Guardianship and Human Rights in Hungary

Analysis of Law, Policy and Practice

mdac
mental disability advocacy center

HU
hungary

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

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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 Hungary. 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.

More specifically, although Hungary adopted a National Disability Programme in 2006, much of its guardianship regulation is based in laws dating from the 1950s. Much remains to be done in this area to bring such law in line with current human rights standards. It is these standards, and the compliance of Hungary with them, in legislation and in practice that form the focus of this report. The legal and moral imperatives on Hungary to amend its guardianship laws are demonstrated in this report, a report that is particularly timely in view of the recent adoption of the UN Convention on the Rights of Persons with Disabilities, which Hungary has signed.[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 Hungarian 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 Hungary is failing in its obligation to protect the rights of people under guardianship, indicating that reforms are urgently required. The most important of these findings are:

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

- There are 66,000 adults who are deprived of legal capacity in Hungary. This represents approximately 0.83% of the adult population.

- Two thirds of adults under guardianship are under plenary (all encompassing) guardianship or 'partial guardianship with general limitations'. These people are subject to significant, arbitrary and automatic deprivations of their 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 Hungary's only legal response to people who require assistance to make decisions. There are no such alternatives available 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.

Despite the constraints imposed upon MDAC's research, the commitment of many professionals involved in the guardianship process was notable. MDAC urges the Hungarian government to utilise this commitment fully and to build 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 Hungary. MDAC specifically urges the government to implement the National Disability Programme, and encourages the government to carry out its reform process in a way that actively involves and respects people with psycho-social disabilities (mental health problems) and intellectual disabilities, as well as their local and national organisations. At the time that this report was produced (May 2007) MDAC was involved in a coalition of Hungarian NGOs which is encouraging the government to reform the Civil Code, and in the course of this project is making specific and detailed recommendations. For more details see MDAC's website, www.mdac.info.

RECOMMENDATIONS

This report suggests that Hungarian guardianship law and practice fails to meet a number of the basic requirements of the international law of human rights. The clear implication of this failure is that the lives of over 66,000 people currently under guardianship in Hungary[2] could be significantly improved. This will only happen if the government commits to further reform the legislative landscape and support those involved in implementing the reforms. With this in mind, MDAC below makes a number of recommendations to the Hungarian government, which – if followed – would bring the law and practice in line with basic international standards. At the time this report was produced (May 2007) MDAC was involved in a coalition of Hungarian NGOs which are encouraging the government to reform the Civil Code, and in the course of this project this civil society coalition is making more detailed recommendations, which can be found on MDAC's website www.mdac.info.

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

1. **Provide alternatives to guardianship:** The Hungarian 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. The establishment of such services is an existing obligation under the National Disability Programme. 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.

[2] Information provided by Hungarian National Council of Justice in letter to MDAC dated 26 January 2006.

- ⇨ 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).
- ⇨ Abolishing plenary guardianship, as well as 'partial guardianship with general limitations' (Indicators 20 and 27).
- ⇨ Abolishing any exceptions to regular reviews of guardianship (Indicator 28).
- ⇨ Requiring that guardianship is used only as a last resort (Indicator 26).

2. **Maximise autonomy:** The Hungarian government should ensure that adults subject to guardianship retain the right to make decisions for themselves in all areas of life where they have functional capacity by:

   - ⇨ Removing the automatic ban currently placed on people under guardianship of exercising such fundamental rights as the right to work, right to property, right to family life, right to marry, right to vote, and right to associate (Indicators 13-17).
   - ⇨ Listing and expanding the areas of life in which an adult subject to partial guardianship retains capacity to make decisions for him- or herself at all times. The legislation is currently unclear and the list risks being read as exhaustive (Indicator 20).
   - ⇨ Requiring guardians to seek the least restrictive living arrangements for adults (Indicator 21).

3. **Improve procedures:** The Hungarian government should provide sufficient guarantees to ensure the right of adults to meaningful participation in the entire guardianship process – from the start of the procedure and for the time the adult is under guardianship by:

   - ⇨ Ensuring State-funded legal representation during all guardianship procedures, including appeals. Law should provide for regular legal representation in guardianship cases, with at least the minimum standard that is provided in other areas of law (such as criminal law and mental health law) (Indicator 4).
   - ⇨ Introducing trainings to lawyers on the practicalities of the guardianship process and offering specialist training on how to represent clients whose functional capacity may be diminished (Indicator 4).
   - ⇨ Clarifying and expanding the role of case guardians, and providing effective training on their duties (Indicator 4).
   - ⇨ Requiring guardians to regularly visit all adults under their care, and to discuss all relevant issues with them. In the event of the adult not being able to express his or her wishes in such a manner that follows the adult's previously known wishes and are in line with the adult's known belief system and life narrative (Indicator 23).
   - ⇨ Removing the option of detaining adults for determining incapacity (Indicator 5).

- ⇨ Ensuring consistency in legislation so that it is possible for an adult to apply for modification of guardianship at any time (Indicator 29).
- ⇨ Providing a process which ensures that the adult has the right to challenge the appointed guardian, even if he or she is a so-called 'professional guardian' (Indicator 12).

4. **Prevent abuse:** The Hungarian government should reduce the potential for abuse of the guardianship relationship by:

   - ⇨ Establishing objective criteria for selecting a guardian and clearly prohibiting people who have conflicts with the interests of the subject adult from serving as guardian (Indicators 10 and 11).
   - ⇨ Establishing objective criteria for conducting incapacity assessments, made by a multi-disciplinary team (not just a psychiatrist), and establishing clear grounds for limiting an adult's legal capacity (Indicators 7 and 8).
   - ⇨ Viewing guardianship as a temporary measure by ensuring that there is compulsory review of guardianship, and apply this to retrospective reviews (Indicator 28).
   - ⇨ Establishing a regularly updated database of all guardians.
   - ⇨ Providing training to guardians, evaluating such training, and requiring continuous professional development of guardians.
   - ⇨ Ensuring that adults under guardianship retain full legal capacity in any dealings with guardianship offices of local authorities (eg. Complaining about the guardian), and enabling adults under guardianship to obtain legal assistance to judicially review decisions by the guardianship authority which are unlawful or unreasonable (eg. When a guardianship office rejects an adult's request to obtain copies of documentation relating to his/her guardianship) (Indicators 21, 25, 29).
   - ⇨ Obliging guardianship offices of local authorities to establish an effective and accessible complaints system which adults under guardianship can directly access; and obliging such guardianship offices to provide information in an understandable format to all adults under guardianship (Indicator 25).

Implementing these recommendations would significantly improve the quality of the Hungarian guardianship system by strengthening the protection of the human rights and interests of adults subject to guardianship. As noted in this report, MDAC is part of a civil society coalition which is providing a series of detailed recommendations to the Hungarian government to improve the Civil Code. MDAC with its NGO partners looks forward to engaging with the Hungarian authorities in planning and implementing reform towards making the existing guardianship system more compliant with international human rights standards, whilst at the same time working towards a paradigm shift of supported decision-making, where adults retain legal capacity and are provided with individualised support.

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.[3] The legal mechanism of guardianship exists in some form in almost every jurisdiction in the world. It is widely accepted as a means of protecting individuals who are deemed incapable of managing their personal affairs as a result of a mental health problem (psycho-social disability), intellectual disability, degenerative disease or profound physical or sensory disability.

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

Guardianship has a profound effect on the lives of those placed under its 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's 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.

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

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

[4] Throughout this report, MDAC uses the term 'legal capacity', as defined in the Glossary at p. 84. 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.

coming under increased criticism. The principal criticism is its failure to provide adequate due process protections in establishing and administering guardianship and ensuring the right of self-determination.[5] In a small number of jurisdictions, such as 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.[6] 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), which Hungary signed on 30 March 2007, 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 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.

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

[6] See the Glossary at p. 85 for a definition of supported decision-making.

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

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 affects 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 (Croatia), Zuzana Benešová (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 Hungary was carried out by Dániel Kaderják who wrote the first draft. Gábor Gombos, Jan Fiala, Csilla Budai and Boglárka Benkó commented on later stages, and Sarah Green, Jill Peay and Oliver Lewis produced the final report.

1.4 Method

1.4.1 Stage one: Legislative Review

Stage one of the research, of which the results for Hungary are found in section 2 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 Hungary of which are found in section 3 of this report, focuses on a de facto[7] examination of guardianship practices within each target country by observing court hearings, reviewing court files and, to the extent applicable and possible, observing guardianship authority proceedings and reviewing guardianship authority files.

Because certain information is available only from those who participate in guardianship processes, MDAC has attempted to follow cases, observe court and guardianship authority hearings, review case files, and conduct interviews. This manner of data collection gives an opportunity to capture a snapshot 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. 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.[8] 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,[9] as well as from a review of guardianship legislation in jurisdictions in Europe, the United States and Canada. MDAC has formulated its indicators bearing in mind that, with the exception of Kyrgyzstan, all countries under review have ratified the

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

[8] See Annex B for a table-summary of all 29 indicators.

[9] See the full text of the memorandum at https://wcd.coe.int/ViewDoc.jsp?id=407333.

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',[10] 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.

[10] '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 HUNGARY

2.1 Introduction

Hungary is a Central European country with a population of approximately 10 million people.[11] Its twentieth century history was rather eventful, including the collapse of the Austro-Hungarian Empire during World War I, the communist rule under which Hungary fell following World War II, and the 1956 uprising which was suppressed by the Soviet army. Hungary held its first multiparty elections in 1990 and promptly launched a free market economy. It joined NATO in 1999 and the European Union in 2004.

2.2 Demographic and Social Landscape of People with Disabilities in Hungary

The number of people with disabilities was assessed at the 1990 and at the 2001 censuses. In 2001, the census identified 577,000 people with disabilities, accounting for 5.7% of the population. This data, according to the government's Central Statistical Office, probably underestimates the real number of people with disabilities.[12]

People with physical disabilities represented the largest proportion (43.6%) of people with disabilities, while the proportion of those with intellectual disabilities was approximately 10%.[13] 22% of people identified as having a disability lived alone, 57% with another person without a disability, and just under 11% with three or more people. Nearly 8% of all persons with disabilities reside long-term in institutions.[14]

The 2001 census identified 62,256 adults as living in long-term social care institutions.[15] Of those, some 37,472 were in social institutions for elderly people. Homes for adults with intellectual disabilities accommodated approximately 14,483 adults, while another 7,540 adults were in homes for people with psycho-social (mental health)

[11] The exact figure provided by the Central Statistics Office was 10,006,835 people as of August 2005. (Personal communication)

[12] Resolution of the Parliament on the New National Programme on Disability Affairs, Chapter II, Presentation of the Social Situation of People with Disabilities, 10/2006 (II.16). On February 16, based upon Section 26 of Act XXVI of 1998 on Rights and Equal Opportunities for People with Disabilities.

[13] *Ibid.*

[14] *Ibid.*

[15] Census 2001, Central Statistics Office, see: http://www.nepszamlalas.hu/hun/kotetek/08/tablak03.html (accessed 1 May 2007).

disabilities. There were 1,339 adults in institutions for people with pathological addictions and 1,422 in institutions for homeless people.[16]

In 2001 the Hungarian Ministry of Justice estimated the number of people under guardianship at 35,000 people,[17] yet by 2006 that number had nearly doubled, rising to 66,203.[18] Research carried out in 2001 revealed that in 22 of the 52 psychiatric social care institutions in existence at that time,[19] all of the residents were under guardianship. In only four of the institutions were less than 80% of the residents placed under guardianship.[20]

It is of particular note that the Hungarian Central Statistics Office could not provide MDAC with data regarding the number of people under guardianship. Nor could it provide data about their living conditions or their gender distribution.

2.3 Hungary's Legal System

Since the collapse of the 'iron curtain' in 1989, Hungary has been an independent and democratic parliamentary republic, whose revised Constitution came into force on 23 October 1989. Hungary has a civil law system. Courts are independent from the government and directly interpret the legislation. Generally, court decisions are not binding on lower courts, although certain decisions of the Supreme Court are in fact binding on all lower courts.

The most important sources of Hungarian law are Acts of Parliament, governmental and ministerial decrees, and decrees issued by local governments. Hungary has ratified many international human rights treaties and conventions: the European Convention on Human Rights,[21] the Convention on the Rights of the Child,[22] the International Covenant on Civil and Political Rights,[23] the International Covenant on Economic,

16 *Ibid.*

17 Katalin Makai, Ministry of Justice, as quoted in *Ki a kompetens?* (translated as *Who is Competent?*) Report of a round-table published by the Hungarian Civil Liberties Union, May 2001, p. 39.

18 Information provided by Hungarian National Council of Justice in letter to MDAC dated 26 January 2006. This letter further indicated that 40,812 were under plenary guardianship, 19,202 were under partial guardianship, and the type of guardianship for 6,189 people was unknown. Letter on file with MDAC.

19 The total number of social care homes listed with the Central Statistics Office is 54. The discrepancy is likely to be the result of varying administrative definitions of what constitutes different institutions.

20 Pszichiátriai Érdekvédelmi Fórum (Mental Health Interest Forum), *The Human Rights of Patients in Social Care Homes for Mentally Ill*, English translation, Budapest, 2001.

21 Ratified on 5 November 1992.

22 Ratified on 7 October 1991.

23 Ratified on 7 September 1988.

Social and Cultural Rights,[24] the Convention on the Elimination of All Forms of Discrimination against Women,[25] the European Social Charter (revised),[26] and the Discrimination (Employment and Occupation) Convention – ILO 111.[27]

In 2006 the Parliament unanimously adopted a new National Disability Programme for the years 2007-2013.[28] This sets governmental policy to create law and develop programs, including an action plan which includes the identification of tasks, functions, responsible bodies and allocation of resources. The government must report to the parliament every two years on progress towards fulfilment of the Programme goals. Disabled people's organisations have a statutory right to participate in developing the action plan. The Programme places emphasis on, among others, the following important principle:

> The principle of protecting personal rights, and the protection of the (special) rights of people with disabilities that they are entitled to, as well as the principle of supported decision-making must prevail in all general rules and regulations (e.g. guardianship, caretaking). The principle of supported decision-making, as against decisions made by professionals instead of people with disabilities, means that people with disabilities are supported in their own decision-making depending on their individual capacity to some or to full extent, covering all possibilities. In order to make use of this principle, the Government must help people with disabilities by providing the necessary resources to create a network for supported decision-making. Besides the 'Programme elements' necessary for exercising rights, the Programme must be monitored, rights must be familiarized and explained, legal protection techniques must be promoted, and institutions protecting rights must be enhanced.[29]

Separate chapters of the Programme deal with the issues of improvement of the quality of life for people with disabilities, putting an emphasis on the importance living outside institutions and promoting the active participation of people with disabilities in social life.[30] According to the Programme, a mid-term action plan was to be created by the Government and submitted to Parliament by 31 August 2006. At the time MDAC went to press with this report (end of July 2007), this had not occurred.[31]

[24] Ratified on 17 January 1974.
[25] Ratified on 22 December 1980.
[26] Ratified on 7 October 2004.
[27] Ratified on 20 June 1961.
[28] Op. cit.
[29] Op. cit, Chapter I. English version available at: http://www.szmm.gov.hu/main.php?folderID=1295.
[30] Op. cit.
[31] It should be noted that there is controversy at the governmental level as to whether this Resolution is currently in force or not.

2.4 Guardianship Law in Hungary

Before the nineteenth century, legislation in Hungary contained references only to people with intellectual disabilities and only in the area of property law. In 1872, the power of the court was separated from that of the guardianship authority. In 1877, the law placed guardianship cases under the competence of the public administration network, leaving only a few issues to be determined by courts. The 1877 law also specified certain obligations of the guardian.

A significant proportion of issues relating to capacity and guardianship[32] are regulated under the 1959 Civil Code[33] and the 1952 Civil Procedure Code,[34] which have undergone some amendments, most notably in 2001. Additional relevant laws affecting guardianship that are currently in force include the Constitution,[35] as well as the Act on the Protection of Children and the Administration of Tutelage,[36] the Governmental Decree on Guardianship Authorities and Child Protection and Guardianship Procedures,[37] the Marriage, Family and Tutelage Act,[38] and the Act on the General Provisions of the Public Administrative Procedures and Services.[39]

2.5 Hungary's Two-Step Guardianship/Incapacity Process

Hungarian law divides responsibilities for the process of determining capacity of adults from the appointment and oversight of the guardianship relationship between two entities: the courts (which make capacity determinations) and guardianship authorities (which are responsible for appointing guardians and overseeing established guardianships).

Guardianship authorities are the executive agencies within local and regional governments whose work is regulated in part by all of the above-mentioned laws.[40] The jurisdiction of guardianship authorities extends to various matters involving children

32 Historical background taken from training materials for professional guardians, p. 7-11, Presented by the Capital Guardianship Authority, Budapest, May 2-5, 2005.
33 Act 4 of 1959 on the Civil Code.
34 Act 3 of 1952 on the Civil Procedure (Hereinafter called the Civil Procedure Code).
35 Act 20 of 1949 on the Constitution of the Republic of Hungary (hereinafter called The Constitution).
36 Act 31 of 1997 on the Protection of Children and the Administration of Tutelage. (For purposes of this report MDAC uses the term 'guardianship' rather than 'tutelage'.)
37 Governmental Decree on Guardianship Authorities and Child Protection and Guardianship Procedures. 149/1997 (IX.10.)
38 Act 4 of 1952 on Marriage, Family and Tutelage.
39 Act 150 of 2004 on the General Provisions of the Public Administrative Procedures and Services.
40 There are 278 local level guardianship authorities including guardianship authorities in each of Budapest's 23 districts. Additionally, there are 20 county/capital level guardianship authorities. (See Appendix 1 of 149/1997. (IX.10.) Governmental Decree.)

and family issues as well as the authority to initiate the procedure of placing adults with mental disabilities under guardianship.[41] In fact, any individual can request that the guardianship authority initiate an investigation into the need for the guardianship of any other person. While investigations are discretionary, the guardianship authority is obliged to initiate the guardianship procedure once it is satisfied that placement of a person under guardianship is 'necessary'.[42]

The Civil Code states that 'everyone has full capacity [if his/her capacity is not limited or unlesss his/her capacity is limited] or abrogated by law.'[43] The law further provides that legal capacity may be limited or abrogated only by a court. This is the first step towards placement under guardianship. The process begins when a person empowered by law or the guardianship authority, files an application with the court seeking an order to declare that that the adult has limited or no capacity.[44] After an application has been filed with the court, the court will conduct a hearing on the evidence and make a decision. The adult is presumed to have capacity throughout the court proceedings and therefore is entitled to all the procedural rights enjoyed by any other litigant in Hungarian courts.[45] Of course, if the court finds that the adult has full capacity then the proceedings terminate without the adult's capacity being limited or abrogated. The court can find that the adult has

41 The list of guardianship authorities' functions can be found in Act 31 of 1997, para. 109-122. These include: child protection (e.g. decisions to place children in foster homes); arrangement of the legal status of families (e.g. requesting a court trial on the identity of the father, if needed); adoptions; parental rights cases (e.g. deciding on the forms of communication between children and parents); guardianship cases (e.g. overseeing the tutor's activities); guardianship; asset management (e.g. supervision of important financial decisions of the guardian); initiating court procedures (e.g. for placing someone under guardianship); requesting criminal investigation (e.g. if a crime is committed against a child); financial benefits and support (e.g. alimony); instructing experts and determining expert fees. Also, see the official website of the Kispest (a Budapest district) guardianship authority at www.hivatal.kispest.hu/gyamhiv/gyamhiv.htm.

42 Civil Code, para. 14(3).

43 *Ibid*, para. 11(1) (unofficial translation by MDAC).

44 Legal capacity in Hungarian terminology (jogképesség) means that a person has rights and can be subject to legal obligations. In Hungary, individuals under law not only have legal capacity, but also 'capacity to take actions' (cselekvőképesség). Under the Constitution of the Republic of Hungary, every person is deemed to have legal capacity, but not necessarily capacity to act. (See the Constitution art. 56). However, in order to be consistent in the use of 'capacity' and 'legal capacity' in this report, they should be understood as 'capacity to act' or 'capacity to take actions' in accordance with the Hungarian terminology (cselekvőképesség). 'Capacity is the ability of a person, based upon which the person can obtain rights and undertake obligations in his/her own name by his/her own decision of will.' (Definition taken from the 'Comments' on para. 11 of the Civil Code. The 'Comments on the Civil Code' is not an official source of law, but rather an interpretation of legislation which is widely used by lawyers, judges, state bodies and others).

45 Civil Procedure Code, para. 306(1) states that 'in a procedure for placement under guardianship the respondent has full procedural capacity.' Unofficial translation by MDAC.

no capacity if it determines that the adult's 'ability'[46] to conduct his or her own affairs is 'permanently'[47] and completely diminished as a result of his or her mental state or intellectual disability.[48] If the adult's impairment is 'largely diminished' as opposed to 'completely diminished,' or if the impairment is episodic then the court may find that the adult has partial capacity.[49] Pathological addiction is also a basis for a court finding of partial capacity but is not a sufficient basis for depriving a person of legal capacity.[50] The court's role ends when the adult's legal capacity has been determined.

Following a court order depriving the adult of legal capacity, the case is transferred to the local guardianship authority which appoints the guardian. Once this has been done, the guardianship authority is responsible for supervising the guardianship, which includes overseeing guardians' activities and resolving disputes. Decisions of individual guardians can be appealed to the local guardianship authority, while decisions of the guardianship authorities may be appealed to county level guardianship authority.[51] Some appeals may, in addition, be filed in the court of first instance depending on the nature and seriousness of the appeal.[52]

2.6 Human-Rights Based Assessment of Hungary'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

46 A note on Hungarian terminology: literal translation of the Hungarian terminology used in the law 'belátási képesség' would be 'competence'; however, to avoid confusion with the common English understanding that competence and capacity are used interchangeably we here use the word 'ability' instead. Civil Code, para. 15(4).

47 The Hungarian expression 'tartósan' can be translated both as 'permanently' and 'for a long time'. It is used in the Civil Code, para. 15(4).

48 The legislation does not define what is meant by the mental state or intellectual disability.

49 Civil Code, para. 14(3).

50 *Ibid*, para. 14(3).

51 If the local authority is situated in Budapest then the appeal may be appealed to the Capital Guardianship Authority.

52 Act 31 of 1997 on the Protection of Children and the Administration of Guardianship and Tutelage, para. 118(1).

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 Hungarian law that support the conclusions. Finally, 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 Frameworks (Indicator 1)

Indicator 1	*Legislative purpose or preamble to the law encompasses respect for the human rights, dignity and fundamental freedom of people with mental disabilities.*

Conclusion: The Constitution and other laws provide for the equal rights of people with disabilities, but human rights principles are rarely mentioned with respect to people with psycho-social disabilities or intellectual disabilities.

Analysis: The Hungarian Constitution recognises fundamental rights and freedoms of all people. Specifically, article 8 of the Constitution states that:

- The Republic of Hungary recognises the inviolable and inalienable rights of human beings. Ensuring respect and protection for these rights is a primary obligation of the State.
- In the Republic of Hungary the law contains rules on fundamental rights and obligations, but must not impose any limitations on the essential contents and meaning of fundamental rights.

In addition to the Constitution, other laws integrate the principles of Indicator 1. In 2001, the guardianship-related provisions of the Civil Code were modified as a result of broader recognition of the rights of people with psycho-social or intellectual disabilities. The Ministerial Justification on these modifications states:

> This law creates a legal framework that better respects the autonomy of the people concerned, a more person-tailored system which limits the personal freedom and autonomy of making decisions only in the least restrictive way. At the same time, this law ensures that – when necessary – the decision about

someone's placement under guardianship should be made in a procedure that is fast and comprehensive and contains appropriate legal guarantees. During the codification process of this law, Recommendation R(99)4 of the Council of Europe had a basic importance.[53]

The Ministerial Justification on the Health Care Act[54] emphasises that the State must ensure the general human, civil rights, and other relevant rights of health service users.[55] Lawmakers recognised the necessity of special rules for mental health service users and stated that 'limitation of the patients' rights is permitted a) only if the person dangerous, and b) only as long as the dangerousness persists.[56]

The 2006 National Programme of Disability enshrines adherence to the principles of dignity, human rights and fundamental freedom of people with disabilities. It sets out, among others, the following standards:

> People with disabilities are not subjects of charity, but they are the owners of rights. People with disabilities are not ill; rather they are individuals assuming responsibility for their own lives. They are not dependants but consumers with working capacities. They are people who do not wish others to make decisions for them on their lives, because they are capable of doing so themselves. *Accordingly, all efforts should be made to support people with disabilities taking part in identifying and then implementing measures. According to the principle of self-determination*, people with disabilities can, within the frame of their capacities and opportunities, freely decide on their lives. Independence covers self-determination on personal movement, time, possession, and one's own body. For the sake of self-determination and for the respect for human dignity the principle must be observed when granting any subsidies and support, so that people with disabilities can decide on their own objectives in their lives, on the way they want to reach them, and on their human and moral values. The support given must not strip people with disabilities of all the things they can do by themselves, and can independently achieve.[57] [Emphasis in original.]

The Programme is a welcome development, but it is of concern that people with people with psycho-social or intellectual disabilities are not specifically referenced within the text. Further, this resolution has yet to be implemented.

53 Ministerial Justification by the Ministry of Justice on the modification of guardianship-related provisions (Act 15 of 2001). In Hungary, a 'Ministerial Justification' is an official explanation of legislation.

54 Act 154 of 1997 on Health Care.

55 Comments on Act 154 of 1997, 'General Reasoning,' para. 4.

56 *Ibid*, paras. 189-195.

57 10/2006 (II.16), Resolution of the Parliament on the New National Programme on Disability Affairs, Chapter I, The Basic Principles of the Programme. English version available at: http://www.szmm.gov.hu/main.php?folderID=1295.

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

> In relation to the protection of incapable adults the fundamental principle, underlying all the other principles, is respect for the dignity of each person as a human being. The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms, taking into account any qualifications on those rights contained in the relevant international legal instruments.[58]

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.'[59] 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 […]'[60] 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.'[61]

[58] Recommendation R(99)4, Principle 1.

[59] 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.

[60] 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.

[61] 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: Hungarian legislation clearly defines who may make an application for appointment of a guardian, but it fails to define a sufficiently clear and specific basis for filing applications.

Analysis: The Civil Code states that the procedure to place someone under guardianship may be initiated at the request of one of the following three categories of people: family members, the guardianship authority, or the public prosecutor.[62] Eligible family members include the spouse, next of kin, and siblings over 18. Other individuals have the right to indicate to the guardianship authority when they believe that there is a need for an adult to be placed under guardianship. However, the authority has the discretion to decide whether to file an application in such instances. If a guardianship authority decides that guardianship is necessary,[63] the authority is obliged to initiate the procedure unless an application for proceedings is filed by family members within 60 days.[64] A prosecutor also has the right to participate in civil cases including filing applications in guardianship cases when circumstances suggest that a person involved is not able to protect his or her own rights for any reason.[65]

Although Hungarian legislation provides the basis on which applications may be filed, the reasons listed are vague: due to mental status, intellectual disability,[66] or pathological addiction (discussed above).[67] The necessary level of proof required to sustain an application is also ill-defined. What is clear, however, is that the burden of proof falls to the applicant.[68] Only when the guardianship authority is the applicant, the law specifically requires an expert opinion, an environmental study and financial records or other relevant materials in the guardianship authority's possession.[69]

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

62 Civil Code, para. 15(2).

63 Governmental Decree 149/1997 (IX.10.), para. 144(2) on Guardianship Authorities, and the Child Protection and Guardianship Procedures on Guardianship Authority, which states that 'guardianship is especially necessary if the protection of the individual's personal and financial interests can be assured only through the placement under guardianship.' Unofficial translation by MDAC.

64 Civil Code, para. 15(3).

65 7/1996 (ÜK. 7.) Instruction of the Chief Prosecutor on Private Law Related Activities of Prosecutors, para. 8(2).

66 The phrase 'mental retardation' (originally used by the Civil Code) is avoided in this report, as the term is generally regarded as derogatory. 'Intellectual disability' is used instead.

67 Civil Code, para. 14(4).

68 Civil Procedure Code, para. 164(1).

69 *Ibid*, para. 307(2).

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.[70]

The Recommendation calls for 'fair and efficient procedures for the taking of measures for the protection of incapable adults'.[71] 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 No. (99)4, which requires an 'up-to-date report from at least one suitably qualified expert.'[72] 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	*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.*

Conclusion: Adults have the right to be present and heard at court proceedings related to the deprivation of capacity. There is no such right for guardianship authority proceedings.

70 Principle 11(1).

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

72 *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/.

Analysis: Hungarian law requires a courts to inform the person subject to a guardianship procedure in a written form via ordinary mail.[73] Notice requirements that are applied to plaintiffs in civil cases also apply to applicants in guardianship applications. An adult subject to a guardianship proceedings must be considered as having full capacity until a court decides otherwise. More specifically, a person who is subject to guardianship proceedings has the same rights as any other person involved in court proceedings.[74] This includes the right to be notified of the procedure and to be present at the hearing.[75] Uniquely to guardianship proceedings, courts in Hungary are required to appoint a 'case guardian'.[76] The law is silent about any other parties who might be entitled to receive notice about the proceedings. All parties are entitled to be present in court and to be heard,[77] and the legislation emphasises that the adult must be heard unless there are exceptional circumstances.[78]

According to a Governmental Decree, the guardianship authority must hear from the adult before making an appointment of a guardian; however, the same Decree states that this must be done only if the adult's 'mental state makes this input possible'.[79] This Decree is problematic under this indicator because it implies a presumption that the adult's mental state precludes his or her input at a critical point in the process; the selection and appointment of the guardian. Further, it is unclear how and who determines whether the adult's mental state is to be assessed.

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.'[80] The Explanatory Memorandum to Recommendation No. R(99)4 reiterates the necessity of this procedural safeguard, citing the requirements

73 Civil Procedure Code, para. 99(1).

74 The procedural rights of a person involved in a civil case are specified in various sections of the Civil Procedure Code. Guardianship specific provisions of the Civil Procedure Code may be found in Chapter 18. Several of these provisions are discussed below.

75 Civil Procedure Code, para. 125(1).

76 *Ibid*, para. 308(1).

77 *Ibid*, paras. 138 and 139.

78 *Ibid*, para. 309(3). Circumstances which warrant hearing without the personal presence of the respondent include when the respondent's whereabouts are unknown or when the respondent's presence is 'hindered unavoidably'.

79 Governmental Decree, para. 131(3), 149/1997 (IX.10.).

80 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'.

of Article 6 of the European Convention on Human Rights.[81] 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 American Uniform Guardianship and Protective Proceedings Act. This simply adds a provision requiring that 'notice under this Act must be in plain language'.[82]

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.'[83] 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.[84]

Indicator 4	*An adult has a right to free and effective legal representation throughout guardianship proceedings.*

Conclusion: The Civil Procedure Code ensures the right to legal representation. However, there is no obligation on any State body to provide an attorney to adults facing guardianship proceedings. Case guardians are appointed at no charge to assist an adult in the procedure; however, they are not necessarily lawyers and their legal responsibilities are vague.

Analysis: All persons subject to legal proceedings in Hungary have the right to be legally represented.[85] However, although an adult may use his or her own lawyer's

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

82 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.

83 Principle 13.

84 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.

85 Civil Procedure Code, para. 49(1).

services, there is no obligation on the State to provide an attorney to represent an adult subject to a guardianship procedure.

When the court issues notice of the guardianship proceedings to an adult, the court must also order the appointment of a case guardian.[86] The Civil Code does not specify that the case guardian must be a lawyer: this requirement is however set out in the accompanying commentary.[87] The role of the case guardian is to provide general assistance to the adult.[88] Case guardians are a peculiarity. They are appointed in every case, are paid for by the State, are usually lawyers and must provide assistance to the adult. However, case guardians are prohibited from providing the adult with legal representation. An adult wishing to be legally represented, instead of or in addition to the case guardian, has to pay for the attorney.

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.'[89] 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.[90] As the requirements of Article 14(3) of the ICCPR are considered basic guarantees of a fair hearing,[91] 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.'[92]

Enforcing this requirement by providing effective legal representation is especially crucial when the person is alleged to lack capacity to represent him or herself.[93] 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:

86 *Ibid*, para. 308(1).
87 *Ibid*, para. 74 and accompanying Comments on para. 74.
88 Governmental Decree, para. 137(2), 149/1997 (IX.10.)
89 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.
90 *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, para. 51.
91 See UN Human Rights Committee, General Comment 13, para. 5.
92 Principle 7.
93 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.

[t]he person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it.[94]

Indicator 5	*An adult may not be detained in order to be subjected to an evaluation of his or her legal capacity.*

Conclusion: Hungarian law does not comply. Adults may be detained for up to 30 days for the purpose of a capacity examination.

Analysis: Under the Civil Procedure Code, if 'longer observation' of adults is necessary, or if they repeatedly fail to attend a forensic examination, they can be detained for a period of no longer than 30 days in a hospital to facilitate an expert examination.[95] This rule applies specifically to cases when the court requests a forensic expert's opinion. Such decisions on detention may be appealed.[96]

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.'[97] 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 fulfill 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 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.[98] In other cases, the Court additionally held that forced psychiatric examinations violate Article 6 (right to fair trial)[99] and Article

94 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).

95 Civil Procedure Code, para. 310(2).

96 *Ibid*.

97 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.

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

99 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.

8 (right to respect for private and family life, home and correspondence)[100] 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	*An adult has the right and opportunity to present his/her own evidence (including witnesses), and to challenge the opposing evidence (witnesses).*

Conclusion: An adult subject to guardianship has the right to present evidence and to call witnesses, as well as to examine and challenge the evidence presented by the opposing party.

Analysis: The Constitution guarantees the equality of rights of each party involved in civil proceedings.[101] Specifically, courts are obliged to ensure that parties have access to all requests, claims, legal statements, and other documents submitted to the court, as well as the opportunity to reflect on them.[102] In general, the parties involved, as well as the prosecutor and other persons taking part in the proceedings, have the full right of access to the case documents without special permission.[103] When filing an application with the court, the relevant law and facts must be stated. Documents intended to be presented as evidence by the applicant must also be attached to the application.[104] The court reviews the application and if the application meets all legal requirements, schedules a date for trial.[105] Along with the summons, copies of the application must be sent by post to each party involved. The date of the trial must be set 15 days or more after the adult receives the application.[106]

The most important evidence in the proceedings is the expert opinion on the mental status of the adult (See Indicator 7). Law does not specify whether the expert opinion must be presented in writing or whether the expert must present his or her evidence orally in court but in either case, all parties present in court are given the opportunity to review and question the expert conclusion.[107] The Civil Procedure Code also allows the adult to present their own defence, counter-claims, and evidence.[108]

[100] 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.
[101] Constitution, art. 57(1).
[102] Civil Procedure Code, para. 3(6).
[103] *Ibid*, para. 119(1).
[104] *Ibid*, para. 121(2).
[105] *Ibid*, paras. 124(1) and 125 (1). The court has 30 days to review and schedule the trial date but the trial need not be heard within those 30 days.
[106] *Ibid*, para. 125(2).
[107] *Ibid*, para. 180(1)-(2).
[108] *Ibid*, para. 139.

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'.[109] 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.[110] 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.[111] 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	*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.*

Conclusion: The guardianship law in Hungary mandates an expert opinion by a psychiatrist in the proceedings to determine incapacity. However, the law does not clearly specify what kind of information such an opinion must contain, or how recent the opinion must be.

Analysis: In guardianship proceedings, a psychiatric opinion must be obtained in order to decide on the individual's capacity.[112] A psychiatrist must provide an opinion on the mental status of the adult. If the application is submitted by the guardianship authority, the expert's opinion must be attached to the application.[113] Legislation does not prescribe how recent or objective the opinion must be.

[109] Principle 7(1).

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

[111] 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.

[112] Civil Procedure Code, para. 310(2).

[113] *Ibid.*

The law gives the power to a judge to detain the adult for assessment if either a longer period of observation is required, or the adult repeatedly fails to appear for assessment.[114] These provisions read together clearly indicate the legislative intent that the examination be conducted in-person.

Unfortunately, Hungarian legislation provides little guidance on how the expert should assess capacity. Forensic psychiatrists can rely on two brief sections of the Civil Code when examining an individual's ability to conduct his or her own affairs. The section defining the basis for total incapacitation sets out the following conditions: the person must permanently lack the ability necessary to conduct his or her own affairs, and this inability must be due to mental status or intellectual disability.[115] The basis for partial incapacitation is that the person's ability is either permanently or periodically and recurrently, substantially diminished – due to mental status, intellectual disability or pathological addiction.[116] These criteria constitute the only legal guidelines for experts in preparing their opinion.

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.[117] 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.[118] 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.[119]

[114] *Ibid.*
[115] Civil Code, para. 15 (4).
[116] *Ibid*, para. 14 (4).
[117] See Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights.
[118] Principle 12.
[119] *H.F. v. Slovakia*, op. cit.

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

Indicator 8	*A finding of incapacity requires a demonstrable link between the underlying diagnosis and the alleged inability to make independent decisions.*

Conclusion: Legislation fails to specify that a finding of incapacity requires a demonstrable link between diagnosis and functional capacity.

Analysis: There is no statutory requirement that any demonstrable link should exist between a diagnosis and the alleged inability to make decisions. However, a recent ruling of the Supreme Court, which is not legally binding on other Hungarian courts, stated that in order to limit capacity through guardianship, two conditions should exist simultaneously: (1) a 'damaged' health status, which (2) affects the adult's discretionary ability in such a way that a rights limitation is justified.[120] The burden on proving both conditions lies with the party filing the application. As noted, this Supreme Court decision is not binding on lower courts. However it represents a persuasive interpretation of the applicable provisions of law and it is hoped that it will be cited in future court decisions, and that the legislature will make changes to solidify the legislation.

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 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.

[120] Supreme Court Decision No. 46 of 2006.

Indicator 9	*A finding of incapacity is based upon sufficient evidence and serves the interests of the adult.*

Conclusion: Legislation is inadequate in relation to sufficiency of evidence.

Analysis: As discussed above in analysis of Indicators 7 and 8, Hungarian law identifies the types of evidence necessary for applicants to present when filing an application for limitation or deprivation of legal capacity. When an application is filed, all documents that justify the application must be attached, particularly those that relate to property rights and ownership interests. There is also a legal expectation that the person should appear in-person before the judge (see Indicator 3).

In addition, guardianship authorities are required to submit an 'environmental study',[121] which should contain information about the adult's lifestyle and care, including contact information for social care institutions and medical providers, a statement on the person's financial and social situation, as well as 'any other relevant information'.[122] Formal environmental studies are not required from individual applicants. However, the combination of required information and the contents of the environmental study imply that the court is to consider the totality of the adult's circumstances before deciding on the level of capacity. The Comments that accompany section 14 of the Civil Code support this view. They require courts to decide not only whether the adult has a qualifying mental condition and diminished capacity, but also whether the incapacity applies to all areas of his or her life or just certain areas. This question is not only a medical question but also a legal question. In sum, the Comments require the judge to conduct a comprehensive examination of all circumstances.[123] Recognising the importance of the matter in guardianship proceedings, courts are empowered to order additional evidence if necessary.[124]

It is of concern that the requirement for an environmental study applies only to applications filed by the guardianship authority. The current situation provides lesser standards on the basis solely of the identity of the applicant. It does not provide adequate protection against unscrupulous family members applying for guardianship for their own interests.

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.

121 Civil Procedure Code, para. 307(2).
122 Governmental Decree, para. 9(3), 149/1997 (IX. 10.)
123 Comments to Civil Code, para. 14.
124 Civil Procedure Code, para. 310(1).

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.[125] 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.

As referred to above, the European Court of Human Rights has already emphasized the necessity of a qualified expert report to determine capacity.[126] 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'.[127] 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	*Selection of a guardian is based on objective criteria and the wishes and feelings of the adult are considered.*

Conclusion: The law provides insufficient objective criteria for selecting professional guardians. It is of concern that the criteria for private guardians (usually family members) are not based solely on the adult's needs. The law does, however, specify that a person cannot be appointed as a guardian if the adult expresses an objection.

[125] Principle 12.
[126] *H.F. v. Slovakia*, Application No. 54797/00, judgment of November 8, 2005.
[127] Principle 8(1).

Analysis: As noted, after a court limits or deprives an adult of legal capacity, the guardianship authority appoints a guardian.[128] A guardian may be any adult with full capacity who accepts the appointment to act and falls into one of the following categories:[129]

- ⇨ Individuals designated by the adult being placed under guardianship (including those nominated by advanced directive).
- ⇨ The adult's spouse living in the same household, parents or relatives.
- ⇨ Other individuals who may be deemed appropriate by the guardianship authority.
- ⇨ A professional guardian.[130]

The categories are listed in a hierarchical order, reflecting the legislature's preference.[131] The Civil Code further provides that a member of a non-governmental organisation may be appointed as a guardian if that organisation's activities are related to people with disabilities, 'psychiatric patients, or people with pathological addictions'.[132]

The adult has the right to express their choice of guardian. If the adult objects to a particular person, the guardianship authority must not appoint that person.[133] Adults may write advance directives regarding their choice of guardian in the event of future incapacity. This allows for adults to make their wishes clearly known while they have functional capacity. Unless there are compelling reasons not to do so, guardianship authorities are legally bound to respect such advance directives.[134]

Guardians can be either 'private' guardians or 'professional' guardians. Law specifies who may be appointed as a professional guardian. The criteria include completion of a guardianship training course, the number of persons currently under their guardianship, and the absence of any disqualifying circumstances such as a criminal record. Law allows more than one guardian to be assigned to one adult. For example, both parents of an adult could be appointed to act as co-guardians or, if a guardian would need 'special expertise' to manage the adult's assets, additional guardians may be appointed for that purpose.[135] The law prescribes that functions should be divided between the guardians, but does not specify how.[136]

128 Civil Code, para. 19(1).
129 *Ibid*, para. 19(2).
130 The category of professional guardians includes people that have completed a secondary education and are certified through a guardianship training course that meets the standards as outlined by the Ministry of Health, Social and Family Affairs and are otherwise not excluded by law. 25/2003. (V. 13.) Decree by the Minister of Health, Social and Family Affairs on the Educational Requirements of Persons Functioning as Professional Guardians.
131 Civil Code, para. 19/A(1)-(3).
132 *Ibid*, para. 19/A(3).
133 *Ibid*, para. 19/A(4).
134 *Ibid*, para. 19/A(1).
135 *Ibid*, para. 19/B(1).
136 *Ibid*, para. 19/B(2).

The law does not explicitly require prospective guardians to detail in advance their plans for ensuring the living arrangements, medical treatment, and social arrangements for the adult. The guardianship authority may inquire about such matters but the law does not require a formal plan.

Law limits the number of adults a 'professional' guardian may have under their care at any given time to 30.[137] However, there is no system for registering guardians in a central database, so it is possible for a guardian working in different geographical areas to be responsible for more than 30 adults.

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'.[138] It also suggests that States take steps to ensure that qualified guardians are available, such as creating training associations.[139] 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.[140]

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'.[141] 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.[142] 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.

137 Governmental Decree, para. 134(4), 149/1997 (IX.10.).
138 Principle 8(2).
139 Principle 17.
140 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.
141 Recommendation No. R(99)4, Principle 9(2).
142 Explanatory Memorandum to Recommendation No. R(99)4, para. 44.

Indicator 11	*The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict.*

Conclusion: Legislation provides that a person with specific conflicts of interests may not be appointed as guardian.

Analysis: Hungarian legislation fulfils to some extent the objective outlined in the conclusion above by explicitly prohibiting certain individuals from acting as a guardian. For instance, staff members of institutions may not be appointed as guardians of adults who are residents of the same institutions.[143] Likewise, employees of health and social services may not be guardian of an adult for whom they provide health or social services. A person is also excluded from being a guardian if they could benefit from contracts between them and the adult e.g. contracts for life annuity.[144] Furthermore, nothing prevents the guardianship authority from declining an appointment of a person when there is a conflict of interests with the adult's best interests.

It is interesting to note that the guardianship authority is legally required to examine whether or not a conflict of interest exists between the adult and the nominated guardian when the adult concerned has made the nomination him or herself or when the potential guardian is the spouse.[145]

After the appointment of a guardian, conflicts of interest may arise between the guardian and the person under guardianship. Guardianship authorities are obliged to appoint a guardian ad litem to represent the interests of the person under guardianship.[146] Once appointed, the guardian ad litem then has the same authority as the guardian would have had in that particular case.[147]

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 include 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.[148]

143 Governmental Decree, para. 134(6), 149/1997 (IX.10.).

144 *Ibid*.

145 Civil Code, para. 19/A(1).

146 *Ibid*, para. 225(1). Other scenarios under which a guardian ad litem should be appointed include situations where the guardian is either unknown, where an individual who lacks capacity has no guardian, or it is necessary to protect the interests of an unknown person or a person who is otherwise unable to manage his/her own affairs.

147 *Ibid*, para. 225(3).

148 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.

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.[149]

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'.[150] 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.

Indicator 12	*An adult has the right to appeal a finding of incapacity and/or the appointment of a guardian.*

Conclusion: Adults subject to guardianship proceedings are entitled to appeal a finding of incapacity and to express an objection to appointment of a guardian.

Analysis: Adults have the right to appeal a court decision limiting legal capacity or depriving a person of it altogether.[151] The general rule is that such a court order comes into effect after the expiration of the appeal period (15 days from the date on which the adult receives the court decision by regular mail),[152] if no appeal is filed, or following an appeal court's decision.[153]

Additionally, adults may object to the appointment of the proposed guardian. If the adult 'expresses an objection', the guardianship authority is precluded from appointing the person in question.[154] The adult has no right to challenge the appointment of a professional guardian by the guardianship authority.[155] However, adults may appeal to the administrative court or the guardianship authority to

149 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.

150 *Ibid*, Standard 16.

151 Civil Procedure Code, para. 233(1).

152 *Ibid*, para. 234(1).

153 *Ibid*, para. 311(1).

154 Civil Code, para. 19/A(4).

155 Governmental Decree, para. 134(7), 149/1997 (IX.10.).

challenge a guardianship authority's decision to select a (non-professional) guardian, such as a family member of the adult.

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'.[156] 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.[157] 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.

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

Conclusion: The Constitution prohibits people under guardianship from voting.

Analysis: The Constitution states that adults placed under partial or plenary guardianship as a result of an effective court decision have no right to vote.[158] Thus, over 60,000 people under guardianship are excluded from exercising political rights. This may further exacerbate stereotypes about people with disabilities and may contribute to social exclusion more generally.

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

[157] 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).

[158] The Constitution, Art. 70(5).

The constitutional bar on voting is inconsistent with the very notion of partial legal capacity. Partial limitation of a person's rights means that only certain aspects of an adult's decision-making areas are given to the guardian. A blanket ban on voting is arbitrary and does not allow for any proportionate consideration in individual cases. For example, an adult may have their capacity limited in the area of financial management only yet still be excluded from political participation – an unrelated area of life. In addition to this, people with limited or no legal capacity are deprived of civil and political rights in many other areas such as founding or acting as officials of political parties.[159]

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'.[160] 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'.[161]

Indicator 14	*By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to work.*

Conclusion: Adults under plenary guardianship are automatically deprived of the right to work. People under partial guardianship are in some cases deprived of the right to work.

[159] Act 2 of 1989, On the Right to Associate, para. 8(2).

[160] 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.

[161] Recommendation No. R(99)4, Principle 3(2).

Analysis: All agreements that would otherwise be legally binding are null and void if made by persons without legal capacity.[162] In such cases, the law requires that the guardian must act on the adult's behalf,[163] unless they are minor transactions.[164]

Adults under partial guardianship are entitled to work and are entitled to dispose up to 50% of their monthly income by themselves.[165] However, since people under plenary guardianship are precluded from entering into contracts on their own behalf, it is questionable whether they are entitled to enter into employment contracts. People under full or partial guardianship are clearly excluded from specific jobs, namely forest guards,[166] attorneys,[167] public administration employees,[168] or most positions within the higher education system.[169]

In 2004 the Parliamentary Commissioner for Human Rights (Ombudsman) noted that provisions of the Civil Code and the Labour Code are inconsistent.[170] In 2005 the government established an inter-ministerial committee to look into the issue of employment of people under guardianship. The results of this have not been promising. Two types of 'occupation in social institution' have been introduced:

- ⇨ Work-rehabilitation occupation. This is for people under plenary guardianship. The salary must be at least 30% of the minimal wage.
- ⇨ Development-preparation occupation. People under plenary guardianship do not qualify. This pays around the same as employment but without the other benefits to employment.

People under plenary guardianship who live in institutions can access 'rehabilitation occupation', which pays around the same for people in other employment but does not include other benefits (such as health insurance, pension contributions). The situation for people under guardianship who live in the community is unchanged: they cannot access employment.

Human Rights Standards: Article 8 (right to privacy) of the European Convention on Human Rights includes the right to work. The European Court of Human Rights has said that 'it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.' The European Social Charter (revised) also contains

[162] Civil Code, para. 15/A(1).
[163] *Ibid*.
[164] *Ibid*, para. 15/A(2).
[165] *Ibid*, para. 14/B(2)(c).
[166] Act 54 of 1996, On Forests and the Protection of Forests, Appx. 7, Section 7.2.
[167] Act 11 of 1998, para. 13(4)e.
[168] Act 22 of 1992, para. 193/S.
[169] Act 139 of 2005, para. 81(2)b.
[170] Parliamentary Commissioner for Human Rights, Reports OBH 3360/2004 and OBH 2729/2002.

provisions protecting the right to work. Recommendation No. R(99)4 provides that where a measure of protection is necessary, it should be proportional to the degree of capacity of the adult and tailored to the individual circumstances and needs of the person. Therefore, while some restriction may be necessary in certain situations, a blanket prohibition from employment of all people under guardianship may exclude individuals from participating in certain realms of life and activities despite their capacity to do so.

Indicator 15	*By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to property.*

Conclusion: An adult under guardianship is automatically deprived of the opportunity to independently exercise rights over property.

Analysis: Guardianship legislation was created mainly for the protection of an individual's property; therefore, this is one of the areas that is most affected by incapacitation. Adults under plenary guardianship may not make any legally valid transactions regarding property.[171] Adults under partial guardianship may exercise property rights only with the consent of the guardian.[172] If the adult's capacity is limited in specific areas, his or her rights to dispose of property are limited only if the court has specifically declared property rights to be restricted.

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

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

Recommendation No. R(99)4 follows this sentiment by recommending that '[w]henever possible the adult should be enabled to enter into legally effective transactions of an everyday nature'.[173] The Council of Europe returned to this theme

[171] Civil Code, para. 15/A(1).
[172] *Ibid*, para. 14/B(1).
[173] Recommendation No. R(99)4, Principle 3(4).

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'.[174]

Indicator 16	*By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to marry, to found a family, and to respect of family life.*

Conclusion: Adults under plenary guardianship are automatically deprived of their right to marry, to found a family and respect of family life. Adults under partial guardianship may marry unless the court specifies otherwise.

Analysis: People under plenary guardianship are prohibited from entering into legally binding agreements, including a marriage agreement. Neither the guardianship authority nor the guardian have the discretion to consent on the adult's behalf.[175] People under partial guardianship are entitled to marry without the consent of the guardian or the guardianship authority, because the Civil Code lists 'legal statements of a personal nature' (which applies to marriage) as an exception to the legal restrictions otherwise applying to people with limited capacity.[176] Hence, adults under partial guardianship are allowed to marry unless specifically prevented by a court.

At the same time, if the court decides that the person lacks capacity in family-related issues, the adult can be deprived of capacity in specific areas, such as the right to act on their own behalf in family law proceedings, to dispose of marriage property, or to determine the name of his/her children.[177] Adults under plenary or partial guardianship are not entitled to adopt children,[178] may not independently file a court application regarding family status issues,[179] or make a paternity declaration.[180]

Human Rights Standards: Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life, home and

[174] 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).
[175] See Comments, Family Code, para. 9.
[176] Civil Code, para. 14/B(2)(a).
[177] *Ibid*, para. 14 (6)(3).
[178] Family Code, para. 47(1).
[179] *Ibid*, para. 44(2).
[180] *Ibid*, para. 37(3).

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',[181] and that '[p]ersons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood'.[182]

Indicator 17	*By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to associate.*

Conclusion: Placement under guardianship deprives people of the opportunity to exercise their right to associate in certain areas of their life.

Analysis: The law is unclear whether people under guardianship – either plenary or partial – can fully exercise their right to participate in associations such as membership organisations or professional associations. However, what is clear is that people under any form of guardianship are legislatively prohibited to be a member of an 'employee council' (a body representing the interests of the employees at workplaces),[183] the Chamber of Auditors,[184] the Chamber of Architects,[185] and the Development and Innovation Council.[186] Nor are they entitled to hold officer positions within cooperatives,[187] or be members of School Cooperatives.[188]

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

[181] 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.
[182] *Ibid*, Rule 9(2).
[183] Act 22 of 1992, The Labour Code, para. 46(1).
[184] Act 55 of 1997, On the Hungarian Auditor Chamber and the Auditor Activities, para. 16(e).
[185] Act 58 of 1996, On the Chambers of Designers, Engineers and Architects, para. 31(e).
[186] Governmental Decree on the Council of Research and Technological Innovation, para. 5(1), 255/2003 (XII.24.).
[187] Act 141 of 2000, On the New Cooperatives, para. 35(b).
[188] Governmental Decree on School Cooperatives, para. 3(2), 159/2001. (IX.12.)

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

Conclusion: Through the existence of plenary guardianship, Hungarian legislation leaves open the possibility that there are people with functional capacity in certain areas who have been deprived of all decision-making rights.

Analysis: For partial guardianship the court may identify and accommodate the specific needs of the individual's life where they are capable of independent management and decision-making. The court may limit the adult's legal capacity in any of those areas where it finds it necessary to do so. Law also provides for a 'general limitation' within partial guardianship. A general limitation is used when the court finds that an adult's capacity is 'generally limited in all areas of life',[190] and the result of such a finding is that the adult may then independently engage in transactions only of minor significance.[191] This would logically include buying a cup of coffee or a newspaper.

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

[190] Civil Code, para. 14(4).

[191] As discussed in other sections of this report, the law elaborates four areas of life in which adults under partial guardianship may act independently, namely: agreements of

Human Rights Standards: As noted, international human rights law demands a least-restrictive approach to guardianship. This approach which 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'.[192] 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 trans--actions 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 independently of the guardian. A medical expert must be consulted when the judge assesses those tasks for which the adult will retain decision-making.[193] 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:

> 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

a personal nature, minor transactions of an everyday nature, disposal of up to 50% of income earned from employment or social benefits, and entering into contracts which require no obligation but provide only benefits. Civil Code, para. 14/B(2).

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

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

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.[194] In this paradigm, the guardian is responsible for ensuring the adult's participation and opportunity to act whenever possible.

Indicator 19	*An adult subject to guardianship must be consulted about major decisions, and have his/her wishes adhered to whenever possible.*

Conclusion: The wishes of the adult under guardianship must be taken into account, but only if the adult is 'able' to express an opinion and if circumstances make adherence to that opinion possible.

Analysis: Within plenary guardianship, the guardian has broad discretion to take legal actions on behalf of the adult.[195] If the adult is able to express a view or make a request, the guardian must take this into account.[196] At the same time, the guardian has sole discretion to determine whether the adult is 'able' to express their opinion. Once the guardian has decided that the adult is unable to express an opinion, the guardian is legally free to take all decisions without every reporting to or consulting with the adult. This legal loophole allows for guardians to ignore the opinions of adults and precludes adults from participating in decisions that may affect every aspect of their lives.

The protective provisions of the law affecting adults under partial guardianship (either under the general limitation or a specifically tailored order) are stronger. Partial guardians must obtain consent from the adult before exercising their decision-making authority on behalf of the adult. There are three scenarios under which guardians of adults with partial capacity are empowered to act independently and without requirement of consent of the adult:

- ⇨ When specifically empowered to do so by a provision of law;
- ⇨ When designated to do so by power of attorney duly executed by the adult; or
- ⇨ In emergency circumstances.[197]

Otherwise binding actions taken by an adult under partial guardianship are valid only if the guardian approves.[198] If there is a disagreement between the adult and

194 See Uniform Guardianship and Protective Proceedings Act (1997), Art. 3, para. 313(a).
195 Civil Code, para. 15/A(1).
196 *Ibid*.
197 *Ibid*, para. 14/D(3), (5).
198 *Ibid*, para. 14/B(1).

the guardian, the guardianship authority makes the final decision.[199] The law is unclear on whether the adult can appeal such decisions of the guardianship authority. Financial management must be performed in manner which promotes the welfare of the adult. The word 'welfare' is not clearly delineated, but what is clear is that guardians must consider the adult's wishes and satisfy their lawful requests in connection with their finances.[200] Ongoing violations of these consultation and consent requirements may lead to the removal of the guardian.[201]

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.[202] Recommendation No. R(99)4 specifies that when taking a decision, 'the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect'.[203] 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'.[204] 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'.[205]

199 *Ibid*.

200 *Ibid*, para. 20/C.

201 *Ibid*, para. 15/A(1).

202 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.

203 Principle 9(1).

204 Principle 9(3).

205 Principle 2(6).

Indicator 20	*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.*

Conclusion: In plenary guardianship and under the partial guardianship general limitation, the guardian's obligations are usually not clearly defined; they are all-encompassing. In other cases of partial guardianship, the court specifies those areas in which the adult needs assistance and the guardian can act only in these areas.

Analysis: When a guardian is appointed, the rights and obligations of the guardian are included in the guardianship authority's appointment order.[206] Legislation only briefly lists these activities; it does not provide an exhaustive list of rights and obligations of guardians. However, the Civil Code sets out guardians' duties generally:

- Financial management;[207]
- Legal representation; and
- In exceptional cases, ensuring personal care;[208]
- As a general rule, guardians may not transfer or delegate their authority to make decisions to another person.

In plenary guardianship, guardians may make all legal and non-legal decisions on the individual's behalf subject to the consultation requirements discussed above.[209] If the adult is under partial guardianship and the court has identified the areas that require the guardian's assistance, the guardian's role is limited to those enumerated areas.[210] If the adult has partial capacity but is placed under the 'general limitation,' the guardian's tasks are not specifically listed and the guardian's consent must be obtained for all major decisions. This sweeping nature of the guardian's participation is akin to plenary guardianship in that the general limitation does not provide for assistance only in areas where such help is warranted.

The most detailed description of the guardians' duties relates to the area of financial management and the monitoring of financial actions taken by the guardian.[211] Financial management issues are examined below (see Indicator 22).

Human Rights Standards: Domestic legislation should provide clear direction to the authority determining capacity to define the scope of the individual guardian's

206 Governmental Decree, para. 134/A(1)(a), 149/1997 (IX.10.).
207 Civil Code, para. 20/C.
208 *Ibid*, para. 20(1)-(2).
209 *Ibid*, para. 15/A(1).
210 *Ibid*, para. 14(5).
211 See Civil Code, paras. 20-20/D and Governmental Decree, Chapters 20-22, 149/1997. (IX. 10).

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'.[212] The Recommendation further advises that:

> The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.[213]

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'.[214] 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,[215] consent to marriage or adoption, or make or revoke a will, absent specific permission of the court.[216]

Indicator 21	*A guardian is obliged to promote the interest, welfare and independence of the adult under guardianship by seeking the least restrictive alternatives in living arrangements, endeavouring to allow the adult to live in the community.*

Conclusion: Law fails to oblige the guardian to promote the adult's independence and is silent on promotion of living in the community.

Analysis: Although there is a general provision to safeguard and promote the interests and welfare of the adult,[217] the law is silent on promotion of independent living in community settings. Hungary's social care system is heavily institution-based. There are 54 large institutions in the country for people with psycho-social disabilities, and 147 institutions specifically for people with intellectual disabilities.[218]

[212] Principle 2(1).
[213] Principle 3(1).
[214] The Finnish Guardianship Services Act, 442/99, para. 8(3).
[215] *Ibid*, para. 34.
[216] *Ibid*, 442/99, para. 29.
[217] Civil Code, para.20(1)-(2).
[218] This is the number of social care homes for persons with disabilities, nevertheless in 2001 persons with physical and sensory disabilities did not qualify for social care home

The lack of obligation on guardians to promote independence may partly explain the fact that the numbers of people institutionalised for life in Hungarian 'social care homes' has remained at a steady for many years.[219] It bears repeating that recent research conducted by a local non-governmental organisation has found that anywhere between 80 to 100 percent of adults in social care institutions for people with psycho-social disabilities are incapacitated and placed under guardianship.[220] Whether these adults were placed into institutions first and then placed under guardianship or whether placement under guardianship leads to institutionalisation is arguable. In any case, there seems to be a strong nexus in Hungary between institutionalisation and placement under guardianship.

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

> *Article 19 – Living Independently and Being Included in the Community*
> States Parties to this Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> - Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.
> - Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.

placement (they might have been placed in rehabilitation institutions) and persons with mental health problems were not considered persons with disabilities under the Hungarian disability definition.

219 In 1998, 6,395 people lived in social care homes for people with mental illnesses and 1,076 patients lived in institutions for rehabilitation (Personal communication with the National Methodological Institution). The 2001 census data revealed 7,540 persons in social care homes for persons with mental health problems; in 2004 there were 7,965 persons in social care homes for persons with mental illnesses (Central Office for Statistics data, see website at: http://www.nepszamlalas.hu/hun/kotetek/08/tablak03.html).

220 Pszichiátriai Érdekvédelmi Fórum, 'The Human Rights of Patients in Social Care Homes for Mentally Ill', English translation, Budapest, 2001.

⇨ Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.[221]

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'.[222] Each person has 'the right to be treated and cared for, as far as possible, in the community in which he or she lives'.[223] 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 community living'.[224] 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.[225]

Indicator 22	*The guardian must manage the assets of the adult in a manner that benefits the adult under guardianship.*

Conclusion: Guardians have a legal duty to manage the assets of the adult in a manner that benefits the adult.

Analysis: A guardian must manage the adult's finances in a manner that both protects the assets and promotes the welfare of the adult.[226] As noted in previous Indicators, guardians must consider the personal wishes of the adult and make efforts to satisfy their lawful requests. This is, of course, dependent upon the amount and type of finances which the adult owns.[227] If the adult lives in a social care institution (see previous Indicator), the guardian is obliged to pay a 'care fee' to the institution and to provide the adult with pocket money.[228]

221 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.

222 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.

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

224 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).

225 Principle 6(2).

226 Civil Code, para. 20/C.

227 *Ibid*.

228 Act 3 of 1993 on Social Administration and Social Services, paras. 117, 117/A(1), 119(1).

If an adult under partial guardianship is employed, he or she may control the spending of up to half of the earnings.[229] Otherwise, guardians may expend funds for the everyday needs of the adult or in amounts less than that prescribed by the guardianship authority (for example, up to 50,000 Hungarian forints, approximately 190 Euros) without prior approval of the guardianship authority. However, transactions of major assets, such as real estate, may only be carried out with the approval of the guardianship authority.[230] There are more stringent requirements for record-keeping with respect to financial management than other areas. Both the guardian and the guardianship authority have responsibilities for financial management.[231] Even before guardianship is formally established, the guardianship authority must protect the finances of an adult who may be in need of guardianship. The guardianship authority may take urgent protective action over assets by temporarily freezing them even before the court has ruled on the issue of legal capacity of the adult concerned.[232] The guardianship authority has the discretion to decide on the extent of freezing assets and for how long assets should remain frozen. This decision may not be appealed.[233]

After a guardianship is established, the newly appointed guardian is required to make an initial report to the guardianship authority that details the financial situation of the adult.[234] Throughout the course of the guardianship, the guardianship authority maintains its protective oversight of the assets and may require the guardian to report at any time on assets that are not immediately required for ongoing expenses, for example, savings, shares and other valuables.[235]

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]

229 Civil Code, para. 14/B(2)(c).
230 *Ibid*, para. 16.
231 *Ibid*, paras. 20-20/D.
232 *Ibid*, para. 18. If assets are frozen the guardianship authority must appoint a guardian to look after the frozen assets.
233 *Ibid*, para.18.
234 Governmental Decree §146(3), 149/1997. (IX. 10.)
235 Civil Code, para.20/B.
236 Principle 8(3).
237 Principle 20(1).
238 World Health Organisation, WHO Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, Dare to Care (World Health Organization, Geneva, Switzerland, 2005), p. 43.

Indicator 23	*The guardian is obliged to visit and confer with the adult periodically.*

Conclusion: Guardians are not legally obliged to regularly visit an adult under guardianship. Law mandates an adult's wishes must be taken into account, if possible.

Analysis: Hungarian legislation does not require a guardian to ever visit the adult, but does require a guardian to consult with the adult before taking decisions, and to follow the adult's wishes whenever possible.[239] This obligation exists only if an adult is deemed (presumably by the guardian) able to express his or her views. There is no legal obligation for the guardian to ever visit the adult – therefore the guardian could lawfully carry on as guardian for life without ever meeting the person for whom they are responsible. The guardian must report on the general status of the adult and his or her condition upon request of the guardianship authority,[240] suggesting that the legislature intended some form of contact between guardian and adult.

Human Rights Standards: A cornerstone of Recommendation No. R(99)4, and person-centred protective systems generally, is the need to ensure that the adult 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]

239 Civil Code, para. 15/A(1).
240 *Ibid*, para. 20/A.
241 See Principle 9.
242 The Uniform Guardianship and Protective Proceedings Act (1997), para. 313(b)(i).

Indicator 24	*A guardian's decisions are periodically reviewed by an objective body and the guardian is held accountable for all decisions.*

Conclusion: Guardians must provide annual reports to the guardianship authority.

Analysis: Guardians must annually send written reports to the guardianship authority. The primary focus of these reports is financial matters. These reports must contain details of financial transactions and supporting documentation.[243] The initial report filed by the guardian (see Indicator 22) provides a baseline against which the income and expenditures are measured. Guardians must also annually provide a statement of the adult's 'personal condition', which should include information about the adult's education, health care and living conditions.[244] There are less strict reporting requirements for guardians who are relatives of the adult.

If the adult has no assets and if his or her monthly income is less than three times the minimum old age pension, then no annual report is required. If the monthly income is below four times the minimum old age pension, then parents who act as guardian are exempt from filing an annual report. Further, parents of the adult who act as guardian and are required to submit annual reports are permitted to submit a simplified, less detailed format that is not backed up by invoices.[245] Guardians are required to submit additional information upon request of the guardianship authority.[246] If a guardian fails to submit a timely report, he or she may receive a written warning from the guardianship authority. Continued failure of reporting duties may result in the guardianship authority's initiating a court procedure to remove the guardian from the position.[247]

Adults under guardianship have no right to receive the reports filed by guardians, nor is there any procedure for them to request information on assets or any other report from the guardian. Failure to fulfil duties can have serious consequences for the guardian. Anyone can request the guardianship authority to investigate an allegation of abuse or neglect. The guardianship authority must investigate allegations of failures of the guardian and, if necessary, ask for involvement of other State bodies such as the police or the Public Prosecutor's Office. If the guardianship authority determines that a guardian has acted inappropriately, it has several

243 More specific requirements are detailed in the law to address the financial reporting requirements when the adult has commercial interests. Governmental Decree, para. 158, 149/1997 (IX.10.).

244 Governmental Decree, para. 158(3).

245 Close relatives who are guardians may also be permitted to file simplified format accounts if the adult's previous years income was less than double the minimum old age pension. Governmental Decree, para. 159(A), 149/1997 (IX. 10.).

246 Civil Code, para. 20/D(1).

247 Governmental Decree, para. 162(1), 149/1997 (IX.10.) and Civil Procedure Code, para. 123.

options available to it, depending on the circumstances. It may file a criminal or civil complaint against the guardian on behalf of the adult. It must remove the guardian if the guardian has caused serious harm to, or has endangered the interest of, the person under guardianship.[248]

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.

Indicator 25	*A complaint procedure exists that triggers review of guardian's acts or omissions.*

Conclusion: Law does not set out a complaint procedure for reviewing the guardian's acts.

Analysis: The guardianship authority oversees all guardianship arrangements. This includes adjudicating on disagreements between guardians and adults as well as to address complaints made against guardians. Although certain guardianship authorities may have their own internal complaints procedures, there is no unified legislative requirement for them to do so. This creates the probability that adults under guardian-ship do not know what their rights are and what procedures will be followed if they make a complaint.

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

248 Civil Code, para. 19/C(2).
249 Principle 16.
250 Principle 20.

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.[251]

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.[252]

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

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

Indicator 26	*Less restrictive alternatives to guardianship are available and are demonstrably exhausted before a guardianship is imposed.*

Conclusion: No less restrictive alternatives to guardianship exist in Hungarian law. As a consequence, there is no legal requirement to exhaust other alternatives before guardianship is imposed.

Analysis: Hungarian law does not provide for any alternatives to guardianship. There is therefore no legal requirement or expectation that less restrictive alternatives will be sought. However, the law emphasizes that 'the necessity of placement under guardianship especially exists, if the personal and financial protection of the individual can be ensured only by placement under guardianship'.[253] In a welcome explicit reference to international law, the Ministerial Justification on the modification of the Civil Code in 2001, states the following:

[251] 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.

[252] See, e.g., Alaska Stat. §13.26.125 (Bender 2005).

[253] Governmental Decree, para. 144(2), 149/1997(IX.10.).

> (…) This law creates a legal frame which respects the autonomy of the people concerned in a better way, a more person-tailored system, which limits the personal freedom and autonomy of making decisions only in the least restrictive way. At the same time this law ensures that – when necessary – the decision on someone's placement under guardianship should be made in a procedure which is fast and comprehensive and contains appropriate legal guarantees. During the codification process of this law, the Recommendation R(99)4 of the Council of Europe had a basic importance. [254]

There are indications that Hungary is moving towards a legal framework that would fully embrace less restrictive alternatives to guardianship. Specifically, the recently adopted Resolution of Parliament on the National Disability Programme (discussed above in section 2.3) says:

> The principle of protecting personal rights, and the protection of the (special) rights of people with disabilities that they are entitled to, as well as the principle of supported decision-making must prevail in all general rules and regulations (e.g. guardianship, caretaking). The principle of supported decision-making, as against decisions made by professionals instead of people with disabilities, means that people with disabilities are supported in their own decision-making depending on their individual capacity to some or to full extent, covering all possibilities. In order to make use of this principle, the Government must help people with disabilities by providing the necessary resources to create a network for supported decision-making.
>
> According to the principle of self-determination, people with disabilities can, within the frame of their capacities and opportunities, freely decide on their lives.[255]

These statements are encouraging, but remain merely aspirations. There is currently no legal provision for less restrictive alternatives.[256]

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

[254] Ministerial Justification by the Ministry of Justice on the modification of guardianship-related provisions (Act 15 of 2001).

[255] Resolution of the Parliament on the New National Programme on Disability Affairs, Chapter I, 10/2006 (II.16) The Basic Principles of the Programme. English version available at: http://www.szmm.gov.hu/main.php?folderID=1295, last accessed 8 November 2006.

[256] The 1/2000 Ministerial Decree by the Ministry of Social and Family Affairs created a legal basis for a so-called 'Supporting Service' (see Sections 39/A-39/E), and some officials view it as a tool for supported decision-making. But in fact, its functions are more related to personal care and assistance in the areas of everyday life, studies, work, etc. of people with mental health problems and intellectual disabilities, and not specifically for people under guardianship.

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'.[257] 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.[258]

Indicator 27	*Guardianships are tailored to the individual needs of the person involved and address the varying degrees of capacity.*

Conclusion: Partial guardianship may be tailored to an adult's needs. Nonetheless, there are over twice as many people under plenary guardianship, which does not recognise varying degrees of capacity, and/or varying degrees of need.

Analysis: Since legislative amendments in 2001 it has been possible for Hungarian courts to limit the capacity of an adult to act in certain areas while retaining the authority to act on their own behalf in others (See Indicators 18 and 20 above). Law provides a non-exhaustive list of areas in which an adult's ability to act on his or her own may be limited by the court.[259] While limited guardianship provides for a determination as to which particular areas of the life of an adult subject to guardianship cannot be managed without a guardian, it can be tailored to the adult's specific level of capacity and needs. Conversely plenary guardianship takes a blunt, uniform approach with no scope for individually tailored decisions.

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.[260]

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

258 *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, para. 32(1) (Yukon).

259 Civil Code, para. 14(6).

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

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'.[261] 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.[262]

Indicator 28	*Guardianship is periodically reviewed and continues only as long as appropriate.*

Conclusion: Guardianship is reviewed infrequently, and some guardianships are not subject to review.

Analysis: The court must terminate guardianship if the conditions that led to the need for guardianship no longer exist.[263] A court must schedule a review for the necessity of guardianship no more than five years from the date on which it limited or deprived the adult of legal capacity.[264] The guardianship authority is tasked with initiating these reviews. [265] The five-year review does not apply for cases in which the judge considers the adult's underlying condition to be permanent.[266]

Law is silent on the content of such reviews, for example, whether a new capacity determination must be conducted or whether the adult is entitled to particular procedural protections.

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

[262] 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.

[263] Civil Code, para. 21(1).

[264] *Ibid*, para. 40/A(1).

[265] *Ibid*, para. 14/A(2).

[266] *Ibid*, para. 15(5).

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.[267] 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'.[268]

Indicator 29	*An adult subject to guardianship has the right to request modification and/or termination of the guardianship.*

Conclusion: An adult has the right to request the termination of guardianship at any time. However, he or she may be required to wait for up to five years in order to modify a guardianship in any way.

Analysis: There are different procedures for modification and termination of a guardianship. Termination of guardianship is possible if the grounds upon which it was ordered no longer exist.[269] The adult (as well as the guardian or other specified people) can initiate this procedure.[270] The applicant bears the burden of disproving the existence of the initial reasons for which an adult was placed under guardianship. Such applications are allowed before the mandatory review, which may be as long as five years' time (See Indicator 28).[271]

Modification of guardianship is also a court procedure and may be initiated by the same people as those requesting a termination of guardianship (see previous paragraph). A request for modification may be made for one of three reasons:

- ⇨ To change from plenary to partial guardianship;
- ⇨ To change from partial guardianship to plenary guardianship; or
- ⇨ To modify the areas of rights which may or may not be exercised independently by an adult under partial guardianship.[272]

267 Recommendation R(99)4, Principle 14.

268 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).

269 Civil Code, para. 21(1).

270 In addition to the person under guardianship, interested people who are authorized to file an application for modification are the spouse of the person under guardianship, next of kin, siblings, the guardian himself or herself, the guardianship authority or the public prosecutor. Civil Code, paras. 21(2), (4).

271 Civil Code, para. 21(3).

272 Civil Code, para. 14/A(2).

Curiously, it is not possible to initiate the modification procedure prior to the statutory review (of up to five years).[273] Adults under guardianship therefore do not have a right to ask for modification of guardianship at the time of their choosing. They may be required to wait for up to five years.[274]

Human Rights Standards: The right to fair trial in determination of civil rights is set out in 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 thus falls under the protection of Article 6.[275] The European Court has also found that guardianship engages Article 8 of the Convention, on privacy rights, asserting that a re-examination of legal incapacity or guardianship is particularly justified if an adult so requests.[276] As with several other indicators, it is especially important that the right to review should be guaranteed in legislation, as the lack of an express provision may preclude the adult from accessing the court due to the earlier decision.

[273] *Ibid*, paras. 14/A (1), 21 (3) and Comments.
[274] See the Comments on Civil Code, para. 14/A.
[275] *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979, (A/33) (1979) 2 EHRR 387.
[276] *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, (2001) 31 EHRR 32.

3. GUARDIANSHIP PRACTICE IN HUNGARY

3.1 Aims and Objectives

The principal objective of the stage 2 research was to gain an understanding of guardianship practice in Hungary. 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

As available information on guardianship practice in Hungary is so limited, MDAC sought to collect as much relevant information as possible and from a broad number of sources. It was planned that these would include national databases, in-depth case studies, a review of case files, observation of court hearings, and interviews with people under guardianship, their guardians, relatives, and professionals involved in the case. As the research was to take place over a full year, March 2006 to March 2007, MDAC 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 Hungary sought access to a range of courts/authorities. Of the 23 guardianship authorities in Budapest, six were selected and approached,[277] and one in a secondary city, Miskolc.[278] Two local level courts in Budapest and one in Miskolc were also approached, as was an appeal level court in Budapest.[279] All were asked for permission to examine case files, active and closed, and to conduct interviews. Every authority and court which MDAC approached agreed to allow the research to proceed. However, this agreement was seriously undermined by the restrictions imposed on the material/documentation to which MDAC was given access.

277 The guardianship offices of local authority in Budapest's 2nd, 3rd, 7th, 8th, 11th and 12th districts.

278 Miskolc, by population, is the third largest city in Hungary, but still significantly smaller than Budapest. It was chosen to enable a basis for comparison of possible different practices outside the capital. In Miskolc there is only one guardianship office because the town is covered by one local authority.

279 The Buda District Court, the Pest Central District Court, Miskolc City Court and the Metropolitan Court in Budapest.

MDAC asked these four courts for access active case files. Such access was denied verbally solely on the basis of confidentiality and despite assurances that confidentiality was to be ensured. A formal review of court files was therefore limited to those that were closed, that is, where the issues had been decided. In total fifteen closed court files were reviewed in depth.

MDAC asked seven guardianship authorities for access to guardianship case files, but none granted access. Three guardianship authorities went even further than the courts, however, by denying formal access to any files at all, whether active or closed. A cursory glance at a few files was permitted simply to allow an impression to be gained as to their typical contents. Whilst all cooperation in this research is acknowledged and welcomed, the limit of that cooperation is troubling: troubling in itself and in relation to this report, the final outcomes of which have been considerably weakened. Notably, the refusals have denied MDAC the important opportunity to follow a case from beginning to end, so as to gain a full understanding of the entire process and its impact on those involved. Second, the refusals have limited the depth of understanding of those court cases that could be observed, as background information was unavailable. The research findings must therefore be read in this light and its limitations recognised.

There were 52 closed court case files selected for review. In order to assess any changes in the system following the 2001 modification of the guardianship system, a number of cases closed prior to this date were specifically sought.

These court files themselves contained limited information: invariably only a copy of the judgment, which tended to average three pages of A4-sized paper. These judgments tended to include little more than the judge's description of the case (detailed below in greater depth). Unfortunately, and surprisingly, additional documents, for example, psychiatric reports, were not included. Oral requests for access to these 'missing' documents were refused. The information gleaned from these closed court files was therefore limited.

A total of 33 court hearings, principally first and second hearings of the process by which an adult's legal capacity is decided, were observed over the year. Again, background information could not be reviewed prior to each case, owing to the deemed confidentiality of the files. Permission to attend such hearings was not required as, in common with all civil cases in Hungary, the hearings were open to the public unless one of the parties specifically asked for a closed hearing. A list of guardianship hearings in each month were provided by the court clerk, and from that list, MDAC selected some court hearings which the researcher then observed. Of those picked, four were closed to public observation. The reason given for each closure was that a specific request had been made by the applicant as a direct result of the presence of a researcher.

MDAC interviewed six judges, selected from those who presided over guardianship hearings, 17 officials of guardianship offices of local authorities, nine guardians,

five people under guardianship, two psychiatrists, and seven 'case guardians', again selected from those regularly attending and so familiar with guardianship hearings. (Interview schedules are attached at Appendix D)

To ensure consistency in all its stage 2 research in each country, MDAC developed at the outset data gathering sheets to be used by each researcher (see Appendix E of this report). These were based on the 29 indicators developed to assess guardianship legislation and which can be found in the Stage 1 of this report and which are reproduced in list form in Appendix B. The data gathering sheets were used throughout the research process, at court hearings, in the review of court case files, and, where possible, during all interviews.

MDAC recognises that as a result of the refusal of both courts and guardianship authorities to allow formal access to files, the research findings are not comprehensive. Nor indeed do they necessarily provide a reliable or accurate picture of guardianship practice. Nonetheless in view of the absence of similar studies and the consequent almost invisibility of the issue, the research does go some way into offering an insight into how the process of guardianship works in a small number of specific cases. Equally, and of utmost importance, it also illustrates the importance of further research. Full government cooperation and participation must be provided in any future research.

It should also be stressed that whilst the 'findings' are based primarily on the different sources used, the researcher who conducted the work and who prepared the first drafts of the Hungary reports was immersed in this work for two years. During that period it is inevitable that he, and MDAC colleagues working with him, formed a number of impressions about the way in which guardianship is used in practice in Hungary. Whilst these are not fully documented in what is inevitably a relatively brief report, they have served to inform MDAC's understanding of the guardianship process and of the conditions in which people under guardianship find themselves.

3.3 Research Findings of Guardianship in Practice

Even if we take into account the difficulties of carrying out the research, the overwhelming impression gained by MDAC was that of a low level of awareness by all stakeholders involved in the guardianship processes of its human rights implications. This low level of awareness spanned the procedural process itself, the actual placements under guardianship and life thereafter. Aspects of particular note arising during the research are detailed below and cross referenced, where directly applicable, with aspects of the 29 indicators discussed in stage 1 of this report.

3.3.1 The Practice of the Guardianship Process

- **Court files**

  As noted, MDAC reviewed 52 court case files. Of these, 15 were appeal court decisions. As also noted, all of these included little more than the judgments of the cases, accompanied occasionally by a document certifying the internal delivery of case files from one court department to another.

The typical judgment found in the court files, included the following information:

- ⇨ Date and place of the court hearing.
- ⇨ Names and addresses of both the applicant(s) and the respondent(s).
- ⇨ Names of representatives (e.g. attorney or case guardian).
- ⇨ Names of all persons present at the hearing.
- ⇨ The purpose of the application (i.e. the outcome sought by the applicant).
- ⇨ The court decision.
- ⇨ Deadline and methods for appealing.
- ⇨ Reasoning of the decision, usually one to two pages in length, with a description of the circumstances of the case, including extracts from the expert opinions, occasionally quotations from the courtroom dialogues (using reported speech), the impressions of the judge, statements by witnesses, information on the detention of the person (if such measure was ordered) and statement on the lawfulness of notifications.

- **Court hearings**

  The 33 court hearings followed a fairly standard format, although they varied in terms of length and content. The format of a typical hearing is described below.

  The adult concerned (the respondent), the case guardian and the applicant waited outside the courtroom. On occasions adult respondents appeared to be unaware of the purpose of their being at the courtroom and were heard to ask those present to explain. The judge called the key people into the courtroom. The judge introduced the case by giving basic information, such as the nature of the case and the names of the parties. Those present were then asked to identify themselves.

  In 24 cases the judge tape-recorded the hearings, and in 28 a specific query was made as to whether the parties were already involved in a court case, or a major dispute, against each other. Occasionally, the judge read the main requests of the application and/or asked applicants themselves to describe briefly the purpose of the application. In the majority of cases, the applicant was a representative of the guardianship office of the local authority. Applications made by relatives of the respondents were in the minority.

The judge sought from each adult respondent present their opinion about the application. The impression gained during the observations, however, was that the adult respondents were frequently stressed as the result of being in a courtroom, and/or did not understand the situation and its importance. In one particular case the adult even stated that 'I am not a criminal so that I would be brought in front of a court. I shouldn't be here'.[280]

It is of particular note that at no time in any of the court hearings observed was written information provided in any case about the procedure itself or about the roles of participants.

The judge then explained, but briefly, the application and the purpose of the case to the respondent adult, and usually summarised the statement of both parties in her or his own words.

The case guardians,[281] whose role it is to provide assistance to the adult, were also present in the court room. They tended to sit alone or next to the adult. In the majority of cases they did not have any papers, and sat behind an empty desk. Whilst this is purely conjecture, it is suggested here that this might indicate a failure to prepare the case or even an inability to fully prepare a case in the possible absence of available papers. In 27 hearings observed by MDAC, the case guardians failed to demonstrate that they were familiar with their client's case. They failed to participate in the court hearings on behalf of their clients in any meaningful way, such as asking questions of witnesses, or questioning the expert opinion.

When the guardianship office of the local authority was the applicant, which as noted above was in the majority of cases, its representative had a folder and papers on the desk.

The judge then read out the statements of the expert (psychiatric) opinion and asked the applicant and the respondent (or the case guardians) to give their opinion and invited them to submit any further evidence or to share any other relevant information regarding the case. Such further relevant information was sparse, particularly on the part of the adult respondent. The guardianship authority, however, almost always relied on witnesses to support its case, such witnesses usually being family members of the adult respondent, although occasionally friends and neighbours. These witnesses were called to give oral evidence.

When all evidence was heard, the judge either announced the decision of the court or adjourned the hearing and ordered further evidence to be submitted (e.g. another incapacity assessment). When a decision was reached, the judge asked the parties if they understood it, and then described the procedure for appealing. It is notable

[280] Court hearing, MDAC Reference No. 6021.
[281] On a general note, the state also provides for a case guardian in appeal cases.

that the case guardian very rarely objected to a decision, even in the face of an adult respondent's own articulated objection. An illustrative example of such passivity of a case guardian is revealed in the following courtroom dialogue in which the applicant was a representative of a guardianship office of a local authority:

Judge:	The court's decision is that [the respondent][282] needs to be placed under plenary guardianship. Do you understand the decision?
Applicant:	Yes, I do.
Adult:	I don't want to have a guardian, I don't want it!
Case guardian:	(Silent.)[283]

Once a decision was reached the parties left the room and generally dispersed promptly. The duration of each hearing was between seven and sixteen minutes and the atmosphere was formal.

Of particular note was the impression that judges often were uncertain about how to communicate with people with psycho-social (mental health) disabilities or intellectual disabilities and did not know how to accommodate their needs during the proceedings. The adult respondents appeared to have significant apprehension in answering questions. Overall, communication in the courtrooms could be described on a number of occasions as inappropriate and inadequate for the needs of specific respondents.

➢ **Guardianship authority files**

MDAC tried to obtain formal access to case files held by guardianship offices of local authorities. As noted above, access to such documents was officially denied by these authorities on the grounds of confidentiality, despite assurances by MDAC to comply with all requirements of Hungarian data protection provisions and ensure confidentiality of all parties involved. Nonetheless, as noted, a cursory glance at the contents list of a few files was granted to allow some insight to be gained as to the typical contents of such files as follows:

⇨ Court decisions.
⇨ Letters from relatives/friends.
⇨ Expert opinion, documentation from treating doctors.
⇨ Home circumstances report about the living conditions etc. of the adult concerned.

[282] Confidentiality is preserved here by omitting the name of the respondent.
[283] Court hearing, MDAC Reference No. 6013.

- ⇨ Invoices, bills, accounting forms, reports from the guardian.
- ⇨ Basic information about the appointed guardian.

3.3.2 Interviews

MDAC conducted interviews with the following groups of people involved in guardianship proceedings: judges, case guardians (lawyers), prosecutors, guardianship officers, guardians, people under guardianship and psychiatrists.

➢ **Interviews with judges**

The six interviews with judges were based on the data gathering sheets. All interviewed judges expressed an active interest in the research project, and this is to be welcomed. In addition none of the judges questioned the importance of the guardianship cases. However, they did not volunteer information which would demonstrate an acknowledgment that guardianship cases touch on core human rights issues. For example, five judges interviewed considered the psychiatric opinions as evidence 'which often has a decisive role',[284] and claimed that guardianship is used when the adult needs protection. All judges recognised their inadequate specialist training on guardianship issues, and that making such decisions about people's lives 'is a great responsibility'.[285] They frequently emphasised the importance and fulfilment of adequate procedural aspects, for example fair trial rights. Several judges mentioned the need to harmonise Hungarian legislation with European law. In this context it is surprising that the most senior judge does not share the views of those lower down the judicial ladder. The President of the Supreme Court in a letter to MDAC stated that the Council of Europe Committee of Ministers Recommendation No. R(99)4 was considered when the law reform took place in 2001 and 'basic contradictions between the Recommendation and the legal capacity and guardianship related provisions of the Hungarian Civil Code do not exist'.[286]

➢ **Interviews with case guardians**

Case guardians are appointed by the judge at the beginning of the court proceedings. They are either a representative of a law firm or 'practice' as attorneys in sole practice. Of the seven case guardians interviewed, three defined guardianship cases as 'not the most important issue' in their practice, but described such court procedures as important ones.

[284] Interview with a judge, MDAC Reference No. 2001.
[285] Interview with a judge, MDAC Reference No. 2003.
[286] Letter to MDAC from Dr. Zoltán Lomniczi, the President of the Supreme Court, 28 March 2007.

When questioned as to issues they felt to be problematic, a number identified the eligibility criteria for applicants. The Civil Code makes it possible for people to initiate placement under guardianship for their spouse and there was a clear recognition that this leaves the system open to abuse. In the words of one case guardian, 'it happens relatively often that the spouse, who no longer has a good relationship with the adult, initiates the procedure for deprivation of legal capacity. But the purpose in those cases is not protection but rather to take over the adult's assets'.[287] MDAC's impressions from a number of observations of the court hearings had raised similar suspicions, although these impressions cannot be substantiated by specific court dialogue.

When asked for their view of their specific role, all case guardians defined it as 'to protect individuals and to protect their interests'.[288] When they were questioned about their passivity, they responded by asserting simply that their role was a 'formal' and 'a legal guarantee'.[289]

- **Interviews with officials of guardianship offices of local authorities**

MDAC interviewed 17 officials of guardianship offices of local authorities. All interviewees described their job as a protective mechanism for those under guardianship. When asked about the shortcomings of the system, a common answer was the criticism of the regulation of the amended Civil Code,[290] which makes it possible for adults under partial guardianship to dispose of 50% of their income[291] independently. One guardianship official said that 'the independent disposal of the 50% is dangerous and should be abolished. This would serve best the adult's interest'.[292] By this, interviewees referred to adults probably being reckless in their spending or being open to exploitation by others, including relatives.

Under Hungarian law, a compulsory judicial review of the necessity of guardianship should take place no later than five years from the original court decision of placement under guardianship. This review is obligatory unless the adult's condition is deemed to be 'permanent' at the time of the incapacity assessment. When questioned on the possibility of modification of the type of guardianship (e.g. from plenary to partial guardianship or vice versa) prior to this compulsory review procedure, guardianship authority officers gave contradictory answers. Some officers believed it possible to initiate a procedure for modification prior the compulsory review and some felt this legally impossible (see further, discussion under Indicator 29 of legislative review in section 3, above).

287 Interview with a case guardian, MDAC Reference No. 11.
288 Interview with a case guardian, MDAC Reference No. 8.
289 Interview with a case guardian, MDAC Reference No. 8.
290 This was mentioned in 11 different interviews.
291 Derived for instance from state pensions, benefits, etc.
292 Interview with a guardianship authority officer, MDAC Reference No. 7004.

➢ **Interviews with guardians**

MDAC interviewed nine guardians (seven professional and two family guardians). All of the professional guardians offered their own proposals for amending the guardianship system. They suggested for instance that guardians should be given greater power. Three highlighted the practice of multiple guardianships under one guardian as being problematic in certain cases. In law one professional guardian can be responsible for a maximum of 30 adults. However, there is no national register for professional guardians, which makes abuse of the system possible by the taking on of more of than 30 clients. As payment is received for each adult under guardianship[293] (varying between approximately 1,600 HUF and 6,500 HUF per person),[294] this abuse of the system might seem attractive to certain guardians. Evidence suggests that this abuse is particularly prevalent in rural areas.[295]

One specific example of the extent of this practice was given as that in Szentgotthárd, a town in western Hungary which hosts Hungary's largest social care institution, with over 700 beds. Everyone accommodated in that institution is under guardianship. Of these, approximately half are under the supervision of only two professional guardians.[296] This brings into serious doubt the efficacy of the guardianship role, in situations when a guardian cannot possibly give the adults the individual attention necessary to provide an effective service.

Some of the guardians interviewed also reflected on the fact that once an adult is placed under guardianship it is almost impossible for the guardianship order to be removed. One professional guardian explained, 'during my nine years' experience as a professional guardian, in only one case was the guardianship terminated out of the 174 cases with which I have dealt'.[297]

Guardians in general agreed with the officials who work in local authority guardianship offices, noted above, who suggested that the ability of those under guardianship to dispose of 50% of their income should be abolished.[298] An illustrative example of their reasoning is that the system 'gives these people too much freedom which they cannot use in a meaningful way'.[299]

293 This applies if the guardian is paid on the basis of the number of persons under his/her supervision. The other form of payment is that the guardian receives a flat monthly fee from the local municipality.

294 This is between 6.5 and 26.2 euro at the 1 May 2007 exchange rates of the Hungarian National Bank.

295 Interview with guardianship authority officer, MDAC Reference No. 7003.

296 Interview with professional guardian, MDAC Reference No. 6002.

297 Interview with professional guardian, MDAC Reference No. 6002.

298 Interview with professional guardian, MDAC Reference Nos. 6002, 6003, 6005, 6007.

299 Interview with professional guardian, MDAC Reference No. 6005.

➢ **Interviews with people under guardianship**

MDAC conducted five interviews with people under guardianship, with the full permission of their guardians and active assistance of other organisations representing or helping people with psycho-social (mental health) disabilities or intellectual disabilities.[300] In general the interviewees' level of functioning allowing active participation in the interviews was good: they understood the questions and replied in a focused way. Nonetheless, their diagnosis was unknown as their case files could not be reviewed and they themselves could not detail specifically the reason for their placement under guardianship. An illustrative example of an adult under guardianship not knowing the reason for the guardianship is given in the words of an adult living in an institution and undergoing the procedure to deprive him of legal capacity:

Adult: The doctor came and saw me, he examined me.
MDAC: Was it because of your court hearing?
Adult: Yes.
MDAC: So, why do you need a guardian?
Adult: I need some help.
MDAC: Why do you need help? What is your problem?
Adult: I don't know.
MDAC: Did the doctor tell you what the problem is?
Adult: No. [301]

Most of the interviewees were able to express their opinion about their guardianship in a straightforward way, and their experiences of guardianship were vividly detailed. Notably, the majority of the issues raised in the 29 indicators were touched upon directly or indirectly. These are not detailed in length in this brief report. However, the exchange repeated below between MDAC's researcher and an adult under plenary guardianship having been so placed eight years ago, is a succinct example of how guardianship impacts upon the lives it touches:

MDAC: Is there anything that you cannot do because of guardianship which you would like to do?
Adult: Yes, I am a conservative person and I want to vote in the elections but I am not allowed to. I often read about politics.

[300] The research was assisted by ÉFOÉSZ (Hungarian Association for Persons with Intellectualy Disabilities) and ÉNO (Day-time Care Centre for Persons with Intellectual Disabilities) of the 2nd district of Budapest.

[301] Interview with a person under guardianship, MDAC Reference No. 9002.

MDAC: Is there anything else that you cannot do?
Adult: I have a girlfriend. And I like her very much. Later, I want to marry her, but I was told that I can't do it. And I want to buy her gifts, but I don't have money. I used to work, but then later we were told in the home that people under guardianship cannot sign an employment contract and I lost my job. I need the money, I would like to work...[302]

This brief exchange therefore touched on the prohibition on people under guardianship from exercising the right to vote, to work, to marry and to manage property. This adult now lives in an long-stay institution, although he said that he owns property which he cannot live in. He explained that when his mother died, his father initiated his placement under plenary guardianship and is now living in 'his' property.

➢ **Interviews with psychiatrists**

The two psychiatrists interviewed regularly carry out incapacity assessments for guardianship cases. They were selected randomly from a list of 165 court experts, a list available from the website of the Ministry of Justice.[303] Both emphasised the importance of the incapacity assessment in guardianship proceedings. When asked about the link between the diagnosis and guardianship, they responded by emphasising that all they can rely on in capacity examinations are the two brief sections of the Civil Code on the reasons for placement of someone under guardianship (See relevant sections on Indicator 7 and 8 of the legislative analysis and also below). They confirmed that they are familiar with the ICD-10 diagnostic system (International Classification of Diseases, a United Nations system of classification used by many practitioners), which they used in their practice. Placement under guardianship was described again as a protective measure and they both claimed to conduct all incapacity assessments through an in-person meeting with the adult concerned.

3.4 General Observations and Conclusions

In making any general observations and in arriving at any general conclusions, MDAC emphasises that this is very much a preliminary report and the findings and impressions gained should be substantiated by further research. MDAC also emphasises that a number of people interviewed and observed during the two years of research demonstrated a genuine commitment to assisting those undergoing

[302] Interview with person under guardianship, MDAC Reference No. 9001.
[303] See: http://im.netforum.hu/isznyr/internet/session/pa02;jsessionid=mp7iv7isg1?nf=&tkf=&szn1f=pszichi%C3%A1tria&szn2f=&szk1f=&szk2f=&kf=&to=, last accessed on 1 May 2007.

guardianship proceedings, and a commitment to improving the effectiveness of that assistance. Those judges interviewed, for instance, were very willing to share their experiences and thoughts on their role in the proceedings. Also, in notable instances, they, and case guardians, clearly questioned the adequacy of evidence placed before the court, and therefore the necessity of guardianship. As noted below, however, such questioning appeared not to be the norm.

The year-long research into the guardianship practice in Hungary has allowed a general insight into a system that purports to protect those it serves. On occasions it undoubtedly does. However, from information available, the overwhelming impression is that all actors in the guardianship process underestimate the relevance and importance of human rights in that process. This is turn undermines the entire guardianship process and negates in many ways the examples of genuine and professional engagement with the issue.

Of particular note was the low level of knowledge of existing Hungarian guardianship law and regulations and also of human rights law and requirements, even for those involved in the guardianship process on a day-to-day basis. Three illustrative examples are given. First, one guardianship authority officer was unaware of the maximum number of people that one professional guardian can legally supervise under the law.[304] In another instance, a case guardian did not know whether people under guardianship were permitted to make a will independently.[305] Possibly of greater concern, however, is the general low level of awareness of many relevant professionals of the National Disability Programme, adopted in 2006 by the Hungarian parliament. As noted elsewhere in this report, the Programme sets out a framework for a system far less restrictive than plenary guardianship, this being supported decision-making.

More specifically, it is notable that of the three categories eligible to make an application for appointment of a guardian,[306] it is typically members of the adult's family that initiate the procedure – either by themselves or by advising the guardianship authority of the need of placement under guardianship. Once aware of the 'need' of guardianship, the guardianship authorities are obliged to initiate an application if the relatives (or other parties as defined in law) do not submit an application to the court within a set time period (60 days). If the guardianship authority is involved, the representative of the guardianship authority acts as the applicant before the court, the relatives acting as witnesses in support of the application.

As noted in section 3 of this report, the legislative basis upon which an application can be made is vague. This vagueness is reflected in the reasons given in support of applications. These tend to vary. For example, descriptions of the adult's health and/or

304 Interview with a guardianship authority officer, MDAC Reference No. 1002.
305 Interview with a case guardian, MDAC Reference No. 6001.
306 See further, discussion under Indicator 2 in stage 1 of this report.

mental condition provided to the court included assertions of schizophrenia, personality disorder, dementia, epilepsy and intellectual disability, either alone or combined. In addition references were made to financial problems and an inability to recognise the value of money. In one case, the (unsuccessful) applicant was the adult herself, who sought a finding of incapacity in order to avoid a property sale agreement, entered into some time earlier.[307]

Although legislation provides for an adult to receive actual notice, and to be present and heard at all proceedings related to the application for deprivation of his or her legal capacity,[308] concern has been raised as to the implementation of this provision in practice. Notices of an application and subsequent court procedures for placement under guardianship are sent to the adult concerned by way of regular, registered mail to the home address or to the social care institution in which they are accommodated. A number of professionals, including judges, case guardians and professional guardians, voiced specific concern at the lack of protection built in to the notice system to ensure the adult receives court letters (they may be intercepted for example by applicant relatives) and understands their content.[309]

Of the 85 cases reviewed, in only 53 was the adult present at the court hearing (the adult was normally present at appeal hearings). The reason for each absence was either unknown (which simply means that the adult did not attend the court hearing and the court received no information on his/her whereabouts), or that the court was told by the psychiatrist in the expert report that the adult's health condition prevented attendance (in 14 cases). In these instances the court adjourned the hearings to another date.

As noted earlier, there is no written information available about the nature of guardianship hearings for people undergoing such proceedings. In practice it remains the judge's role to explain how the reason for the hearing and how it will proceed. In most cases observed, the judge attempted to fulfil this role. Examples of typical questions heard were, What is your name? How old are you? Where do you live? Who do you live with? Do you work? Do you know how much a litre of milk costs? What date is it today? As noted above, however, the impression gained from the hearings observed was a distinct discomfort on the part of judges in communicating with people with psycho-social (mental health) disabilities or intellectual disabilities.

The suggested peculiarity of the role of the case guardian, often a lawyer but acting as a non-legal representative of an adult respondent, discussed under Indicator 4 of section 3 of this report, was reflected in the files reviewed and the hearings observed. Although under a vague obligation to assist their clients, they frequently appeared

[307] Observation of court hearing, MDAC Reference No. 12.
[308] See further, discussion under Indicator 3 in stage 1 of this report.
[309] Interview with a judge, MDAC Reference No. 3003.

to fail to take a proactive role at all on behalf of their clients. This was abundantly clear in 72 cases of the 85 cases reviewed/observed. In 63 of these, the case guardian made no active contribution, for example, by putting forward any argument or questioning witnesses. Further, in most cases the case guardian did not express any objection against placing their clients under guardianship, despite objections of their clients.

The impression gained following the observations was a typical scenario where a case guardian would arrive at court without any previous consultation or sometimes even without any previous communication at all with the adult concerned. Even in files reviewed where reliance had to be placed on brief written judgments alone, it was clear that few questions or concerns were raised by the case guardian during the proceedings. Participation of case guardians, appointed by the court, is free for the adult concerned. In addition, all related costs are borne by the state.

Although the right and opportunity to present evidence, and challenge that of others, is constitutionally and legislatively guaranteed,[310] for adult representatives this rarely takes place in practice. Observation of court cases and reviews of the closed case files indicate that one possible explanation of this was the failure to provide adults subject to guardianship proceedings with appropriate assistance to allow them to take advantage of such provisions and to navigate the court process.

For instance, in 44 of the 85 cases, adults objected to placement under guardianship. Objections tended to be by way of simple verbal assertions, for example, 'I don't need a guardian' or 'I don't want to be placed under guardianship' or 'I object'. Being unfamiliar with court proceedings, they also tended to be simply unaware of their right to present their own evidence or to challenge that of the applicant. It was invariably left to the judge to explain the procedural rights and help adults understand and express their views on the case. Of equal concern was the unawareness, in some cases, of the very purpose of the court hearing. The general vulnerability of such adults in this respect is further compounded by the failure of the Hungarian government to ensure adequate assistance and representation before and during guardianship proceedings, this failure starkly illustrated by the passivity of most case guardians.

In direct contrast to the position of those who stand to lose their legal capacity, and consequently, numerous rights, are the applicants. Indeed, the hearings observed showed that applicants had, and took, numerous opportunities to present and challenge evidence. Of particular note was the frequency with which they presented witnesses in support of their application, those witnesses invariably being relatives of the adult respondent.

[310] See further, discussion under Indicator 6.

In all observed hearings the judges appeared to have requested a psychiatrist to prepare an incapacity assessment, and to have that assessment before them.[311] As to the role played by those assessments, research findings make it quite clear that they are decisive in most guardianship decisions. Indeed in 82 of the 85 cases reviewed, as court hearings or by way of file review, the judge followed the psychiatrist's assessment. However, in none of the court hearings observed was the psychiatrist actually present. It is clear therefore that psychiatric evidence is rarely questioned. This is extremely troubling and substantiates the concern raised under the discussion of Indicator 8 of stage 1 of this report, of the lack of legislative provision requiring a link between a diagnosis and alleged inability to make independent decisions. A notable exception, however, given in greater detail below to illustrate a second point, concerned a hearing where a case guardian specifically sought an opportunity to test the expert opinion. In response the presiding judge ordered a second hearing to which the medical expert was summoned to attend in person.[312]

In every case examined by MDAC, the expert opinion specifically referred to the wording of the Civil Code in terms of reasons and grounds for a finding of incapacitation – sometimes word for word. Invariably, however, the existing diagnosis served as the principal ground for the final decision.

As noted, of the 85 cases reviewed, in only three did the judge decide against the expert opinion.[313] An example where this occurred is given below, and serves also to highlight a rare instance of a case guardian taking an active and informed part in the proceedings. In this instance the case guardian questioned the witness (the adult's sister) who had asked the guardianship authority to initiate a procedure for placement under guardianship. The case guardian (in direct contrast to those in most of the hearings observed) asked her about the health status of the adult concerned:

Judge:	So do you live with your sister in the same household?
Witness:	Yes, I do. I take care of her, because she is not able to communicate with the world outside. She needs my help, she is in a very bad condition.
Case guardian:	What do you mean by bad condition?
Witness:	She is not talking to anyone. I think she cannot talk because of her illness. She is unfortunately not 100% in her mind.
Case guardian:	So you say that she cannot speak. But does she understand what you tell her?
Witness:	Yes, she does. But she is very sick.
Case guardian:	Maybe she is still '100% in her mind', but she cannot speak only. It is possible that actually inside, she is totally capable

311 See further, discussion under Indicator 7.
312 Observation of court hearing, MDAC Reference No. 4.
313 In these cases the judges based their judgments on the circumstances.

	of understanding everything that is happening to her. Have you ever heard the phrase 'aphasia' for example? Did the treating psychiatrist say something like that to you?
Witness:	No.
Case guardian:	Because such disease exists: when you cannot talk but can actually understand and realise everything. I would like to request another expert opinion from the court.[314]

The result of this exchange was that the judge postponed the final hearing until receipt of a second incapacity assessment. At that final hearing, the court rejected the guardianship authority's application to place the adult under guardianship. A clear implication of this example is that the performance of a case guardian can directly affect the outcome of hearings. Consequently, if case guardians are encouraged to take an active role in court hearings, the imposition of often inappropriate guardianships might be reduced.

Finally, in another notable case, the judge asked comprehensive questions about the adult's living circumstances. The judge's final decision rested upon the answers to these questions, rather than solely on the medical evidence. The judge's decision stated that although the adult before him had a 'mental disorder', he was able to shop alone and to take care of himself without assistance, bills were paid regularly, so he did not need to be placed under guardianship.[315] The importance of a right of appeal of any court decision cannot be overlooked. Indeed this is recognised under Hungarian law which makes provision, as previously noted, for adults deprived or restricted of legal capacity to appeal that deprivation.[316] Similarly adults have a right to express an objection to appointment of a guardian.[317]

As noted above, of the 85 judicial decisions reviewed or observed, there were indications that 44 were to be appealed, and/or the adult concerned expressed an objection against the placement under guardianship. It is difficult to estimate the exact number of formal appeals that were eventually submitted in view of the inability to review active files. From the closed files reviewed, however, it is clear that, of the appeals made, two thirds of the appeal decisions approved the original decision of the court of first instance. It should be noted that, based on comparisons with the closed files, the impression gained of court observations was that when observed, judges were more precise about following the rules of procedure.

The relevance of this point is that those minority appeal judgments that did overturn the first instance decisions tended to be reasoned on the basis of procedural grounds

[314] Court hearing, MDAC Reference No. 17.
[315] Court hearing, MDAC Reference No. 25.
[316] Civil Procedure Code, para. 233(1). See also discussion under Indicator 12 of stage 1 of this report.
[317] Civil Code, para. 19/A(4).

(for example, missing procedural deadlines) and of ignorance of some relevant and important facts (for example, when the parties are already in a serious, often legal, dispute at the time of the guardianship application). In such instances the appeal court can order a second hearing, or decide the matter based on the documents.

As noted in section 3 of the report, a guardian has a broad discretion to take legal action of behalf of an adult, although if that adult is able to express a view or make a request, this view must be taken into account.[318] Notable in this respect was that in many of the cases observed and reviewed, the perceived 'best interests' of adults appeared to be the deciding factor in the majority of decisions taken on their behalf. In addition, although all guardians interviewed indicated their belief in the importance of consultation with adults under their protection – and those under guardianship interviewed by MDAC indicated that they did meet regularly with their guardians – it became apparent that in plenary guardianship cases in particular, the guardians generally felt that they 'knew better what was best for the adult'.[319]

Connected to this rather discretionary and paternalistic approach is the failure of legislative provision to limit and define this broad discretion. This is reflected in practice where it was observed that the depth in which the scope of authority and obligations were defined, differed depending on the issue concerned. Financial management is subject to the greatest definition. The lack of guidance on other less regulated issues serves simply to create uncertainty for those involved. Professional guardians were very conscious of this uncertainty and commented that their duties should be better defined.[320] In their view this could be achieved via training, which although it already exists, is in the opinion of one guardian, 'more theoretical than practical'.[321] Four other guardians concurred with this view.

MDAC's researcher had the opportunity to attend in spring 2005 the four-day training to which the guardians referred and also concurred with the view of its theoretical, rather than practical, nature. Participants of the training received in-depth lectures on the guardianship system and authorities, and an introduction to property law and other family law related issues. Only half a day was devoted to issues relating specifically to people with intellectual disabilities and psycho-social (mental health) disabilities.

Of note however, and again connected to the exercise of the discretion of guardians, was that of the guardianship authorities' approach to their supervisory role. All guardianship office representatives interviewed for this research appeared to approach their supervisory role strictly. They are entitled to seek ad hoc accounting and reporting on the status of the adult concerned and that adult's assets. One

[318] See further, discussion under Indicator 19 of stage 1 of the report.
[319] Interviews with professional guardians, MDAC Reference Nos. 6002 and 6009.
[320] Interviews with professional guardians, MDAC Reference Nos. 6002 and 6005.
[321] Interview with a professional guardian, MDAC Reference No. 6002.

guardian said that that some local authorities ask for such a report every month or even more frequently.[322]

Examples have been given above of inadequate legislation reflected by inadequate practice, and adequate protective legislation working inadequately. In contrast is inadequate legislation, which in practice is rarely followed. One example relates to the legislative provision for detention for the purposes of the incapacity assessment.[323] Despite this, in only three of the 52 closed cases reviewed were inpatient incapacity assessments ordered. The bases upon which these orders were made were the following. First that the adult was already in psychiatric care and the treating psychiatrist was of the opinion that this was necessary; and second, there was a reported unwillingness of the adult to undergo an incapacity assessment voluntarily.

Finally, it is particularly troubling that guardianship appears to be greatly overused, as suggested by – if nothing else – the sheer numbers of people: 66,000 adults in Hungary. Another contributing factor for this high figure may be the significant lack of awareness that guardianship is not automatically appropriate simply on the basis of disability or institutionalisation. This lack of awareness is combined with a lack of availability of less restrictive alternatives to guardianship. Indeed when asked specifically about alternatives, few of those interviewed were able to identify any, and were unaware of the concept of, for instance, supported decision making or individually tailored systems of support.

3.5 General Comments and the Need for Further Research

We begin this section with a general, but vitally important comment: 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 greatly as it might have been by those responsible for implementing such legislation and policy.

MDAC therefore urges the Hungarian government to encourage, cooperate with 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 to take place and the findings are acted upon, Hungary 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 denial by the guardianship authorities of access to their case files on the basis of confidentiality, despite assurances that confidentially would be

[322] Interview with a professional guardian, MDAC Reference Nos. 6002 and interview with guardianship authority officer, MDAC Reference No. 1003.

[323] See further, discussion under Indicator 5 of section 3 of the report.

appropriately honoured, is troubling for two principal reasons. First it ensured that no full picture could be obtained of the manner in which the guardianship authorities deal with guardianship cases. Second, and on a more general level, such a refusal should be considered in light of the fact that legislation itself fails to ensure adequate supervision of those authorities. Thus both legislation and practice suggest that the guardianship authorities' work is inadequately monitored.

Equally troubling was the inability of MDAC to follow cases from beginning to end, and so obtain a holistic overview of the working of the system. This was the direct consequence of being granted access to closed cases only. As a result, only a disjointed picture could be gained and the manner in which all participants (eg. 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.

MDAC is conscious that this research only touched the surface of the views and feelings of participants in the guardianship system, principally as a result of the limited number of interviews undertaken of those under guardianship and their families. These few interviews however have clearly highlighted many difficulties faced by these groups, and suggest that further research into their direct experiences must be carried out.

As guardianship touches so many different areas of life, there are several additional issues that require more detailed analysis. Perhaps the most pressing of these include the denial of employment for people under guardianship, the training of guardians, the role of the guardianship authority, the lack of meaningful and effective participation by lawyers, and the role of the psychiatrist. These professionals have enormous power, as there is a clear and direct link between the opinion of a psychiatrist and a judge's decision. MDAC's earlier work on court reviews of criminal psychiatric cases in Hungary, resulting in its 2004 *Liberty Denied* report, revealed a similar link.[324] In order for Hungarian citizens to be assured that their justice system is objective and non-arbitrary, considerably more research needs to be carried out into how psychiatrists carry out incapacity assessments, and why it is that judges almost automatically accept their conclusions as scientific truth.

A final point made on the issue of the need for further research links clearly into a February 2006 Supreme Court decision,[325] where it was emphasised that a medical diagnosis alone cannot serve as a basis for depriving a person of legal capacity. Further research should now be carried out to see if this principle has been adopted in practice, and if so, to what extent.

[324] This report is available from MDAC's website, www.mdac.info.
[325] Supreme Court Decision No. 46 of 2006.

MDAC is pleased to note that during the course of its research a number of non-governmental organisations, primarily those comprised of people with disabilities, acknowledged the importance of guardianship and its human rights implications. MDAC urges Hungary to support these NGOs in order to allow them to strengthen and continue their vital work on this issue.

On 30 March 2007 Hungary signed 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 therefore that the Hungarian government will now demonstrate a dual commitment: a commitment first to remedying human rights abuses created by the current guardianship system, and second to drive through policy reforms to establish meaningful and workable support systems for people who need assistance in making decisions. MDAC will continue, in the spirit of cooperation, to offer detailed recommendations to the government, and monitor compliance with the promises the Hungarian government has already made to its own people and to the international community.

ANNEX A

Glossary of Terminology

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

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

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

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

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

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

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

Mental health problem: (see 'psycho-social disability')

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

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

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

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

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

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

ANNEX B

Summary Table of the Indicators

Indicator 1	*Legislative purpose or preamble to the law encompasses respect for the human rights, dignity and fundamental freedom of people with mental disabilities.*
Indicator 2	*The legislation clearly identifies who may make an application for appointment of a guardian and the foundation needed to support it.*
Indicator 3	*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.*
Indicator 4	*An adult has a right to free and effective legal representation throughout guardianship proceedings.*
Indicator 5	*An adult may not be detained in order to be subjected to an evaluation of his or her legal capacity.*
Indicator 6	*An adult has the right and opportunity to present his/her own evidence (including witnesses), and to challenge the opposing evidence (witnesses).*
Indicator 7	*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.*
Indicator 8	*A finding of incapacity requires a demonstrable link between the underlying diagnosis and the alleged inability to make independent decisions.*
Indicator 9	*A finding of incapacity is based upon sufficient evidence and serves the interests of the adult.*
Indicator 10	*Selection of a guardian is based on objective criteria and the wishes and feelings of the adult are considered.*

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

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

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
March 23, 2007	*Psychiatrist*
March 23, 2007	*Person under guardianship*
March 23, 2007	*Person under guardianship*
March 23, 2007	*Person under guardianship*
March 22, 2007	*Person under guardianship*
March 22, 2007	*Person under guardianship*
March 22, 2007	*Psychiatrist*
February 20, 2007	*Case guardian*
February 5, 2007	*Case guardian*
October 11, 2006	*Guardianship Officer*
October 11, 2006	*Guardianship Officer*
October 4, 2006	*Guardian*
September 27, 2006	*Guardian*
September 26, 2006	*Guardianship Officer*
September 26, 2006	*Guardianship Officer*
September 22, 2006	*Guardianship Officer*
September 22, 2006	*Guardian*
September 21, 2006	*Guardian*
September 21, 2006	*Guardian*
September 12, 2006	*Guardianship Officer*
September 12, 2006	*Case guardian*

September 8, 2006	*Judge*
September 2, 2006	*Guardianship Officer*
August 22, 2006	*Case guardian*
August 19, 2006	*Case guardian*
July 25, 2006	*Guardianship Officer*
July 21, 2006	*Guardian*
July 21, 2006	*Guardianship Officer*
July 7, 2006	*Guardianship Officer*
July 7, 2006	*Guardianship Officer*
June 29, 2006	*Guardian*
June 22, 2006	*Judge*
June 22, 2006	*Guardianship Officer*
June 12, 2006	*Case guardian*
June 8, 2006	*Guardianship Officer*
June 8, 2006	*Guardianship Officer*
June 8, 2006	*Guardian*
April 11, 2006	*Judge*
April 11, 2006	*Judge*
March 30, 2006	*Judge*
March 13, 2006	*Case guardian*
March 13, 2006	*Guardianship Officer*
March 13, 2006	*Guardian*
March 6, 2006	*Guardianship Officer*
March 6, 2006	*Guardianship Officer*
March 29, 2006	*Judge*

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 _____) Requested guardian was also the applicant: Yes _____, No _____.
5.	I-9	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)
10.	I-3	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:
11.	I-4	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):
12.	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	The capacity evaluation was provided to the person concerned in advance of the court hearing: Yes _____ No _____. If yes, how long before the court hearing did person involved receive capacity evaluation: _____ (in days). Not Available:____. If no, reason given for person not receiving the capacity evaluation in advance of court hearing:
14.	I-5	Person who conducted the capacity evaluation appeared in court in person: Yes _____ No _____. Not Available: _____. Other evidence or witnesses was presented in court in addition to capacity evaluation: Yes _____ No _____. If yes, what other evidence was presented to court:
15.	I-5	Person involved presented an alternative capacity evaluation: Yes _____ No _____. Person concerned presented other evidence: Yes _____ No _____. If yes, specify what type of other evidence was presented (i.e. witnesses):
16.	I-3	Is there any indication in the court file that the person concerned objected to being incapacitated: Yes _____, No _____. Is there any indication in the court file that the person concerned objected to being placed under guardianship: Yes _____, No _____. Is there any indication in the court file that the person concerned agreed to be incapacitated: Yes _____, No _____. Is there any indication in the court file that the person concerned agreed to be placed under guardianship: Yes _____, No_____.

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

19.	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:
20.	I-9	In this case, notice of the application was provided to: Family member _____, Social care home (director) _____ Other person _____. Not Available: _____ If other person was given notice describe how that person was related to the case or the person concerned:
21.	I-10	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:
22.	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 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:
23.	I-10	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 _____.

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: _____.
3.		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): 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.		Person that the Applicant requested to be the guardian was: Family member _____, Professional Guardian _____, Director of Institution _____, Other _____ (specify _____) Requested guardian was also the applicant: Yes _____, No _____.
6.		Initial application filed sought to establish: Plenary guardianship _____, Partial guardianship _____. Change of guardianship _____. If change, explain what type of change was sought:
7.		Outcome of case was order for: Plenary guardianship _____, Partial guardianship _____, No guardian _____
8.	I-2	Capacity evaluation was ordered: Yes _____, No _____ Person was ordered to be detained in order to complete capacity evaluation: Yes _____ No _____ . Person already detained for other reasons: _____. 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 _____. 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:
10.	I-4	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 (ie case guardian): 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 _____. The person representing the person concerned supported the application for guardianship: Yes _____ No ____.

11.	I-5	The capacity evaluation was provided to the person concerned in advance of the court hearing: Yes _____ No _____. If yes, how long before the court hearing did person involved receive capacity evaluation: _____ (in days). If no, reason given for person not receiving the capacity evaluation in advance of court hearing:
12.	I-5	Person who conducted the capacity evaluation appeared in court in person: Yes _____ No _____. The capacity evaluator submitted a written report of his/her findings: Yes _____ No _____. 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): Other evidence or witnesses was presented in court in addition to capacity evaluation: Yes _____ No _____. If yes, what other evidence was presented to court:
13.	I-5	Person involved presented an alternative capacity evaluation: Yes _____ No _____. Person concerned presented other evidence: Yes _____ No _____ If yes, specify what type of other evidence was presented (i.e. witnesses):
14.	I-3	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 _____.

15.	I-2..6	Was the person concerned told what their rights are during the proceedings: Yes _____ No _____. If yes, summarize what rights the person was informed of: Was the person concerned asked any questions by the judge during the proceeding: Yes _____ No _____. If yes, what questions was the person concerned asked: 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 _____. Was an appeal filed in this case: Yes _____ No _____ . If yes, who filed the appeal:
16.	I-7..8	Does the case file contain a written capacity evaluation: Yes _____ No _____. If yes, how many pages is the evaluation: _____ According to the case file, did the evaluator have a face-to-face meeting with the person concerned: Yes _____ No _____. 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) Number of days (or months) old the capacity evaluation was at the time of the capacity hearing: _____ . Was any additional mental health information/evaluation that was provided to the court: Yes _____ No _____ 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: Does the capacity evaluation provide an ICD 10 diagnosis: Yes ____ No _____. If yes, what diagnosis is given: Does capacity evaluation explain HOW the diagnosis affects the person's capacity: Yes _____ No _____. If yes, please explain how the capacity evaluation makes this link:

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:
21.	I-10	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 _____.

22.	I-6	Does file indicate whether notice of the court decision was sent out to the person concerned: Yes _____ No _____ _____. If yes, how long after the court decision was the notice sent out: _____ (in days) Does file indicate whether the person involved was told of their right to appeal the capacity decision: Yes _____ No _____. Was an appeal filed in this case: Yes _____ No _____ . If yes, who filed the appeal:

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.		Does the person concerned have a guardian appointed: Yes _____ No _____. If no, the reason provided in the file that no guardian has been appointed: If no, how long has the person been incapacitated with no guardian appointed: _____ (in days or months).
4.	I-11	The person that the applicant requested to be appointed guardian was: Family member _____, Professional Guardian _____, Director of Institution _____, Other _____ _ (specify _____) 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): What reason was given for appointing someone other than the person requested to be guardian:

5.	I-16	Was person concerned seen personally (ie: interviewed/consulted) by the guardianship authority prior to appointment of the guardian: Yes _____ No _____. If no, what reason was given for the person concerned not being seen (interviewed or consulted) by the GA: 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: 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: 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:
6.	I-12	Does there appear to be a conflict of interest between the person concerned and the person appointed guardian: Yes _____ _____, No _____. 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:
7.	I-20	Has this case ever undergone a case review by the GA: Yes _____ No _____. If yes, how many: _____ _____ How much time elapsed between each review:

8.	I-19	Have any complaints ever been filed against this guardian: Yes _____ No _____. If yes, how many: _____ For what reason: 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: If not investigated, what reason was given for no investigation: Was there a review of the guardianship/guardians actions as a result of the complaint: Yes _____, No_____.
9.	I-20	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): _____. If yes, what was purpose of the review: Living situation of person under guardianship: Medical situation/treatment of person under guardianship: Financial situation/transaction involving the assets of the person under guardianship: Was person under guardianship interviewed/asked for input on/during the review: Yes _____ No _____.
10.	I-20	Has the guardian ever contacted the guardianship authority for permission to take any action regarding the person under guardianship: Yes _____ No _____. If yes, what was the nature of the request (ie: financial, medical etc.):
11.	I-27	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:

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.	Number of applications filed for new guardianships: 2005 (give number of months included): Partial _____ Plenary _____ 2004: Partial _____ Plenary _____ 1999: Partial _____ Plenary _____ 1994: Partial _____ Plenary _____ 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. Are guardians paid for their services? Does this apply to all guardians? How much are they paid (on average)? Who pays them?
8.	Are there any 'official' statistics on how many guardianship cases are initiated each year? If so, are they broken down into any smaller categories such as by full or partial guardianship? Or by region, gender, diagnosis, age?
9.	Number of guardianships terminated for reasons other than death of the person under guardianship: 2005 (include number of months) Plenary (male) _____ Plenary (female) _____ Partial (male) _____ Partial (female) _____ Total _____. 2004 Plenary (male) _____ Plenary (female) _____ Partial (male) _____ Partial (female) _____ Total _____.
GAP Research Statistics: Refer to all cases examined as part of Stage Two research	
10.	Number of cases examined Total _____ Number of Men _____ Number of Women _____.
11.	Average age of persons whose case was examined: Male _____ Female _____
12.	Number of cases examined where person was under: Partial Guardianship_____ Plenary Guardianship_____

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

Question and Answer Sheet for Interviews with Professional Participants in the Guardianship Processes
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.
Interviews with Professionals: Date, Time and Location of Interview: _____ Identification Code for Interviewee (pursuant to your own confidential system which protects identity of research participants): _____ Role of Interviewee in guardianship processes (ie: 'judge,' 'prosecutor,' 'professional guardian'): _____. Number of years person has been involved in guardianship cases: _____ Interviewee's estimate of how many guardianship cases he/she has been involved in: _____ Training/educational background of the interviewee:
Interviews with Person Concerned: Date, Time and Location of Interview: _____ Identification Code for Interviewee (pursuant to your own confidential system which protects identity of research participants): _____ Interviewee's experience with the guardianship processes (ie: 'is under guardianship' 'was once under guardianship' 'was the subject of a guardianship application'): _____. Interviewee lives in: Institution _____, Community _____, Other _____ (specify). Number of years person has been under guardianship: _____ Mental health history, diagnosis, background of the interviewee:

Corresponding Indicator	**Suggested questions for interviews with participants in the guardianship proceedings**
Indicator 1	Interviewee: **Professionals** What is your opinion of the existing guardianship system in your country? Is the system utilized to the appropriate degree? Ie: used only when needed. Are procedures for determining capacity fair to the person involved? (explain) **Person Concerned** What is your opinion of the existing guardianship system in your country? Is the system utilized to the appropriate degree? Ie: used only when needed. Are procedures for determining capacity fair to the person involved? (explain)

Indicator 2	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? **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?
Indicator 3	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) **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?
Indicator s 4 & 5	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.)
Indicator s 4 & 5	**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? Did your representative present any witnesses, documents, reports or other information to the court on your behalf? Were you satisfied with the help/representation that you had during your hearing? (why or why not) Did anyone ask you want result you wanted in the case? (ie Whether you object to incapacitation or guardian)

Indicator 6	Interviewee: **Professionals** Are you aware of any case where the person concerned filed an appeal of the court's capacity finding? *If yes:* How many appeals have there been, or how often are they filed? Does the person usually file the appeal for themselves or do they usually have a lawyer to file the appeal? Why do you think that more appeals are not filed? **Person Concerned** Did you know that you had the right to appeal in your case? If yes, how did you know about this right? Did you receive notice of the court's decision in your case? If yes, how and when did you receive the notice? Did you file an appeal in your case? (why or why not) If a guardian was appointed for you, did you agree with the choice of the guardian?
Indicator 7	Interviewee: **Professionals** 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?) Other than the 'capacity evaluation' is there any other information that would be helpful for a judge in making a capacity determination? If yes, what kind of information? Have you received, or do others in your position receive, special training on the use and meaning of mental health information/diagnoses etc? **Person Concerned**
Indicator 8	Interviewee: **Professionals** 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?) 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? **Person Concerned**
Indicator 9	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? **Person Concerned** Why do you think that an application was filed to appoint a guardian for you? (explain)

Indicator 10	Interviewee: **Professionals** (For Judges) How do you decide whether a person should be incapacitated? (explain) (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? **Person Concerned** In your case, was there information that you thought the judge should know before making a decision? If yes, give examples: Why did the judge not have that information (the information described above)?
Indicator 11	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) **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?
Indicator 12	Interviewee: **Professionals** What constitutes a conflict of interest that would or should prevent a person from acting as a guardian? (give examples) **Person Concerned**

Indicator 13	Interviewee: **Professionals** (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? **Person Concerned** 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?
Indicator 14	Interviewee: **Professionals** (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? **Person Concerned** 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?
Indicator 15	Interviewee: **Professionals** Are there any decisions that a person under guardianship should be allowed to make for themselves? If so, what decisions? If not, why not? **Person Concerned** 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?

Indicator 16	Interviewee: **Professionals** 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? (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? **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)
Indicator 17	Interviewee: **Professionals** **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?
Indicator 18	Interviewee: **Professionals** 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? **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?
Indicator 19	Interviewee: **Professionals** 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?) **Person Concerned**

Indicator 20	Interviewee: **Professionals** 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? In reality, how often are the decisions of a guardian reviewed by someone else (such as the guardianship authority)? **Person Concerned** Has anyone ever asked you if you think your guardian is doing a good job for you? If yes, who asked you?
Indicator 21	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? **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)?
Indicator 22	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? **Person Concerned** (For those living in institutions) Since you've had a guardian, have you ever lived outside of the institution? (explain)
Indicator 23	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? **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?

Indicator 24	(For countries which utilize partial guardianships) 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? How are partial guardianships different from plenary guardianships? What are the practical differences between partial and plenary guardianships? **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?
Indicator 25	Interviewee: **Professionals** What (if any) alternatives to guardianship exist in your region? How often are alternatives used? **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?)
Indicator 26	Interviewee: **Professionals** Should guardianship be a first response or a last resort for people with mental disabilities? (explain) **Person Concerned**
Indicator 27	Interviewee: **Professionals** How often are (should) guardianship cases be reviewed by the guardianship authority? What is the purpose of guardianship reviews? **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?
Indicator 28	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? **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?