is in a medical institution the judge shall request information about the adult's medical condition¹²⁷ however such information is not necessarily a capacity evaluation. If the judge orders an expert to conduct an assessment and present a report for the purpose of determining whether or not the adult has legal capacity, there are no provisions in the law regarding how the assessment should be conducted or what information the report should contain. However, if the court refuses to accept the report's conclusions, it must provide reasons.¹²⁸

It should be noted that the Supreme Court has found that the court, after questioning the adult, may decide that no other evidence is needed (including talking to the relatives) if the court concludes that the adult is 'mentally healthy'.¹²⁹

Human Rights Standards: A finding of legal incapacity removes an individual's right to make decisions about all areas of his or her personal and public life. It, therefore, interferes with rights to privacy protected by international law.¹³⁰ Such interference must be in accordance with the law and necessary in a democratic society. Legislation should therefore contain provisions to ensure that a decision to deprive an adult of legal capacity is based upon current and reliable information. Recommendation No. R(99)4 calls for a thorough in-person meeting between the adult and a 'suitably qualified expert.' There must also be an up-to-date report to attest to the person's condition and notes that the resulting report should be recorded in writing.¹³¹ In *H.F. v. Slovakia*, the European Court of Human Rights cited Recommendation No. R(99)4 in connection with the obligation to consult recent medical reports in determining legal capacity. In *H.F.*, the Court found that relying on an outdated psychiatric report did not amount to sufficient procedural safeguards to protect the applicant whose capacity was at issue. The Court additionally stated that a request for a second psychiatric report would have been in the interests of the adult.¹³²

¹²⁶ Supreme Court of Cassation, Decision N593/04.03.1967 (case number 3218/66) and Civil Procedure Code, art. 276, para. 1.

¹²⁷ Civil Procedure Code, art. 276.(Amd. - SG No 28 of 1983) para. 2.

¹²⁸ Supreme Court of Cassation, Decision N3152/26.12.1969 (case number 2365/69).

¹²⁹ *Ibid*, N1538/21.08.1961 (case number 5408/61).

¹³⁰ See Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights.

¹³¹ Principle 12.

¹³² *H.F. v. Slovakia*, op. cit.

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: Bulgarian legislation provides that a finding of full incapacity is appropriate in cases where the person concerned cannot take care of his/her personal affairs *due to* a mental condition. In the case of partial incapacity, the law is weaker in that it provides merely that individuals who have a less severe condition shall be only partially incapacitated. The law fails to specify how the person's inability to manage his/her personal affairs should be measured and provides no guidance for courts in assessing the severity of the individual's mental condition to distinguish between partial and plenary incapacity.

Analysis: The Family Code states that the purpose of guardianship is 'protection of the rights and interests of those under guardianship or trusteeship'.¹³³ The Bulgarian Law on Individuals and Family provides that a person may be found fully incapacitated if, due to his/her intellectual disability or mental 'disease,' he/she cannot take care of his/her affairs.¹³⁴ The provision further provides that a person who has a less severe condition will be placed under partial incapacity. The law seems to say that there are two criteria necessary for placement of a person under guardianship: (1) the existence of a mental disability and, (2) due to this disability, the inability to take care of one's own affairs. In other words, the mental disability must be, at least in theory, the cause of corresponding inability. However, there is no further guidance within the legislation for how these criteria should be evaluated and decided upon by the court.

Human Rights Standards: This indicator finds express support in the UN Mental Illness Principles which states at principle 4(5) that, 'No 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.' There must therefore be a demonstrable link between a diagnosis and limitation or deprivation of legal capacity.

This indicator also invokes several of the R(99)4 principles. Principle 6 on proportionality states that limitation or deprivation of legal capacity must be proportional to the degree of an adult's capacity and tailored to his or her circumstances and needs. This reflects an understanding that mental disabilities may fluctuate. People need different levels of protection based on the nature, seriousness and fluctuation of the disability, which may vary throughout a person's life. Principles 7 and 12

¹³³ Family Code, ch. 1, art. 2. (Amend SG 11/92).

¹³⁴ Law of Individuals and the Family, para. 5, (Amend SG 89/53).

provide that an adequate investigation and assessment of an adult's particular needs is an issue of fundamental fairness. Furthermore, Article 8 of the European Convention on Human Rights mandates that any interference with a person's private life should be proportionate to the aims pursued. Compliance with international human rights standards suggests that legal capacity should be restricted only to the extent necessary to carry out the purpose of the guardianship.

Indicator 9	<i>A finding of incapacity is based upon sufficient evidence and serves the interests of the adult.</i>
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Conclusion: The law fails to specify the type of evidence required to deprive or restrict an adult's legal capacity. The law fails to specify a standard of proof. There is no legal requirement that the court base its decision on the best interests of the adult.

Analysis: Irrespective of the form of guardianship suggested in an application, the Bulgarian court is obliged to take into consideration all of the evidence gathered and presented during the hearings and issue a decision based on the evidence.¹³⁵ However, there are no clear legal standards as to the minimum evidentiary requirements to sustain an application. Further, the law does not require the applicant to adequately support the application with evidence prior to filing. The Family Code states that it is both an objective of the law and a function of the family to provide 'protection of the rights and interests of those under full legal guardianship.'¹³⁶ There is an inherent assumption in the law, therefore, that the family should and will act to protect the rights and interests of family members who lack capacity. The great deference shown in the law towards family members, coupled with the fact that there is no specific provision in the law requiring that the decisions made by the court serve the independent interests of the adult concerned, may leave the adult with inadequate protection from unscrupulous family members.

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

Evidence must meet qualitative standards. Recommendation No. R(99)4 requires that judges should see the adult personally and that an up-to-date report from a qualified expert must be submitted.¹³⁷ The phrase '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.

¹³⁵ Supreme Court of Cassation, Decision N2895/20.11.1968 (case number 557/68).

¹³⁶ Family Code, ch. 1, art. 2, 4. (Amend SG 11/92)

¹³⁷ Principle 12.

As referred to above, the European Court of Human Rights has already emphasized the necessity of a qualified expert report to determine capacity.¹³⁸ In its *H.F. v. Slovakia* ruling, the Court held that statements made by the adult's former spouse and lay witnesses in combination with a psychiatric evaluation that was one and a half years old were not sufficient evidence for a finding of incapacity. The decision, therefore, not only reiterates that an expert report is necessary for States to meet their obligation under the Convention, and that lay (non-professional) witnesses are not a satisfactory substitute. The Court further observed that reports must be recent in order to reflect the functional capacity of the individual at the time of the hearing.

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'.¹³⁹ To achieve this, the individual's circumstances must be taken into account and the protection offered by guardianship should be weighed against any possible negative consequences. As stated in Principle 5 of Recommendation No. R(99)4, restriction should not be imposed 'unless the measure is necessary, taking into account the individual circumstances and needs of an adult.' For example, as employment is an important source of social interaction and self-esteem, guardianship may not be in the adult's best interests if, as a result of it, the right to work is restricted. Such aspects should be thoroughly 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: Legislation does not provide sufficient criteria for evaluation of the guardian because the selection of the guardian is primarily based upon familial relationships rather than on the individual needs of the adult or the prospective guardians' plan for meeting those needs. Additionally, there is no legislative provision to ensure that the wishes of the person concerned are considered and given due weight.

Analysis: If the adult's spouse or parents are available and willing to serve the law gives preference to their appointment as guardian and a guardianship board need not be convened.¹⁴⁰ The guardianship authority is not then involved in the case.¹⁴¹ In all other circumstances, the selection and appointment of the guardian is a matter for the guardianship authority rather than the court.

¹³⁸ *H.F. v. Slovakia*, Application No. 54797/00, judgment of November 8, 2005.

¹³⁹ Principle 8(1).

¹⁴⁰ Family Code, art. 128, para. 3.

¹⁴¹ Family Code, art. 128, para. 4.

When the guardianship authority appoints the guardian, it also appoints a guardianship board to assist the guardian in carrying out the duties of the position.¹⁴² Apart from the preference to appoint relatives and friends of the adult as guardian,¹⁴³ there are no other stated criteria for who should be selected. The law does not require the guardian to undergo any training but it does state that where possible, the guardian board should include people with ‘pedagogical training’ though precisely what this means or what role persons with ‘pedagogical training’ would play is unclear.¹⁴⁴

The guardianship authority must convene members of a guardianship board who will ‘best care for [the person’s] interests’.¹⁴⁵ There is no further elaboration on in the law regarding how this is to be implemented and evaluated.¹⁴⁶ The fact that the guardianship authority is obliged to select the guardianship board from among the ‘relatives and close acquaintances’ of the person concerned suggests a presumption that the family will act in the best interests of the person concerned; the law does not appear to contemplate a rebuttal of this presumption. However, the guardianship authority may change the membership of the guardianship board where the interests of the person under guardianship require.

The law indicates several categories of people who are prohibited from serving as guardian or as a member of a guardianship board, including: a person who has been deprived of legal capacity; a person deprived of parental rights; a person convicted for serious intentional crimes; as well as ‘persons who due to sickness, alcoholism, immoral life, mercenary conduct, contradiction with the interests of those under guardianship or for other reasons, are unable to fulfill guardian functions’.¹⁴⁷ While the law does not allow for agencies or public corporations to be guardians, it is notable that there is no prohibition against the directors or staff of institutions in which a person resides from acting as guardian.

Bulgarian legislation does not stipulate that the adult must be consulted or that any opinion expressed by the person concerned regarding who should be the guardian even be considered in making any decisions.

Human Rights Standards: Recommendation No. R(99)4 provides that the primary concern in assessing the suitability of a guardian should be the ability of that person to ‘safeguard and promote the adult’s interests and welfare’.¹⁴⁸ It also suggests that States take steps to ensure that qualified guardians are available, such as creating training

¹⁴² Family Code, art. 111, et seq.

¹⁴³ *Ibid*, art. 111, para. 1 and art. 113, para.1.

¹⁴⁴ *Ibid*, art.111.

¹⁴⁵ *Ibid*, art. 112.

¹⁴⁶ According to the Family Code the guardian is always one person and he/she is to be assisted in fulfilment of his/her duties by the deputy-guardian and the members of the guardianship board (in cases of plenary guardianship).

¹⁴⁷ Family Code, art. 116.

¹⁴⁸ Principle 8(2).

associations.¹⁴⁹ This Indicator assesses whether legislation prescribes requirements for specific qualities or attributes necessary for an individual to be appointed as a guardian. For example, Finnish legislation states that the suitability of a prospective guardian should be determined based on skill, experience and the nature and extent of the duties required.¹⁵⁰

According to Recommendation No. R(99)4, ‘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’.¹⁵¹ 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.¹⁵² 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 guardian.

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: Bulgaria’s legislation does not adequately protect the person under guardianship from appointment of a guardian with a conflict of interest.

Analysis: Bulgarian legislation is silent on the possibility of appointing as guardian someone with an actual or perceived conflict of interest with the adult under guardianship. Therefore, directors of social care institutions may act as guardians of residents of the institution.¹⁵³ Directors of such institutions are responsible for ensuring the smooth operations of their facilities economically, therapeutically and otherwise. Therefore, having directors of institutions be legally responsible for making important social, medical and financial decisions of adults residing in the homes that they operate is poses conflicts both actual and potential. For example, a director is dependent on maintaining a number of residents in the institution to continue to receive governmental funding but, at the same time, an adult under the director’s guardianship may not want to live in the institution. Directors as guardians therefore are one of the obstacles to pursuing policies of de-institutionalisation and establishment of community services.

¹⁴⁹ Principle 17.

¹⁵⁰ Guardianship Services Act, (Finland), 442/99, Chapter 2, Section 5. Unofficial translation provided by FINLEX, a service of the Finnish Government. Available at: <http://www.finlex.fi/en/laki/kaannokset/1999/en19990442.pdf>, last accessed on 1 May 2007.

¹⁵¹ Recommendation No. R(99)4, Principle 9(2).

¹⁵² Explanatory Memorandum to Recommendation No. R(99)4, para. 44.

¹⁵³ This will further be explored in the Stage Two report on how guardianship works in practice.

The Ministry of Labour and Social Policy issued an instruction in 1999 obliging the directors of social care homes to file applications to have all residents who did not already have a guardian or parents placed under guardianship.

Bulgarian law provides that where the guardian is unable to fulfill obligations or a conflict of interest arises between guardian and adult, the deputy guardian can substitute for the guardian. The law is silent as to the circumstances in which this provision would apply. Nonetheless, if such circumstances exist, the guardianship authority may also appoint a special attorney.¹⁵⁴

Human Rights Standards: Conflicts between an appointed representative and the adult are not directly addressed by Recommendation No. R(99)4. Best practices from other countries includes France, where legislation directly provides that an ‘additional supervisory guardian’ is appointed who, among other duties, is designated to represent the adult when his or her interests are in conflict with the guardian’s interests.¹⁵⁵ The Standards of Practice adopted by the National Guardianship Association, an American membership organisation of guardians and legal professionals, address the issue of conflicts of interest between a guardian and an adult 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.’¹⁵⁶

This document goes on to state: ‘a guardian who is not a family guardian shall not directly provide housing, medical, legal or other direct services to a ward’.¹⁵⁷ The guardian has a duty to challenge inappropriate, inadequate or poor quality services from service providers on behalf of the adult. Clearly, an impossible situation arises when the guardian is also the service provider, the guardian has a conflict of interest.

¹⁵⁴ Family Code, art. 123.

¹⁵⁵ French Civil Code Book 1, Title X, Chapter II, Article 420, applicable to adults under guardianship per Title XI, Chapter III, Article 495. Unofficial translation provided by Legifrance, a service of the French Government. Available at: www.legifrance.gouv.fr, last accessed on 1 May 2007.

¹⁵⁶ National Guardianship Association, ‘Standards of Practice,’ Adopted by the NGA Board of Directors, Ratified by the NGA Membership in June 2000, Edited Edition 2002, page 9. State College, Pennsylvania. MDAC note: the word ‘ward’ is used in this quotation has the same meaning as ‘adult’, which is the term, used throughout this report.

¹⁵⁷ *Ibid*, Standard 16.

Indicator 12	<i>An adult has the right to appeal a finding of incapacity and/or the appointment of a guardian.</i>
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Conclusion: The adult has the right to appeal a finding of incapacity whether it is partial or plenary. However, only people under partial guardianship may appeal decisions of the guardianship authority.

Analysis: Bulgarian law does not specifically allow for or prohibit appeal rights in guardianship cases. The Civil Procedure Code outlines in general terms the appeal rights of litigants. These provisions probably also apply to capacity decisions. The Code allows a person 14 days to file an appeal if that person was present at the court hearing where the decision was announced. If the person is not present when the decision is announced, he or she has 14 days from the date of the communication notifying him/her of the decision.¹⁵⁸

Decisions of the guardianship authority may be appealed to the district court by interested parties or by the prosecutor. However, a person under plenary guardianship, having been deemed to lack all capacity, is not eligible to appeal the decisions of the guardianship authority. People under partial guardianship may, with the consent of their guardian, file such appeals. In such cases, the decision of the district court is not subject to appeal.¹⁵⁹

Human Rights Standards: The right to appeal a decision of incapacity is an important aspect of procedural fairness and human rights safeguards, both of which are required by Principle 7 of Recommendation No. R(99)4. The Recommendation relies on the United Nations Declaration on the Rights of Mentally Retarded Persons, which states 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'.¹⁶⁰ A subsequent United Nations Resolution, the UN Mental Illness Principles, reaffirms the UN's position and requires States to guarantee the right to appeal a decision to a higher court by the adult whose capacity is at issue, by their personal representative or other individuals.¹⁶¹ Legislation providing for others to appeal a decision on the adult's behalf can be crucial, because the adult may not have the capacity to know that there have been procedural or other violations or how to go about challenging the decision.

¹⁵⁸ Civil Procedure Code, art. 196, para (1) and art. 197.

¹⁵⁹ Family Code, art. 115.

¹⁶⁰ UN Declaration of the Rights of Mentally Retarded Persons, Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971.

¹⁶¹ 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).

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

International human rights law requires domestic legislation to ensure that an individual placed under plenary or partial 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 these residual rights, including the right to vote, the right to work, the right to property, the right to marry, the right to found a family, the right to respect of his or her family life, and the right to associate.

Indicator 13	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise political rights.</i>
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Conclusion: Significant and automatic deprivations of this right exist for people under both partial and plenary guardianship.

Analysis: The Constitution of Bulgaria restricts the rights of people deprived of legal capacity in two areas: the right to vote¹⁶² and the right to be elected and serve in the National Assembly.¹⁶³ These rights are denied to all people under partial and plenary guardianship, regardless of their actual, individual level of functional ability.¹⁶⁴

The Law for Political Parties provides that political parties can only be established by Bulgarian citizens who have the right to vote.¹⁶⁵ Thus the prohibition against voting for people under guardianship also leads to prohibitions on other activities of political life. Adults under guardianship are prohibited from holding public office or professions, including:

- ⇒ Member of the Supreme Judicial Council.¹⁶⁶
- ⇒ Member of cooperatives.¹⁶⁷
- ⇒ Employee of the cadastre (the registrar of real property).¹⁶⁸

¹⁶² Bulgarian Constitution. ch. II, art. 42(1).

¹⁶³ *Ibid.* ch. II, art. 65(1), Law for the Great National Assembly, SG 28, 6 April 1990, art. 3, also Law for Elections for Members of the National Assembly, SG 37, 13 April 2001, art. 3.

¹⁶⁴ By virtue of the fact that a person under guardianship is not eligible to be elected to the National Assembly, a person under guardianship is similarly disqualified from the Presidency and Vice-Presidency. BULG. CONST. ch. IV, art. 93(2), 94.

¹⁶⁵ Law for Political Parties, art. 4.

¹⁶⁶ Law for Judicial Power, SG 59, 22 July 1994, art. 22(1).

¹⁶⁷ Law for Cooperatives, SG 113, 28 December 1999, art. 7.

¹⁶⁸ Law for Cadastre and Real Estate Register, SG 34, 25 April 2000, art. 21.

- ⇒ Member or Chairperson of the Economic and Social Council.¹⁶⁹
- ⇒ Member of the Municipality Council.¹⁷⁰

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

Regarding public participation and participation in the democratic process of people with mental disabilities, the Council of Europe has stated that ‘[s]ociety needs to reflect the diversity of its citizens and benefit from their varied experience and knowledge. It is therefore important that people with disabilities can exercise their rights to vote and to participate in such activities’.¹⁷¹ Specifically addressing individuals with mental disabilities, the right to autonomy and self-determination is elaborated in Principle 3 of Recommendation No. R(99)4, which denotes that legislative frameworks need to incorporate guardianship laws that recognise the existence of various degrees of capacity as well as the dynamic nature of capacity over time. Recommendation No. R(99)4 emphasises that a measure of protection such as guardianship ‘should not automatically deprive an adult of the right to vote, or to [...] make other decisions of a personal character at any time when his or her capacity permits him or her to do so’.¹⁷²

Indicator 14	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to work.</i>
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Conclusion: Significant and automatic deprivations of the right to work exist for people under both partial and plenary guardianship.

Analysis: Adults under plenary or partial guardianship are legally prohibited from independently signing employment contracts. Guardians, however, may consent to employment with the exception of certain types of jobs that are prohibited for people under guardianship.¹⁷³ Specifically, adults under plenary or partial guardianship are not allowed to hold the following positions and professions:

¹⁶⁹ Law for Economic and Social Council, SG 41, 24 April 2001, art. 9(1).

¹⁷⁰ Law for Local Governing and Local Administration, SG 77, 17 September 1991, art. 30(4).

¹⁷¹ Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Recommendation No. (2006)5 of the Committee of Ministers of the Council of Europe, para. 3.1.1.

¹⁷² Recommendation No. R(99)4, Principle 3(2).

¹⁷³ Law for Individuals and Families, Chapter 1, para 1-5.

- ⇒ Attorney at law.¹⁷⁴
- ⇒ Notary.¹⁷⁵
- ⇒ Civil servant.¹⁷⁶
- ⇒ Member of the Commission for Protection of Personal Data.¹⁷⁷
- ⇒ Director or Deputy-Director of the State or Regional Health Insurance Funds.¹⁷⁸
- ⇒ Assignee in bankruptcy.¹⁷⁹
- ⇒ Chairperson of the Agency for Nuclear Power Regulation.¹⁸⁰
- ⇒ Professor at a university.¹⁸¹
- ⇒ Management of the Regional Crafts Chamber.¹⁸²
- ⇒ Mediator.¹⁸³
- ⇒ Broker.¹⁸⁴
- ⇒ Private forester.¹⁸⁵
- ⇒ The law does contemplate that persons subject only to partial guardianship might earn money from work.¹⁸⁶

Human Rights Standards: Article 8 of the European Convention on Human Rights guarantees respect for private life, and case law of the European Court of Human Rights has made clear that the right to work should be considered part of private life, notably explaining 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’.¹⁸⁷ Both the International Covenant on Economic, Social and Cultural Rights and the Revised European Social Charter contain provisions protecting the right to work.¹⁸⁸ Recommendation No. R(99)4 provides that where a measure of protection is necessary, it should be proportional to the degree of the capacity of an adult and tailored to the individual circumstances and needs of the person.¹⁸⁹ Therefore, while some restriction may be

¹⁷⁴ Law for Attorneys at Law, SG 55, 25 June 2004, art. 5(1), sentence 2.

¹⁷⁵ Law for Notaries and the Notary Activity, SG 104, 6 December 1996, art. 35, sentence 2.

¹⁷⁶ Law for State Servant, SG 67, 27 July 1999, art. 7(1), sentence 3.

¹⁷⁷ Law for Protection of Personal Data, SG 1, 4 January 2002, art. 8(2).

¹⁷⁸ Law for Health Insurance, SG 70, 19 June 1998, art. 21(1), sentence 2.

¹⁷⁹ Law for Bankruptcy, SG 92, 27 September 2002, art. 29(1).

¹⁸⁰ Law for Safe Usage of Nuclear Power, SG 63, 28 June 2002, art. 7(2).

¹⁸¹ Law for Tertiary Education, SG 112, 27 December 1995, art. 58(1), sentence 8.

¹⁸² Law for Crafts, SG 42, 27 April 2001, art. 18(2).

¹⁸³ Law for Mediation, SG 110, 17 December 2004, art. 8.

¹⁸⁴ Law for Commodity Exchange and Market Places, SG 93, 1 November 1996, art. 40(1).

¹⁸⁵ Law for Forests, SG 125, 29 December 1997, art 39b(1), sentence 3.

¹⁸⁶ Family Code, ch. 7, art. 73 et. seq.

¹⁸⁷ *Niemietz v. Germany*, Application No. 13710/88, judgment of December 16, 1992, (A/251-B) (1993) 16 EHRR 97, para 29.

¹⁸⁸ Article 6 of the International Covenant on Economic, Social and Cultural Rights, UN Document A/6316, entered into force on March 23, 1976; Article 15(2) of the European Social Charter (revised), Strasbourg, May 3, 1996.

¹⁸⁹ Recommendation No. R(99)4, Principle 6.

necessary in certain situations, a blanket prohibition on employment of all people under guardianship excludes individuals from participating in certain aspects of life and activities despite their capacity to do so.¹⁹⁰ Such restrictions are also contrary to the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which provides that ‘[l]aws and regulations in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment’.¹⁹¹

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: Significant and automatic deprivations of the right to property exist for people under both partial and plenary guardianship.

Analysis: Restrictions are placed on nearly all of the financial transactions of persons under guardianship because all responsibility for monetary issues is handed to the guardian. Only adults under partial guardianship are allowed to enter legally-effective transactions of an everyday nature.¹⁹² Law prohibits adults under guardianship from managing their money and property by prohibiting those under plenary guardianship from performing legal actions.¹⁹³ Adults under partial guardianship have the right to perform legal actions only for every-day needs but there is no definition of what ‘every-day needs’ means.¹⁹⁴ In all other cases a person under guardianship can perform legal action concerning his/her property only with the consent of the guardian. Under plenary or partial guardianship, adults are legally prevented from entering into contracts of any kind.¹⁹⁵

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

¹⁹⁰ The European Employment Framework Directive establishing a general framework for equal treatment in employment and occupation (Council Directive 2000/78/EC of November 27, 2000) requires legislation in EU Member States to prohibit discrimination in employment and training on grounds including disability. Specifically, see Articles 1, 2 and 5.

¹⁹¹ Rule 7(2).

¹⁹² Law for Individuals and Family, art.4.

¹⁹³ *Ibid*, art. 3.

¹⁹⁴ *Ibid*, art. 4.

¹⁹⁵ *Ibid*, art. 3, 5.

Human Rights, which reads, in relevant part:

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

Recommendation No. R(99)4 follows this sentiment by recommending that ‘[w]henver possible the adult should be enabled to enter into legally effective transactions of an everyday nature’.¹⁹⁶ The Council of Europe returned to this theme in its 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. These measures included action ‘to ensure the equal right of persons with disabilities to own and inherit property, providing legal protection to manage their assets on an equal basis to others’.¹⁹⁷

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>
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Conclusion: Significant and automatic deprivations of the right to marry, to found a family, and to respect of his/her family life exist for people under both partial and plenary guardianship.

Analysis: People under plenary guardianship are categorically prohibited from marrying.¹⁹⁸ They are also prohibited from fostering children, and may be restricted from raising their own children. The Family Code defines an eligible adoptive parent as one who is ‘legally able and not deprived of parental rights’.¹⁹⁹ Therefore, persons under plenary guardianship are not included in this definition and are not allowed to adopt children. However, the Bulgarian Supreme Court does not regard people under partial guardianship as legally incapable and, therefore, they may be eligible to adopt children.²⁰⁰ If a child of an adult under plenary guardianship is put up for

¹⁹⁶ Recommendation No. R(99)4, Principle 3(4).

¹⁹⁷ Council of Europe, Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Recommendation (2006)5, para. 3.12.3(viii).

¹⁹⁸ Family Code, art. 13, para 1 (2) ‘Marrying cannot be contracted by a person who has been placed under full judicial disability or suffers from a mental disease or imbecility constituting grounds for his/her placement under full judicial disability.’

¹⁹⁹ Family Code, art. 50.

²⁰⁰ Supreme Court of Cassation, Decision N58/21.02.1989.

adoption, that parent's consent is not required only that of the guardian is needed.²⁰¹ The guardianship authority has the authority to appoint a guardian not only for adults who have been incapacitated but for their children under the age of 18 as well. The Supreme Court has held that 'persons under partial guardianship are not restricted in taking care of their children and exercising parental rights.'²⁰² The logic of the court in this case was that since marriage by adults under partial guardianship is not prohibited within the law, then the parent-child relationship is not restricted on the basis of parental capacity alone.

Human Rights Standards: Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life, home and correspondence. This imposes on States a negative obligation not to interfere with, as well as a positive obligation to respect a person's private and family life. There are similar Convention obligations to respect a person's right to marry and found a family under Article 12, which reads, '[m]en and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right.' The UN has also addressed this issue. Rule 9 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities contains strong language on the rights of people with disabilities to family life and personal integrity, affirming that 'States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood',²⁰³ and that '[p]ersons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood'.²⁰⁴

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: Significant and automatic deprivations of the right to associate exist for people under both partial and plenary guardianship.

Analysis: Law prohibits adults under guardianship from exercising freedom of association by prohibiting them from founding or joining non-profit organisations and cooperatives.²⁰⁵

²⁰¹ Family Code, art. 54, para 4.

²⁰² Supreme Court of Cassation, Decision N58/21.02.1989.

²⁰³ UN General Assembly, UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, dated March 4, 1996, Rule 9.

²⁰⁴ *Ibid*, Rule 9(2).

²⁰⁵ Law for Non-Profit Organisations, art. 22. SG 81, 6 October 2000, entered into force on 1 January 2001.

Human Rights Standards: The right to associate can be especially important for people with disabilities, as membership in advocacy and peer support groups can foster skills development, empowerment and autonomy. Advocacy associations in particular may give individuals a collective political voice to lobby for legislative protection. A prohibition from associating with others to pursue a common aim engages Article 11 of the European Convention on Human Rights, which states: ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.’ Any restrictions on these rights must be clearly stated in law and necessary in a democratic society for one of the listed grounds in Article 11(2), such as for the protection of health or morals or for the protection of the rights and freedoms of others. The European Court of Human Rights has confirmed that ‘an inherent part of the right set forth in Article 11’ is the right to form associations.²⁰⁶ It is difficult even to imagine a scenario in which restricting the rights of people under guardianship to associate would be ‘necessary in a democratic society.’ A blanket ban on doing so almost certainly violates binding international human rights law.

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

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

Indicator 18	<i>A person under guardianship is not precluded from making decisions in those areas where he/she has functional capacity.</i>
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Conclusion: Bulgaria’s legislation does not ensure that people under guardianship have the right to make decisions in areas where they have functional capacity.

Analysis: Bulgarian legislation allows for only two types of guardianship that cannot be further tailored according to the needs of the person under guardianship. In plenary guardianship cases, the guardian makes *all* decisions for the adult, while in partial guardianship cases, the adult has some authority to make decisions on his/her own behalf, but only in the case of very basic decisions of an everyday nature. In all other decisions, the guardian of the person under partial guardianship has the authority to decide through the provision or withholding of consent.²⁰⁷ Thus, even an adult under

²⁰⁶ *Sidiropoulos v. Greece*, Application No. 26695/95, judgment 10 July 1998, (1998) EHRR 633.

²⁰⁷ Family Code, art. 122, para. 2.

partial guardianship is precluded from making any decisions on his/her own behalf since the guardian can always veto any decisions that the adult wants to make.

Human Rights Standards: As noted, international human rights law demands a least-restrictive approach to guardianship. This approach maximises self-determination and autonomy, basic principles of human rights which permeate Recommendation No. R(99)4. For example, the document recommends 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'.²⁰⁸ Principle 3 recommends that legislation should allow for a maximum preservation of capacity:

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

A best-practice example could be from France, where legislation successfully incorporates this principle. When establishing guardianship in France, the judge may list transactions that an adult may undertake independent of the guardian. A medical expert must be consulted when the judge assesses those tasks the decision-making of which the adult will retain.²⁰⁹ Another approach – encouraging the adult's participation – is found in the Uniform Guardianship Act of the US, which provides guidance on how to incorporate this principle into legislation. In the section entitled 'Guardian's Duties,' the model legislation suggests:

²⁰⁸ Recommendation No. R(99)4, Principle 2(5).

²⁰⁹ French Civil Code, op. cit, art. 501. Unofficial translation provided by Legifrance, a service of the French Government. Available at: www.legifrance.gouv.fr (last accessed 1 May 2007).

‘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.’²¹⁰ In this paradigm, the guardian is responsible for ensuring the adult’s participation and opportunity to act whenever possible.’

Indicator 19	<i>An adult subject to guardianship must be consulted about major decisions, and have his/her wishes adhered to whenever possible.</i>
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Conclusion: There is no legal requirement for guardians to consult the adult subject to guardianship regarding any decisions.

Analysis: Once an individual has been found to lack capacity, the adult is excluded from all decision-making processes that follow. Although guardians are required to make decisions that promote the adult’s interests, they are not obliged to determine what the adult’s wishes are. There are no provisions, with limited exceptions in medical treatment cases, that provide for obtaining the adult’s consent before a guardian takes any decision. For example, one such area is in clinical trials for medications. While the consent of a person under partial guardianship is required before the individual may be subjected to clinical trials, the consent of a person under plenary guardianship is not required.²¹¹ Not only is the consent of the person under guardianship not required for medical treatment decisions, the guardian need not inform the person under guardianship of the decision after it has been made.

Human Rights Standards: It is important for legislation to expressly give the adult a role in decision-making as it provides both a benchmark to evaluate the guardian’s performance and a judicially enforceable standard. A good practice example would be Finland, whose legislation incorporates this principle by requiring that guardians ask an adult’s opinion in connection with decisions within the scope of the guardian’s duties.²¹² Recommendation No. R(99)4 specifies that when taking a decision, ‘the

²¹⁰ See Uniform Guardianship and Protective Proceedings Act (1997), art. 3, para. 313(a).

²¹¹ Law for Medicines and Pharmacies in Humane Medicine, art. 48, para.2.

²¹² See The Finnish Guardianship Services Act, 442/99, Section 43(1) entitled Hearing the Ward which reads, ‘Before the guardian makes a decision in a matter falling within his/her task, he/she shall inquire the opinion of the ward, if the matter is to be deemed important from the ward’s point of view and if the hearing can be arranged without considerable inconvenience.’ Unofficial translation provided by FINLEX, a service of the Finnish Government. Available at: <http://www.finlex.fi/en/laki/kaannokset/1999/en19990442.pdf>, visited on May 1, 2007. This provision is not cited as a ‘best practice’ example because the Finnish legislation unfortunately contains a broad list of derogations.

last 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'.²¹³ This principle suggests that 'a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view'.²¹⁴ 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'.²¹⁵

Indicator 20	<i>The scope of authority and obligations of the guardian are clearly defined and limited to those areas in which the adult subject to guardianship needs assistance.</i>
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Conclusion: The scope and authority of the guardian is all-encompassing rather than limited to the areas where the person concerned needs assistance.

Analysis: Legislation provides that the guardian must take care of the person under guardianship, manage his or her property, and represent the person to third persons.²¹⁶ There is no list of rights or decision-making areas that are expressly reserved for the adult under guardianship, so the legislation could be interpreted as authorising the guardian to make all personal decisions, including medical and financial decisions. This means that in all guardianship cases the guardian has the authority to make major decisions of a highly personal nature, such as whether and where the adult will be institutionalised, educated, treated for medical or mental health conditions, and employed. The guardian also has the authority to make more minor decisions, such as what leisure activities the person concerned will engage in and with whom the person will socialize.

Human Rights Standards: Domestic legislation should provide clear direction to the authority determining capacity to define the scope of the individual guardian's obligations in light of the particular adult's capacity. Recommendation No. R(99)4 encourages countries to take a flexible approach, noting that '[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'.²¹⁷ The Recommendation further advises that:

²¹³ Principle 9(1).

²¹⁴ Principle 9(3).

²¹⁵ Principle 2(6).

²¹⁶ Family Code, art. 117(2).

²¹⁷ Principle 2(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.’²¹⁸

A best practice example of this approach is the Finnish Guardianship Act, which specifies that ‘the task of the guardian may be restricted to cover only a given transaction, matter, or property’.²¹⁹ Even within a particular matter, the Finnish legislation safeguards the interests of the adult by prohibiting guardians from a number of specified activities including conveying or purchasing property,²²⁰ consent to marriage or adoption, or make or revoke a will, absent specific permission of the court.²²¹

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>
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Conclusion: A guardian need not promote independence or to seek community-based or less restrictive living arrangements.

Analysis: In Bulgaria, a guardian has the authority to determine where the adult will live. There is no provision in the legislation that dictates an appropriate basis for the guardian to make this determination. It merely states that, unless good reason requires otherwise, the adult should live with his/her guardian. There is no indication in the legislation as to what constitutes a ‘good reason’ for the person to live elsewhere, including in institutionalized settings.²²² The guardian need not seek approval from the guardianship authority or any other body in arriving at such a decision.

The guardian has the absolute power to select the adult’s place of residence. There is no requirement in law that the guardian must select the least restrictive living alternative. In fact, the Family Code provides that if the place of residence is changed without the consent of the guardian, then the guardian may obtain an order from the district court for the return of the person to the place of residence as determined by the guardian.²²³ While this order of return is appealable, the legislation

²¹⁸ Principle 3(1).

²¹⁹ The Finnish Guardianship Services Act, 442/99, para. 8(3).

²²⁰ *Ibid*, para. 34.

²²¹ *Ibid*, 442/99, para. 29.

²²² Family Code, art 120(1)

²²³ *Ibid*, art. 120(2).

does not specify who has the right to appeal. The appeal right may be limited to the same ‘interested parties’ eligible to appeal decisions of the guardianship authority and the prosecutor, but would exclude people under plenary guardianship.²²⁴

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

Article 19 – Living Independently and Being Included in the Community

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

- ⇒ Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.
- ⇒ Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.
- ⇒ Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.²²⁵

The 1991 UN Mental Illness Principles provide that ‘[e]very person with a mental illness shall have the right to live and work, to the extent possible, in the community’.²²⁶ Each person has ‘the right to be treated and cared for, as far as possible, in the community in which he or she lives’.²²⁷ In addition to this, 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

²²⁴ Family Code, arts. 115 and 120.

²²⁵ Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Eighth session, New York, 14-25 August 2006.

²²⁶ UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on December 17, 1991, Principle 4, Life in the community.

²²⁷ *Ibid*, Principle 7, Role of community and culture.

community living'.²²⁸ 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.²²⁹

Indicator 22	<i>The guardian must manage the assets of the adult in a manner that benefits the adult under guardianship.</i>
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Conclusion: The law fails to ensure that the guardian manages the assets of the adult under guardianship for the benefit of that person alone.

Analysis: The guardianship authority must take an inventory of the adult's property in the period between a court's finding that an adult lacks legal capacity, either partial or plenary, and the appointment of a guardian for that person.²³⁰ In cases of urgent need the guardianship authority may appoint a temporary guardian to conduct the inventory and manage the assets.

Within one month of being appointed, the guardian is required to notify the guardianship authority of any property of considerable value acquired after the establishment of the guardianship so that it may be added to the inventory list.²³¹ The guardian is also required to deposit any money belonging to the adult into a bank account for that adult. Failure by the guardian to make a timely deposit of such sums may result in the guardian having to pay interest.²³²

When administering property of a person under guardianship certain actions regarding real estate, such as its sale or transfer, require the permission of the district court.²³³ Further, the law provides that in order to obtain court permission, the action with respect to the property must be either a necessity or of a clear benefit to the adult.²³⁴ Permission of the district court is required for the withdrawal of funds from adult's bank accounts. When applying to the court for permission, the guardian is obliged to attach the opinion of the guardianship board.²³⁵

²²⁸ Recommendation R(2006)5 of the Council of Europe to member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015 (adopted by the Committee of Ministers on April 5, 2006 at the 961st meeting of the Ministers' Deputies), para. 3.8.3(vi).

²²⁹ Principle 6(2).

²³⁰ Family Code, art 114 (1)

²³¹ *Ibid*, art. 117.

²³² The amount of interest owed is one percent per month. (Family Code, art. 119).

²³³ Family Code, art. 118(1).

²³⁴ *Ibid*, art. 73(2).

²³⁵ *Ibid*, art. 118(2).

All acts regulated by Bulgarian laws may be carried out by a guardian. Some acts pertaining to property and asset management can be performed by a guardian only with the permission of the district court supported by the opinion of the guardianship board. However, even in these situations there is no requirement of consulting with the adult under guardianship. This provides minimal protection for the adult's assets, but the lack of any standards for how the assets should be spent leaves open the possibility of exploitation of the adult's assets by the guardian. Additionally, there is no provision in the law to ensure that the person can have or spend any of his or her assets independent of the guardian.

Human Rights Standards: Recommendation No. R(99)4 states that 'the property of the incapable adult should be managed and used for the benefit of an adult and to secure his or her welfare'.²³⁶ 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'.²³⁷ This principle suggests that a guardian should be held liable for mismanagement or misappropriation of the funds or property of an adult under guardianship, arguably including acts or expenditures that do not directly benefit the adult. The World Health Organization is of the view that '[s]pecifying penalties if guardians fail to perform their duties would strengthen legislation'.²³⁸

Indicator 23	<i>The guardian is obliged to visit and confer with the adult periodically.</i>
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Conclusion: There is no requirement that the guardian visit or consult with the adult before making any decision.

Analysis: Bulgarian law requires that the adult reside with the guardian unless 'important reasons' require a different placement. Arguably, in such situations, the guardian is well positioned to be aware of the adult's condition, needs and desires.²³⁹ However, when the guardian and the person under guardianship do not live together, there is no requirement that the guardian visit the person concerned.²⁴⁰ As discussed under Indicator 17, the guardian is expected to look after the adult's interests, an obligation that would be almost impossible without face-to-face meetings, yet Bulgarian legislation does not require even periodic visits from guardians.

²³⁶ Principle 8(3).

²³⁷ Principle 20(1).

²³⁸ 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. 43.

²³⁹ Family Code, Art 120(1)

²⁴⁰ MDAC's stage two guardianship reports will address whether guardians routinely visits adults.

Human Rights Standards: A cornerstone of Recommendation No. R(99)4, and person-centred protective systems generally, is the need to ensure that the adult remains central within the decision-making process. In order to take the adult's wishes into account, it follows that the guardian must consult with the adult. Recommendation No. R(99)4 importantly places an obligation on the guardian to provide the adult with sufficient information concerning major decisions to put the adult in a position to express an informed view on the issue.²⁴¹ Another important benefit of requiring guardians to visit adults they represent is that they may gain a full understanding of the adults' living conditions, as well as the care and services provided. This links with the indicator above on the guardian's duty on maximising independent living.

A best practice example is the model legislation Uniform Guardianship and Protective Proceedings Act, which provides that the guardian must 'become or remain personally acquainted with the [adult] and maintain sufficient contact with the [adult] to know of the [adult's] capacities, limitations, needs, opportunities, and physical and mental health'.²⁴²

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 are expected to provide annual activity reports. However, legislation fails to specify the content of such reports. Legislation also fails to ensure that guardians are sufficiently accountable for their decisions.

Analysis: The guardian of a person placed under plenary guardianship must present an annual report on activity to the guardianship board and municipal guardianship authority.²⁴³ The guardian must present a report whenever the guardianship authority so requires and is obliged to do so if he or she stops being a guardian. As the legislation does not require reporting on any specific issues the content of the report is not legally regulated. This leaves open the possibility of cursory reports being accepted by the guardianship authority. However, if the guardianship authority is unsatisfied with the report, it may require the guardian to submit additional information or if funds are unaccounted for, the guardianship authority can recoup the funds. There is no provision for recoup or the return of funds that were misspent, even though they may have been accounted for, or were lost due to poor decision-making on the part of the guardian.

The reports are kept by the guardianship authority. The guardianship authority is under no obligation to share the contents of the report with the adult or even to inform

²⁴¹ See Principle 9.

²⁴² The Uniform Guardianship and Protective Proceedings Act (1997), para. 313(b)(i).

²⁴³ Family Code, art. 126.

the adult that a report has been submitted. The adult is excluded from the opportunity to demand an explanation from the guardian for decisions or expenditures. Oversight of the guardian's decision-making is therefore lacking.

The law mandates the guardianship authority to inform the guardian of its opinion on the report and on explanations made by the guardian. If the guardianship authority finds irregularities it may require the guardian's removal.²⁴⁴ Additionally, if the guardianship authority requests it, the district court can issue an order requiring the guardian to repay any expenditures either not properly accounted for or not approved by the guardianship authority.²⁴⁵ If the guardian fails to appear before the guardianship authority when requested or fails to present a report, the guardianship authority issues a statement against the guardians which, if approved by the chairman of the executive committee of the district council, may lead to a fine against the guardian. However, the fine is maximum 10 Euro cents, a fine so small as to bring into question its purpose.²⁴⁶ Any further disciplinary measures that may be taken against the guardian, such as fines, reproach, deprivation of right to perform certain professional activities, are covered by the Law for the Administrative Offences and Penalties.²⁴⁷ After taking advice from the guardianship board, the guardianship authority may prevent the guardian from taking certain actions.²⁴⁸ However, there is no mechanism for periodic review of the guardian's activity other than annual review so whether such circumstances ever actually come to light is questionable.

Finally, for all people under the guardianship of their spouse or their parents, there is no guardianship board established and no case opened with the guardianship authority (see analysis under Indicator 10). There is no requirement for these family guardians to file reports of their activities, meaning that there is no oversight of any family guardians.

Human Rights Standards: Recommendation No. R(99)4 specifies that '[t]here should be adequate control of the operation of measures of protection and of the acts and decisions of representatives'.²⁴⁹ The Recommendation also specifies that guardians should be held accountable for their actions and for 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'.²⁵⁰ To meaningfully comply with this measure, review mechanisms must specify what is expected both from guardians in terms of their duties (as discussed under Indicator 20), and what is expected in procedural terms in order to comply with monitoring regulations.

²⁴⁴ Family Code, art. 126(3).

²⁴⁵ *Ibid*, art. 126(4).

²⁴⁶ The fine is small and may be only up to 0.20 Leva (approximately 10 Euro cents), Family Code, art. 126(5).

²⁴⁷ Family Code, art. 126(6).

²⁴⁸ *Ibid*, art 125.

²⁴⁹ Principle 16.

²⁵⁰ Principle 20.

Indicator 25	<i>A complaint procedure exists that triggers review of guardian's acts or omissions.</i>
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Conclusion: The law does not provide for a complaint mechanism to trigger review of a guardian's acts or omissions.

Analysis: The law does not provide for a complaint process that would trigger reviewing a guardian's activities. The guardianship authority is empowered to require a report from the guardian at any time and for any reason.²⁵¹ There are no legislative provisions requiring the guardianship authority to investigate complaints made or to take any particular action with respect to complaints it may receive. The law does not provide for a mechanism for the adult under guardianship to file a complaint against the guardian. The decisions of the guardianship authority can be appealed to a court by an interested party, but as discussed under indicator 12, only people under partial guardianship enjoy this right.²⁵²

Human Rights Standards: Limitation or deprivation of legal capacity should not exclude an adult from access to courts, authorities or complaints mechanisms to review a guardian's decision. It is imperative that there are bodies which have a legal mandate to amend or reverse a guardian's decision. Regrettably, Recommendation No. R(99)4 does not directly address this point, but the World Health Organization has listed the availability of procedures for review of a guardian's decisions as one of the recommended ten basic principles of mental health law. The components of the review, according to the WHO are availability, timeliness, accessibility to the individual concerned and an opportunity for the adult to be heard in person.²⁵³

A best practice example can be found in a United States statute, which provides that an adult may request the court to review and amend a decision made by a guardian, to review the guardian's responsibilities, to remove a guardian and appoint a successor, or to terminate the guardianship.²⁵⁴

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

The last group of indicators (Indicators 26 to 29) examines legal alternatives to guardianship. Because of its intrusive and personal nature, guardianship should be used only as a last resort. Legislation that is compliant with international human rights norms usually provides for alternatives that give protection to individuals with mental

²⁵¹ Family Code, art. 126(1).

²⁵² *Ibid*, art. 115.

²⁵³ Mental Health Care Law: Ten Basic Principles, WHO/MNG/MND/96.9. World Health Organization, Geneva. Available at: http://www.who.int/entity/mental_health/media/en/75.pdf, last accessed on 1 May 2007.

²⁵⁴ See, e.g., Alaska Stat. §13.26.125 (Bender 2005).

health problems and intellectual disabilities, but these alternatives are less intrusive in nature and preserve the adult's rights to exercise decision-making to the greatest extent possible. The last group of indicators reflect the need for guardianship frameworks to recognise the dynamic nature of capacity over time. Guardianship should be used only as long as and to the extent necessary to accomplish the task of protection of vulnerable persons. Therefore, it is paramount that guardianship arrangements are reviewed periodically, and modified or terminated as required by circumstances.

Indicator 26	<i>Less restrictive alternatives to guardianship are available and are demonstrably exhausted before a guardianship is imposed.</i>
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Conclusion: Less restrictive alternatives that would prevent the need for partial or plenary guardianship do not exist in law. There is no requirement to exhaust any other means of protection before imposing guardianship.

Analysis: Bulgarian law does not provide any protective measures for people with limited capacity other than placement under either plenary or partial guardianship. There are no mechanisms available in law, such as powers-of-attorney or advanced directives, that could make it possible to avoid the need to appoint a guardian for individuals who become incapacitated later in their lives.

Human Rights Standards: Recommendation No. R(99)4 states in Principle 5 that a protective measure such as legal incapacity and guardianship should be based on the principle of minimum necessary intervention, or the least restrictive alternative. It suggests that an adult should not be placed under guardianship unless other less formal arrangements have been exhausted. A best practice example of legislation that meets the standard set out in this indicator can be found in Canada. The Manitoba Vulnerable Persons Living with a Mental Disability Act specifies that a substitute decision maker may not be appointed before it is determined whether the individual has a support network and 'reasonable efforts have been made to involve the support network'.²⁵⁵ Furthermore, if the first criterion is not met, the court may mandate efforts to involve a support network as an alternative to appointing a substitute decision maker.²⁵⁶

²⁵⁵ Vulnerable Persons Living with a Mental Disability Act, R.M., ch. 29, paras. 49(a)-(b) (1993).

²⁵⁶ *Ibid*, ch. 29, para. 50(2). This approach is also followed in other Canadian jurisdictions. For example, in Ontario a court cannot appoint a guardian to take care of an adult's property unless an alternative course 'less restrictive to the person's decision making rights' is unavailable. (Mental Health Act, S.O., ch. M.7, para. 33.1 and para. 33.7 (1990); Substitute Decisions Act, S.O., ch. 30, para. 22(3) (1992)). Similarly, in Yukon, the court cannot appoint a guardian unless 'forms of available support and assistance less intrusive than guardianship have been tried or carefully considered.' Adult Protection and Decision Making Act S.Y. ch. 21, Schedule A, §32(1) (Yukon).

Indicator 27

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

Conclusion: There is no opportunity in law to individually tailor either partial or plenary guardianship to address the varying levels of capacity or needs of individual adults.

Analysis: Bulgarian law recognises only two degrees of capacity, which are determined by the severity of the diagnosed mental condition not by a functional assessment of the abilities and needs of the person concerned.²⁵⁷ A person may be placed under either plenary guardianship or partial guardianship, but there is no opportunity within the law to tailor either type of guardianship to needs of the adult.

Human Rights Standards: Principle 6 of Recommendation No. R(99)4, which addresses the principle of proportionality, suggests that after all less restrictive alternatives have been exhausted and where guardianship is deemed to be necessary, it should be imposed in a manner proportional to the adult's degree of capacity and should be tailored to meet the specific needs of the adult. Guardianship should restrict the legal capacity to act and the rights and freedoms of an adult only to the extent necessary to provide adequate protection.²⁵⁸

Internationally, this standard has been endorsed by the World Health Organization's handbook on mental health, human rights and legislation which advises that 'any [guardianship] order must be tailored to ensure that it best suits the interests of the person who is subject to it'.²⁵⁹ A best practice example comes from Germany, where guardianship has been largely replaced by 'care and assistance' (Betreuung in German) programmes, which include an individualised support order to be carried out by a caretaker (Betreuer in German) whose responsibility is limited to those tasks which the adult cannot manage without assistance. Additionally, the adult maintains all legal rights; the court determines whether under the circumstances it is necessary for the caretaker to legally represent the individual or to provide additional consent for legal actions. This has been described as a double-competence system in which both the caretaker and the adult have competence in legal issues.²⁶⁰

²⁵⁷ See discussion of indicator 8, above.

²⁵⁸ Explanatory Memorandum to Recommendation R(99)4, para. 40.

²⁵⁹ Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, Dare to Care (World Health Organization, Geneva, Switzerland, 2005), p. 43.

²⁶⁰ Doron, I. (2002) 'Elder Guardianship Kaleidoscope – A Comparative Perspective', 16 Intl J Law Policy and the Family 368, at 378-9. The relevant sections of the German Civil Code are 1902 BGB and 1897 BGB. Also, importantly, a caretaker must seek judicial authorization for decisions with high risk or of importance. See 1902 BGB, discussed in Blankman, K. (1997) 'Guardianship Models in the Netherlands and Western Europe', 20(1) Intl J Law and Psychiatry 47, at 54.

Indicator 28	<i>Guardianship is periodically reviewed and continues only as long as appropriate.</i>
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Conclusion: Bulgarian legislation does not ensure that the need for either plenary or partial guardianship is ever reviewed.

Analysis: Bulgarian law does not contain any provision for periodic review of the necessity of guardianship. There is no limitation on the duration of guardianship once it is established. Some periodic reporting is required of some guardians,²⁶¹ but since the content of the periodic reports is unregulated these reports insufficiently address whether guardianship needs to be continued. Once a person is placed under guardianship, it persists for his or her lifetime unless a specific application is made to support restoration of the capacity of the adult.²⁶²

Human Rights Standards: Recommendation No. R(99)4 provides 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.²⁶³ This standard is also found in the United Nations Mental Illness Principles, which require that, '[d]ecisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law'.²⁶⁴

Indicator 29	<i>An adult subject to guardianship has the right to request modification and/or termination of the guardianship.</i>
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Conclusion: Adults under partial guardianship have the right to request termination of guardianship. Adults under plenary guardianship may only request someone else to file the request on their behalf but have no right to file the application themselves.

Analysis: Once an individual is placed under guardianship, revocation of the guardianship requires demonstrable medical evidence that the person's mental health has improved. Adults under partial guardianship are allowed to file an application for revocation of the guardianship themselves or with the consent of the guardian,²⁶⁵ whereas adults under plenary guardianship may request an application for revocation

²⁶¹ See indicator 20, above.

²⁶² See indicator 25, above.

²⁶³ Recommendation No. R(99)4, Principle 14.

²⁶⁴ UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on December 17, 1991, Principle 1(6).

²⁶⁵ Supreme Court of Cassation, Decree 5/79/13.02.1980, para. 10.

of guardianship from the guardianship authority or the guardian.²⁶⁶ If the guardian and the guardianship authority refuse to file the application, the adult can ask the prosecutor to file for revocation of the guardianship.²⁶⁷ However, if the prosecutor refuses to file, there is no recourse for the adult under plenary guardianship.

Human Rights Standards: The right to fair trial in determination of civil (and criminal) rights is set out by Article 6 of the European Convention on Human Rights. The European Court of Human Rights has held that guardianship that affects someone's property rights falls within 'civil rights' and is thus afforded the protection of Article 6.²⁶⁸ The European Court has also found that guardianship engages Article 8 (privacy rights) of the Convention, asserting that a re-examination of legal incapacity or guardianship is particularly justified if the person concerned so requests.²⁶⁹

²⁶⁶ Civil Procedure Code, art. 277, para.1 and 2.

²⁶⁷ Supreme Court of Cassation, Decree 5/79/13.02.1980, para. 10.

²⁶⁸ *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979, (A/33) (1979) 2 EHRR 387.

²⁶⁹ *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, (2001) 31 EHRR 32.

3. GUARDIANSHIP PRACTICE IN BULGARIA

3.1 Aims and Objectives

The principal objective of the stage 2 research was to gain an understanding of guardianship practice in Bulgaria. To do this we sought to:

- Document the process of guardianship so as to examine the extent to which actual practice complies with or deviates from the legal framework.
- Describe, in so far as possible, the conditions under which people subject to guardianship live.

3.2 Methodology

Given the limits in the available information on guardianship practice in Bulgaria, MDAC sought to collect as much relevant information as possible, from a broad range of sources. It was hoped that specific cases could be followed from the initial application, through the court hearing and for a period thereafter. To obtain a broad but representative overview of the situation, MDAC's researcher based in Bulgaria sought access to a range of courts/authorities.

The Bulgarian government keeps no national statistics on the numbers, status, or condition of people under guardianship. The only way to obtain the numbers, age and place of residence of people under guardianship in Bulgaria was from election lists, because people under guardianship are not allowed to vote and special lists are kept of such people. All 264 municipalities in Bulgaria are obliged to report to the Department of Civil Registration and Administrative Service at the Ministry of Regional Development about the lists of people who are not allowed to vote. When this information was sought, the Department replied in written form²⁷⁰ that it possessed relevant statistics but that supplying them would cost €450. MDAC refused on principle to pay the requested sum, as this information should be in the public domain for free or, at worst, for a minimal payment. Thus MDAC chose not to obtain statistics on guardianship.

MDAC used four methods to collect data on guardianship practice in Bulgaria:

- ⇒ Observation of court hearings.
- ⇒ Review of court case files.

²⁷⁰ Letter 9200128/6 February 2007, Chief director of Civil Registration and Administrative Service Department, Ivan Getov.

- ⇒ Review of guardianship files.
- ⇒ Interviews with judges, prosecutors, lawyers, experts, persons to be placed under guardianship, and guardians.

3.3 Court Hearings

To obtain information on the dates and numbers of scheduled court hearings on guardianship cases, the researcher sent letters in April 2005 and April 2006 to all 28 regional courts, which are first-instance courts for guardianship cases. All regional courts replied. Some courts replied that the researcher had to declare the legal basis for observing hearings and reviewing files. Since the courts are not legally obliged to provide access to researchers, two courts denied access to review court files and to observe hearings. Some courts agreed to let the researcher observe hearings and review the cases – in Stara Zagora, Plovdiv, Lovech (hearings only), and Varna (hearings only). All courts provided information about the scheduled guardianship cases. The researcher selected the court hearings to be monitored by their number and variety. In most of the courts, guardianship cases are heard on one day every two or four weeks. In some courts only two or three hearings take place in a month or longer, while in others as many as ten hearings may take place in one day. In order to obtain as much information as possible, the researcher monitored cases in the larger cities, which probably had more court activity. As a result, Varna, Stara Zagora and Plovdiv Regional Courts were selected for this research. It was also important that the senior judges of these courts allowed the researcher to attend the hearings.

From the replies sent by the courts, it was not clear whether the hearing which the researcher would observe was the first in the procedure or whether there had been previous hearings in the case. Thus it was not possible to select cases using this criterion.

While observing the court hearings, the researcher experienced different reactions from the judges, varying from indifference to cautiousness. The judges saw the researcher take written notes during the hearings and it appeared that the note-taking sometimes made judges feel uncomfortable or nervous. For the sake of objectivity, the researcher, unless specifically requested to, did not explain to the judge at the beginning of the hearing the purpose of observing the court hearings.

As a result, 56 court hearings from 49 cases were observed in four regional courts. Of these 56 court hearings, 25 were first hearings during which the adult was present and interviewed by the court, and 31 were second hearings during which usually the medical examination was discussed and witnesses were heard. Three of these 25 first hearings were also the last hearing. First and second (last) hearings were monitored in only 6 cases. In 15 of the observed hearings the second hearing was the last hearing of the case (in most cases there are two hearings). In the rest of the cases, the reason for not deciding on the case at the second hearing was that

either one of the parties was not present (because they were not properly notified or because of health conditions), or because the examination was not done until the second hearing (for more details see Table 1).

3.4 Court Case Files

The researcher asked all 28 regional courts for permission to review guardianship case files in 2006. Some courts gave such permission but only for archived files, since only the involved parties have access to open case files. The files are closed and archived after the judicial decision comes into force.

Only two courts provided access to court files. In the Stara Zagora Regional Court the researcher was able to randomly select 12 files from a pile of around 20 files (of these she took the first six and then every other file) and was given enough time and space to review them.²⁷¹ In the Plovdiv Regional Court, the chairperson requested advance notice of when the research would take place so that the court administration could prepare the files. Before the researcher was given the files she had to sign a declaration that she would not distribute personal data contained in them. The researcher was then given five files at the beginning of the day, and was promised five more after returning the first five. The review lasted about seven hours, during which 12 court files were reviewed. During this time two administration officials offered to photocopy some pages of the files so that the researcher would not have to write them down. Thus five pages from a court file were photocopied. The next day the researcher was supposed to review the rest of the files, but the senior judge instructed the administration to refuse access because he found out that the researcher had photocopied some pages, which he viewed as a breach of the data protection agreement which was signed the previous day. The researcher had to give back the photocopies which she had received the previous day. The senior judge of the court was not available to discuss the situation.

In total, 24 court case files from 2005 were thoroughly reviewed. The researcher took notes and summarized the information, focusing on the application, notification of the parties, notes from the hearings, medical examinations, witness statements, and announcements of the decision to the person placed under guardianship. (See Table 2 for more details).

²⁷¹ According to letter 280/30 January 2007 from chair of Stara Zagora Regional Court 'In 2005 there were 32 cases regarding placement under guardianship at this court and for 2006 – 11 were for a review of, and 32 were for placement under guardianship'.

3.5 Guardianship Files

In 2005, MDAC's researcher requested information from six municipalities (mayors and secretaries)²⁷² about their responsibilities in the guardianship system. In subsequent interviews conducted with these officials they first denied that they had any duties, and often the researcher had to read the Family Code with them and explain their role in the system of guardianship. To continue the research this way soon turned out to be fruitless, as the only thing which it revealed was the almost total lack of knowledge on the part of municipal officials.

In January 2007, letters were sent to 65 municipalities²⁷³ asking about the number of people under (both plenary and partial) guardianship, the ages of these people, how many lived in the community and how many in institutions, whether they were invited to and participated in the procedure for placement under guardianship, who appointed the guardians, how the guardianship authorities were informed about the court decisions on placement under guardianship, and how the guardianship agencies controlled the guardians' activities.

Replies were received from 30 municipalities (including Plovdiv with its three regions and Sofia with its 16 regions) covering a total of 47 regions as of the beginning of April 2007. According to the replies, a guardianship file contain the following documents:

- ⇒ The application by the potential guardian asking to be appointed as such.
- ⇒ The court decision for placement under guardianship.
- ⇒ A mayor's order for the appointment.
- ⇒ A certificate for the appointment.
- ⇒ Annual reports.
- ⇒ Minutes of guardianship authority meetings.

The practice of keeping files varies from authority to authority. Unfortunately, MDAC's researcher was not able to review any guardianship files, for a variety of reasons. When municipalities were visited, sometimes the only municipal official in charge of the files was absent, sometimes no one knew who was in charge of them or where they were kept, and sometimes there were no such files. On other occasions municipalities replied to a written request that protection of personal data excluded review of the files by any researcher. In many cases there was no rejection at the beginning, but the officials who agreed to show the files was so reluctant or slow so that it made research impossible (for more details see Table 3 of Annex 3).

²⁷² Ruse, Belogradchik, Goren Chiflik, Shumen, Bregovo, Rila.

²⁷³ Bulgaria has 264 municipalities. Letters were sent to the 28 municipalities that serve as district centres, and to the 37 municipalities with homes for people with intellectual or psycho-social (mental health) disabilities.

3.6 Interviews

MDAC's researcher carried out interviews with guardianship personnel after she observed court hearings. The main problem was that most of the participants – especially the adults, their relatives and guardians of people placed in social care homes – were not fully aware of the aims and effects of the procedure. The professionals involved – judges, prosecutors and lawyers – performed as they would with other court hearings, and did not demonstrate sensitivity to, nor make reasonable accommodations for, people with intellectual disabilities or psycho-social (mental health) disabilities during the court procedure.

The interviews with professionals were not as detailed as originally intended, because professionals had little interest in discussing guardianship issues. Many of them said that guardianship was only one of many issues in their practice, that they did not have the time (courts in Bulgaria are overburdened), and that they did not have a deep understanding of guardianship procedures. MDAC's researcher talked to all six judges who heard the guardianship cases that she observed, but only three of the six agreed to be interviewed.

Prosecutors did not agree to be interviewed, but two of them were present and participated in two of the interviews with judges. The lawyers representing adults in the procedure were interviewed after the hearings in which they participated. Only two lawyers agreed to talk to MDAC's researcher. Like the judges, guardians said they were overburdened and only two of them agreed to talk to the researcher. About ten adults awaiting placement under guardianship were asked questions after the hearings they participated in, but only two of them were able to talk and had fairly clear views on guardianship. Most of the relatives appeared to the researcher to feel uncomfortable during the hearings, so the researcher did not seek to interview many of them. The researcher interviewed five guardians, of whom three were directors of social care institutions and two were guardians of adults who lived in the community. The latter two were contacted via the lawyer of the adults under guardianship.

As a result, interviews were carried out with three judges, two prosecutors, two lawyers (one on the applicant's side and one on the side of the person to be placed under guardianship), two psychiatrists, two adults to be placed under guardianship, four relatives and more than twenty adults who were already under guardianship. Few of the people to be placed under guardianship were in a condition allowing interviews. At least five adults were unable to talk because they had never been rehabilitated or had multiple disabilities. Two adults replied to simple questions about their needs only with the help of sign language which only their relatives could interpret. Five adults (with schizophrenia or dementia) had been brought by relatives from other cities, and the short conversations possible in the limited time and space showed only that the adults were not aware of where they were and why. Others had hallucinations during the conversation or refused to talk because they didn't know the researcher and thought she was a person from the past, or could not understand the aim of

the interview. Some adults were interviewed long after they had been placed under guardianship; their opinions have been incorporated into this report.

3.7 Description of a Typical Court Hearing

Observations of court hearings and interviews with participants in guardianship cases allowed the researcher to conclude that the practice of Bulgarian courts regarding guardianship hearings is similar enough to be summarised in a unified description. The only difference that could be immediately seen was between cases of adults with intellectual disabilities and of those diagnosed with psycho-social (mental health) disabilities. Again, it should be taken into consideration that the following description is the result of exploratory research that may not be representative of practice nationwide.

3.7.1 Typical Court Hearing for Adult with Intellectual Disabilities

Usually parents of young people with intellectual disability initiated these cases, and the parents came with the young adults to the first hearing, when the adult was to be heard. Usually, it was also the first time both parties had entered a courtroom; therefore, both parties looked uncomfortable. Usually several cases were scheduled for the same time, which made it unclear which case was being heard when these people arrived at the courtroom. The cases were often delayed, so often the adults became restless and wanted to go home.

In most cases, parents hired a lawyer to write the application and then to represent them during the court procedure. Only rarely did the lawyer talk to the adult before entering the courtroom.

After everyone assembled in the courtroom, the judge asked people to identify themselves and officially opened the case, dictating to the secretary the names of the parties present and whether they had been properly notified. Then the judge asked the lawyer and prosecutor whether the hearing should proceed.

After both sides confirmed that the hearing should proceed, the judge turned to the adult and asked whether the adult knew why everyone was in the courtroom. In most of the cases observed, the young adults stayed silent. Parents offered an explanation to the judge that the adult was not able to speak. Then the judge asked the adult's name and examined the reaction when calling the adult by his or her name. The judge asked 'yes/no' questions as well as questions such as 'Where did you come from?', 'Who is this?' (pointing at the mother), 'How old are you?', and 'Where do you live?' The adult usually stayed silent or replied only to the 'yes/no' questions.

Very often this courtroom interview and the application were the judge's only source of information. The judge often treated this information as sufficient to decide the

case even without an incapacity assessment by qualified experts. Sometimes a relative of the adult was present and testified that the adult was not able to dress, eat or use the toilet without assistance.

The court hearing usually lasted six to fifteen minutes. When the adult and the witness were questioned the judge asked the prosecutor to contribute questions, but in most of the cases the prosecutor had none. After that the applicant's lawyer asked for placement under plenary guardianship, and the prosecutor agreed. The judge ordered the deprivation of legal capacity and placement under plenary guardianship, but usually did not announce it in the courtroom.

In cases concerning an adult with moderate intellectual disabilities the court sometimes ordered, at the end of the first hearing, a medical examination. At the second hearing the judge then deprived the adult of legal capacity. Rarely was the adult present at the second hearing, and at no stage was the adult informed about his or her rights in a language which he or she understands.

MDAC's researcher observed several physical difficulties. First, it was difficult to hear everything that the judge, the prosecutor or the lawyer said. Second, the professionals, in a kind of shorthand, referred to the numbers of legislative articles without explaining their meaning. Third, important details of a case were not discussed, such as results of an incapacity assessment. And fourth, the judge rarely actually announced the court's decision.

3.7.2 Typical Court Hearing for Adult with a Psycho-Social (Mental Health) Disabilities

A typical hearing for a person with psycho-social (mental health) disability was somewhat different. Typically, such an adult was in a mental health institution, and only at the hearing did the adult meet the relatives who initiated the procedure. However, it was rare for such adults to believe that their relatives started the procedure, simply because they were not aware that the procedure had started. Adults coming from a mental health institution were generally more sedated and inactive during the court hearing –probably due to side effects of psychiatric medication – and generally acknowledged that they had a mental health problem. In contrast, people coming from their own home often denied that they had any illness and attributed the application for guardianship to problems in the relationships between them and their relatives (with whom they often lived in the same flat).

Typically, the applicant relatives had a lawyer, who did not pay attention to the adult. The judge started the procedure the same way as in cases for people with intellectual disabilities, described above. Some judges explained to the adult that the aim of the procedure was to appoint a person who would help them or take care for them. No judge was heard to explain that the purpose of the procedure is to find out whether the person needed a guardian, and no judge explained the consequences of placement under guardianship.

Often the adult appeared to be surprised, which could have stemmed from a misunderstanding. Perhaps the adult thought the court hearing was about compulsory treatment for their mental illness, or connected the hearing with a criminal case from their past. Many adults said that they had not done anything wrong. Some of the adults asked why the judge thought they needed a guardian and explained that they had problems with the relatives who started the procedure.

Then the judge asked questions about their daily routine, such as ‘Where do you live?’, ‘With whom do you live?’, ‘Who cooks for you?’, ‘Who buys food for you?’, ‘Do you work?’, ‘Do you have a partner?’, ‘Are you ill?’, ‘Do you take any medication?’, ‘How much is your pension?’, or ‘How much does a loaf of bread cost?’ Younger people with mental health problems replied to all questions, but people with dementia started talking about their past, or sometimes in a confusing way about numbers, age, and activities of the day before.

The applicant’s lawyer asked the judge to request an incapacity assessment and to hear witnesses. The judge usually allowed one witness and granted the incapacity assessment. The witness, usually a neighbour or a relative, was invited to testify during the first hearing if they were present. They briefly described how they got to know the adult, and the period when the adult started to behave in an unusual way. Perhaps they describe a memorable incident when the adult was (allegedly) aggressive, drunk, screaming, or violent towards relatives.

The lawyer and the prosecutor were given an opportunity to put questions to the witness, such as whether the adult’s behaviour changed if medication was taken or not, and whether the adult’s condition fluctuated. Then the judge appointed a psychiatrist, who is tasked with conducting an incapacity assessment. Often some psychiatrists are present in the courtroom (because they are waiting to testify in other cases).

The judge scheduled the second hearing, saying something like ‘The parties are presumed to be notified of the next hearing’. The reason for this wording is that Bulgarian law allows notice of a subsequent court hearing to be given when the parties are present during a previous court hearing. They then need not be notified in writing. However, the judge never turned to the adult and told him or her the date and time of the next court hearing or that the adult should participate. It was apparent to MDAC’s researcher that the adult usually did not understand the judge’s legalistic phrase. This perhaps explains why adults are rarely present at second or subsequent court hearings.

During the second hearing the judge invited the psychiatrist to present the conclusions of the incapacity assessment. The language the experts use was medical and formal. The prosecutor and the applicant’s lawyer rarely had questions unless the expert found the adult capable of taking care of his/her own affairs. But then there were a few questions about fluctuations, the diagnosis, or potentially aggressive behaviour. The adult was normally not present. After the conclusions were heard and the questions answered, the applicant’s lawyer proposed that the adult be deprived of legal capacity

and placed under plenary guardianship. The prosecutor agreed. The decision was issued in writing within thirty days.

Much information is missed if one observes only court hearings. It is difficult to gain an impression about the relationship between the applicant and the adult, the motivations for guardianship, the mental health state of the adult, and whether parties had been notified. Similarly, during the second hearing it is stated how, when and for how long the incapacity assessment was carried out. These facts can be found only by reviewing court case files. As detailed in section 3.5 above, MDAC had great difficulty in reviewing court case files but eventually managed to review 24 such files.

3.7.3 Typical Court Guardianship File

A typical court file on guardianship was kept in a folder which lists the case number, the number of hearings and the names of the applicant and the adult on the front page. The folder contained approximately 20 documents, including:

- ⇒ A list of all documents.
- ⇒ The application to deprive the adult of legal capacity.
- ⇒ A receipt for the court fees provided by the applicant.
- ⇒ A list of persons to be notified for the first hearing.
- ⇒ Notifications signed by the parties and sent back to court.
- ⇒ Power of attorney for applicant's lawyer.
- ⇒ A document certifying the relationship between the applicant and the adult – birth certificate, marriage certificate, etc.
- ⇒ Notes from the first hearing.
- ⇒ The decision of the Labour Expert Medical Commission.²⁷⁴
- ⇒ A list of notifications:
 - Notifications for the second hearings to the experts and the parties not present at the first hearing, signed and sent back to the court.
 - The court decision with hand-written date when it entered into force (one to two pages).
 - Notification to the parties about the decision, signed by them and sent back to the court.
 - Notification to the guardianship authority about the appointment of a guardian signed, sealed and sent back to the court.

²⁷⁴ Labour Expert Medical Commissions (LEMCs) are bodies authorised to assess the capacity of disabled people for work purposes in Bulgaria. These bodies are subordinated to the Ministry of Health and are based in the district hospitals. They consist of three psychiatrists who examine mentally disabled people. In cases viewed as less serious, a LEMC reviews the condition of the adult every two years. In cases of severely disabled people born with a disability a LEMC can certify that a person lacks the ability to work for life. Decisions issued by LEMC are among the most common documents used during guardianship proceedings.

Reviewing guardianship court files gives much more information about why applicants decided to place the adults under guardianship, the condition of the adults before the application was filed, how parties were notified about the hearings, and the court's decisions, as well as conclusions the experts reached concerning the adults' condition and ability to take care of their own affairs. These issues are analysed in the section below.

3.7.4 Guardianship Files

As noted in section 3.5 above, MDAC's researcher was refused access to guardianship files held by guardianship offices of local authorities, but the guardianship offices did explained in letters to MDAC's researcher what the files contained. Three facts are important to bear in mind. First, the files only exist in cases where a court deprived an adult of legal capacity but did *not* appoint a guardian, instead sending its decision to the guardianship office. Second, there is no mechanism to check whether the guardianship office received all court decisions sent to it, nor to ascertain how long the guardianship office takes to appoint a guardian. (Bulgaria has no 'professional guardians', and there is no deadline for this procedure.) Third, in some municipalities, guardianship offices simply do not keep guardianship files.

According to the guardianship offices – but unconfirmed by MDAC – guardianship files, where they exist, contain:

- ⇒ The court decision depriving the adult of legal capacity and placing him or her under guardianship.
- ⇒ An application by a potential guardian asking to be appointed as a guardian.
- ⇒ A certificate for the appointment, for the guardian to present as an official document when needed.
- ⇒ A mayor's order for the appointment of a guardian.
- ⇒ Annual reports from the guardian on the guardian's activities.
- ⇒ Minutes of the guardianship office meetings.

In Pazardzhik municipality, the annual reports are supposed to contain a statement by the guardian describing the health condition of the adult, and the adult's living conditions, income and expenses. The files are also supposed to contain a list of the adult's possessions and real estate. According to written replies by other guardianship offices, this practice is uncommon.

In Pleven, the potential guardian is asked to present written evidence that he/she has no criminal record and has never been under criminal investigation, as well as a document stating that he or she is not registered as a person with mental illness at the district psychiatric institution. In addition, the Pleven guardianship office asks for a declaration of the adult's possessions.

In the central region in Plovdiv, potential guardians are asked to present the same written evidence as in Pleven, but the documents certifying lack of mental illness and

clean criminal record must be provided for all members of the guardianship board, not only for the guardian.

In the eastern region in Plovdiv, a copy of the adult's national identity card and the disability examination document are kept in the files, as well as documents from the tax agency regarding the adult's real estate, and a copy of the guardian's national identity card. Interestingly, the eastern region in Plovdiv is the only guardianship office that requires statements from neighbours that they are not aware of any alcohol addiction by the potential guardian and/or the deputy guardian, or that they treat their own families in a bad way.

In Ruse, the guardianship office requires a list of the adult's possessions, as well as documents which show that the guardian has a clean criminal record and no mental illness. The guardianship office in the Septemvri municipality, similarly to the one in Ruse, mandates a list of the adult's possessions.

The following is a template used for annual reporting by the guardians in some municipalities in Bulgaria:

To the guardianship body

Report from(guardian's name)

Address

About the person and the property of(adult's name)

Address

In accordance with Art. 126 of the Family Code, I submit a guardian's report for the year 2... :

1. About the person – full description of the physical and moral state of the person under guardianship supported with the following documents:

- ⇒ For minors and children between the age of 14 and 18 – signed and sealed document from the form master.
- ⇒ For children in care home – signed and sealed document from the home.
- ⇒ For adults under guardianship – a document received from the guardianship board/council and should contain a description of the attitude of the guardian towards the adult (behaviour, services, care, etc). If the person under guardianship has been in a hospital, a document from the hospital is required.

2. About financial matters:

- ⇒ Real estate property – description, number, location, and document of the ownership is attached.
- ⇒ In case of renting the property – a document certifying the amount received as rent is required, and the period of time should be specified.
- ⇒ If the person under guardianship owns a farm or land, income from these should be documented and presented.
- ⇒ In case the person under guardianship receives a pension, a signed and sealed document from the Pension Department for the period should be presented.
- ⇒ In case some of the property of the person under guardianship has been sold, the following documents should be presented:
 - Donation, will, selling and other transfers that need a notary participation – a permission form the District Court is required.
 - When property was taken by the state or municipality – a document for that is required.
- ⇒ Other property.
 - Money – document from the bank about the account.
 - Documents for all purchased property of high value.
 - Personal belongings – an itemised list.

The report is submitted with all documents attached signed by all members of the guardianship board/council.

Date.....

Signatures.....

3.8 Observations and Conclusions

3.8.1 Application

Relatives or directors of social care institutions initiated nearly all of the cases of placement under guardianship which MDAC monitored. Regional prosecutors initiated 3 cases; husbands or wives, 10; adult children or parents of the adult in question, at least 40; and nephews and cousins, at least 3. The common pattern was that people who personally took care of and lived with the adult initiated the procedure.

Since the largest number of people from social care institutions were deprived of legal capacity in 2003 and 2004, only a small number of cases were initiated by directors of social care institutions during 2005 and 2006. Some directors initiated reviews of guardianship (11 cases in Stara Zagora Regional Court and 2 cases in Varna Regional Court).

It seems that a standardised application procedure was used throughout Bulgaria. Part of this was a written application containing relevant information such as a description of the relationship between the applicant and adult, personal data about the adult, the history of hospitalisation, and an explanation of the current condition that hindered the adult from taking care of himself or herself. Having submitted the written application, the applicant usually asked the court to open a procedure and order an incapacity assessment.

Very rarely, and mainly for people with psycho-social (mental health) disabilities, the written applications mentioned financial transactions the adult carried out that were, in the opinion of the applicant, not in the adult's best interests, for example, selling a flat at a very low price, or spending all of his or her pension on cigarettes and alcohol.

The 73 cases reviewed consisted of

- ⇒ 30 of people with intellectual disabilities.
- ⇒ 20 of people who had schizophrenia, epilepsy or bipolar disorder.
- ⇒ 20 of people with dementia and/or Alzheimer disease.
- ⇒ 3 of people who had severe brain trauma which might lead to coma or total loss of physical function (as happened in one case of intoxication).²⁷⁵

Applications also often contained medical documents issued by the Labour Expert Medical Commission stating that the adult was assessed as 'disabled for life'.

3.8.2 Notice of Court Proceedings and the Right to be Present

In two cases concerning adults who lived in social care or mental health institutions, MDAC's research revealed that the adults did not sign the notification for guardianship cases, which suggests that they were not informed of the court proceedings initiated against them. Two other adults who did sign the notification were in the same psychiatric institution in Radnevo, whereas the psychiatric hospital in Lovech and Karvuna, for example, had a different practice. In these latter two hospitals, notifications were signed by an official whose name and position could not be identified because the person's handwriting was unclear, or the position in the hospital was not stated. The adults in question, regardless of whether they had signed the notifications themselves, were brought to the court for the first hearing but not for subsequent ones.

After an application was submitted, typically the first hearing took place a month later. In the meantime the court notified the parties, who received such notifications between 14 to 20 days before the court hearing. In two or three cases when the adults or their

²⁷⁵ The numbers may not be fully accurate as in some cases it was difficult to understand the diagnosis of the adult (particularly when only the first hearing was monitored and the person was between 50 and 60 years old: These adults could have had psycho-social disabilities or dementia, or both, and this was not mentioned during the hearing).

relatives could not be found and the neighbours refused to receive the notification, the mayor of the village signed it and informed the parties about the hearing.

In the 24 court files reviewed, the notification contained information about the location of the court, the date and time of the hearing, the number of the case, the names of the person notified and his or her address and in what capacity (adult/applicant/expert/witness) he or she would be involved in the case. On the back of the notification slip was a citation from the Civil Procedure Code about notifications.

In at least five cases applicants did not provide information about the location of the adult to be placed under guardianship, although they themselves had authorised the adult's placement in hospitals or called the police to help place them in hospital. Improper notification apparently happened more to adults with a psycho-social (mental health) disability than to those with an intellectual disability. From observing court hearings and reviewing court files, it was obvious that the people with intellectual disabilities were brought to the courtroom by their parents or other relatives, and the hearings or statements by witnesses (usually neighbours) made it clear that these adults lived with their families. In contrast, people with psycho-social disabilities were brought to the court from hospitals, or the files provided information that adults had been living in hospitals for a long time.

The most common way to notify the adult was apparently to deliver the notification to the adult's home or the institution where he or she was detained. An officer from the court usually delivered the note in person. However, there were several problems with the notification:

- The notifications were often received by a person other than the adult, because the adult could not be found (or little attempt was made to find him or her) or was believed to be unable to understand what it meant and to sign it.
- When relatives who lived with the adult were the applicants in the case, these same people signed the notification on behalf of the adult. In 8 of 13 cases, a mother or another relative who lived in the same house or flat received and signed the notifications. In a few cases neighbours who signed the notification.
- The notification did not state the nature of the case and the rights of the adult in question. Thus even if an adult were notified about the court proceedings, he or she would likely remain unaware of the content of such a hearing, the reasons for participating in it and the rights he or she held. As noted above, adults generally assumed that they were taken to court to be punished.

In only 3 out of 73 cases did the adults have lawyers representing them. In the other cases the adults were accompanied, if at all, by relatives or staff from the social care institution where they lived. The observed hearings and the reviewed court files made it clear that even the applicants were not well informed about what a successful guardianship procedure would achieve. Applicants often started

guardianship procedures to be able to represent the adult in bureaucratic procedures (pension, social benefits, wheelchairs, signing tax declarations, etc.) or to take away property or income.

The description which judges gave to adults facing placement under guardianship is especially interesting. First, judges just asked whether the adult knew why he or she was in the courtroom. MDAC's researcher noted a variety of replies; the predominant impression was that adults did not understand the nature of the case. In particular, adults to be placed under guardianship did not appear to realize that the judges would decide whether they should be placed under guardianship. This is not surprising, because in the hearings observed, judges simply declared that the case was about selection and appointment of a guardian. The following courtroom dialogue from a first hearing illustrates this point:

<i>Judge</i>	Hi Maria, where are you now?
<i>Adult</i>	Courtroom.
<i>Judge</i>	Do you know why you are here?
<i>Adult</i>	Explain to me why!
<i>Judge</i>	You are here because you need a person to be appointed to take care of your interests – personal and financial.
<i>Adult</i>	I can take care of myself. ²⁷⁶

On the same day the following dialogue was noted during the first hearing of another case:

<i>Judge</i>	Hi S! Why are you here?
<i>Adult</i>	To give up my idea of selling my property.
<i>Judge</i>	We need to appoint a person to take care of you – this is the purpose of this case.
<i>Adult</i>	My daughter takes care of me anyway.
<i>Judge</i>	Do you agree that someone else has to take care of your property, flat...
<i>Adult</i>	I can do that, I cook, do the washing, I can cope with everything myself. During the day I go to the city park to play chess, I do not drink or smoke.
<i>Judge</i>	We are going to order an examination for you.
<i>Adult</i>	Can't we avoid that? There is no need to pay to a doctor, it is a waste of money.
<i>Judge</i>	Let's hear an expert's opinion. ²⁷⁷

²⁷⁶ Stara Zagora Regional Court, 31 May 2006, case number 359/06.

²⁷⁷ Stara Zagora Regional Court, 31 May 2006, case number 356/06.

In 55 cases of second hearings, usually the last one, the adults to be placed under guardianship were not present. The three exceptions were individuals who hired lawyers themselves and eventually avoided being placed under guardianship. During the procedure the adults were not informed that they could present evidence or call witnesses. MDAC's researcher gained the impression that the judge, experts and other participants in the procedure perceived the adults as people whose only role and entitlement was to submit to the judge's questioning during the first hearing.

According to the court files, the court considered that adults were considered properly notified of the second and following hearings solely because they were present at the first hearing, at which the date of the second was scheduled.

In one rare example among the reviewed and observed cases, the adult did not have an address where he could have been properly notified, but still hired a lawyer and managed to participate in all hearings in the case. In the end, he was not placed under guardianship because the court found that the applicant's aim was to take away property inherited by the adult and his sister, rather than to act in his best interests.

Case Example

In one case which MDAC observed, a woman lodged an application with the Plovdiv Regional Court requesting that her brother, aged 53, be placed under guardianship.²⁷⁸ The man had left his home and was living in a lorry. He was not notified of the first court hearing. At the first hearing, on 17 November 2005, the adult was present with a lawyer, and a lawyer represented the applicant. The adult's lawyer denied that her client was mentally ill. Both lawyers wanted the court to order an incapacity assessment and wanted to present two witnesses each. The court ordered an incapacity assessment and allowed each party only one witness. Medical documents from hospitalisations in 1998 and in 2003 were presented by the applicant.

The adult's diagnosis was F10 from ICD-9 (alcohol addiction and as a result of it personality disorder) and the adult had been treated with haloperidol, chlorpromazine, biperiden and carbamazepin. The incapacity assessment, carried out on 6 December 2005, established normal intelligence, slight memory dysfunctions, unstable attention and generally good orientation. The adult was registered with a family doctor as an alcohol addict and had been hospitalised three times. After 2003 he was no longer treated, and at the time of the research the adult had a personality disorder but was capable of understanding and managing his behaviour.

On 9 December 2005 the lawyers received the expert's report. At the next hearing, on 10 January 2006, the applicant's lawyer requested that the expert check all

²⁷⁸ Case 3014/05.

medical documentation from the 1998 hospitalisation, but the adult's lawyer opposed this since the adult had been examined a month before the court hearing, saying the adult's current condition, not a past one, should be relied on. The court agreed that the expert should accept the proposed examination of documents.

Two witnesses were questioned by the court. The applicant's witness claimed that in 2003 he drove the adult, who was in a psychotic condition, to the medical institution, and said he was not aware of that condition thereafter. The adult's witness stated that he was a neighbour of the adult (though the adult at that time was living in a lorry on the street) and met him once a week when they would drink together, and that the adult did not cause any problems. The applicant's lawyer proposed that the judge place the adult under partial guardianship but the adult's lawyer and the prosecutor were against this proposal.

The court decision was issued on 31 March 2006 and stated, 'the adult has mental illness but he is not incapable of taking care of himself. He understands and perceives the environment and can act to protect his interest – one [piece] of the evidence for that is that he hired a lawyer. So he should not be placed under guardianship'.

Another example of abuse for the purpose of transferring ownership of property was in case N. 3045/05 in Plovdiv:

An application was lodged with the Regional Court by a man aged 35, against his mother, aged 61, who at that time was in a psychiatric hospital. The application stated that the son took care of his mother because she had a paranoid schizophrenia in remission. Since 2000 she had lived almost all year round in a psychiatric hospital as she could not take care of herself and communicate. On 24 November 2005, 20 days after the application was lodged, the first hearing took place. A notification was sent to the hospital, but, according to a response, the mother was not there until November 23 as she was taking care of property issues. So the hearing was postponed since she was not present at it.

The adult used to work as a nurse in a hospital for almost 10 years (a document in the file offered proof). Before that she worked as a nurse in a clinic for four years. The psychiatric hospital sent a letter proving that she had lived there since 2003 and that each time when she wanted to go back to live in her flat in Plovdiv her son abused her both physically and mentally because he wanted her to give an apartment to him. According to the medical documentation, the lady developed mental illness after 1986 when her husband died. She developed paranoia and stayed in hospital in 1987. In 2001, their house burned down and she began to live with her son in a flat. The son began to physically abuse her. She spent over a year living with her cousin in her flat, then she moved to her apartment again and took a drug overdose in August 2002. The son has been an alcohol addict since 2000. The son confessed before doctors who first examined her after the last beating in November 2003 that he drank a lot to make himself calmer (a medical document

about her trauma was attached to the file). Several of her ribs were broken, she was in coma for a while, and had bruises etc. all over her body.

On 10 January 2006, the adult and her lawyer as well as the applicant's lawyer were in the courtroom. They all presented written evidence. The court questioned the lady and she explained that her son initiated the procedure because he wanted to take away a third of a house and a small flat they had. She, among others, stated that she took medicines, felt better, and received a pension of around 85 Euro each month, and lived in the protected home. She confessed that she did not even ask for rent from the son because she was afraid of him.

The psychiatric examination concluded that the mother behaved adequately, in a socially acceptable way, comprehended everything, was well-oriented, took care of everything in her life and should not be placed under guardianship. Both lawyers received the report on 30 January 2006. One witness (the daughter) was questioned; she stated that her mother took care of herself perfectly well, but had problems with her son. On one occasion the sister witnessed that her mother was physically abused. She claimed that a financial interest was the basis of the case. The court decided that, although the woman was mentally ill, guardianship was not needed.

Although these cases resulted in denial of placement under guardianship, it was obvious that the adults themselves did not participate in the proceedings. It was also striking how difficult it was to prove that they were capable of taking care of themselves despite the mental illness and the fact that they had lawyers. Also, in the second case, neither the judge nor the prosecutor initiated any proceedings to investigate the serious allegations of abuse of the mother by her son, evidence which came out in the courtroom and was supported by written documentation. This is despite a general legal obligation for anyone in Bulgaria who has information about a crime to report it to the police or the prosecutor's office. These cases also illustrated that adults with psycho-social (mental health) disabilities are vulnerable to abuse, and that it is nearly impossible to protect themselves from abuse even if they are able to comprehend, speak for themselves or use the safeguards in a legal procedure. Lastly, these cases demonstrated how much effort the adult needed to make in order to protect him or herself from abusive and needless guardianship applications.

As for selection of guardian, it was clear from the research that the adult was not asked for his or her opinion. Over time it has become routine for the adult's parents to be appointed as guardians if they had initiated the guardianship procedure. The same is the case with children whose parents have dementia. In the majority of cases, court decisions were not received by the adult, nor was there evidence that the adult was aware that he or she had been placed under guardianship. Court decisions were received by relatives who live at the same address and who had initiated the procedure. As for people in social care institutions, court decisions were received by the administration. So only rarely could residents, when asked, say whether they had been placed under guardianship and who their guardian was.

3.8.3 Legal Representation

Adults to be placed under guardianship are not entitled to free and effective legal aid, and nor do they receive such. In 73 cases researched by MDAC, at least 50 applicants hired a lawyer but in only three cases did the adult have a lawyer. It is likely no coincidence that these three adults were not eventually placed under guardianship. The other 70 adults, who did not have legal representation, were all placed under guardianship.

In interviews, judges said that they thought adults need legal representation but the law does not provide for it. Judges also said that relatives care for the adults anyway, so the legal case is a mere formality.

3.8.4 Detention

Although the research showed that no adults were detained solely for an incapacity assessment, some adults were in a mental health or a social care institution while the guardianship case was initiated. In such cases proper notification seemed almost impossible and thus the adult's participation was jeopardised. In addition, the administration of some hospitals and social care homes did not respond in time to the invitation for an assessment. This slowed down the procedure and did not leave an opportunity for the adults to request an incapacity assessment to be carried by an expert selected by them.

The experts rarely travelled to the adult's residence in order to carry out the incapacity assessment. The only expert who travelled was a psychiatrist who was often appointed in Stara Zagora for guardianship cases. The majority of them expected the adults to come to their offices, which often did not happen due to such obstacles as inability to pay for transportation, inability to move in the case of bedridden adults or others with physical disabilities, inaccessible buildings, and so on.

3.8.5 Presenting and Challenging Evidence

It is a significant finding that the only cases in which the adult presented evidence was in the three (of 73) cases in which lawyers acted on their behalf. In all the other cases:

- Adults were not informed about their right to present evidence and challenge the evidence presented by the applicant.
- Most of the adults were not aware about the purpose of the case.
- Adults were so dependent on the applicants (relatives or directors of social care institutions) to be told anything about the procedure, including the date of the hearings, that it was almost inconceivable for the adults to present or challenge evidence.

3.8.6 How Judges Decide Cases

As noted in the Indicator section above, Bulgarian legislation allows a court to deprive an adult of legal capacity even if there has been no incapacity assessment. How do judges decide cases without an incapacity assessment? The judges whom MDAC's researcher interviewed confessed that they had never been trained to interview people with intellectual disabilities or psycho-social (mental health) disabilities. Their practice is based on hunches and the practice of other courts. As mentioned above, at the beginning of the first hearing the judges interview the person. Here are some examples of how they do it:

Case 3157/05, Plovdiv Regional Court. The adult person was a 27-year-old woman with intellectual disabilities ('born with brain deficiency. Diagnosis: unspecified oligophrenia').

<i>Judge</i>	How old are you?
<i>Adult</i>	(silent)
<i>Judge</i>	What date is today?
<i>Adult</i>	(silent)
<i>Judge</i>	What time is now?
<i>Adult</i>	(silent)
<i>Judge</i>	What did you do today? Yesterday?
<i>Adult</i>	(silent)
<i>Judge</i>	Do you have money?
<i>Adult</i>	(silent)
<i>Judge</i>	Pension?
<i>Adult</i>	(silent)

Case 3288/05, Plovdiv Regional Court. The adult person was an 18-year-old man with intellectual disabilities (diagnosis: oligophrenia, aggressive towards his relatives). In its 2003 decision LEMC diagnosed the person as incapable for life.

<i>Judge</i>	What is your name?
<i>Adult</i>	(says name)
<i>Judge</i>	Who is this? (pointing at his mother)
<i>Adult</i>	My mother, (the name of the mother)
<i>Judge</i>	And this? (pointing at the sister)
<i>Adult</i>	My sister, (the name of the sister)

Judge Where do you live?
Adult (says street and house number)
Judge With whom?
Adult With my mother in Plovdiv.

People with intellectual disabilities are often asked about their names, address, age, their ability to read and write, their ability to use the toilet, to get dressed, and the ability to use money. Approximately 10 out of 30 cases regarding people with intellectual disabilities were of young people who could not respond to such questions, or were not able to speak at all. In some of these cases, their relatives told the judge that they could understand everything but could not speak. The judge tried to interview them anyway.

People with dementia were usually asked about their age and family at the beginning, and the interview usually finished when the judge found that the person could not recognise their children in the courtroom and could not tell when they were born or where they lived.

People with psycho-social (mental health) disabilities were interviewed by the court for approximately 10 minutes. Here is such an interview:

Case 951/06, Varna Regional Court. The adult person was a 38-year-old man who was undergoing treatment in hospital.

Judge What is your name?
Adult (states his name).
Judge When were you born?
Adult 18 March 1969.
Judge Where do you live permanently?
Adult Charles Georgiev Street.
Judge Do you live alone?
Adult No, with my mother and father. They take care of me.
Judge Why do you need care?
Adult Because I do not know how to spend money.
Judge Why?
Adult Because I like paying the bills of people with whom I go to a restaurant, and besides they want me to.
Judge Do you work?

- Adult* No, I cannot, because I have not been working for the last 10 years now. I only go to the city park near my home.
- Judge* Do you have friends?
- Adult* No, I do not have friends, or a girl friend.
- Judge* Do you buy food, etc?
- Adult* No, my mother does the shopping, she takes the money and buys what is needed.
- Judge* Who cooks for you?
- Adult* My mother cooks and I eat with her. I help her to peel potatoes, to do the dishes, and to water the flowers. But I take care of my personal hygiene.
- Judge* What date is it today?
- Adult* 21 June 2006.
- Judge* Where are you?
- Adult* Regional Court Varna.
- Judge* Where did you come from?
- Adult* From Karvuna Psychiatric Hospital.
- Judge* Are you ill?
- Adult* Yes, I have schizophrenia.
- Judge* Do you take medication?
- Adult* Yes, permanently. But I want to go back home after the hearing.
- Prosecutor* Where would you go?
- Adult* In the hospital.
- Judge* Were you placed there for compulsory treatment?
- Adult* I think so, I cannot remember well. I have spent 22 days there and before that I was in the hospital in Varna for 40 days.

In this case much of the information provided about the adult came from his father, who was interviewed as a witness. He explained that the adult fell off a donkey as a child and then had a speech disorder, but that neurologists helped with that problem. Later, in the army, some soldiers beat him, after which he was hospitalised for the first time with a mental illness. He was hospitalised eight times. His father testified that he sometimes communicated with Ludvig XIV and elves, did not know what he was talking about, behaved in a “stupid” way, and became aggressive and threatened his mother, the neighbours and his brother with a knife, did not take medication and drank alcohol. According to the father, the son was not able to live alone because if he had 100 Levas in the morning he will have spent it by the evening. Nevertheless, it was mentioned that he could deal with money and go shopping, had a high school

education, used to work as a waiter, was married and had a daughter who lived with her mother after her father became ill.

The only reason the father expressed for placing his son under guardianship was that it would prevent him from spending his pension on alcohol. The judge did not try to find out what the adult thought about his father's statement and did not give him an opportunity to comment on or challenge it, or to invite witnesses. The father's testimony was not conclusive as to whether his son could handle money or whether he was willing and could work. In this case, again, the judge did not explain to the adult the purpose and consequences of the procedure, and the adult was not informed about any rights he had during it. Finally, the above interview with the adult turned out to be sufficient for the judge to obtain a personal impression and to make a decision.

3.8.7 Incapacity Assessments

Generally, an incapacity assessment is required for a court to deprive an adult of legal capacity. Witnesses are usually either family members who take care of the adult, or people who may know the adult well, such as neighbours, social workers or people who work at the local municipality. Their role is to provide an account of the adult's behaviour. They often describe the adult's actions as 'psychotic' when referring to a person with psycho-social (mental health) disabilities, or 'helpless' when referring to a person with dementia or intellectual disabilities.

The incapacity assessment is supposed to detail the history of the adult's condition or illness, the current condition, the witness statements and the medical documentation. Depending on the findings, the expert suggests either not placing the adult under guardianship, or a form of guardianship. In every case in which incapacity was assessed, the judge followed the recommendation of the experts, and in most cases also the applicant's wishes.

No incapacity assessment was done in many cases which MDAC's researcher observed that involved people with intellectual disabilities. A grave example of such practice occurred in 2004, when ten young adults from a social care institution were placed under guardianship together in one court hearing, on the basis of interviews with three of them and medical documents presented by the administration of the institution.²⁷⁹

A case with a crude in-court incapacity assessment concerned Ms S at the Plovdiv Regional Court.²⁸⁰ Ms S was a 45 – year-old woman who was born with a brain injury and diagnosed in 1996 with epilepsy after cerebral paralysis and as a 'person suffering from debility' for life. When the woman was interviewed by the judge, she identified her mother as her aunt, and said that she was three years old. The prosecutor

²⁷⁹ Case N.1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169 from 2003, and 45 and 48 from 2004. The hearing took place on 5 March 2004.

²⁸⁰ Case N. 3094/05.

showed her 20 Levas and she said it was 1 Leva. Her brother testified that his sister was unable to take care of herself, that she could not eat and move without assistance. Following a ten-minute court hearing, the judge decided not to seek further evidence, and immediately deprived Ms S of her legal capacity.

The case of Mr F is an example of how experts assessed the capacity of a person with intellectual disability.²⁸¹ Mr F was 60 years old and had been diagnosed in 1978 with ‘moderate oligophrenia, severe debility, and epilepsy’. An incapacity assessment was ordered by the court but Mr F, although invited by the experts, was not taken to the hospital for the assessment. Over a year later, the incapacity assessment was carried out by a psychiatrist and a psychologist who found that Mr F had never attended school and could hardly communicate. He did not take medication as a child and as a youth, but after 1995 started taking medication. He did not orient properly in space and time, was not aware of his condition, had insane ideas, and had ‘memory and intelligence at the level of severe debility’. He was unable to make proper statements, and could not explain the meaning of proverbs. He did not know how many fingers he had on his hands, could not recognise the value of money, did not remember important dates, and could not say the names of closest relatives properly. The court placed Mr F under plenary guardianship without ascertaining what assistance Mr F needed to carry on his daily life.

In eight of all the reviewed cases²⁸² and in three of the observed court cases about people with intellectual disability (besides the ten cases for residents from a social care home mentioned above),²⁸³ an incapacity assessment was not sought. The adults in these cases always had intellectual disabilities and one had dementia. There were regional differences in approach. In Plovdiv, judges did not order incapacity assessments in some cases of moderate intellectual disability, while in Lovech, Stara Zagora and Varna judges ordered incapacity assessments even in such cases.

In the rest of the reviewed cases, a psychiatrist from the local psychiatric hospital or other medical institution carried out the incapacity assessment. According to the documents in the case files, doctors usually first checked all medical documentation such as LEMC decisions and medical files, and collected information from the relative who accompanied the person to the incapacity assessment. The doctor then interviewed the adult. Sometimes a psychologist also took part in the examination to assess IQ (intelligence quotient), memory, attention, perceptions and speech. The examination, which cost between 50 and 70 Levas,²⁸⁴ was paid for by the court and resulted in a report of about three pages. Some incapacity assessment reports (but not all) stated that experts spent approximately two hours examining

²⁸¹ Case N. 2960/05 which was lodged on 21 October 2005 at the Plovdiv Regional Court.

²⁸² These were 3288/05, 3157/05, 3094/05, 3352/05, 3387/05, 237/05 at Plovdiv Regional Court and 944/05 and 364/05 at Stara Zagora Regional Court.

²⁸³ These were 660/05, 714/05 and 774/05 at Varna Regional Court.

²⁸⁴ Approximately 25-35 euro.

the person and three hours reviewing documentation. The payment per hour is between three and ten Levas.

Incapacity assessments deal in general with three areas. The experts are supposed to find out:

- ⇒ Whether the adult has an intellectual disability or a psycho-social (mental health) disability.
- ⇒ Whether the adult is able to understand the characteristics and the importance of his/her own actions and manage them.
- ⇒ Whether the medical criteria for placement under guardianship are met.

Experts usually do not present to the judge many details about the incapacity assessment. They generally point out that they confirm the conclusions, mention the diagnosis and describe the adult's behaviour and prognosis, and the proposed form of guardianship. Their statements in court do not last more than three minutes, and they are usually asked no questions. MDAC's researcher observed that experts demonstrated little knowledge of the guardianship law, and had little idea of the consequences of their opinions. The only expert who appeared to do a thorough job was a psychiatrist who participated in most of the guardianship cases in Stara Zagora. He was also the only expert who had a time sheet and could explain in detail what the incapacity assessment entailed.

MDAC's researcher monitored a hearing at the Stara Zagora Regional Court on 31 May 2005.²⁸⁵ It was the second hearing in a case about a man aged about 65 who had been detained for treatment in a psychiatric hospital for two months. The man was not present in the courtroom, although the judge said he had been properly notified. The applicant's lawyer, the prosecutor and the psychiatrist assessing the person were present. The parties agreed that the hearing would take place. The incapacity assessment report was submitted to the court in advance, as well as the 2005 court decision on compulsory treatment. Until then, the man had never been hospitalised. The courtroom dialogue below is the longest questioning of an expert which MDAC's researcher observed during the research.

²⁸⁵ Case N. 292/05.

Expert

I confirm my conclusions made after the in-person examination of the adult in the hospital. The adult is able to take care of himself. He has a mental illness with an attack development. At the beginning he had insane hallucinations and ideas. These ideas faded by the time I examined him; his aggression develops mostly in his relationships with his relatives, and this causes a social dysfunction. I examined him several months after the treatment, and the symptoms of the illness were not present, but the fluctuation can be seen even in the witness's replies. He has structured behaviour, is aware of his illness but does not accept that treatment is needed. He can work normally with conflict situations in the family (in the psychological sense), obeys the hospital rules, undergoes compulsory treatment and thus every three months his condition should be reviewed as well as the basis of the compulsory treatment. In June 2005 this will need to be done for the first time. The patient has 60% reduced labour capacity, has 22 years of work experience, and his capacity from [an] expert's point of view is not damaged.

Judge

Can the use of alcohol in any way influence the development of his illness?

Expert

Patients who experience a manic condition are emotionally lifted, and that is when they use alcohol.

Judge

But this is not a major cause?

Expert

No.

Judge

Is he dangerous?

Expert

Yes.

Judge

It is evident from what witnesses told us that this condition could get worse in spring and autumn.

Expert

The mental illness depends on the position of the sun and on seasons.

Judge

Has the personality of the adult changed?

Expert

There always is a personality change, but this does not mean that placement under guardianship is needed.

Applicant's lawyer

What medical documents did you use in the hospital?

Expert

All medical documents from the personal medical file.

App's lawyer

Did you see the documents from the previous treatment of the adult in the same hospital?

<i>Expert</i>	Being a lawyer you should know that, in accordance with Article 147 of the Health Law, the expert's opinion should not be based on data from previous treatment. I do not violate the law and make examination of the skills and ability using the Global Function System scale.
<i>Judge</i>	Do the previous hospitalisations not influence the expert's opinion?
<i>Expert</i>	My conclusion focuses on the current condition of the patient.
<i>App's lawyer</i>	But this is related to the illness – from 1988 until now the person has been hospitalised 10 times, on each occasion for 6-7 months long. How do you comment on that?
<i>Expert</i>	The court did not authorise me to search in all documents kept in the hospital regarding the person.
<i>Judge</i>	The court has given you the opportunity to review all documents in the hospital. The hospital is obliged to cooperate.
<i>Expert</i>	I am aware of the fact that the patient had been hospitalised in the past but these are past conditions and cannot reflect my conclusion. When the illness development influences the structure of someone's personality and he or she is unable to take care of everyday life and environment, the experts would say that the basic abilities for adapting and functioning are damaged and that the person is not able to take care of him/herself. The case law shows that in at least 90 percent of the cases the court decision for placement under guardianship is decisive until the end of the person's life.
<i>App's lawyer</i>	Did the treatment in the hospital manage to improve the patient's condition?
<i>Expert</i>	Yes.
<i>App's lawyer</i>	Would the patient need to take medication after release from the hospital?
<i>Expert</i>	The treating doctors should decide on that. There are two approaches in the treatment of bipolar disorder: permanent medication as prophylactic measure, and medication only in urgent cases at the first symptoms as urgent intervention. The first approach is more frequently used. Timostabilisers are prescribed to influence the mood.

- Judge* How are you going to comment on the witnesses' statements?
- Expert* I read them and cited them in the examination document I prepared.
- Judge* Can we say that the adult behaves inadequately?
- Expert* The witnesses share an increased apprehension of conflicts, and their fear is justified.
- Judge* Is the person aware of his illness and is he dangerous?
- Expert* Personal choice is very important for taking medication. The patient is able to give informed consent for medication. He has the capacity to take care of his own affairs, and if there is any problem with the consent to treatment, chapter 5 of the Health Law shall be applied.
- App's lawyer* Has the patient behavioural deviations and mind disorder?
- Expert* I am repeating for the fifth time that the patient has a mental disorder at a certain level, and also a behavioural deviation, but these are not a sufficient reason for placement under guardianship.
- Judge* There are symptoms of the illness, right?
- Expert* The law does not give the right as an expert to assess the past, but the present with an idea of the future.
- App's lawyer* Can the expert make a different reply regarding the attack conditions and the chances of coping with them by the patient?
- Expert* The patient can take care of himself and his affairs now, and placement under guardianship is not needed.
- Judge* Is the core of the personality damaged? It would be important for me to know.
- Expert* No. The witnesses also spoke about light and dark periods in behavioural aspect, but there is no 'will-emotion equation' as we psychiatrists say.
- Judge* When the adult is recovering is he a normal person?
- Expert* No, he still has a deficiency, but this is not a reason for placement under guardianship as it is with the mild levels of intellectual disability.
- Judge* The Labour Expert Medical Commission's decision from 6 March 2001 says that there is change in the personality.
- Expert* There is change in personality, but not on the level damaging the basic ability to cope.

<i>Judge</i>	Did you have the same finding as the LEMC?
<i>Expert</i>	Yes.
<i>App's lawyer</i>	Is that condition long-lasting?
<i>Expert</i>	Yes, 60 percent of the working capacity is reduced. But LEMC does not review cases of people at the age above 65. And he is above 65.
<i>App's lawyer</i>	I am asking about his mental state and the illness – it that long-lasting?
<i>Expert</i>	Yes.
<i>App's lawyer</i>	You say in your examination that he is in the range of 40-50 points.
<i>Expert</i>	Legal capacity is damaged in the range of 20-30 points; from 0 to 20 one should be careful when making an examination, because the reduction of capacity is serious, but his 41 to 50 points means that his everyday life functioning is not reduced.
<i>App's lawyer</i>	In your paper it is written that the social functioning is reduced.
<i>Expert</i>	It is. If he had 90 points it would mean that he is a leader, colleagues would ask for his opinion, people would ask him to lend them money, he would be in the centre of attention from everyone. 50 points mean that he is not a leader, but can cope with his own affairs.
<i>Judge</i>	Is a calm environment needed?
<i>Expert</i>	No one has [a] calm environment.
<i>Judge</i>	Does he pose a danger for his own interests in everyday sense?
<i>Expert</i>	Not now.
<i>Prosecutor</i>	The mania was faded when you examined him. What happens when he is not in that period? When the mood shifts is he capable of taking care of his interests?
<i>Expert</i>	This is an important question. It is certain that there may be periods when he would not be able to take care [of] himself; such periods in his case have been reoccurring every year till now. It is difficult to say what will happen in the future, but it is highly probable that he would have one episode every year. Whether he is dangerous then is disputable.
<i>Judge</i>	Is schizophrenia a bipolar disorder?

<i>Expert</i>	Schizoaffective disorder sometimes becomes bipolar, and it is a series of mania and depression.
<i>Judge</i>	Shall we accept the examination of the expert?
<i>App's lawyer</i>	Yes. I request the court that the adult be placed under partial guardianship since it has been found that the person has suffered mental illness for the past 20 years, and the forecast is that it could re-emerge at some periods in the future and this would prevent him from taking care of himself. He is disabled and the witnesses and the evidence confirmed that he expressed his illness in a variety of ways. When not hospitalised he drinks a lot and does not take medication, thus becomes dangerous to himself and others.
<i>Prosecutor</i>	I find it indisputably proven that the mental illness occurred in 1988 and till now has developed in passive and active periods. I believe that in a mania period the patient will not be able to take care of himself. This is why I suggest placement under guardianship.

This courtroom dialogue was by far the longest that MDAC's researcher observed and is thus reproduced to demonstrate that experts could be cross-examined in a satisfactory way. Whatever one makes of the psychiatrist's opinion, one can observe from this dialogue that the expert knew more about guardianship legislation – and more importantly the aim of the procedure and the guardianship practice – than the judge and the applicant's lawyer. It also demonstrates how difficult it is to decide on a case if only three options available are – the status quo, or plenary or partial guardianship. It is obvious that the judge, the prosecutor and the applicant's lawyer chose the easier way of matching the adult's condition with the placement under guardianship ignoring his ability to make decisions in many other areas of life. This dialogue raises the issue of predicting the future development of illness as a precondition for placement under guardianship, excluding any developments in social and personal environment that might influence it. Again, this shows a lack of flexibility to review and change guardianship following a change of condition.

In the Varna Regional Court the judge often asked experts about the prognosis of the adult's condition. In other courts the expert's opinion would not be discussed at all. Experts usually described a condition with seemingly standardised phrases such as 'the core of the personality was already damaged', 'the basic abilities were impaired', 'the person is not aware of his condition, not critical' and 'psychotic and insane ideas lead his behaviour'.

3.8.8 Link Between the Diagnosis and Functional Incapacity

Bulgarian case law shows that court decisions are based on information gathered from the past about the ability of the adult to make independent decisions, rather than relying solely on the diagnosis.

When the adult is not able to, or for another reason does not, speak, the court usually decides to place a person under plenary guardianship. Usually no evidence or witnesses confirm that he or she ever took any decision, and no information is available on whether the adult's condition can improve. Most court decisions are like the following: 'From the interview with the adult, the court found that the person can hardly speak and did not reply to some of the questions at all. It was proved by use of evidence that he/she has a mental disorder and is not able to take care of herself and her affairs. The court therefore decided to place her under plenary guardianship'.²⁸⁶

The link between the diagnosis and the ability to take care of oneself is often disputable, especially in diagnoses such as autism or 'unspecified oligophrenia' and in which no services – education, rehabilitation, training for parents - were available in the recent past. The court never makes an effort to understand to what extent the condition described by witnesses and experts is a result of a lack of education, training or therapy. If known, this could influence decisions on whether placement under guardianship is the most appropriate form of assistance to the adult.

Controversial statements like those in the case described below are often discussed by the court only from the point of view of the adult's inability to take care of him/herself. In case No. 2991/05 there was evidence that the person could escape from his home and travel, but his sister and the expert claimed that he could not do anything without assistance. Obviously he could communicate somehow to receive food and water and survive when he escaped home for 10 days, but it was determined that he could not take care of himself at all.

In one case, the adult, a 26-year-old man wanted to die.²⁸⁷ He was born with 'organic autism', early childhood schizophrenia and moderate intellectual disability, had sensory illusions and often ran away from home to other villages. His mother decided to place him under guardianship. When interviewed by the court, the man said that he did not know his full name or that he was 26, that he could not read and did not recognise the value of money. However, the man recognised his mother and knew that he was in Plovdiv, although he did not know why he was in court. His sister stated as a witness that he was not able to do anything without assistance and that the family had been taking care of him since he was born. The findings of the examination were that the man had no education, had reduced memory and low IQ, had limited independence, was completely unaware of the illness, could not communicate efficiently, could not

²⁸⁶ Plovdiv Regional Court decision 473 from 2 March 2006, case number 2960/05.

²⁸⁷ Case No. 2991/05, Plovdiv Regional Court.

think in terms of events, and could not take care of himself. In its decision N. 292 made on 3 February 2006, the court held:

‘During the interview with the court the person talked inadequately, was not aware of the reality, suffers mental disorder and is not able to take care of his own affairs. Because the mental disorder is severe and serious, it requires plenary guardianship.’

In cases of people with psycho-social disabilities, neither the experts nor the courts ever presumed that lifestyle or an event in the adult’s life might have a permanent negative effect on their condition – for example, living with an overprotective mother, facing a divorce or being made redundant (losing a job). Usually the people who complained of a relative’s dangerous behaviour were those who initiated the procedure and wanted to become the adult’s guardian. Their arguments for placement under guardianship were related to consequences of psychotic behaviour which would (to state the obvious) not be affected by guardianship. On the contrary, guardianship would oblige the relative presenting these arguments to take even better care of the adult. This point of view sometimes was shared by some experts,²⁸⁸ but was never taken into account by the court. One such case is described below.

In case No. 724/06 heard in the Varna Regional Court, the expert stated that the adult’s diagnosis was paranoid schizophrenia and that there was a personality change at a relatively serious level, but that the structure of the mind process was preserved. The adult was able to take care of the most basic practical needs, but his behaviour was affected by his mental illness. Even though he was young, the prognosis apparently was not positive. A witness stated at the court hearing that the man had had problems with his mother for years. According to the witness, the man had physically abused his mother, heard voices and laughed with them, talked to himself, did not come out of his home during the day, did not eat because he had an obsession that the food was poisoned, had a persecution mania and took an overdose three months earlier. The applicant’s lawyer asked for plenary guardianship.

Sometimes the relatives or spouses do not intend to take care of the adult whom they want placed under guardianship, which is clearly stated before the court. They use guardianship as a tool to permanently place the adult in a social care institution.

In case N. 585/05 heard at the Stara Zagora Regional Court, a husband wanted to place under guardianship his 57-year-old wife, who lived in a hospital. Apparently, she threatened people with physical abuse, refused to take medication and hence was sent to hospital, where she was diagnosed with ‘schizoaffective disorder, mixed type with progressive deficit’. During the past two years she had thrown sharp objects at windows and doors, and when outside the hospital did not take

²⁸⁸ A psychiatrist in Stara Zagora, 31 May 2005.

her medication. The family's doctor and a psychiatrist from the hospital where she was staying suggested that the husband place his wife under partial guardianship so that it would be easier to put her in hospital for compulsory treatment, as it was obvious that she would not agree to voluntary treatment. The hospital sent to the court a document referring her to a social care institution. The doctor found that the woman had 'schizophrenia with permanent development and paranoid syndrome, that there was a change of the personality, and that there was a durable lack of social and work adaptation'.

When interviewed by the court, the woman stated that she was born in 1948, had been married since 1966, had two children, and used to work as a cook. She was not able to say for how long she had been staying in hospital, but said it was warm there and that she felt better. She also said that she had a good relationship with her husband and took care of herself, and that she hoped she would be released from hospital. She said she did not want her husband to be her guardian and wanted her son to manage the real estate.

The incapacity assessment of November 2005, which lasted for three hours, concluded that she had a permanent mental disorder which hindered her from understanding her actions and managing her behaviour.

A witness stated that she saw the woman acting dangerously. For example, she attempted to throw a television out of a window. She said that the woman was not able to manage money, but was able to take care of personal hygiene and maintain order in her home. On 21 December 2005 the court placed the woman under plenary guardianship, reasoning that her capacity to assess life situations was changed by the illness and she lacked the resources to cope with crises. The court also thought that she would feel better in a social care institution because of the 'similar environment'.

In this case the court did not take into account the motivation of the husband (to send the wife to a permanent social care institution), or the wishes of the adult. The court decided solely on the basis that the woman could not take care of her own affairs, even though she was at that time in hospital and thus had no opportunity to demonstrate her ability to live an independent life. In this case the court appointed the husband as guardian, which raises serious concerns as to how the court came to the conclusion that this was in the woman's best interests.

3.8.9 Selection of a Guardian is Based on Objective Criteria and the Wishes and Feelings of the Adult are Considered

There was no written evidence in any of the reviewed court files that adults under guardianship were asked about whom they wished to become their guardian. Interviews with the adults showed also that it was presumed that the person who initiated the proceedings would be the guardian since no one else wanted to be a guardian. Usually the guardianship authority formally asked the relatives whether

they would like to be guardians, and then the relatives signed a declaration of confirmation. The relationship between the adult and the relatives was not examined, nor was any conflict of interest analysed.

3.8.10 Appeals

In only one case of 24 reviewed court files did the adult appeal the court decision for incapacitation. This appeal was unsuccessful.

3.9 Role of Guardianship Offices of Local Authorities

One would expect most information about appeals of guardianship to be found in guardianship offices of local authorities. However, such information is scarce. Most of the guardianship authorities refused to give MDAC's researcher any information in person, and replied to the researcher's questions only in writing. Interestingly, the valuable information provided by lawyers and persons under guardianship as well as by the guardians themselves during interviews contradicted the information given by the guardianship authorities in their letters to the researcher.

The research at 47 municipal guardianship authorities²⁸⁹ led to several conclusions. First, guardianship authorities gather data on people under guardianship in different ways: some have registers, some have guardianship files, some have nothing (Burgas, Razgrad, and the Kremikovci region in Sofia municipality). They receive information from regional courts, but it cannot be confirmed that the decisions are sent to the correct guardianship authorities, whether indeed the guardianship authorities receive the court decisions, or if they do whether they count all people placed under guardianship or only those for whom the guardianship authorities are obliged to appoint a guardian. According to the information provided by guardianship authorities in these 47 replies from 30 municipalities, 2,604 people were under guardianship, of whom 2,258 were under plenary guardianship. Some 914 people of these 2,604 lived in institutions. More people under guardianship lived in social care institutions than in the community in these municipalities: Vraca, Veliko Turnovo, Shumen, Smolyan, Septemvri, Sevlievo, Trakia region in Plovdiv, Luki, Kyustendil, and Duloovo. These municipalities all have at least one social care institution. In the other municipalities, the majority of people under guardianship live with their families.

Regarding the age of people under guardianship, the information provided by municipalities divides the people in decade groupings: 20 to 30 years old and so on. In 23 municipalities the majority of the people under guardianship were under 50. The youngest people under guardianship were 19 years old, the oldest 85, and the

²⁸⁹ Actually there are 30 municipalities, but in two of them – Plovdiv and Sofia – every region replied separately. Thus 47 bodies replied from 30 municipalities.

largest group consists of people 30 to 60 years old. Nine municipalities did not provide disaggregated statistics.

Guardianship officials told MDAC's researcher that guardians have to report annually, usually at the end of February. Some officials refused to show these reports to the researcher. The researcher saw some reports prepared by directors of social care institutions acting in their capacity as guardian. They reported only on financial expenses in relation to the adult's pension. They did not contain details but rather a table or description of the prices and listing items such as sweets, socks, shoes, underwear, watch, tape recorder, and other such items bought using the adult's personal money.

Guardianship offices have different ways of involving adults in appointing their guardian. Twenty-nine offices do not involve the adult at all, a practice which they explained by stating that the law has no such provision, or asserting that the adult's health did not allow such involvement. Eight offices stated that they involve the adult depending on the adult's condition and relatives' decisions, but it remained unclear who actually decided on the guardian. Only one office told MDAC that its officials visit the adult's home to see the living conditions and co-habitants before deciding who should be the guardian. Ten authorities claimed that they invite the adult to the office, but their letters did not mention whether the adults really participated in the process of appointing the guardian.

This information contradicts the information provided to MDAC by people under guardianship and their lawyers. These people told MDAC that they were not informed at all about placement under guardianship, because as this report noted previously, in most cases the court notification about the decision is signed by a relative who subsequently becomes the guardian. Since the adult is not invited and not informed again, the adult has no way of knowing what guardianship is and how it could affect his or her life.

Guardianship officials did not seem to be concerned that adults under guardianship are not notified about who has been appointed as their guardian. Guardianship officials stated that they have no such legal obligation, and that often the adults are in no condition – according to their relatives – to visit the guardianship meetings held at the municipality. Nor did they seem concerned that the adult is not given a copy of the guardianship certificate issued by the mayor.

In most local authorities, officials such as the mayor's secretary, the lawyer and the head of the Civil Registration and Administrative Service Department are responsible for guardianship. Sometimes mayors delegate this obligation to officials of the Civil Status Department or to the municipality's lawyer or mayor's secretary. In each municipality only one person deals with guardianship issues, though this person may consult with others. None of these people have undergone formal training on guardianship issues.

According to the replies received by MDAC from guardianship authorities, the adult's relatives (husband, wife, parent, brother or sister) are appointed as guardian in the majority of cases. The guardianship office writes a letter to the relatives clarifying

whether they agree to be guardian. The relatives visit the guardianship office and talk to the person in charge, and the officials assess whether these people should be appointed guardian. The candidate guardian signs a declaration that he or she agrees to be appointed. In four municipalities, guardianship authorities require potential guardians or all members of guardianship boards to present documents ‘proving’ lack of mental disability and a criminal record (for more details on this, see section 3.7.4 above, on guardianship files). Some municipalities stated that sometimes appointing a guardian is difficult because close relatives are ill, old or absent.

A few guardianship officials reported some cases of abuse of the rights of people under guardianship. The rest claimed there are no cases of abuse, and stated that no person under guardianship had ever asked for replacement of the guardian. Members of the guardianship council or guardians themselves are replaced if they die.

Most municipalities said there were no cases of guardians being fined for not submitting an annual report. Some stated that the guardians do not report regularly, adding that there is no way to force them to report.

3.10 Access to Justice

In March 2005, the Ministry of Labour and Social Policy²⁹⁰ launched a policy for monitoring the condition of residents in social care institutions. The letter mandated local guardianship offices to identify adults whose condition had changed and thus whose guardianship should be reviewed. Some municipalities set up committees to assess all residents and decide whether a court procedure should be initiated. Members of these committees were usually officials working in the Social Services department at the municipality, regional representatives of the Ministry of Health, or General Practitioners of the residents, local nongovernmental organizations, directors, social workers, and officials from the Social Services department of the Ministry of Labour and Social Policy. The committee members generally had no expertise in guardianship, and the Ministry appears not to have provided any guidance on how to proceed. The effectiveness of this initiative remains to be seen but MDAC acknowledges it as a step in the right direction.

MDAC’s researcher received information from Stara Zagora Regional Court on 4 May 2006 about eleven guardianship cases expected to be heard in May 2006, ten of which were initiated by the prosecutor. The first hearings of the ten cases had been held in April. Only in June did it become obvious that the cases were supposed to be reviews of the guardianship arrangements of ten residents in the Lyaskovo social care home for people with intellectual disabilities. These ten people were selected by the municipality committee to be moved to a protected home in a nearby city.

²⁹⁰ Letter N. 9100-45/01.03.2005 issued by Nikolay Angelov, director of the Social Assistance Agency.

Unfortunately, on the day of the scheduled second hearing (23 May 2006), no proper hearings were held because the psychiatric expert brought written reports stating that almost none of the ten people would be able to cope with their day-to-day activities because of their condition. The hearing was over within thirty minutes. None of the residents were in the courtroom. MDAC's researcher talked to the expert and the judge. The expert strongly believed that the residents had showed few skills and little knowledge of how to lead an independent life, which he deemed sufficient to recommend that guardianship should not be reviewed. The judge rescheduled the cases for September 2006. At that time, these cases (numbers 17, 18, 36, 37, 38, 39, 42, 43, 44, and 45) were closed based on the applicant's request (the legal basis for this is Article 199, par. 2 of the Civil Procedure Code).²⁹¹

In March 2005 the Social Assistance Agency²⁹² sent letters to the mayors, asking them to form a commission of partners to decide on the guardianship of residents of social care homes in their municipalities.²⁹³ Accordingly the mayor of Kameno municipality ordered a commission to be established, consisting of the deputy mayor of the municipality with the social care institution, the municipality's secretary and lawyer, a senior expert from the Regional Department for Social Assistance, the director and general physician of the social care institution, a psychiatrist from the local psychiatric hospital, the director of the District Department of Social Services Assistance, and a municipal expert on social activities.

The director of the Rusocastro Social Care Home for Men with Intellectual Disabilities sent fifty cases to the commission for review. The commission asked the director to bring the personal files of the 95 remaining residents. The commission examined these cases, resulting in a recommendation to lift the guardianship arrangement for three of 145 residents placed under guardianship. These three cases concerned people aged 24, 32 and 37 years old. In October 2005 the director of the social care institution asked the mayor to initiate the court procedure to lift the guardianship for these three residents.

²⁹¹ Letter from Stara Zagora Court, number 280, 30 January 2007.

²⁹² The Social Assistance Agency (SAA) was established in order to implement the state policy on social assistance at the Ministry of Labour and Social Policy in accordance with the Law on Social Assistance adopted in 1998.

The current Law on Social Assistance assigns the following to the SAA:

- To implement the state policy on social assistance.
- To grant social benefits and render social services.
- To monitor compliance with the approved criteria and standards for social services.
- To permit the establishment and closure of specialized institutions for social services.
- To register persons carrying out social services.
- To produce annual reports and analyses on social assistance activities, to be presented to the Minister of Labour and Social Policy.
- To participate in preparing legislative bills related to the social assistance.
- To carry out other activities assigned by law.

²⁹³ Letter 9100-45/01.03.2005, issued by Nikolay Angelov, director of the Social Support Agency.

The mayor's secretary applied to the court on 9 February 2006 asking that the guardianship of these three persons be changed from plenary to partial since they did not receive medication, could perform their duties and control their behaviour but it was still difficult for them to adapt to a 'complex social environment'. She attached the court decision for placement under guardianship of the 24-year-old man. This decision, issued on 12 June 2000 by the Burgas Regional Court, stated:

'The procedure for placement under guardianship is initiated by the prosecutor for a person living in the social care home in Rusocastro. It is claimed that he suffers from a mental illness and cannot have normal contacts with people, as well as he cannot care for his own interests. Written and oral evidence has been presented. The person did not show any opinion on the application. The court concluded from the personal contact with the person that [his replies] to the questions – what his name is, where he is, how old he is, who his parents are, where he was born – [were] not clear and adequate. He says that he has relatives – mother and uncle. Claims that he can recognise 100 Levas, 20 Levas, 50 Levas. He said when 5 Levas was shown to him that it is 3 Levas. The medical document presented to the court issued by the Centre for Mental Health in Burgas says the person has diagnosis 'imbecilitas levis' from his early childhood. The court decided that the person should be placed under plenary guardianship.'²⁹⁴

On 27 February 2006, the Burgas Regional Court notified two of the three men selected. The notifications were received by an official in the Rusocastro home on 2 March 2006. At the hearing on 29 March 2006, the director, the social worker and the residents were in the courtroom as well as the lawyer of the municipality. The MDAC researcher was present there too. The judge reviewed the applications and stated that the guardian (the director of the home) should speak for the adults. The lawyer from the municipality explained that the residents had no relatives or anyone to represent them except the director. The prosecutor suggested postponing the hearing until the issue of legal capacity of the adults had been clarified. The judge decided to leave the application inactive until the applicant clarified out who the adult in this procedure was.

According to the social worker in the home, interviewed by the MDAC researcher in July 2007, guardianship was changed from plenary to partial in these two cases.

During the second monitoring of cases in Varna Regional Court on 21 June 2006 the guardianship of a resident in Gorni Chiflik Social Care Home was reviewed.²⁹⁵ The applicant was the guardian, and the resident was a 32-year-old Romani woman. The judge asked the woman questions, and she stated her full name, the day, her date of birth, the village where the home is, and that she had lived there for the last four years. A social worker from the institution testified that the woman was taken into the home in July 2002, was able to take care of personal hygiene, could read, write

²⁹⁴ Number 242/2000.

²⁹⁵ Number 78/2006.

and communicate, went out of the institution every day and worked for villagers, recognised money relatively well, and had friends in the village but didn't trust people. A second witness, a friend of the adult, was a fellow resident of the institution who had known the woman since October 2005. This witness said she thought the adult was communicative, worked hard inside and outside the institution, was able to read and write, had friends, and was able to buy what she needed every day. The judge ordered an incapacity assessment at the end of the hearing.

This woman was representative of a relatively large group of residents of social care institutions who were trans-institutionalised to the home from a so-called special school when they turned 18.²⁹⁶ These adults were deemed incapacitated based on an order by the Ministry of Labour and Social Policy, and in 2006 a process to lift guardianship was initiated following a letter from the Social Assistance Agency. The interview above indicates what was taken into account by the court in these cases. Monitoring of several such cases indicated that judges' questioning did not differentiate between people coming from institutions and people coming from a family environment. The researcher inquired to the court in January 2007 about the outcome of this case, but has not received a reply.

People with similar diagnoses of intellectual disability behave quite differently in courtrooms depending on where they live: adults coming from a family environment showed less ability to take care of themselves than adults coming from institutions. On the other hand, people from a family environment with light intellectual disabilities are rarely placed under guardianship, but people with this diagnosis from institutions were seen in cases for lifting guardianship.

Before the 2005 Ministerial policy on reviewing guardianships (detailed above), nongovernmental organisations (NGOs) helped adults in social care institutions to initiate review procedures by themselves. Applications sent by the resident to the local prosecutors' offices were accompanied by a letter written by the NGO researcher,²⁹⁷ as well as a report on conditions in the homes and guardianship issues. This is how some prosecutors decided to initiate a procedure, but the majority refused.

In the following cases, people from social care homes who were under guardianship were provided them pro bono legal assistance by NGOs. The cases illustrate the obstacles faced by people under guardianship who wish to challenge that legal status.²⁹⁸

²⁹⁶ This is the impression of the MDAC researcher, who before 2006 participated in a national monitoring project of all social care homes for adults with mental disabilities and all special schools for children with intellectual disabilities in Bulgaria.

²⁹⁷ The researcher is Slavka Kukova, who whilst researching this report also worked as a researcher for the Bulgarian Helsinki Committee. The Mental Disability Advocacy Center and the Bulgarian Helsinki Committee have since 2005 had a joint partnership whereby the NGOs provide individuals with legal assistance in Bulgarian courts and at the European Court of Human Rights.

²⁹⁸ Information was provided in several interviews in 2006 with their lawyer and by review of the main documents described above.

Case 1: Mr RS

Mr RS lives in the Pastra Social Care Home for Men with Mental Disorders. He was placed under partial guardianship on 20 November 2000 by the Russe Regional Court.²⁹⁹ On 23 May 2002, a municipal official was appointed as his guardian. On 4 July 2002, the guardian filed a request with regard to the placement of the man in a social home for persons with mental disorders. On 12 December 2002, the guardian signed a contract for provision of social services with the director of the institution in the village of Pastra. Mr RS's consent was neither sought nor obtained. The director of the social care institution thought favourably of a community-based placement some time in the future. The man himself wanted his guardianship to be reviewed, because at that time he had a place to live and wanted to work.

One way of reviewing guardianship is for the adult to submit an application to the prosecutor, who can ask the court to start a review procedure. Following a meeting with NGO representatives, Mr RS wrote an application on 25 November 2004 and sent it to the Kyustendil Regional Prosecutor's Office. The prosecutor ordered a medical examination, which was carried out and a report written on 15 June 2005. The report stated: 'As regards the interviews conducted and behaviour observed, limited ductility and halt of emotional and behavioural condition were noted as well as depletion of communication skills and persistent lack of criticism towards his condition. The above are clearly expressed negative symptoms resulting from the experienced psychotic episodes.' On 29 June 2005 Mr RS signed a power of attorney for an attorney to represent him.

On 10 August 2005, the Kyustendil Regional Prosecutor's Office refused to open a procedure to review the guardianship. On 25 August 2005, Mr RS appealed at the Sofia Appeal Prosecutor's Office, but on 20 October 2005, this office refused to annul the refusal. Mr RS appealed to the Supreme Cassation Prosecutor's Office on 2 November 2005, but on 29 November 2005, this organ rejected the appeal – exhausting all prosecutorial remedies.

The other strategy in accordance with the Bulgarian legislation is for the adult to ask the guardianship authority or the mayor to start a court procedure for a review of guardianship. On 10 September 2005, Mr RS's attorney requested the Rila Municipality (the guardianship authority) to initiate a procedure for a review of Mr RS's guardianship. On 16 September 2005 the Rila Municipality sent a refusal to open such a procedure. The mayor's order appointing the new guardian (the director of the social care institution) was also sent to the attorney. Until then neither Mr RS nor his attorney had been informed whether there even was a guardian. On 28 September 2005, Mr RS submitted a complaint challenging the mayor's refusal to the Dupnitsa District Court. On 3 November 2005, a

²⁹⁹ Case No. 672/2000.

notification was received from this court (case No. 1337/2005), but proceedings were suspended until a court fee was paid and Mr RS stated whether he would like the guardian to be involved as a party in the proceedings.

The first application in the matter was sent to the European Court of Human Rights on 8 September 2006.

Case 2: Mr DM

Another case involves a 65-year-old man who lives in the Pravda Social Care Home for Men with Mental Disorders. Mr DM is divorced and has a daughter. He was placed under plenary guardianship by the Shumen Regional Court on 29 April 2002. On 21 June 2002, Shumen's mayor appointed a guardianship board that included Mr DM's daughter. On 10 September 2002, the guardian asked the Social Assistance Services to accommodate her father in a social care institution. On 13 May 2003, the adult was taken to the Pravda social care institution. At that time Mr DM owned part of an apartment in Shumen and a country house in a nearby village.

On 1 November 2004, Mr DM sent an application to the Shumen Regional Prosecutor's Office requesting a review of his guardianship. On 3 December 2004, a policeman questioned Mr DM's ex-wife and his daughter – both of whom were members of the guardianship board. They described his behaviour during the last years as aggressive and dangerous to himself and to others. The policeman also questioned a neighbour, who said Mr DM felt better after the treatment, but the neighbour was not sure if Mr DM was able to take care of himself, because she had not seen him for more than a year. The director of the social care institution was questioned and stated that he had known the man since 2003 when he was placed in the institution, and that Mr DM was able to take care of himself, was not aggressive and was a sociable person who knew his rights and obligations. Another member of the guardianship board was questioned and stated that Mr DM was not able to take care of himself. On 13 January 2005, a neighbour was questioned and also stated that Mr DM was not able to take care of himself.

On 19 January 2005, a policeman sent a report based on the above information to the prosecutor. On 10 May 2005, an expert psychiatrist assessed the man's condition. The psychiatrist concluded that Mr DM 'has suffered from schizophrenic psychosis for a long period of time with a developed and continuous course of the disorder, accompanied by alteration of personality. Due to his condition, he is mentally/intellectually and volitionally/incapacitated and incapable of taking care of his own affairs and protecting his interests'.

On 12 May 2005, the Shumen Regional Prosecutor's Office refused to start a procedure for a review of Mr DM's guardianship. On 13 July 2005 Mr DM appealed the refusal at the Varna Appeal Prosecutor's Office, which rejected the

request five days later. On 1 September 2005 the refusal was appealed to the Supreme Cassation Prosecutor's Office, which on 7 October 2005 rejected it. As all domestic remedies had been exhausted, Mr DM's attorneys helped him send an application to the European Court of Human Rights on 12 April 2006, arguing that there is no remedy in Bulgaria because a person under guardianship has to rely on the goodwill of the prosecutor to send the case to court to review. The person under guardianship is prohibited from having direct access to a court, in violation, the application argues, of the European Convention on Human Rights.

Mr DM's case demonstrated the inability of judges to decide whether the adult was able to take care of himself, even in light of such facts as the adult's ability to start to work for a reasonable salary. His guardian often failed to undertake simple actions like providing documents or informing him about an upcoming medical examination, but was still considered by the court as more responsible regarding the adult than the adult himself. This case was the only one among the those observed by the researcher that reached the second court instance, and in which the right to appeal was effectively used – albeit with an as yet unknown outcome.

Case 3: Mr VP

Mr VP was placed in the Pravda Social Care Home for Men with Mental Disorders in 2002, having been in 2000 deprived of legal capacity by the Sofia City District Court.³⁰⁰ In accordance with an order issued by the Sofia City Mayor, Mr VP's mother was appointed as his guardian. On 4 August 2005, Mr VP wrote to a lawyer requesting initiation of a procedure for review of his guardianship. On 7 September 2005, the lawyer so asked the mayor of Sofia Municipality, but on 2 February 2006, the mayor of Sofia Municipality, Lyulin District, issued a refusal to review the guardianship. On 19 May 2006, the Lyulin municipality replied to the attorney stating that the man could request a review of his guardianship if he had evidence for his recovery, adding that the municipality had no contacts with the guardian. The mayor wrote that the prosecutor should start a criminal procedure against the guardian if there was evidence of harm to the adult's health caused by her actions or lack of actions. On 14 February 2006, the lawyer appealed the refusal at the Sofia District Court, based on Article 115 of the Family Code.

In the meantime, on 13 January 2006, the adult's lawyer had asked the Shumen Regional Prosecutor's Office to initiate a procedure for a review of the guardianship. On 2 February 2006, the lawyer met the guardian and proposed a review of the guardianship, but she expressly refused. On 10 February 2006, the lawyer was informed by the Shumen Regional Prosecutor's Office that the file was sent to the Silistra Regional Prosecutor's Office.

³⁰⁰ Decision No. 183/27.

Later the case was transferred to Sofia, where a criminal investigation (for unknown reason) against Mr VP also commenced. However, the investigator died and the prosecution office refused to initiate a review procedure for lifting his guardianship. In the meantime a mayor's order appointed the director of the home as a temporary guardian. Mr VP escaped from the home and was living homeless in Sofia.

Case 4: Mr GC

On 29 October 2001 an adult was put under plenary guardianship by the Sofia Regional Court³⁰¹ on application by the Sofia Regional Prosecutor's Office. The reasons for guardianship were epilepsy and his apparent inability to care for his own interests. According to his guardian, the director of the Home for Adults with Intellectual Disabilities in Podgumer, Sofia Region, he was able to look after his interests. This was unusual: the guardian wanted to apply for a review of the guardianship. Following several meetings with the guardian and the adult, a lawyer filed an application for a review of the guardianship on 13 February 2006 at the Sofia Regional Court.

There were three hearings between April and July 2006. The court refused to review the guardianship arrangement, leading to an appeal in August 2006.

During the first hearing a witness was heard and an examination was ordered. Although the adult and his guardian were present and wanted to speak, the judge did not give them an opportunity. The law requires an interview with the adult only before the first-instance court (Sofia Regional Court in this case). At that time, the adult was working and had a contract signed by him (with the help of the lawyer), although he did not have his own ID card. He was still registered at the Podgumer home, from which he had escaped a long time ago.

As of 18 June 2007 the case was still pending before the Sofia Court of Appeals. The complex 17-page-long incapacity assessment prepared by a psychiatrist and a psychologist in April 2007 concluded that the man suffered epileptic change of personality, an organic personality disorder (F 07.0 in ICD-10 and light intellectual disability). According to the experts, 'the intellectual deficits are due to an organic dysfunction of the brain rather than environmental factors' and that 'since the personality disorder is a deeply rooted and permanent model of behaviour, the probability of its change no matter what interventions (social, psychotherapeutic, medicines) is insignificant. But some aspects of personality could be an aim for correction'. The experts also stated that an intellectual disability cannot be corrected, 'but in the case of light forms through special training programmes,

³⁰¹ Case N. 865/2001.

mental ability could be mobilised'. The experts concluded that the man could bear limited responsibility for his actions.

There are cases in which the guardians are not close relatives, but on paper perform the duties of a guardian. Often they have a financial interest in being a guardian, for instance, when they are potential heirs to the adult's property. The case below is an example of a guardian who had never demonstrated any interest in or care for the adult, and never reported to the guardianship authority, but took advantage of the adult's property.

Case 5: Mr KN

Mr KN was born in 1960 and placed under plenary guardianship by the Sofia Regional Court in February 2001. In the same year he was placed in the Pastra Social Care Home. His guardian – the wife of the adult's cousin – lived in Sofia and did not keep in touch with him. Mr KN wanted to replace the guardian with someone who would visit him. The Pastra Social Care Home wrote a report about Mr KN stating that he was in a long remission, participated in all kinds of events, loved to play chess, and was able to organise his leisure time and manage his finances.

On 13 December 2005, the NGO lawyer sent a letter to Mr KN's guardian, and on 20 December 2005 the guardian presented documents outlining the history of the adult's illness. In summary, he had had a diagnosis of schizophrenia since 1975 and was not able to perform any kind of work because of his 'personality degradation'. Further, the report stated that he was aggressive because of alcohol. Mr KN's guardianship file was kept in the Haskovo Municipality, although he lived in the Pastra Home (municipality of Rila) and his place of residence was in Pastra. The guardian had never submitted reports to the municipality in relation to her guardianship duties.

Before they died, Mr KN's parents transferred the title to their house in Haskovo to the guardian. According to the contract, the guardian was obliged to take care of and support them and their son, Mr KN. If the guardian sold the house, she was obliged to buy another one in Sofia. Further, she was obliged to set up his estate of freehold. The guardian sold the house and bought another one in Sofia. Mr KN has the right to use the new house, but the guardian and the adult had never lived together. The guardian was afraid of the adult's aggressive behaviour, but never denied his right to use the house. The adult also had agricultural lands rented to an agricultural cooperative, from which the guardian collected products and small sums. The guardian had no idea how the home was using the adult's pension. Eighty percent of the adult's income went to the institution as fees, as specified in the social services contract between the adult and the home, but it was not clear how the other twenty percent was used. The guardian had never asked

Mr KN about this, and the guardianship office at Haskovo municipality had never explained to the guardian what her obligations were.

Mr KN's lawyer prepared letters to the Ministry of Labour and Social Policy and to Sofia municipality, asking them to provide community-based services to help the guardian care better for KN in the community.

In summary, no effective mechanisms exist for people under guardianship to seek a review of the guardianship. Even when an NGO provides a pro bono lawyer who experiments with different strategies, the cases invariably fail. The cases described above also illustrate the difficulty in changing from plenary to partial guardianship, in displacing the guardian and appointing someone else, and in obliging the guardian to carry out their duties. Guardianship authorities do not control guardians and thus fail in their most basic duty: to ensure the protection of potentially vulnerable adults.

3.11 Interviews

Interviews assisted MDAC's understanding of the guardianship system in Bulgaria, the depths of the problems inherent in it, and the often entrenched stigmatising views of professionals working in the guardianship system.

Most of the adults under guardianship and their guardians interviewed by MDAC's researcher reported problems with guardianship. Adults under guardianship commonly did not know that they were under guardianship. When MDAC's researcher mentioned the subject, some adults expressed surprise, asking the researcher what guardianship meant and whether this was why they lived in a social care institution.

MDAC's researcher met other adults outside courtrooms where guardianship proceedings take place. Many were not able to communicate; in the opinion of MDAC's researcher, because of their condition or because they were nervous about the court procedure. None of the adults whom MDAC interviewed was aware of the nature and aims of guardianship. After they discovered that they were under guardianship, some adults told MDAC, 'I did not know what guardianship is about. There was no one I could ask. Even later when I asked about my ID card or why I was placed in a home and the director explained it to me, I still did not understand who my guardian was and what I could do to get rid of the guardian.'³⁰²

Another adult under guardianship told MDAC, 'No one should be placed under guardianship unless it is totally clear to him/her what guardianship is about'.³⁰³ Some

³⁰² Interview with a man in Pastra Social Care Home for Men with Mental Disorders, 6 December 2005.

³⁰³ Interview with a 28-year-old man, 25 September 2006.

people with psycho-social (mental health) disabilities whom MDAC's researcher met in court told the researcher that they wanted to make autonomous decisions. One said, 'I want to make my own decisions things about my everyday life, but my mother is in charge of the money and because of this I simply cannot. But on the other hand it is good because she buys everything I need'.³⁰⁴

Often relatives take care of adults with intellectual disabilities or psycho-social (mental health) disabilities. Curiously, relatives are frequently unaware of why the guardianship procedure is needed, but prefer to make the relationship official. Judges tell relatives that the purpose of the case is to decide who will take care of the person.

Bulgaria does not have so-called professional guardians.³⁰⁵ However, Bulgarian law does, wrongly, allow directors of residential institutions to be appointed as guardians of residents of their social care institution. In most cases, institutional directors do not conceptualise guardianship as depriving the adult from exercising human rights. However, one institutional director told MDAC's researcher:

'These people were thrown away from society a long time ago. They are not able to make their own decisions just because they had never decided on anything before they were admitted here. But now they are not aware of life outside the home, and it would be even more difficult for them to live outside the institution.'³⁰⁶

The overwhelming majority of guardians of people who live in the community do not understand the nature of guardianship. They typically hold opinions such as the following, as one guardian told MDAC's researcher: 'I was advised to place him under guardianship because he drank a lot and spent all his money on alcohol and this was the only way to save him'.³⁰⁷ Another guardian told MDAC, 'I was advised to place her under guardianship because they did not want to give me her pension or integration welfare any more without any documents'.³⁰⁸ Some guardians told MDAC that they started guardianship procedure 'because they needed to sell their property or divide it among the children'.³⁰⁹

MDAC gained the impression that judges are sympathetic towards relatives who apply to have their family member placed under guardianship. One judge talked about a relative and said, 'These people live a hard life. I understand them'.³¹⁰ Another judge admitted that, 'We do not have training on the cases we hear. But of course we need

³⁰⁴ Interview in Varna Regional Court on 16 June 2006.

³⁰⁵ See, for example, Guardianship and Human Rights in Hungary, Mental Disability Advocacy Center, 2007.

³⁰⁶ Director of Lyaskovo social care home for adults with intellectual disability, 20 June 2005.

³⁰⁷ Interview in Varna Regional Court on 16 June 2006.

³⁰⁸ Interview in Stara Zagora Regional Court on 31 May 2005.

³⁰⁹ Interview in Stara Zagora Regional Court on 22 May 2006.

³¹⁰ Interview in Stara Zagora Regional Court on 31 May 2005.

to know more about these people's problems, although this is why we usually order an examination'.³¹¹ A third judge became defensive when asked about the lack of training for judges, justifying the lack of any training on these issues by asserting that, 'The court cannot be an expert in everything'.³¹²

However, judges frequently demonstrated a low understanding of the human rights implications of guardianship. When MDAC's researcher asked whether adults should be legally represented during the guardianship process, one judge answered, 'I have not thought about an ex officio lawyer for the adults. It is true that there should be someone to explain to them what is going on, but the law does not require it and I honestly do not think this would help them understand'.³¹³ Judges seemed to be oblivious to the real-life consequences of guardianship. None had ever visited a guardianship authority to see how guardians were appointed and how the authority controlled (or as this report has revealed, did not control) guardians' actions. Judges do not conceive guardianship as a life-time deprivation of rights, and seemed only to start thinking about this when MDAC's researcher asked about the number of cases judges had dealt with concerning a review of guardianship. None could remember any.

A prosecutor was amazed to see an adult placed under guardianship in the courtroom. In one case, after the relatives and the adult left the room, a prosecutor told MDAC's researcher, 'What an awful life these people live. I just cannot even imagine it. Let none of us have this fate'.³¹⁴ MDAC is not able to state whether prosecutor colleagues share this sentiment, because most refused to be interviewed, saying they consider guardianship cases neither important nor interesting.

Lawyers of applicants usually tried to convince the court that the person's condition was irreversible and that the adult needed immediate deprivation of legal capacity. Usually the lawyers did not know the adult in question nor did they try to talk to the adult while in court. One lawyer told MDAC that guardianship is clearly in the best interest of adults: 'Look how much suffering he brings to his family. I really empathise with those people'.³¹⁵

At the same time the few lawyers who represented adults thought that guardianship legislation urgently needs to be amended, and that opportunities need to be created for adults under guardianship to challenge evidence presented in the courtroom, and to challenge the notion of guardianship itself.

³¹¹ Interview in Stara Zagora Regional Court on 22 May 2006.

³¹² Interview in Varna Regional Court on 16 June 2006.

³¹³ Interview in Varna Regional Court on 16 June 2006.

³¹⁴ Interview in Varna Regional Court on 16 June 2006.

³¹⁵ Interview in Lovech Regional Court on 22 May 2006.

3.12 Conclusions

This research of guardianship practice in Bulgaria adds the human side to conclusions reached earlier in the report, namely that Bulgarian guardianship legislation generally fails to meet international human rights standards. It is hoped that this research is a helpful contribution to the Bulgarian government and civil society as the country embarks on an urgently needed reform of guardianship law and practice.

It is clear that meaningful participation of adults in the guardianship process is insufficiently guaranteed. Lack of proper notification of the adults to be placed under guardianship as well as lack of information about the nature and effects of the procedure proved to be among the main problems. Many other abuses stem from the fact that adults are simply denied vital information, and denied legal representation to help them understand the information and take appropriate action. Furthermore, Bulgarian legislation far from satisfies the underlying principles of protection, which presumably is the underpinning philosophy of guardianship. This is so because legislation is outdated, and follows a binary and illogical theory that people are either capable or incapable. Able or unable. Helpful or helpless. Ill or healthy. Normal or abnormal. This approach does not take into account the individual differences and needs of humanity, and probably violates the United Nations Convention on the Rights of Persons with Disabilities. Certainly it has devastating consequences for many thousands of people in Bulgaria and in many other European States.

During both the court and the administrative procedure, no one explains in understandable language to the adult what changes guardianship would bring in his or her life. There is no legislative obligation to do so, so other people take decisions for the adult, without that person's knowledge or consent.

Adults in question on the whole do not participate in the guardianship procedure, and are seen by the court only once. The manner in which judges talk to people with disabilities raises questions about fair trial rights and equality of the parties. It also reveals the urgent need for judicial training on the nature of disability, how to address people with disabilities, and on the consequences of guardianship.

Medical and other experts receive no guidance on how to carry out incapacity assessments. In some cases, mostly concerning adults with intellectual disabilities, incapacity assessments are not carried out at all. In some cases these assessments are a mere formality. In other cases, the incapacity assessment fails to link the condition of the adult with his or her ability to take care of their own affairs. Many incapacity assessments amount to nothing more than statements such as 'this person has an intellectual disability, so obviously needs to be placed under plenary guardianship'. Such an approach fails to take into consideration the person's individual abilities, interests, needs and potential.

Neither courts nor guardianship offices make any serious effort to ascertain the adult's opinion about who the guardian should be. In many cases the adult is not told who the

guardian is. In some cases, even with the assistance of an attorney it is either impossible or extremely difficult to find that out who the guardian is, and what decisions he or she has made. The often impenetrable wall of bureaucracy is yet another illustration of the need for whole-scale reform.

Guardianship offices of local authorities consider guardianship as another burden to be dealt with in a bureaucratic way. Many guardianship officials – people who are responsible in law to ensure the protection of vulnerable adults – lack understanding of guardianship and its severe consequences on people. Since no national authority controls the work of guardianship officials, they generally feel no responsibility for their work or to ensure the highest possible service for vulnerable adults. Guardianship officials are content to rely on the (often glaringly wrong) assumption that relatives take care of adults under guardianship.

3.13 General Comments and the Need for Further Research

Governments should not embark on legislative or policy reform unless such reform is based upon, and informed by, a thorough understanding of the issues it seeks to address. MDAC's research is only the first step towards reaching that understanding. Unfortunately, in this instance research was not facilitated as much as it might have been by those responsible for implementing such legislation and policy.

MDAC therefore urges the Bulgarian government to encourage, co-operate and participate in future research. This will allow instances of good practice to be identified, but also weaknesses that should be addressed. Unless such research is allowed and the findings acted upon, Bulgaria will continue to fail to meet its international legal and moral obligations towards people with psycho-social (mental health) and intellectual disabilities.

More specifically, the guardianship authorities' denial of access to their case files on the basis of confidentiality, despite assurances that confidentiality would be appropriately honoured, is troubling. First it ensured that a full picture could not be obtained of the manner in which guardianship authorities deal with cases. Second, and more generally, as legislation fails to ensure adequate supervision of those authorities, this combination of legislation and practice suggests inadequate monitoring and oversight of their work. The manner in which all participants (e.g. people under guardianship, expert and lay witnesses, family members, judges, lawyers, guardianship authority officers) in the system interacted, and the impact of that interaction, was impossible to assess accurately. The impact of these constraints on conclusions that can be drawn and recommendations based upon these conclusions is clear.

Equally troubling is the attitude of the central government that it can hide public data about guardianship, and make that information available only if a sum of 900 lv. (approximately 450 euros) is paid. MDAC believes that this information

should be freely available, and any denial constitutes a violation of the principle of freedom of information.

MDAC is conscious that this research only touched the surface of the views and feelings of participants in the guardianship system. However, the interviews have clearly highlighted many difficulties faced by these groups, and suggest that further research into their direct experiences is needed.

As guardianship touches so many different areas of life, several additional issues require more detailed analysis. Perhaps the most pressing of these include the training of guardians, the role of the guardianship authorities, the lack of meaningful and effective participation by lawyers, and the role of psychiatrists. These professionals have enormous power, as there is a clear and direct link between a psychiatrist's opinion and a judge's decision. In order for Bulgarian citizens to be assured that their justice system is objective and non-arbitrary, considerably more research is needed into how psychiatrists carry out incapacity assessments, and why judges almost automatically accept their conclusions as scientific truth.

As of the date of publication of this report, Bulgaria was not among the signatories of the UN Convention on the Rights of People with Disabilities. A principal component of this Convention is an obligation upon countries to implement alternatives to guardianship. MDAC hopes that the Bulgarian government will sooner rather than later make a commitment to sign, ratify and implement this important international document.

ANNEX A

Glossary of Terminology

Adult: An adult is a person who has reached the legal age of majority – usually age 18 – as defined in the jurisdiction where the person is located.

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 the national languages of our target countries may be outdated and pejorative (for example, terms such as ‘mental retardation,’ ‘imbecile,’ ‘abnormal comprehension,’ ‘idiocy,’ ‘weak mind’ and so on). Therefore, MDAC has elected to use ‘intellectual disability’ in lieu of all such terms.

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

Guardianship: A legal relationship established through a court or administrative process between a person deemed to lack 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: A term applied to people who have been diagnosed with, or labelled as having, mental health problems and/or intellectual disabilities.

Mental health problem: An admittedly broad term meant to include people who have been diagnosed, labelled or perceived as suffering from a mental illness, and can include people with personality disorders. Members of this population are

sometimes referred to as having a ‘mental disorder,’ ‘mental disease’ or ‘mental defect’. For purposes of this report, all such terms are translated as ‘mental health problem’, a term MDAC maintains is less stigmatising.

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

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

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

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

ANNEX B

Summary Table of the Indicators

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

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

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

ANNEX C

Protocol for Researchers on Protection of Research Data and Participants

Introduction

The purpose of the stage two in the guardianship research is to gather information on the practical application and the implications of guardianship legislation and frameworks on adults under guardianship. Researchers will attempt to hold interviews with adults under guardianship, or who are going through court processes related to guardianship. Gathering of data in this manner is necessary to fully understand and document the reality of the guardianship system by those affected by it.

The World Medical Association Declaration Of Helsinki: Ethical Principles for Medical Research Involving Human Subjects (Revised 2000), while specifically applying ethical principles to medical research on human subjects, also provides guidance for less intrusive research involving vulnerable human beings as subject-participants as well. Article 5 of the Declaration states that ‘considerations related to the well-being of the human subject should take precedence over the interests of science and society.’ This approach informs the collection and handling of information by MDAC.

Handling Personal Data

Oversight by MDAC

Maintenance and use of the data collected from individuals during the empirical stage of the project will be overseen by an assigned MDAC staff member and the guardianship advisory board, to ensure that use of the collected data is protected and directed towards improving the well-being of people under guardianship as well as people likely to be placed under guardianship.

Protection of collected information

Each researcher must devise a number-based data storage system to protect the information (including any personal notes, records or other information) that is gathered from any source, by any means, throughout the course of the research project. The key to the numerical system will be maintained in a different location than the actual research data and will be available only to the researcher and the assigned MDAC staff member.

Required Disclosures to Participants

Recognising that individuals who reside in closed institutions often have few visitors and little contact with the outside world, it is possible, if not probable, that researchers may encounter research participants who specifically ask for assistance from the researcher. Because of this possibility, before a researcher begins an interview with a research participant, the researcher must inform each participant of the following:

- The purpose of the research. Considering that many participants may have difficulty comprehending the potential risks and benefits of participating in research, particular attention must be paid to providing an explanation of potential risks and benefits in a language and format that is both comprehensible and tailored to the needs of each individual participant.
- The voluntary nature of the research. Individuals have the right to refuse to participate (or to refuse to answer any particular question) or to withdraw from participating at any time. Researchers must directly ask each potential participant whether he or she consents to participating in the research and to the recording of personal information for use in the project. If an individual refuses or withdraws consent, all information pertaining to that individual must be deleted from project records.
- The role of the researcher. Researchers should explain to participants that the researcher's role is one of information gathering and that the researcher is not permitted to provide legal advice or representation to research participants.
- The confidentiality of research data. Researchers must explain to participants that any information that a participant chooses to share will be maintained by the researcher and by MDAC in a confidential manner. It should further be explained that the information eventually may be disclosed in MDAC's published report and that, if included in the published report, it will be anonymous; i.e., no personally identifiable information or statement will be included in any published report.
- The interviewing conditions. Interviews must be conducted in a private and confidential manner, out of earshot of others, and with no additional person present, unless requested and authorised by the participant.
- Exceptions to confidentiality/anonymity. Before conducting any interview, the researcher must explain to participants that if during the course of the interview the participant discloses (or the researcher observes) information that suggests the participant is at substantial risk of significant harm, that it may not be possible for the researcher to keep such information confidential or anonymous.

Procedure Following Disclosure Suggesting a Substantial Risk of Significant Harm

If a participant makes disclosure suggesting a substantial risk of significant harm during the course of the interview or otherwise, the researcher must again inform the participant of the need to notify an appropriate person(s) or authority (such as police, relevant governmental authority or institution director) who can intervene to stop the harm. Exercising his or her own judgment, the researcher must decide whether it is sufficiently imminent to notify police or staff in person, gather as much detail as possible about the situation and then contact the MDAC staff member responsible for the project as soon as possible to discuss how to proceed. Non-emergency requests by research participants of the researcher for assistance (legal or other) should be handled on a case-by-case basis.

The researcher must note to the participant that the researcher's role is as researcher only and that a request for assistance would require that the anonymity of any information related to the request be lost as it would require disclosure to a third party who could provide the assistance. If, following this disclosure, the participant wants assistance, the researcher should take steps to ensure that the participant clearly understands the exact nature of the assistance sought. The researcher must discuss with the participant precisely what information would need to be disclosed (including the name and location of the person, relevant facts, diagnosis) and to whom (for example, lawyer, guardian, MDAC staff). The researcher should then ask for specific permission to disclose that information to the people or agency identified. Before any disclosure of the information is made, the researcher must contact the responsible MDAC staff member to discuss the situation.

ANNEX D

List of Interviews

Date	Interviewee
6 December 2005	Person under guardianship
25 September 2006	Person under guardianship
16 June 2006	Person under guardianship
20 June 2005	Guardian, director of social home
16 June 2006	Guardian, family member
16 June 2006	2 psychiatrists
31 May 2005	Guardian, family member
22 May 2006	Guardian, family member
31 May 2005	Judge
22 May 2006	Judge
16 June 2006	Judge
16 June 2006	Prosecutor
22 May 2006	Applicant's lawyer
31 May 2005	Psychiatrist
22 May 2006	Psychiatrist
29 March 2006	Guardian, director of social home
29 March 2006	Judge
29 March 2006	2 persons whose guardianship was lifted
10 May 2005	Lawyer of the adult to be placed under guardianship
20 June 2006	Lawyer of the adult to be placed under guardianship
17 September 2006	Lawyer of the adult to be placed under guardianship
20 June 2005	10 adults under guardianship

ANNEX E

Question box	Indicator	Data Gathering Sheet for Individual Case File (Court) Reviews
1.		Case file identifying number: (based on researcher's own numbering system).
2.		Regional court the case file is from: _____. Date of court finding: _____. Gender of person concerned: Male / Female. Year of birth of person concerned: _____. Ethnicity of person concerned: _____. Not Available: _____.
3.		At initiation of case, person concerned was living in: Community _____, Social care home or other State institution _____. (specify the type of institution) Other (specify) _____.
4.	I-9	Did the applicant ask for him or herself to be appointed guardian: Yes _____, No _____; if not, what was the relationship of the person that the applicant asked to be appointed as guardian to the Adult in question: Family member _____, Professional Guardian _____, Director of Institution _____, Other _____ (specify _____)
5.	I-9	Requested guardian was also the applicant: Yes _____, No _____. Initial application filed sought to establish: Plenary guardianship _____, Partial guardianship _____. Change of guardianship _____. If change, explain what type of change was sought:

6.	I-9	Outcome of case was court order for: Plenary guardianship _____, Partial guardianship _____, No guardian _____. Change of guardian _____.
7.	I-7	Capacity evaluation was ordered: Yes _____, No _____.
8.	I-2	Person was ordered to be detained in order to complete capacity evaluation: Yes _____ No _____ Information Not Available: _____ Person already detained for other reasons (explain): _____ If person was detained in order to submit to capacity evaluation, how long were they detained: _____ (in days).
9.	I-3	File indicates proof of written notice of proceedings to person involved: Yes _____ No _____ Amount of time between when written notice was served and the proceeding: _____ (in days) Person concerned was present at the initial court hearing: Yes _____ No _____ Not Available _____ Person concerned was present at any subsequent court hearings: Yes _____ No _____ Not Available _____ If no, what reason is provided (if any) for the absence of the person concerned: _____
10.	I-3	Person concerned was represented by an attorney during the proceedings: Yes _____ No _____ If no, person concerned was represented by any third-party: Yes _____ No _____ If yes, specify type of third party (i.e. case guardian): _____
11.	I-4	The person representing the person concerned made any arguments or asked any questions of any witness during the proceedings: Yes _____ No _____ The person representing the person concerned supported the application for guardianship: Yes _____ No _____.

13.	I-5	<p>The capacity evaluation was provided to the person concerned in advance of the court hearing: Yes _____ No _____.</p> <p>If yes, how long before the court hearing did person involved receive capacity evaluation: _____ (in days). Not Available: _____.</p> <p>If no, reason given for person not receiving the capacity evaluation in advance of court hearing: _____.</p>
14.	I-5	<p>Person who conducted the capacity evaluation appeared in court in person: Yes _____ No _____. Not Available: _____.</p> <p>Other evidence or witnesses was presented in court in addition to capacity evaluation: Yes _____ No _____.</p> <p>If yes, what other evidence was presented to court: _____.</p>
15.	I-5	<p>Person involved presented an alternative capacity evaluation: Yes _____ No _____.</p> <p>Person concerned presented other evidence: Yes _____ No _____. If yes, specify what type of other evidence was presented (i.e. witnesses): _____.</p>
16.	I-3	<p>Is there any indication in the court file that the person concerned objected to being incapacitated: Yes _____, No _____.</p> <p>Is there any indication in the court file that the person concerned objected to being placed under guardianship: Yes _____, No _____.</p> <p>Is there any indication in the court file that the person concerned agreed to be incapacitated: Yes _____, No _____.</p> <p>Is there any indication in the court file that the person concerned agreed to be placed under guardianship: Yes _____, No _____.</p>

17.	I-6	<p>Does file indicate whether notice of the court decision was sent out to the person concerned: Yes _____ No _____.</p> <p>If yes, how long after the court decision was the notice sent out: _____ (in days) Not Available: _____.</p> <p>Does file indicate whether the person involved was told of their right to appeal the capacity decision: Yes _____ No _____.</p> <p>Was an appeal filed in this case: Yes _____ No _____.</p> <p>If yes, who filed the appeal: _____.</p>
18.	I-7	<p>Does the case file contain a written capacity evaluation: Yes _____ No _____.</p> <p>If yes, how many pages is the evaluation: _____.</p> <p>According to the case file, did the evaluator have a face-to-face meeting with the person concerned: Yes _____ No _____.</p> <p>Not available: _____. If yes, how long was the meeting: _____ (you may need to look for a billing invoice from the evaluator in order to answer this question)</p> <p>Number of days (or months) old the capacity evaluation was at the time of the capacity hearing: _____.</p> <p>Was any additional mental health information/evaluation that was provided to the court: Yes _____ No _____.</p> <p>Not Available: _____. If yes, explain what kind of information was used by the court and how old that data was at the time of the hearing: _____.</p> <p>Does the capacity evaluation provide a diagnosis: Yes _____ No _____. If yes, what diagnosis is given: _____.</p> <p>Is the given diagnosis included in ICD 10: Yes _____ No _____.</p> <p>Does capacity evaluation explain HOW the diagnosis affects the person's capacity: Yes _____ No _____.</p> <p>If yes, please explain how the capacity evaluation makes this link: _____.</p>

19.	I-9	<p>In this case, the applicant was: Family member _____, Social care home (Director) _____, Prosecutor _____ Other _____</p> <p>If other, what was the applicant's relationship to the person concerned:</p>
20.	I-9	<p>In this case, notice of the application was provided to: Family member _____, Social care home (director) _____ Other person _____.</p> <p>Not Available: _____</p> <p>If other person was given notice describe how that person was related to the case or the person concerned:</p>
21.	I-10	<p>According to the case file, what reason was provided for the need for guardianship: Placement in institution _____, Financial management _____ Protection of person concerned _____, Protection of others _____, Compliance with ministerial orders _____, Other reason _____. If other reason, please explain what reason was provided for the filing of the application:</p>
22.	I-10	<p>Did court enter a finding of incapacity in this case: Yes _____ No _____. If yes, the incapacity was found to be: Partial _____, Plenary _____.</p> <p>If no, what reason was given for not entering a finding of incapacity:</p> <p>For Partial cases, the court identified particular areas where the individual could retain their own decision-making powers: Yes _____ No _____. If yes, what areas (types) of decisions are reserved for the individual: _____ (list examples):</p> <p>According to the case file, the court's stated reason for entering a finding of incapacity was: Placement in institutional care _____, Financial _____, Protection of person concerned _____, Protection of others _____, Compliance with ministerial orders _____, Other reason _____. If other reason is given, explain the reason:</p>
23.	I-10	<p>Did court's decision agree with the recommendation of the capacity evaluator: Yes _____ No _____.</p> <p>Did prosecutor agree with the recommendation of the capacity evaluator: Yes _____ No _____ Prosecutor did not participate _____.</p>

Question box	Indicator	Data Gathering Sheet for Individual Court Observations
1.		Case file identifying number: (based on researcher's own numbering system). Total length of court hearing: _____.
2.		Gender of person concerned: Male / Female. Year of birth of person concerned: _____. Ethnicity of person concerned: _____.
		Regional court the case file is from: _____. Date of court observation: _____. Type of court hearing (purpose): _____. Have there been any previous court dates for this case: Yes _____ No _____. If yes, how many and for what purpose(s): _____.
3.		Who is present in court: Person concerned: Yes _____ No _____ If no, why not: _____. If no, was person informed of court hearing: Yes _____, No _____, Not sure _____. Attorney or representative for person concerned: Yes _____ No _____. Prosecutor: Yes _____ No _____ Applicant: Yes _____ No _____ Attorney for Applicant: Yes _____ No _____ Capacity evaluator: Yes _____ No _____ Others: (identify their role such as 'witness for applicant', 'family member', 'friend')
4.		At initiation of case, person involved was living in: Community _____, Social care home or other State institution _____. Other _____.

5.	<p>Person that the Applicant requested to be the guardian was: Family member _____, Professional Guardian _____, Director of Institution _____, Other _____ (specify _____)</p> <p>Requested guardian was also the applicant: Yes _____, No _____.</p>
6.	<p>Initial application filed sought to establish: Plenary guardianship _____, Partial guardianship _____. Change of guardianship _____. If change, explain what type of change was sought:</p>
7.	<p>Outcome of case was order for: Plenary guardianship _____, Partial guardianship _____, No guardian _____</p> <p>Capacity evaluation was ordered: Yes _____, No _____</p>
8.	<p>I-2</p> <p>Person was ordered to be detained in order to complete capacity evaluation: Yes _____ No _____.</p> <p>Person already detained for other reasons: _____.</p> <p>If person was detained in order to submit to capacity evaluation, how long were they detained: _____ (in days).</p>
9.	<p>I-3</p> <p>File indicates proof of written notice of proceedings to person involved: Yes _____ No _____.</p> <p>Amount of time between when written notice was served and the proceeding: _____ (in days)</p> <p>Person concerned was present at the initial court hearing: Yes _____ No _____.</p> <p>Person concerned was present at any subsequent court hearings: Yes _____ No _____ If no, what reason is provided (if any) for the absence of the person concerned:</p>
10.	<p>I-4</p> <p>Person concerned was represented by an attorney during the proceedings: Yes _____ No _____.</p> <p>If no, person concerned was represented by any third-party: Yes _____ No _____ If yes, specify type of third party (ie case guardian): _____</p> <p>The person representing the person concerned made arguments or asked questions on behalf of the person involved to any witness during the proceedings: Yes _____ No _____.</p> <p>The person representing the person concerned supported the application for guardianship: Yes _____ No _____.</p>

11.	I-5	<p>The capacity evaluation was provided to the person concerned in advance of the court hearing: Yes _____ No _____.</p> <p>If yes, how long before the court hearing did person involved receive capacity evaluation: _____ (in days).</p> <p>If no, reason given for person not receiving the capacity evaluation in advance of court hearing: _____</p> <p>Person who conducted the capacity evaluation appeared in court in person: Yes _____ No _____.</p> <p>The capacity evaluator submitted a written report of his/her findings: Yes _____ No _____.</p> <p>Person concerned was given a copy of the capacity evaluation: Yes _____ No _____. If yes, when (ie at court hearing or in advance of court by _____ days): _____</p> <p>Other evidence or witnesses was presented in court in addition to capacity evaluation: Yes _____ No _____. If yes, what other evidence was presented to court: _____</p>
13.	I-5	<p>Person involved presented an alternative capacity evaluation: Yes _____ No _____. Person concerned presented other evidence: Yes _____ No _____.</p> <p>If yes, specify what type of other evidence was presented (i.e. witnesses): _____</p>
14.	I-3	<p>Was the person concerned asked their opinion about being incapacitated/placed under guardianship: Yes _____, No _____. Is there any indication in the court file that the person concerned agreed to being placed under guardianship: Yes _____, No _____.</p>

15.	1-2..6	<p>Was the person concerned told what their rights are during the proceedings: Yes ____ No ____ . If yes, summarize what rights the person was informed of:</p> <p>Was the person concerned asked any questions by the judge during the proceeding: Yes ____ No ____ . If yes, what questions was the person concerned asked:</p> <p>Was the person concerned told that he/she has the right to file an appeal of the court's decision: Yes ____ No ____ . If yes, was the person concerned given any information as to HOW they would file an appeal: Yes ____ No ____ .</p> <p>Was an appeal filed in this case: Yes ____ No ____ .</p> <p>If yes, who filed the appeal:</p> <p>Does the case file contain a written capacity evaluation: Yes ____ No ____ .</p> <p>If yes, how many pages is the evaluation: _____</p> <p>According to the case file, did the evaluator have a face-to-face meeting with the person concerned: Yes ____ No ____ .</p> <p>If yes, how long was the meeting: _____ (you may need to look for a billing invoice from the evaluator in order to answer this question)</p> <p>Number of days (or months) old the capacity evaluation was at the time of the capacity hearing: _____ .</p> <p>Was any additional mental health information/evaluation that was provided to the court: Yes ____ No ____ Not available _____.</p> <p>If yes, explain what kind of information was used by the court and how old that data was at the time of the hearing: _____</p> <p>Does the capacity evaluation provide an ICD 10 diagnosis: Yes ____ No ____ . If yes, what diagnosis is given: _____</p> <p>Does capacity evaluation explain HOW the diagnosis affects the person's capacity: Yes ____ No ____ .</p> <p>If yes, please explain how the capacity evaluation makes this link: _____</p>
16.	1-7..8	

17.	I-9	In this case the applicant was: Family member _____, Social care home (Director) _____, Prosecutor _____ Other _____ If other, what was the applicant's relationship to the person concerned: _____
18.	I-9	In this case, notice of the application was provided to: Family member _____, Social care home (director) _____ Other person _____ If other person was given notice describe how that person was related to the case or the person concerned: _____
19.	I-10	According to the application to court, what reason was provided for the need for guardianship: Placement in institution _____, Financial management _____ Protection of person concerned _____ _____, Protection of others _____, Compliance with ministerial orders _____, Other reason _____ _____. If other reason, please explain what reason was provided for the filing of the application: _____
20.	I-10	Did court enter a finding of incapacity in this case: Yes _____ No _____ If yes, the incapacity was found to be: Partial _____, Plenary _____ If no, what reason was given for not entering a finding of incapacity: _____ For Partial cases, the court the court identified particular areas where the individual could retain their own decision-making powers: Yes _____ No _____ If yes, what areas (types) of decisions are reserved for the individual: _____ (list examples): _____ According to the case file, the court's stated reason for entering a finding of incapacity was: Placement in institutional care _____, Financial _____, Protection of person concerned _____, Protection of others _____, Compliance with ministerial orders _____, Other reason _____ If other reason is given, explain the reason: _____ Did court's decision agree with the recommendation of the capacity evaluator: Yes _____ No _____ Did prosecutor agree with the recommendation of the capacity evaluator: Yes _____ No _____ Prosecutor did not participate _____
21.	I-10	Did prosecutor agree with the recommendation of the capacity evaluator: Yes _____ No _____ Prosecutor did not participate _____

22.	I-6	<p>Does file indicate whether notice of the court decision was sent out to the person concerned: Yes _____ No _____</p> <p>If yes, how long after the court decision was the notice sent out: _____ (in days)</p> <p>Does file indicate whether the person involved was told of their right to appeal the capacity decision: Yes _____ No _____</p> <p>_____.</p> <p>Was an appeal filed in this case: Yes _____ No _____.</p> <p>If yes, who filed the appeal:</p>
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Question box	Indicator	Data Gathering Sheet for Individual Case File (Guardianship authority) Reviews
1.		Case file identifying code (based on researcher's numbering system): _____
2.		Regional guardianship authority where the case file is from: _____, Date guardian was appointed: _____ _____. Date of court order finding incapacity: _____
3.		<p>Does the person concerned have a guardian appointed: Yes _____ No _____. If no, the reason provided in the file that no guardian has been appointed:</p> <p>If no, how long has the person been incapacitated with no guardian appointed: _____ (in days or months).</p>
4.	I-11	<p>The person that the applicant requested to be appointed guardian was: Family member _____, Professional Guardian _____, Director of Institution _____, Other _____ (specify _____)</p> <p>Requested guardian was appointed the guardian: Yes _____, No _____. If no, who was appointed guardian (i.e. what is that person's relationship to the person concerned):</p> <p>What reason was given for appointing someone other than the person requested to be guardian:</p>

5.	<p>Was person concerned seen personally (ie: interviewed/consulted) by the guardianship authority prior to appointment of the guardian: Yes _____ No _____.</p> <p>If no, what reason was given for the person concerned not being seen (interviewed or consulted) by the GA:</p> <p>If yes, was the person concerned asked who they would want to be their guardian: Yes _____ No _____. If yes, was the appointed guardian the same as the person concerned said they wanted: Yes _____ No _____. If no, what reason was given for appointing someone other than who the person concerned wanted:</p> <p>If person was seen personally by GA, was the person concerned informed of what it would mean for them to be placed under guardianship (i.e. what residual rights the person concerned has – if any): Yes _____ No _____. What rights were they informed of:</p> <p>If person was seen personally by GA, was the person concerned asked to express their opinion about any (other) issue relating to the proceeding: Yes _____ No _____. If yes, what issues was the person concerned asked for their opinion:</p>
6.	<p>Does there appear to be a conflict of interest between the person concerned and the person appointed guardian: Yes _____, No _____.</p> <p>If yes, what is the nature of the conflict of interest: Financial _____, Director of facility where person involved resides _____, Other _____, If other, describe what ‘other’ conflicts or potential conflicts you note from the file:</p>
7.	<p>Has this case ever undergone a case review by the GA: Yes _____ No _____. If yes, how many: _____ _____ How much time elapsed between each review:</p>

8.	I-19	<p>Have any complaints ever been filed against this guardian: Yes ____ No ____ . If yes, how many: ____ For what reason: _____</p> <p>If there has been a complaint filed, what action was taken as a result: Complaint investigated ____, Complaint not investigated ____, If investigated, what was the outcome: _____</p> <p>If not investigated, what reason was given for no investigation: _____</p> <p>Was there a review of the guardianship/guardians actions as a result of the complaint: Yes ____, No ____.</p> <p>Has there ever been a review of the guardian's actions/decisions in this case: Yes ____, No ____ . If yes, how many: ____ at what frequency (i.e. every year/every five years): _____.</p> <p>If yes, what was purpose of the review: _____</p> <p>Living situation of person under guardianship: _____</p> <p>Medical situation/treatment of person under guardianship: _____</p> <p>Financial situation/transaction involving the assets of the person under guardianship: _____</p> <p>Was person under guardianship interviewed/asked for input on/during the review: Yes ____ No ____.</p> <p>Has the guardian ever contacted the guardianship authority for permission to take any action regarding the person under guardianship: Yes ____ No ____.</p> <p>If yes, what was the nature of the request (ie: financial, medical etc.): _____</p> <p>Has the need for guardianship ever been re-evaluated by the GA: Yes ____ No ____ . If yes, how long ago: _____. If no, reason given (if any) for lack of review: _____.</p>
9.	I-20	
10.	I-20	
11.	I-27	

Data Gathering Sheet for Statistical Information

General disability statistics for country (by region if possible):³³²

Please identify (list) what statistical information regarding guardianships/mental disability is available and explain the manner in which it is kept.

General Country (Regional) Statistics

1.	Number of persons under guardianship in the country (by region if possible): Male _____ Female _____ Total _____.
2.	Average age of people under guardianship in the country (by region if possible): Male _____ Female _____
3.	Number of persons under guardianship in the country who are in: Partial Guardianship _____ Plenary Guardianship _____ Total _____.
4.	Current living arrangement (total number of cases) of people under guardianship in the country (by region if possible): Social care homes _____ Psychiatric institutions _____ Other institutions _____ Living alone _____ Living with family _____ Living with friends _____ Living with relative (family) guardian _____ Homeless _____ Other _____
5.	Total number of people under guardianship of relative (family) guardian: _____ Total number of people under guardianship of professional (public) guardian: _____ Total number of those people who reside in community: _____ Total number who reside in an institution: _____ Total number of people under guardianship of directors (or staff) of institution: _____.
6.	Number of guardians responsible for: 1 person: _____ 2-5 people: _____ 6-10 people: _____ 10-30 people: _____ Over 30 people: _____ Average number of people under guardianship for whom each professional guardian is responsible: _____.

7.	<p>Number of applications filed for new guardianships: 2005 (give number of months included): Partial _____ Plenary _____ 2004: Partial _____ Plenary _____ 1999: Partial _____ Plenary _____ 1994: Partial _____ Plenary _____</p> <p>In those countries where directors of institutions are routinely appointed guardian of their residents we should try to gather statistical/budgetary information regarding the financing of institutions so that we can show whether/where there is financial conflict of interest etc.</p> <p>Are guardians paid for their services? Does this apply to all guardians? How much are they paid (on average)? Who pays them?</p>
8.	<p>Are there any 'official' statistics on how many guardianship cases are initiated each year?</p> <p>If so, are they broken down into any smaller categories such as by full or partial guardianship?</p> <p>Or by region, gender, diagnosis, age?</p>
9.	<p>Number of guardianships terminated for reasons other than death of the person under guardianship:</p> <p>2005 (include number of months) Plenary (male) _____ Plenary (female) _____ Partial (male) _____ Partial (female) _____ Total _____.</p> <p>2004 Plenary (male) _____ Plenary (female) _____ Partial (male) _____ Partial (female) _____ Total _____.</p>
GAP Research Statistics: Refer to all cases examined as part of Stage Two research	
10.	<p>Number of cases examined Total _____ Number of Men _____ Number of Women _____.</p>
11.	<p>Average age of persons whose case was examined: Male _____ Female _____</p>
12.	<p>Number of cases examined where person was under: Partial Guardianship _____ Plenary Guardianship _____</p>

13.	<p>Current living arrangement (total number of cases examined) of people under guardianship:</p> <p>Social care homes _____</p> <p>Psychiatric institutions _____</p> <p>Other institutions _____</p> <p>Living alone _____</p> <p>Living with family _____</p> <p>Living with friends _____</p> <p>Living with relative (family) guardian _____</p> <p>Homeless _____</p> <p>Other _____</p>
14.	<p>Total number of cases examined where person was under guardianship of relative (family) guardian: _____</p> <p>Total number of cases examined where person was under guardianship of professional (public) guardian: _____.</p> <p>Total number of those cases examined where person resides in community: _____</p> <p>Total number of those cases examined where person resides in an institution: _____.</p> <p>Total number of cases examined where person was under guardianship of directors (or staff) of institution: _____.</p>

Question and Answer Sheet for Interviews with Professional Participants in the Guardianship Processes	
<p>Many of the questions suggested for the quasi-formal interview process are open-ended questions meaning that they are designed to elicit a narrative response. Listen and record the answers carefully (using a data recorder if possible) and ask for examples and elaboration of opinions when possible.</p>	
<p>Interviews with Professionals:</p> <p>Date, Time and Location of Interview: _____</p> <p>Identification Code for Interviewee (pursuant to your own confidential system which protects identity of research participants): _____</p> <p>Role of Interviewee in guardianship processes (ie: 'judge,' 'prosecutor,' 'professional guardian'): _____</p> <p>Number of years person has been involved in guardianship cases: _____</p> <p>Interviewee's estimate of how many guardianship cases he/she has been involved in: _____</p> <p>Training/educational background of the interviewee: _____</p>	
<p>Interviews with Person Concerned:</p> <p>Date, Time and Location of Interview: _____</p> <p>Identification Code for Interviewee (pursuant to your own confidential system which protects identity of research participants): _____</p> <p>Interviewee's experience with the guardianship processes (ie: 'is under guardianship' 'was once under guardianship' 'was the subject of a guardianship application'): _____</p> <p>Interviewee lives in: Institution _____, Community _____, Other _____ (specify).</p> <p>Number of years person has been under guardianship: _____</p> <p>Mental health history, diagnosis, background of the interviewee: _____</p>	
Corresponding Indicator	Suggested questions for interviews with participants in the guardianship proceedings
Indicator 1	<p>Interviewee:</p> <p>Professionals</p> <p>What is your opinion of the existing guardianship system in your country?</p> <p>Is the system utilized to the appropriate degree? Ie: used only when needed.</p> <p>Are procedures for determining capacity fair to the person involved? (explain)</p> <p>Person Concerned</p> <p>What is your opinion of the existing guardianship system in your country?</p> <p>Is the system utilized to the appropriate degree? Ie: used only when needed.</p> <p>Are procedures for determining capacity fair to the person involved? (explain)</p>

Indicator 2	<p>Interviewee: Professionals What is the purpose/importance of capacity evaluations in the guardianship process? Are capacity exams always ordered in capacity determinations? (why or why not) Under what circumstances (if any) should a person be detained in an institution in order to have a capacity exam completed?</p> <p>Person Concerned Was a capacity examination ordered in your case? (why or why not) Were you asked whether you wanted to participate in being examined?</p>
Indicator 3	<p>Interviewee: Professionals Is the presence of the person concerned important and/or necessary at each and every hearing or court date? (why or why not)</p> <p>Person Concerned Did you know that there was going to be a hearing to decide whether you had capacity and needed a guardian? If yes, how did you find out? Did you know that you have the right to be present at every court date that concerns you? Did you want to be present at court? (why or why not) Did someone tell you should come to court or that you should not come to court? If yes, who told you and what did they say?</p>
Indicators 4 & 5	<p>Interviewee: Professionals Is it important/necessary for the person involved in guardianship proceedings to be represented by a lawyer? (why or why not) In your experience, how often does the person involved have a lawyer to represent them during the proceedings? Is there/should there be a system to provide free lawyers to people facing guardianship proceedings? Is it common for the person concerned to present 'a case' on their own behalf? What kind of evidence is most likely to be presented by the person concerned (or their representative)? (ie alternative capacity exam, witnesses such as friends/family etc.)</p> <p>Person Concerned Did you know you had the right to have a lawyer to represent you? Did you have a lawyer to represent you during your case? (why or why not) If not, did you have anyone (such as a 'case guardian') represent your interest during the proceedings? Would you have liked to have a lawyer to represent you? If someone did represent you during the proceedings, did that person meet with you before court?</p>

Indicator s 4 & 5	<p>Did your representative present any witnesses, documents, reports or other information to the court on your behalf?</p> <p>Were you satisfied with the help/representation that you had during your hearing? (why or why not)</p> <p>Did anyone ask you want result you wanted in the case? (ie Whether you object to incapacitation or guardian)</p>
Indicator 6	<p>Interviewee: Professionals</p> <p>Are you aware of any case where the person concerned filed an appeal of the court's capacity finding?</p> <p><i>If yes:</i></p> <p>How many appeals have there been, or how often are they filed?</p> <p>Does the person usually file the appeal for themselves or do they usually have a lawyer to file the appeal?</p> <p>Why do you think that more appeals are not filed?</p> <p>Person Concerned</p> <p>Did you know that you had the right to appeal in your case?</p> <p>If yes, how did you know about this right?</p> <p>Did you receive notice of the court's decision in your case?</p> <p>If yes, how and when did you receive the notice?</p> <p>Did you file an appeal in your case? (why or why not)</p> <p>If a guardian was appointed for you, did you agree with the choice of the guardian?</p>
Indicator 7	<p>Interviewee: Professionals</p> <p>What do you believe is the most important evidence to determine capacity? (in other words, what does the judge most rely on to make the decision?)</p> <p>Other than the 'capacity evaluation' is there any other information that would be helpful for a judge in making a capacity determination?</p> <p>If yes, what kind of information?</p> <p>Have you received, or do others in your position receive, special training on the use and meaning of mental health information/diagnoses etc?</p> <p>Person Concerned</p>
Indicator 8	<p>Interviewee: Professionals</p> <p>How is the connection between a person's diagnosis and whether they have capacity determined? (ie: does the court require that any social service report be submitted to provide illustrations of how the person's ability is impaired due to their mental condition?)</p> <p>Do you feel that most lawyers and judges have adequate information/training to ascertain how a diagnosis relates to a person's capacity to take care of their own affairs?</p> <p>Person Concerned</p>

Indicator 9	<p>Interviewee: Professionals What is the most common reason, in your opinion, for applicants to file requests for guardianship? (ie financial reasons, protection of person or others etc.) What do you think is the most important result of the appointment of a guardian?</p> <p>Person Concerned Why do you think that an application was filed to appoint a guardian for you? (explain)</p>
Indicator 10	<p>Interviewee: Professionals (For Judges) How do you decide whether a person should be incapacitated? (explain)</p> <p>(For Others) How should judges decide whether a person should be incapacitated? (what should they consider when making the decision?) Do you believe that judges usually receive adequate information to make the best decision? Who benefits the most from incapacitating a person and placing them under guardianship? How often are cases dismissed without a finding of incapacitation? What is usually is the reason that cases are dismissed? What risks are involved in not incapacitating a person with mental health problems? When making the decision, do judges consider what the person involved will lose in terms of their individual rights once incapacitated?</p> <p>Person Concerned In your case, was there information that you thought the judge should know before making a decision? If yes, give examples:</p> <p>Why did the judge not have that information (the information described above)?</p>
Indicator 11	<p>Interviewee: Professionals What qualities do you think make a person a good (appropriate) guardian? (explain) If more than one person wants to be the guardian of a person, what should the decision be based upon? Should the person involved have the right to choose who will be their guardian? (explain why or why not)</p> <p>Person Concerned Have you ever been asked who you would want to be your guardian if a guardian is going to be appointed? If yes, was the person you wanted made your guardian? (why or why not) What qualities do you think make for a good guardian?</p>

Indicator 12	<p>Interviewee: Professionals</p> <p>What constitutes a conflict of interest that would or should prevent a person from acting as a guardian? (give examples)</p> <p>Person Concerned</p>
Indicator 13	<p>Interviewee: Professionals</p> <p>(For Guardians) Have you ever (or would you ever) consent to an individual exercising civil or political rights that can only be exercised with guardian's consent? If yes, please explain: If not, why not?</p> <p>Person Concerned</p> <p>Have you ever wanted to or tried to exercise rights which you were prevented from exercising because you are under guardianship? If so, what did you want/try to do? Who prevented you from doing so?</p>
Indicator 14	<p>Interviewee: Professionals</p> <p>(For Guardians) Have you ever (or would you ever) consent to an individual exercising social or economic rights that can only be exercised with guardian's consent? If yes, please explain: If not, why not?</p> <p>Person Concerned</p> <p>Have you ever wanted to or tried to exercise rights which you were prevented from exercising because you are under guardianship? If so, what did you want/try to do? Who prevented you from doing so?</p>
Indicator 15	<p>Interviewee: Professionals</p> <p>Are there any decisions that a person under guardianship should be allowed to make for themselves? If so, what decisions? If not, why not?</p> <p>Person Concerned</p> <p>What areas of your life would you most like to be in charge of for yourself? Are there decisions that you think you should be allowed to make for yourself rather than having your guardian make those decisions? If so, what are they? Have you ever disagreed with a decision that your guardian has made for or about you?</p>

Indicator 16	<p>Interviewee: Professionals</p> <p>Do you think that the person under guardianship should be consulted about some decisions before the guardian makes a decision? If so, what kinds of decisions should the person under guardianship be consulted about? What weight should the person under guardianship's opinion be given? If the person under guardianship should not be consulted, why not?</p> <p>(For Guardians) Do you consult the person under guardianship when you are making a decision (a major decision) about their life? Why or why not?</p> <p>Person Concerned Does your guardian ever ask you what you think/want? If so, what kinds of things has your guardian asked you about? Do you feel that your guardian listens to your wishes/opinions? (explain)</p>
Indicator 17	<p>Interviewee: Professionals</p> <p>Person Concerned Are you aware of any way in which you can challenge a decision that your guardian has made on your behalf about your life? If yes, what can you do?</p>
Indicator 18	<p>Interviewee: Professionals</p> <p>Do you accept that a guardian is responsible for providing all the basic necessities of the person under guardianship? What happens to a guardian who fails to provide for a person under guardianship? How does that guardian get discovered?</p> <p>Person Concerned What is your understanding of what your guardian's job is? Who is responsible for making sure that you have enough food and clothing, for example? What happens if you don't have what you need?</p>
Indicator 19	<p>Interviewee: Professionals</p> <p>Is there a mechanism for complaints about a guardian? If so, how are complaints investigated? (ie who is responsible for investigating and how is investigation done?)</p> <p>Person Concerned</p>
Indicator 20	<p>Interviewee: Professionals</p> <p>Describe the extent of a guardians' authority: Are there any decisions that a guardian is not allowed to make for the person under guardianship? If so, what are they?</p>

Indicator 20	<p>In reality, how often are the decisions of a guardian reviewed by someone else (such as the guardianship authority)?</p> <p>Person Concerned Has anyone ever asked you if you think your guardian is doing a good job for you? If yes, who asked you?</p>
Indicator 21	<p>Interviewee: Professionals Do you think it is important for a guardian to visit the person under guardianship periodically? Why or why not? How often do most guardians visit and talk to the person under guardianship?</p> <p>Person Concerned Do you see your guardian regularly? How often do you see your guardian? If so, does your guardian ask you about what you want or need? Do you feel that your guardian listens to what you say (want or need)?</p>
Indicator 22	<p>Interviewee: Professionals Who decides where the person under guardianship should live? (ie, guardian, family, psychiatrist etc.) Have you known a guardian who has moved the person from an institution into the community?</p> <p>Person Concerned (For those living in institutions) Since you've had a guardian, have you ever lived outside of the institution? (explain)</p>
Indicator 23	<p>Interviewee: Professionals How is the property (financial assets) of the person under guardianship used? Does the guardian have to report to anyone about how the assets are used/spent? If so, how often does this reporting happen?</p> <p>Person Concerned Do you have any money or property that belongs to you? If so, who takes care of it? (who manages it) Do you know how your money is spent? Does anyone ever show you any accounts or reports on how your assets (property) are being used?</p>
Indicator 24	<p>(For countries which utilize partial guardianships)</p> <p>Interviewee: Professionals Are all guardians given the same authority and decision-making power over the people under guardianship? If not, how is the extent of a guardian's authority determined?</p>

Indicator 24	<p>How are partial guardianships different from plenary guardianships? What are the practical differences between partial and plenary guardianships?</p> <p>Person Concerned (Persons under partial guardianship) What kinds of things/decisions are you able to do on your own without the consent of your guardian?</p>
Indicator 25	<p>Interviewee: Professionals What (if any) alternatives to guardianship exist in your region? How often are alternatives used?</p> <p>Person Concerned Do you think that there is some help that you need/want that would allow you to live without having a guardian? If so, what would that be? (ie what kind of help do you think you need?)</p>
Indicator 26	<p>Interviewee: Professionals Should guardianship be a first response or a last resort for people with mental disabilities? (explain)</p> <p>Person Concerned</p>
Indicator 27	<p>Interviewee: Professionals How often are (should) guardianship cases be reviewed by the guardianship authority? What is the purpose of guardianship reviews?</p> <p>Person Concerned To your knowledge, are the decisions that your guardian makes for you ever reviewed by anyone else to determine if they are good decisions or not? To your knowledge, has your case ever been reviewed to determine whether you still need a guardian? If so, how often?</p>
Indicator 28	<p>Interviewee: Professionals How often are guardianships terminated and the person under guardianship restored to their full capacity? Who usually initiates applications for termination of guardianship? How often are guardianships changed from partial to plenary or plenary to partial guardianships?</p> <p>Person Concerned Have you ever wanted to have your guardianship changed somehow or ended all together? If so, what did you want changed? How would you go about getting it changed?</p>

Varna Regional Court	711/05	Attended 6 June 2005, no hearing, def. not able to move	Not attended 10 June 05, was held at defendant's home	no data	yes	no
Varna Regional Court	771/05	Attended 6 June 05, no hearing, def. not noticed	Not attended 29 September 05	No data	yes	Yes, <i>ex officio</i>
Varna Regional Court	45/05	Not attended, defendant interviewed at hospital	Attended 6 June 05, last hearing	Assessment available	yes	no
Varna Regional Court	817/05	Attended 6 June 05	Not attended 29 September 05	Assessment available	yes	no
Varna Regional Court	694/05	Attended 6 June 05, no hearing, no party appeared	Not attended	No data	No data	No data
Varna Regional Court	78/06 for lifting guardianship of a resident in a social care home	Attended 21 July 06	Not attended	Assessment available	no	no
Varna Regional Court	148/06	Not attended	Attended 16 June 06, last	Assessment available	yes	no
Varna Regional Court	499/06	Not attended	Attended 16 June 06, last	Assessment available	no	no
Varna Regional Court	950/06	Attended 21 July 06	Not attended 15 September 06	Assessment available	yes	no

Varna Regional Court	386/06	Not attended	Attended 16 June 06, last	Assessment available	yes	no
Varna Regional Court	448/06	Not attended	Attended 16 June 06, last	Assessment available	yes	no
Varna Regional Court	484/06	Not attended	Attended 16 June 06, last	Assessment available	yes	no
Varna Regional Court	951/06	Attended 16 June 06	Attended 21 July 06	Assessment available	yes	no
Varna Regional Court	510/06, home	Not attended	Attended 16 June 06, last	Assessment available	no	no
Varna Regional Court	512/06, home	Not attended	Attended 16 June 06, last	Assessment available	no	no
Varna Regional Court	797/06	Attended 16 June 06	Attended 21 July 06	Assessment available	yes	yes
Varna Regional Court	840/06	Attended 16 June 06, breach with law, hearing before the interview	Not attended, was in the home of the defendant	No data	yes	no
Varna Regional Court	844/06	Attended 21 July 06	Not attended 8 September 06	No data	yes	no
Varna Regional Court	1706/05	Not attended	Attended 16 June 06, last	Assessment available	yes	no

Varna Regional Court	2192/05	Not attended	Attended 16 June 06 and 3 rd on 21 July 06	Impossible assessment	yes	no
Varna Regional Court	210/06	Not attended	Attended 16 June 06, defendant cannot be found	No data	yes	no
Varna Regional Court	553/06	Not attended	Attended 16 June 06, last	Assessment available	yes	no
Varna Regional Court	724/06	Not attended	Attended 16 June 06 and 3 rd hearing on 21 July 06, last	Assessment available	yes	no
Varna Regional Court	797/06	Not attended	Attended 21 July 06	Assessment not done, lack of access to the person	yes	yes
Varna Regional Court	1121/06	Attended 21 July 06	Not attended 15 September 06	Assessment available	yes	no
Plovdiv Regional Court	461/06	Not attended	Attended, 18 May 06	Assessment available before the interview	yes	no
Plovdiv Regional Court	821/06	Not attended	Attended, 18 May 06	Assessment done before interview	yes	no
Plovdiv Regional Court	488/06	Not attended	Attended, 18 May 06	Assessment available	yes	no
Plovdiv Regional Court	1038/06	Not attended	Attended, 18 May 06	Assessment available	yes	no

Plovdiv Regional Court	290/06	Not attended	Attended, 18 May 06	Assessment available	yes	no
Lovech Regional Court	75/06	Attended, 22 May 06	Not attended 26 June 06	Assessment appointed before interview	yes	no
Lovech Regional Court	78/06	Attended, 22 May 06	Not attended 26 June 06	Assessment available	yes	no
Lovech Regional Court	52/06	Not attended	Attended, 22 May 06	Assessment available	yes	no
Stara Zagora Regional Court	135/05	Attended 31 May 05	Attended 29 June 05	Assessment available	yes	no
Stara Zagora Regional Court	136/05	Not attended	Attended 31 May 05	Assessment available	yes	no
Stara Zagora Regional Court	292/05	Not attended	Attended 31 May 05, last	Assessment available	yes	no
Stara Zagora Regional Court	356/06	Attended 31 May 06	Attended 21 June 06	Impossible assessment	yes	no
Stara Zagora Regional Court	357/06	Attended 31 May 06	Attended 21 June 06, last	Assessment available	yes	no
Stara Zagora Regional Court	359/06	Attended 31 May 06	Attended 21 June 06, last	Assessment available	yes	no
Stara Zagora Regional Court	399/06	Attended 31 May 06	Attended 21 June 06, last	Assessment available	no	no

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TABLE 2 ARCHIVED COURT CASE FILES ON GUARDIANSHIP CASES REVIEWED

Court	Case number	Number of hearings and outcome	Assessment	Lawyer for applicant	Lawyer for defendant
Stara Zagora Regional Court	888/05 reviewed on 23 May 06	2 hearings, 1 person under plenary guardianship	yes	yes	no
Stara Zagora Regional Court	915/05 reviewed on 23 May 06	2 hearings, 2 persons are placed under plenary guardianship	yes	yes	no
Stara Zagora Regional Court	944/05 reviewed on 23 May 06	1 hearing, 2 persons are placed under plenary guardianship	no	yes	no
Stara Zagora Regional Court	713/05 reviewed on 23 May 06	3 hearings, 1 person is placed under plenary guardianship	yes	yes	no
Stara Zagora Regional Court	686/05 reviewed on 23 May 06	3 hearings, the applicant ceased the case	yes	yes	no
Stara Zagora Regional Court	135/05 reviewed on 31 May 06	4 hearings, 1 person placed under plenary guardianship	yes	yes	no
Stara Zagora Regional Court	838/04 reviewed on 31 May 06	2 hearings, the case is ceased	yes	yes	no
Stara Zagora Regional Court	534/05 reviewed on 31 May 06	2 hearings, 1 person is placed under plenary guardianship	yes	yes	no

Stara Zagora Regional Court	585/05, reviewed on 31 May 06	3 hearings, 1 person is placed under plenary guardianship	yes	yes	no
Stara Zagora Regional Court	512/05 reviewed on 31 May 06	2 hearings, 1 person is placed under plenary guardianship	yes	yes	no
Stara Zagora Regional Court	364/05 reviewed on 31 May 06	2 hearings, 1 person is placed under plenary guardianship	no	no	no
Stara Zagora Regional Court	728/05 reviewed on 31 May 06	2 hearings, 1 person is placed under plenary guardianship	yes	yes	no
Plovdiv Regional Court	2960/05 reviewed on 18 May 06	2 hearings, 1 person placed under plenary guardianship	yes	yes	no
Plovdiv Regional Court	2991/05 reviewed on 18 May 06	2 hearings, 1 person placed under plenary guardianship	yes	yes	no
Plovdiv Regional Court	3014/05 reviewed on 18 May 06	5 hearings, 1 person is not placed under guardianship	yes	yes	yes
Plovdiv Regional Court	3045/05 reviewed on 18 May 06	3 hearings, 1 person is not placed under guardianship	yes	yes	yes
Plovdiv Regional Court	3094/05 reviewed on 18 May 06	1 hearing, 1 person is placed under plenary guardianship	no	no	no
Plovdiv Regional Court	3157/05 reviewed on 18 May 06	1 hearing, 1 person placed under plenary guardianship	no	yes	no

Plovdiv Regional Court	3288/05 reviewed on 18 May 06	2 hearings, 1 person placed under plenary guardianship	no	no	no
Plovdiv Regional Court	3352/05 reviewed on 18 May 06	2 hearings, 1 person placed under plenary guardianship	no	no	no
Plovdiv Regional Court	3387/05 reviewed on 18 May 06	2 hearings, 1 person placed under plenary guardianship	no	yes	no
Plovdiv Regional Court	3485/05 reviewed on 18 May 06	2 hearings, 1 person placed under plenary guardianship	yes	yes	no
Plovdiv Regional Court	185/05 reviewed on 18 May 06	1 hearing, 1 person placed under plenary guardianship	yes	no	no
Plovdiv Regional Court	237/05 reviewed on 18 May 06	2 hearings, 1 person placed under plenary guardianship	no	yes	no

Interviews

1. Judge in Stara Zagora Regional Court in May 2005 (case 135/05).
2. Judge in Stara Zagora Regional Court in May 2006 (case 356/05, 357/05, 359/05, 399/05).
3. Prosecutor in Stara Zagora Regional Court in May 2006 (case 356/05, 357/05, 359/05, 399/05).
4. Prosecutor in Varna Regional Court in June 2006.
5. Judge in Varna Regional Court in June 2006 (case 951/06, 510/06, 512/06, etc.).
6. Lawyer on applicant's side in Lovech Regional Court in May 2006 (case 75/06, 78/06).
7. Lawyer on defendants's side in Sofia in June 2006 (only cases for lifting guardianship).
8. Expert in Stara Zagora Regional Court in June 2006.
9. Expert in Varna Regional Court in June 2006.
10. Two persons to be placed under guardianship in Stara Zagora.
11. Four relatives of persons to be placed under guardianship in Stara Zagora and Varna.
12. Five guardians.

TABLE 3 GUARDIANSHIP BODIES (MUNICIPALITIES)

Municipality	Number of people under guardianship	Number of plenary guardianships	Number of partial guardianships	Number of wards with relatives/spouses appointed guardians	Number of wards living in institutions	Number of wards living in community	Availability of guard. files	Signals of misuse complains from wards	Do they invite ward when decision is made	Age data about wards	Reports available on guard. activities
Berkovica ¹	12	11	1	12	7	5	yes	no	yes	Yes, majority under 50	Part of them report
Blagoevgrad ²	33	24	9	33	2	31	yes	1	no	Yes, majority under 50	Yes, written
Burgas ³	147	117	30	146, 145, appoint by munic.	16	130	no	no	depending on the case	Yes, majority over 50	Yes, no template, written
Byala ⁴	2	2	0	2	No data	No data	yes	no	no	Yes, over 50	Yes, written

¹ Letter 4800-35/15 February 2007, mayor of Berkovica municipality.
² Letter 53-00-28/26 February 2007, mayor of Blagoevgrad municipality.
³ Letter 92B-3/09 February 2007, official at administrative services, Burgas municipality.
⁴ Letter RD-92.00-14/ 5 February 2007, mayor of Byala municipality.

Dimitrovgrad ⁵	16	16	0	7, 9 appoint. by munic.	2	14	yes	no	yes	Yes, under 50	Yes, written
Dobrich ⁶	140	125	15	140, 79 by munic.	15	125	yes	1	no	Yes, majority under 50	Yes, written
Dulovo ⁷	74	65	8	74 by munic.	61	13	yes	no	no	Yes, majority under 50	No, template yes
Gabrovo ⁸	50	39	11	25, 25 by munic.	3, no data about partial	36	yes	no	no	Yes, majority under 50	Yes, written
Kyustendil ⁹	85	83	2	85 by munic.	53	32	yes	no	no	no	Yes, written
Kurdzhali ¹⁰	13	10	3	13, 13 by munic.	1	12	yes	no	no	Yes, majority over 50	No, some reports, guardians do not obey
Lovech ¹¹	81	68	13	81	0	81	yes	1	yes	No data	When necessary
Luki ¹²	38	38	0	2, 36 by munic., guardian is the social worker	38	0	yes	no	yes	Yes, majority under 30	Not yet

⁵ Letter 05-02-1/6 February 2007, mayor of Dimitrovgrad municipality.

⁶ Letter 5-00-1/29 January 2007, mayor of Dobrich municipality.

⁷ Letter 92-K-02/5 March 2007, mayor of Dulovo municipality.

⁸ Letter 92-146/1 February 2007, mayor of Gabrovo municipality.

⁹ Letter 05-00-01/31 January 2007, mayor of Kyustendil municipality.

¹⁰ Letter 92-00-174/19 February 2007, mayor of Kurdzhali municipality.

¹¹ Letter HP 363/31 January 2007, mayor of Lovech municipality.

¹² Letter 120/12 February 2007, mayor of Luki municipality.

Pazardzhik ¹³	48	43	5	38, 41 by munic.	14	34	Yes	1	Various practice	Yes, majority over 40	Yes, written
Pernik ¹⁴	70	62	8	50, 58 by munic.	18	52	Yes	no	yes	Yes, 20 to 85	Yes, written
Pleven ¹⁵	54	46	8	35 by law, 19 by munic.	0	54	Yes	no	no	Yes, majority over 40	Yes, written
Plovdiv, central region ¹⁶	28	22	6	3 by law, 25 by munic.	0	28	Yes	no	no	Yes, 23 to 82	Yes, financial-protocol
Plovdiv, Eastern region ¹⁷	7	4	3	7	0	7	Yes	no	Meeting at home	Yes, majority over 50	Yes, financial-protocol
Plovdiv, Trakiya region ¹⁸	63	56	7	6 by law, 46 by munic.	43	20	yes	no	no	Yes, majority under 50	Yes, financial-protocol
Razgrad ¹⁹	47	34	13	39, 47 by municip.	8	39	no	no	yes	Yes, majority over 50	Yes, no data
Radnevo ²⁰	6	5	1	6 by munic.	2	4	No data	no	no	Yes, majority under 50	Yes, how not clear

¹³ Letter 05-00-1/21 February 2007, Pazardzhik guardianship body.

¹⁴ Letter 07/SPU 530/22 February 2007, mayor of Pernik municipality.

¹⁵ Letter RD-92-42/14 February 2007, mayor of Pleven municipality.

¹⁶ Letter OP10-4865/8 February 2007, mayor of the Central Region in Plovdiv.

¹⁷ Letter I70800-92/14 February 2007, mayor of Eastern region in Plovdiv.

¹⁸ Letter P7080072/20 March 2007, Trakia region's guardianship body in Plovdiv.

¹⁹ Letter 40-00-5-7/31 January 2007, Mayor of Razgrad municipality.

²⁰ Letter 05001(1)/21 February 2007, mayor of Radnevo municipality.

Ruse ²¹	66	54	12	66, 66	3	63	yes	no	yes, some cases	Yes, majority is under 50	Yes, written, copies of financial documents
Sevlievo ²²	91	80	11	59 by munic.	82	9	yes	no	No data	No data	Yes, written
Septemvri ²³	41	39	2	10, 41 by munic.	31	10	yes	no	yes	Yes, majority under 50	Yes, written
Silistra ²⁴	36	35	1	28, 35 by munic.	7	29	yes	1	Yes, some cases	No data	Yes, written
Sofia, Izgrev region ²⁵	34	25	9	34, 34 by munic	5	29	yes	no	No for plenary, yes for partial	Yes, majority under 50	Yes, written
Sofia, Krasna Polyana region ²⁶	65	54	11	65, 63 by munic.	Not clear	Not clear	yes	no	no	Yes, 22 to 80	Yes, how not clear
Sofia, Kremikovci region ²⁷	16	11	5	16	0	16	no	no	Some cases	Yes, majority over 50	Yes, written

²¹ Letter 48/2/12 February 2007, secretary of Ruse municipality.

²² Letter 92.29/13 February 2007, mayor of Sevlievo municipality.

²³ Letter 05-00-1-1/15 February 2007, mayor of Septemvri municipality.

²⁴ Letter 506/7 March 2007, secretary of Silistra municipality.

²⁵ Letter 07-01-29/20 February 2007, mayor of Izgrev region.

²⁶ Letter RD-07-00-20/8 February 2007, mayor of Krasna Polyana region.

²⁷ Letter 0700-74/6 March 2007, mayor of Kremikovci region.

Sofia, Lozenec region ²⁸	38	28	5	25, 33 by munic.	7	31	yes	2	No, old people	Yes, majority under 50	Yes, written
Sofia, Mladost region ²⁹	57	50	7	40 by munic.	7	50	yes	yes	yes	Yes, majority over 50	Yes, written
Sofia, Nadezhda region ³⁰	38	31	7	38 by munic.	3	35	yes	no	no	Yes, majority over 50	Yes, written
Sofia, Novi Iskur ³¹ region	59	58	1	33, 59 files	40	19	yes	no	no	Yes, majority under 50	Yes, written
Sofia, Oborishte region ³²	54	48	6	54, 50 by munic.	4	50	yes	no	no	Yes, majority over 50	Yes, written
Sofia, Ovcha ³³ kupel region	42	40	2	31, 42 by munic.	14	28	yes	no	yes	Yes, majority under 50	Yes, written
Sofia, Pancharevo region ³⁴	15	11	4	14, 15 by munic	1	14	yes	no	no	Yes, majority over 50	Yes, written
Sofia, Poduyane region ³⁵	49	44	5	44, 44	3	46	yes	no	no	Yes, majority over 50	Yes, no written

²⁸ Letter 0700-86/12 February 2007, mayor of Lozenec region.

²⁹ Letter PO-07-00-3/21 February 2007, mayor of Mladost region.

³⁰ Letter RD070093/19 February 2007, mayor of Nadezhda region.

³¹ Letter 0700-81/14 February 2007, mayor of Novi Iskur region.

³² Letter PO 070010/13 February 2007, mayor of Oborishte region.

³³ Letter RD 0700-39/6 March 2007, mayor of Ovcha kupel region.

³⁴ Letter 0700106/9 February 2007, mayor of Pancharevo region.

³⁵ Letter 070069/27 February 2007, mayor of Poduyane region.

Sofia, Serdika region ³⁶	17	16	1	17, 17	6	11	yes	no	Some cases yes	Yes, majority over 50	Yes, written
Sofia, Sredec region ³⁷	31	21	10	No data	No data	No data	yes	no	no	Yes, majority under 50	Yes, but they do not report
Sofia, Vitosha region ³⁸	30	27	3	30	a few	majority	yes	no	no	No data	Yes, written
Sofia, Vrubnica region ³⁹	22	19	3	22, 22	3	19	yes	no	no	Yes, under 50	Yes, written
Sofia, Vuzrazhdane region ⁴⁰	40	34	6	21, 40 by munic.	4	36	yes	no	no	Yes, 19 to 85	Yes, no data how
Sliven ⁴¹	88	77	11	82, 1 by munic.	6	82	yes	no	no	Yes, majority under 50	Yes, written
Smolyan ⁴²	155	145	10	58, 155 by munic.	113	42	yes	no	no	Yes, majority under 50	Yes, no written
Shumen ⁴³	133	113	20	93, 40 by munic.	73	60	yes	no	no	Yes, majority under 50	Yes, written

³⁶ Letter RD 0700120/6 February 2007, mayor of Serdika region.

³⁷ Letter PO07002087/14 March 2007, mayor of Sredec region.

³⁸ Letter 070098/21 February 2007, mayor of Vitosha region.

³⁹ Letter RD 070030/12 February 2007, mayor of Vrubnica region.

⁴⁰ Letter PO07005/16 February 2007, mayor of Vuzrazhdane region.

⁴¹ Letter 05002/13 February 2007, deputy-mayor of Sliven municipality.

⁴² Letter 05461/13 February 2007, mayor of Smolyan municipality.

⁴³ Letter 05003/1 March 2007, Shumen guardianship body.

Turgovishte ⁴⁴	34	32	2	34, 3 -director	11	23	yes	no	no	Yes, majority over 50	Yes
Veliko Turnovo ⁴⁵	214	191	23	37, 13 without guard.	168	48	yes	no	no	Yes, majority under 50	yes
Vraca ⁴⁶	83	69	14	39, 74 by munic.	43	39	yes	no	Some cases	Yes, majority under 50	Yes, no written
Yambol ⁴⁷	42	36	6	42, 41 by munic.	A few	majority	yes	yes	yes	Yes, majority under 50	Yes, written

⁴⁴ Letter K480012(1)/2 February 2007, mayor of Turgovishte municipality.

⁴⁵ Letter 48-11/2 March 2007, mayor of Veliko Turnovo municipality.

⁴⁶ Letter 91000166/8 February 2007, Vraca guardianship body.

⁴⁷ Letter 530325/8 February 2007, mayor of Yambol municipality.

